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Part I. ZOOM OUT

The Question:

For all or for some? Functional immunity of State officials before the International Law Commission

Introduced by Beatrice Bonafé, Micaela Frulli and Paolo Palchetti

Under international law, State officials are entitled to different types of immunity from foreign jurisdiction. Generally, two categories of immunities are identified: the so-called functional immunity (or *ratione materiae*) and personal immunities (or *ratione personae*). Notwithstanding the fact that these rules are among the oldest ones of modern international law, there are still many controversial issues surrounding them. It is therefore not surprising that the International Law Commission (ILC) decided to include the topic ‘Immunity of State officials from foreign criminal jurisdiction’ in its programme of work. Two Special Rapporteurs were appointed: Roman Anatoloievich Kolodkin from 2007 until 2011 and Concepción Escobar Hernández from then until today.

The present Zoom-out intends to discuss one of the most contentious issues in this field, namely whether it is all State officials or only some of them that enjoy functional immunity from foreign jurisdiction. Both Rapporteurs share the traditional view upheld by most international law scholars and affirm that there exists a customary rule granting functional immunity from the jurisdiction of foreign States to every State official for acts performed in an official capacity. Over time, this view has been criticized by a number of scholars who deny the existence of a general rule along these lines and argue that there are instead some specific rules granting functional immunity only to a few classes of State officials for acts performed within the limits of their official mandate.

In order to stimulate the debate over this issue QIL asked Riccardo Pisillo Mazzeschi to present his critique to the traditional theories by comprehensively addressing the questions concerning the legal basis,

scope of application and content of functional immunity for foreign officials. Philippa Webb and Gionata Buzzini replied upholding the more traditional view and dwelling on its enduring validity. Other scholars will take part in the debate in the following weeks.

With the present Zoom-out, QIL presents a variation on the usual formula, by offering a wider, background paper from one author, together with shorter and targeted commentaries from a number of other scholars. This Zoom-out also represents the inauguration of an occasional series devoted to the critical examination of some of the general topics addressed by the ILC in its work of codification of international law.



The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories

*Riccardo Pisillo Mazzeschi**

1. *Introduction: The controversial issue of the functional immunity of State officials from foreign jurisdiction and the work of the ILC*

The norms of customary international law concerning the functional (or *ratione materiae*) immunity of State officials from foreign (criminal, civil and administrative) jurisdiction are somewhat dated but nonetheless remain controversial and contemporary international law scholars still disagree about their scope of application and content. This is due to different conceptual premises of international scholars, as well as a lack of uniformity and consistency in practice and case-law.

The United Nations' International Law Commission (ILC) has recently undertaken a study on a key aspect of this topic, namely the functional (as well as personal) immunity of State officials from foreign criminal jurisdiction.¹ However, in the view of this author, these works have not yet clarified the most controversial legal issues and further have not yet produced convincing results. In fact, both the ILC Special Rapporteurs have dogmatically accepted, without any form of critical review, the old 'Kelsenian theory', according to which *all* State officials

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¹ See especially the following reports of the Special Rapporteurs: RA Kolodkin, 'Preliminary report on immunity of State officials from foreign criminal jurisdiction' (29 May 2008) UN Doc A/CN.4/601; RA Kolodkin, 'Second report on immunity of State officials from foreign criminal jurisdiction' (10 June 2010) UN Doc A/CN.4/631; RA Kolodkin, 'Third report on immunity of State officials from foreign criminal jurisdiction' (24 May 2011) UN Doc A/CN.4/646; C Escobar Hernández, 'Preliminary report on the immunity of State officials from foreign criminal jurisdiction' (31 May 2012) UN Doc A/CN.4/654; C Escobar Hernández, 'Second report on the immunity of State officials from foreign criminal jurisdiction' (4 April 2013) UN Doc A/CN.4/661; C Escobar Hernández, 'Third report on the immunity of State officials from foreign criminal jurisdiction' (2 June 2014) UN Doc A/CN.4/673.



have the right, in principle, to functional immunity from foreign jurisdiction regarding their ‘official’ acts, ie when acting in their official capacity.

This basic theory, which will have a strong impact on the future work of the ILC, is not convincing. Thus, the issue is worth re-examining, especially in light of the most recent developments in practice and in the literature. In doing so, this paper will deal with the entire issue of the functional immunity of foreign officials, without limiting the research to immunity from criminal jurisdiction.

2. *Problems relating to the distinction between personal and functional immunities*

According to the dominant view of international scholars, a clear and radical distinction should be made between the concept of both the State officials’ personal and functional immunities (and between the corresponding international norms). As we shall see below, nowadays this position demands a critical review. Effectively, some differences are clear and well-settled. The main one concerns the duration of immunity. While personal immunity is only granted to foreign officials for the duration of their mandate (covering acts performed before and during the mandate) and ceases to apply after the termination of their mandate, functional immunity is granted both during their mandate *and* after its termination (but the immunity only covers acts performed in the context of the mandate).

A second difference, according to the prevailing, but not unanimous view in the literature, concerns the scope of the application of immunity. While personal immunity covers both the ‘private’ and ‘official’ acts of foreign officials who benefit from it,² functional immunity only co-

² See eg HF Van Panhuis, ‘In the Borderline Between the Act of State Doctrine and Questions of Jurisdictional Immunities’ (1964) 13 ICLQ 1204; Y Dinstein, ‘Diplomatic Immunity from Jurisdiction *Rationae Materiae*’ (1966) 15 ICLQ 79; Kolodkin, ‘Preliminary report’ (n 1) para 79; Escobar Hernández, ‘Preliminary report’ (n 1) para 61; Escobar Hernández, ‘Second report’ (n 1) paras 69-74 and draft art 5(1). For a different view see G Morelli, ‘Circa l’esenzione degli agenti diplomatici dalla giurisdizione’ (1940) *Foro italiano* I 336-339; T Perassi, ‘Su l’esenzione degli agenti diplomatici dalla giurisdizione’ (1940) 52 *Rivista di diritto internazionale* 96 ff; H Kelsen, *Principles of*



vers the acts performed by State agents in the discharge of their duties (so-called 'official acts'). However, the interpretation of the concept of 'official acts' is itself the subject of differing opinions.

Other distinctions between personal and functional immunities are more controversial. In particular, there is no agreement on one important conceptual premise which gives rise to many legal consequences, namely whether or not the legal foundation of these two forms of immunity is radically different.

In fact, personal immunity is unanimously seen as being based on the concept that an official's acts are attributed to the individual agent and that such immunity has the procedural nature of an exemption from legal proceedings (but not from the law). Moreover, there is general consensus on the fact that personal immunity is only available to a limited number of State officials (diplomatic agents, heads of State and Government, ministers of foreign affairs, members of special missions), all of whom perform duties pertaining to their State's international relations.

On the contrary, scholars are divided on the question of the legal foundation of functional immunity. In brief, we can start by saying that, according to the traditional long held view, functional immunity is based on the conceptual premise that acts performed by an agent in his/her official capacity and in the exercise of his/her duties cannot be attributed to the individual agent, but only and always to the State for which the official is acting. Therefore, functional immunity should not be procedural in nature, but rather should represent a substantive exemption from the law. This would mean that functional immunity is due to *all* foreign State officials and, at least in principle, would cover *all* their 'official' acts. However, a growing number of scholars reject the basic conceptual premise of this traditional view and maintain that functional immunity has the same procedural nature as personal immunity. The latter approach induces many writers to deny the fact that functional immunity is available to *all* foreign State agents and/or the fact that such immunity covers *all* the official acts of those agents.

International Law (Rinehart & Co. 1952) 229-230; PH Cahier, *Le droit diplomatique contemporain* (Droz-Minard 1962) 253; M Giuliano, *Le relazioni e immunità diplomatiche* (Istituto Editoriale Cisalpino 1968) 109 ff.



Thus, the different doctrinal views on the legal basis of functional immunity have an impact on any conclusions regarding the scope of its application and its content, as well as any conclusions on the real extent and significance of the distinction between personal and functional immunities. It is therefore appropriate to carry out a brief review of these doctrinal views, in order to subsequently verify their validity through an empirical examination of international practice.

3. *Doctrinal theories regarding functional immunity*

As the doctrinal theories on the legal basis and the scope of application of functional immunity are numerous, it is worth organizing them into three main general approaches.

According to the first and oldest approach, the legal regime of functional immunity has a general scope of application; that is, it applies to *all* State officials and to *all* acts performed by them in the exercise of their duties. Within this approach, many individual theories are based on a deductive method, founded on the conceptual premise that every ‘official’ act of a foreign State’s agent can be attributed only to the State for which the agent is acting. For some scholars, this deduction derives from the principle of international law that is intended to protect the internal organization of the State.³ For others it derives from the principle of non-interference in the constitutional ‘life’ of the foreign State,⁴ or from the principle that protects the ‘exclusive jurisdiction’ of the

³ See, eg, G Morelli, *Diritto processuale civile internazionale* (Cedam 1938) 176 ff; Morelli, ‘Circa l’esonazione’ (n 2) 336 ff; G Morelli, *Nozioni di diritto internazionale* (Cedam 1967) 215 ff; JP Niboyet, ‘Immunité de juridiction et incompetence d’attribution’ (1950) 39 *Revue générale de droit international public* 139 ff; H Briggs, *The Law of Nations* (Stevens 1952) 782; A Malintoppi, ‘Su l’esonazione giurisdizionale degli agenti diplomatici’ (1954) 57 *Rivista di diritto internazionale* 125 ff; G Sperduti, *Lezioni di diritto internazionale* (Giuffrè 1958) 119; Van Panhuys, ‘In the Borderland’ (n 2) 1205 ff; A Tanzi, *L’immunità dalla giurisdizione degli agenti diplomatici* (Cedam 1991) 8 ff; N Ronzitti, ‘L’immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso *Calipari*’ (2008) 91 *Rivista di diritto internazionale* 1033 ff; N Ronzitti, *Introduzione al diritto internazionale* (4th edn, Giappichelli 2013) 146; E Cannizzaro, *Diritto internazionale* (Giappichelli 2012) 331-333.

⁴ See R Quadri, *Diritto internazionale pubblico* (Liguori Editore 1968) 487 ff, 614-616.



State in its relationship with its own agents.⁵ For yet others, it derives from the concept that the functional immunity of foreign officials ultimately coincides with the immunity of foreign States.⁶ A further theory, based instead on an inductive method, maintains that a specific customary norm has developed, which prohibits the exercise of State jurisdiction over foreign State agents acting in their 'official' capacity.⁷ The latter theory has, in substance, been espoused by the two ILC Special Rapporteurs in their work on the immunity of State officials from foreign criminal jurisdiction.⁸

According to the second doctrinal approach, the legal regime of functional immunity has a limited scope of application because it only covers *some categories of acts* performed by foreign State officials. Within this approach, a first longstanding and widely held theory maintains that the functional immunity of foreign officials only covers their internationally lawful acts.⁹ A second, and more recent theory maintains that

⁵ See F Seyersted, 'Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations' (1965) 14 ICLQ 31-81.

⁶ See H Kelsen, 'Collective and Individual Responsibility with Particular Regard to the Punishment of War Criminals' (1942-43) 31 California L Rev 530-571; H Kelsen, 'Collective and Individual Responsibility for Acts of State in International Law' (1948-49) 1 Jewish YB Intl L 226-239; Kelsen, *Principles* (n 2) 235 ff; P Guggenheim, *Lehrbuch des Völkerrechts*, vol I (Verlag für Recht und Gesellschaft AG 1948) 171 ff; G Dahm, *Völkerrecht*, vol I (Kohlhammer 1958) 225, 237, 303, 325; MB Akehurst, 'Jurisdiction in International Law' (1972-73) 46 British YB Intl L 241 ff; I Seidl-Hoenveldern, *Völkerrecht* (Heymann 1984) 312 ff; I Wuerth, 'Foreign Official Immunity: Invocation, Purpose, Exceptions' (2013) 23 *Revue Suisse de droit international et européen* 214.

⁷ G Balladore Pallieri, 'La competenza delle autorità giudiziarie di Danzica nei confronti dei funzionari polacchi' (1937) 1 *Giurisprudenza comparata di diritto internazionale privato* 234 ff; G Balladore Pallieri, *Diritto internazionale pubblico* (Giuffrè 1937) 385 ff; L Oppenheim, H Lauterpacht, *International Law* (Longmans, Green & Co 1955) 850 ff; M Miele, *L'immunità giurisdizionale degli organi stranieri* (Giuffrè 1961) 23, 39, 137 ff, 161 ff; W Wengler, *Völkerrecht*, vol I (Springer 1964) 540 ff; A Verdross, B Simma, *Völkerrecht: Theorie und Praxis* (Dunker and Humblot 1984) 774.

⁸ Kolodkin, 'Preliminary report' (n 1) paras 80-81, 107, 109; Kolodkin, 'Second report' (n 1) paras 19, 21, 85, 90; Escobar Hernández, 'Second report' (n 1) paras 50 e 53; Escobar Hernández, 'Third report' (n 1) paras 12, 112, 151 and draft art 5.

⁹ See eg CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown & Co. 1945-I) 821; AP Sereni, *Diritto internazionale* (Giuffrè 1960-II) 1, 521; M Giuliano, 'Les relations et immunités diplomatiques', *Recueil des Cours* (1960-III) 161 ff; Dinstein, 'Diplomatic Immunity' (n 2) 77-89; M Giuliano, T Scovazzi, T Treves, *Diritto internazionale* (Giuffrè 1983) 422-429, 506-512,



functional immunity covers foreign officials when they cannot be held personally responsible for their acts because they are conducted under the authority of their State, that is to say, they are ‘the arm and mouth-piece’ used by the State in its actions. Consequently foreign officials have no right to functional immunity when performing acts that can also be attributed to themselves and for which they may be personally responsible.¹⁰ A third recent theory maintains that the relationship between the individual agent and the State, which constitutes the legal basis for functional immunity, is governed by specific norms of international law, according to which this immunity is due to foreign officials only when their acts are ‘performed in the service of the foreign State’; this wording excludes acts that are not based on the exercise of public duties or acts that are prohibited by international law provisions addressed to individuals.¹¹

Lastly, according to the third, and less traditional, doctrinal approach, which represents a radical break from the others, the legal regime of foreign officials’ functional immunity is not governed by a single and sole customary norm, as international practice demonstrates that such a regime is both fragmented and complex. In other words, no principle or customary norm on functional immunity may be applicable in the same way to all foreign officials for all their acts or for entire categories of certain acts. On the contrary, there is a range of *different norms*, which *change* according to different officials, different acts, or the exercise of criminal or civil jurisdiction. Various doctrinal theories have also developed within this third approach. A first theory maintains that different norms concerning the functional immunity of foreign officials apply according to the kind of activities performed; ie whether they are ‘official’ acts prohibited by international law, acts only lawful in international law, or acts specifically protected by international law.¹²

537; G Carella, *La responsabilità dello Stato per crimini internazionali* (Jovene 1985) 172 ff.

¹⁰ See R Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) especially 106-143; R Van Alebeek, ‘National Courts, International Crimes and the Functional Immunity of State Officials’ (2012) 59 *Netherlands Intl L Rev* 5-41.

¹¹ Z Douglas, ‘State Immunity for the Acts of State Officials’ (2012) 82 *British YB Intl L* 281.

¹² See P De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè 1996) 100-104.



According to a second theory, a distinction must be made between the exercise of criminal jurisdiction and that of civil jurisdiction: foreign officials have no right to immunity from criminal jurisdiction, at least in general international law, and only some categories of foreign officials have a right to immunity from civil jurisdiction, but on the basis of international norms having different contents.¹³ According to a third theory, which is also based on a distinction between criminal and civil jurisdiction, only some categories of foreign officials have a right to immunity from both civil and criminal jurisdiction, while all other foreign officials only have the right to immunity from civil jurisdiction.¹⁴ Lastly, according to a fourth and even more radical theory, *only a restricted core* of foreign officials, by virtue of their duties specifically pertaining to international relations, have the right to functional immunity from both criminal and civil jurisdiction, while all other foreign officials have no right to such immunity.¹⁵

4. *Methodological issues*

We have seen that there are numerous, and fairly diverse doctrinal theories in respect of the legal basis, scope of application and content of functional immunity for foreign officials. Before verifying the validity of

¹³ See M Frulli, *Immunità e crimini internazionali. L'esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini internazionali* (Giappichelli 2007) especially ch I and 307-318.

¹⁴ See B Conforti, 'In tema di immunità funzionale degli organi statali stranieri' (2010) 93 *Rivista di diritto internazionale* 5 ff. For similar views see EH Franey, *Immunity, Individuals and International Law: Which Individuals are Immune from the Jurisdiction of National Courts under International Law* (Lambert Academic Publishing 2011) 330-340; A Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 *ICLQ* 193 ff, 217-220.

¹⁵ See R Nigro, 'La disciplina dei militari impegnati all'estero in missioni umanitarie: in margine al caso *Lozano*' (2009) 3 *Diritti umani e diritto internazionale* 565 ff; G Cataldi, G Serra, 'Ordinamento italiano e corpi di spedizione all'estero, fra diritto umanitario, diritto penale e tutela dei diritti umani' (2010) 4 *Diritti umani e diritto internazionale* 141 ff, 154-155; D Amoroso, 'Sull'(in)esistenza di un regime generale in materia di immunità funzionale degli organi stranieri' (2013) 8-9 *Giurisprudenza italiana* 1900 ff, 1908; R Pisillo Mazzeschi, 'Organi degli Stati stranieri (immunità giurisdizionale degli)' (2014-VII) *Enciclopedia del diritto*, Annali 749-777.



each theory in the light of international practice, it is worth providing some observations of a general and methodological character.

First of all, in the light of contemporary international law the validity of the oldest theories, based on a merely deductive method, should be questioned, as they construct a legal regime of functional immunity applicable to *all* foreign officials based on general, aprioristic and unproven principles, such as the principle of protection of the State's domestic organization, that of non-interference in the constitutional 'life' of the State, that of protection of the State's 'exclusive jurisdiction' in its relationship with its own agents, or that of concurrence between the immunity of officials and the immunity of the State. This deductive method is now considered by international scholars to be obsolete.

Secondly, it is wise to question the traditional theory on the foundations of functional immunity, which is based on the conceptual premise that 'official' acts performed by an agent of the foreign State are always and only attributable to the foreign State, and never to the individual agent, who cannot therefore be held responsible for those acts. This fundamental idea, of the *necessary irresponsibility of individual State agents when acting in an 'official' capacity*, is at the basis of many of the abovementioned traditional theories. However, in this author's opinion, this idea, which belongs to the historical period in which international law only recognized the collective responsibility of the State, has lost all validity in contemporary international law, which admits the *personal responsibility of individuals*, and especially of individual State agents, alongside the collective responsibility of the State. Following this trend, the rapid development of international criminal law has led to a *radical break away* from the traditional system of international responsibility, also impacting upon the whole system of international law. Therefore, the old dogma regarding the absoluteness of the organic link between the individual State agent and his/her State, which has been outmoded in domestic law for some time, is now also obsolete in international law.

Thirdly, and consequently, there is now some doubt as to the concept that the functional immunity of foreign officials should be conceived as a form of irresponsibility, ie as an exemption from the law, and that, therefore, it should be applicable to *all* State officials when performing their duties. On the contrary, it is conceivable that only *some* State officials have a right to functional immunity, by virtue of the im-



portance of their duties for their State's international relations.¹⁶ Besides, from a logical viewpoint, it is hardly justifiable in contemporary international law for functional immunity to expand to such an extent as to include all persons belonging to the entire public administration of a foreign State.¹⁷

Fourthly, considering the rapid development of the whole system of international law over the last few decades, it is clearly possible that international norms regarding the immunity of foreign officials have also undergone a process of evolution, and that a progressive reduction has occurred in the scope of application of functional immunity. It is also plausible that a progressive 'rapprochement' is taking place between the legal regime of functional immunity and that of personal immunity.

That said, it is almost inevitable therefore to conclude that the doctrinal theories based on a deductive method are now inadequate and that the problem of the legal regime of foreign officials' functional immunity should be dealt with using an *inductive method*, founded on an examination of practice and *opinio iuris*. Moreover, this examination should be conducted using an appropriate methodology. This means, first of all, not starting from the aprioristic and unproven assumption that a survey of international practice will only prove the existence or non-existence of a single customary norm on functional immunity, possibly applicable to *all* foreign officials without distinction. On the contrary, such an examination needs to cover practice relating to all categories of State officials who may, at least hypothetically, have the right to immunity. Secondly, since all jurisdictional immunities of foreign officials establish an exception to the usual exercise of jurisdiction by the territorial State, any demonstration of the existence of customary norms relating to immunities must be rigorous; ie based on extensive, consolidated and uniform practice and a well-demonstrated *opinio iuris*. In the absence of these elements, the conclusion that such customary norms do not exist is inevitable.¹⁸

¹⁶ See Nigro (n 15) 575-577.

¹⁷ For a similar comment see Douglas (n 11) 293.

¹⁸ Therefore this author does not agree with the general methodological approach taken by Kolodkin ('Second report' (n 1) para 18), in the abovementioned work of the ILC on immunity of foreign officials from criminal jurisdiction. According to such an approach, which reverses the correct method, the immunity of foreign officials would be the rule and the practice would serve to prove the lack of immunity.

5. *The functional immunity of different State officials in practice*

5.1. *Diplomatic agents, high ranking officials, consular agents, members of special missions*

A first category of State officials who undoubtedly have a right to functional immunity is that of diplomatic agents. This emerges clearly from international practice, although such practice is not particularly extensive, since the functional immunity for the most part needs to be inferred from practice relating to *former* diplomatic agents with regard to official acts performed during their mandates.¹⁹ It is not helpful to look at practice relating to diplomatic agents *during* their mandates, as they enjoy personal immunity for that period of time, which covers both official and private acts²⁰ and therefore ends up absorbing functional immunity. Although not extensive, international practice is nonetheless composed of a uniform and unambiguous series of domestic court judgments.²¹ Moreover, the 1961 Vienna Convention on Diplomatic Relations, commonly considered as a codification of customary international law, contains certain provisions that confirm diplomatic agents' enjoyment of not only personal, but also functional immunity.²²

A second category of State officials who have a right to functional immunity according to prevailing opinion is that of heads of State, heads of Government and ministers of foreign affairs. These figures en-

¹⁹ The functional immunity of diplomatic agents could also be inferred from practice concerning diplomatic agents having the same nationality of the host State and from practice regarding the granting of immunity from States different to the host State. But such practice is almost non-existent.

²⁰ According to the dominant view in literature. See (n 2).

²¹ See eg Cour d'appel de Paris (29 June 1811) *Angelo-Poulos c Fertou* (1809-1811) *Recueil Sirey* 514 ff; Tribunal de première instance de Genève (29 March 1927) *V et Dicker c D* (1927) *Journal de droit international* 1179; London Court of Appeals (24 March 1964) *Zoernsch v Waldock and McNulty* (1964) 3 ILM 425; Cour de Paris (30 June 1967) *Querouil c Breton* (1968) 14 *Annuaire français de droit international* 859; England, Court of Appeals (17 April 1997) *Propend Finance Pty Ltd and Others v Sing and Others* (1997) 111 ILM 611 ff; District Court of the District of New York (20 March 2009) *Swarna v Al-Awadi, Al-Shaitan and the State of Kuwait* <www.leagle.com>; Court of Appeals for the Second Circuit (24 September 2010) *Swarna v Al-Awadi, Al-Shaitan and the State of Kuwait* <www.leagle.com>.

²² See especially arts 38 and 39(2) of the Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.



joy personal immunity during their mandates and their functional immunity therefore has to be inferred, especially from practice concerning former heads of State, heads of Government and ministers of foreign affairs with regard to official acts performed during their mandates. Although this practice is not completely uniform, it confirms the existence of a customary norm giving these three high-ranking State representatives functional immunity from foreign (criminal and civil) jurisdiction, though, a restrictive interpretation should be given to this immunity.

The customary norm can be inferred, above all, from extensive domestic court case-law,²³ one may mention, as a significant example, the clear statements of some law Lords in House of Lords judgment of 24 March 1999 in the *Pinochet* case.²⁴ The existence of such a norm is also confirmed, albeit implicitly, in the case-law of international courts, such as in the 2002 judgment of the International Court of Justice (ICJ) in the *Arrest Warrant* case.²⁵ Moreover, the *Institut de Droit International*

²³ See, for instance, within the extensive case law of United States courts, the following judgments: Supreme Court of the State of New York, *Hatch v Baez* (1876) 7 Hun's Rep 596 (NY Sup Ct); Supreme Court (29 November 1897) *Underbill v Hernandez* 168 US 250, 18 S Ct 83; District Court for the Eastern District of New York (27 January 1994) *Lafontant v Aristide*, 844 F Supp 128; Court of Appeals for the Seventh Circuit (8 September 2004) *Wei Ye and Others v Jiang Zemin*, 383 F 3d 620; Court of Appeals for the Fifth Circuit (12 December 1962) *Marcos Perez Jimenez v Manuel Aristequieta and John E Maguire*, 311 F 2d 547; Court of Appeals for the Second Circuit (26 November 1986) *Republic of the Philippines v Marcos and others*, 806 F 2d 344; Court of Appeals for the Ninth Circuit (4 June 1987) *Republic of the Philippines v Marcos and others*, 818 F 2d 1473; Court of Appeals for the Ninth Circuit (1 December 1988) *Republic of the Philippines v Marcos and others*, 862 F 2d 1364; District Court for the Southern District of Florida (ord 8 June 1990) *United States of America v Manuel Antonio Noriega et al*, 746 F Supp 1506; Court of Appeals for the Eleventh Circuit (7 July 1997) *United States of America v Noriega*, 117 F 3d 1206. See also, for judgments in other States, Tribunale di Roma (ord 28 February 1987) *Imputato Bigi* (1988) 24 Rivista di diritto internazionale privato e processuale 359 ff; Tribunal Correctionnel de Paris (1 July 1999) *Noriega* (1999) 103 Revue générale de droit international public 958 ff; Tribunal Correctionnel de Paris (7 July 2010) *Noriega* <www.nytimes.com/2010/07/08/world/americas>.

²⁴ House of Lords (24 March 1999) *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* ('Pinochet III') 119 ILM 136 ff. See especially the statements made by Lord Browne-Wilkinson (ibid para 202) and by Lord Millet (ibid para 269). See also House of Lords (25 November 1998) *Regina v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* ('Pinochet I') ibid 51 ff.

²⁵ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 ff para 61.



adopted a resolution in 2001 affirming that former heads of State have a right to functional immunity with regard to acts ‘accomplis durant ses fonctions et qui participaient de leur exercice.’²⁶

A third category of State officials who undoubtedly have a right to functional immunity according to customary international law is that of consular agents. However, their immunity from criminal and civil jurisdiction must be interpreted extremely restrictively, since it is limited to acts performed in the *typical exercise of consular functions*. This has been confirmed by the 1963 Vienna Convention on Consular Relations²⁷ and by extensive case-law in the domestic courts of many States.²⁸ Among the most significant decisions, one that stands out is the 2012 judgment of the Italian Court of Cassation in the *Abu Omar* case,²⁹ which stated that the scope of consular duties covered by functional immunity must be limited to typically administrative duties performed in observance of the laws and regulations of the territorial State.

Lastly, a fourth category of State officials who, in this author’s view, have a right to functional immunity is that of members of special missions. In treaty law their legal regime is governed by the 1969 New York Convention on Special Missions,³⁰ which, with the intention of assimilating these missions into permanent diplomatic missions, grants members of special missions jurisdictional immunities similar to those of dip-

²⁶ Institut de Droit International, ‘Resolution of 26 August 2001: Les immunités de juridiction et d’exécution du chef d’Etat et de gouvernement en droit international’ (2001-2002) 69 *Annuaire de l’Institut de Droit International* 742-754.

²⁷ Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 3 September 1953) 213 UNTS 222. See especially art 43.

²⁸ See eg Tribunal correctionnel de Dieppe (22 January 1900) *Murphy c Lee Jortin* [1900] *Journal de droit international privé* 959 ff; District Court for the Southern District of New York (15 October 1956) *Arcaya v Páez*; Court of Appeals for the Second Circuit (17 June 1957) *Arcaya v Páez* (1957) 23 ILR 436 ff; Corte di Cassazione (19 April 1933) *In re Vubotic* (1933-34) 7 *Annual Digest and Rep Public Intl L Cases* 392; Cour d’appel de Paris (28 January 1928) *Bigelow c Zizianov*, (1928) *Journal de droit international* 142 ff; Tribunale di Genova (6 May 1970) (1971) 54 *Rivista di diritto internazionale* 702 ff; Corte di Cassazione (28 February 1972) (1976) 2 *Italian YB Intl L* 339; Superior Court of Lake County (30 September 1988) *State of Indiana v Peter L. Ström*, see T Lee, *Consular Law and Practice* (OUP 1991) 501-503.

²⁹ Corte di Cassazione, sez V penale (29 novembre 2012) n 46340, *Proc. Gen. Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri* (2013) 96 *Rivista di diritto internazionale* 272 ff.

³⁰ Convention on Special Missions (adopted 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231, specially arts 24-31.



lomatic agents. In this author's opinion this Convention codifies customary international law, as States' recent practice (although mostly dealing with personal immunity) shows a clear trend in favour of the existence of a customary norm granting members of special missions both personal and functional immunity.³¹ In other words, international practice confirms that special missions are to be treated in the same way as permanent diplomatic missions. However, in actual fact, the functional immunity of members of special missions only applies after the cessation of their mission.

A separate legal regime governs the immunity of members of missions representing States in their relations with international organizations or in international conferences. The numerous bilateral and multilateral treaties dealing with this matter usually grant such missions only functional immunity.³² However, it does not appear possible to infer a customary norm on immunity from this set of treaties. Moreover, international practice is not sufficiently extensive and uniform, except for the cases in which immunity has been granted on the basis of a specific treaty provision.

5.2. *Military forces*

Members of military forces deserve separate treatment. This paper includes within this broad category of State officials, members of military forces operating abroad in times of peace, with the consent of the territorial State, as well as members of military forces operating abroad during wartime occupation or during missions authorised by the United Nations or the European Union.

³¹ See eg High Court, Queen's Bench Division, *Kburts Bat v Investigating Judge of the Federal Court of Germany* [2011] EWHC 2029 (Admin) and (2012) 3 Weekly L Rep 180; Divisional Court, *R. v Governor of Pentoville Prison, ex parte Teja*, [1971] 2 QB 274; Bow Street Magistrates' Court (8 November 2005) *Re Bo Xilai*, 128 ILR 713 ff; District Court (29 September 2009) *Re Ebud Barak*, reported in Franey (n 14) 146-147; District Court for the Northern District of Ohio, Eastern Division (7 December 1978) *Kirloy v Windsor*, 81 ILR 605 ff; Court of Appeals for the Eleventh Circuit (18 September 1984) *Abdulaziz v Metropolitan Dade County and Others* 741 F 2d 1328.

³² See, for instance, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (adopted 14 March 1975, not yet in force) arts 30, 37, 60, 66, 67, 68.



International law scholars are divided about the existence of a customary norm attributing functional immunity to members of military forces. Some writers maintain that such a norm exists and that it grants immunity for acts strictly connected to the duties of the military forces.³³ Others maintain that the customary norm has a more limited scope, since it is supposed to cover only criminal and disciplinary immunity for acts 'exclusively internal' to the military force.³⁴ Still others deny the existence of a customary norm and maintain that the immunity of military forces is only governed at treaty level.³⁵

The latter view is the most convincing, as international practice shows that the treatment of members of military forces operating abroad is almost always governed by specific bilateral agreements between the sending State and the territorial State or, in more recent times, by multilateral agreements, such as the Status of Forces Agreements (SOFAs). In fact, these agreements have left no room for the development of a customary norm, because they contain very different provisions in regards to jurisdiction over the members of military forces. In some cases the agreement provides for the exclusive jurisdiction of the sending State, in others for the exclusive jurisdiction of the territorial State, and in yet others for the concurrent jurisdiction of the sending and the territorial State. Hence, in this author's view, it should be concluded that these agreements tend to govern the distribution of competences among States, rather than the functional immunity of military forces. At most it could be inferred from this set of agreements that there is a trend in favour of the of the sending State having *priority* in terms of the exercise of jurisdiction over military forces.

The idea that there is no customary norm concerning the functional immunity of military forces was recently supported by the High Court of Kerala in its judgment concerning the dispute between Italy and India in the case of the ship *Enrica Lexie*.³⁶ The Court rejected the Italian

³³ See eg Conforti (n 14) 6.

³⁴ See eg GP Barton, 'Foreign Armed Forces: Immunity from Criminal Jurisdiction' (1950) 31 *British YB Intl L* 186-234; H Fox, *The Law of State Immunity* (2nd ed, OUP 2008) 717; C Focarelli, *Diritto internazionale, Il sistema degli Stati e i valori comuni dell'umanità* (2nd ed, Cedam 2012) 390.

³⁵ See Frulli (n 13) 34-37.

³⁶ High Court of Kerala (29 May 2012) *Latorre and Others v Union of India and Others* (2012) 252 KLR 794.



argument that the two Italian marines involved benefitted from functional immunity, stating that, in international law, the immunity of foreign military forces depends on the presence or absence of a specific agreement between the sending and the territorial State.

5.3. *Other State officials*

As we have seen, the practice concerning the various categories of State officials who could, at least hypothetically, enjoy functional immunity demonstrates that *only some officials* have a right to this immunity on the basis of customary international law.

Therefore, both the doctrinal approach according to which functional immunity is due to all foreign officials in relation to all their acts, and the approach according to which functional immunity is due to all foreign officials but only for their lawful acts or for certain categories of acts should be rejected. Instead, the third doctrinal approach, which denies the existence of a single and sole customary norm applicable to all foreign officials without distinction, seems a more reasonable one. However, in order to be certain, it is also necessary to examine the practice concerning State officials *other than those already taken into consideration*. In doing so, a distinction should be made between the practice relating to possible immunity from criminal jurisdiction and that relating to possible immunity from civil jurisdiction.

5.3.1. *Immunity from criminal jurisdiction*

An examination of practice, especially more recent practice, demonstrates that there is no norm of customary international law which grants functional immunity from criminal jurisdiction to foreign officials other than those in the four categories mentioned above (diplomatic agents; heads of State and Government and ministers of foreign affairs; consular agents; and members of special missions).

Historical practice shows that domestic courts have denied functional immunity to foreign officials when they are accused of: a) espionage; b) serious breaches of the law of war; c) aerial intrusions or unlawful trespassing in foreign territories or maritime spaces. This has also been confirmed in more recent practice. With regard to espionage, for example, reference can be made to the 1998-99 dispute between Cyprus

and Israel.³⁷ This concerned the arrest by Cypriot authorities of two Israeli agents suspected of having performed espionage activities in Cyprus, who were tried and sentenced by the Cypriot courts. With regard to war crimes, we may recall the *Von Lewinski* case,³⁸ decided by a British court in 1949, in which the accused contested the jurisdiction of the court and cited the *McLeod* case³⁹ as a precedent in his favour; however, the court decided to exercise its jurisdiction and stated that, if anything, the *McLeod* case constituted a precedent against the functional immunity of foreign officials.

Moreover, most recent practice demonstrates that the courts are willing to deny foreign officials functional immunity from criminal jurisdiction with regard to many other categories of unlawful acts, that is to say besides those mentioned above. With respect to crimes against humanity, for instance, we may cite the 1962 judgment of the Israeli Supreme Court in the *Eichmann* case,⁴⁰ and the 2004 decision of the Belgian Court of Cassation in the *Sharon and Yaron* case,⁴¹ which denied functional immunity to Yaron. With regard to the offence of defamation, we may recall the 1960 judgment of the Supreme Court of Burma in the *Kovtunen* case,⁴² in which the accused was an officer of the Soviet Telegraph Agency, TASS, who was charged with defamation and claimed functional immunity. Even though the court recognised that the accused had acted in the exercise of his official duties and with the authorisation of his Government, it denied him immunity.

There have also been many cases relating to crimes of murder, abduction or terrorism committed by foreign officials. Reference can be made, for instance, to the 1962 judgment of a German court in the

³⁷ The diplomatic dispute is described in Franey (n 14) 216-220.

³⁸ British Military Court at Hamburg (Germany) (19 December 1949) *In re Von Lewinski (called von Manstein)* (1949) 16 Annual Digest Rep Public Intl L Cases 509 ff.

³⁹ Supreme Court of New York (6 July 1841) *People v McLeod* [1840-1841] Wendell's L Rep 483.

⁴⁰ Israel, Supreme Court (29 May 1962) *Attorney-General of the Government of Israel v Adolf Eichmann* (1968) 36 ILR 277-342, specially 308-312.

⁴¹ Belgium, Court of Cassation (12 February 2003) *H.S.A. et al v S.A. et al* (Decision related to the indictment of Ariel Sharon, Amos Yaron and Others) No P.02.1139.f 127 ILR 110 ff.

⁴² Burma, Supreme Court *Kovtunen v U Law Yone* (1 March 1960) 31 ILR 259 ff.



Staschynskij case;⁴³ the 1984 judgment of an English court in the *Yusufu* case;⁴⁴ the arrest warrant of an English court in the *Lugovoi* case⁴⁵ concerning the murder of Litvinenko; the 1986 judgment of the District Court of Auckland in the *Rainbow Warrior* case, as well as the conduct of both the Governments of France and New Zealand during the dispute;⁴⁶ the 2001 judgment of a Scottish court in the *Lockerbie* case and the conduct of both Libya and many other States during the dispute.⁴⁷ Lastly, the abovementioned judgment of the High Court of Kerala in the *Enrica Lexie* case denied the existence of a customary norm providing all foreign officials with immunity from criminal jurisdiction.

Moreover, domestic courts have taken a clear and well-reasoned position against the existence of such a customary norm in two recent and important cases. In the *Kburts Bat* case,⁴⁸ the English High Court was asked to decide whether the head of the executive office of Mongolia's National Security Council – wanted for the crime of abduction among others committed in various European States – could claim functional immunity, being a foreign official who had acted in the exercise of his duties. In its judgment of 2001 the Court denied such immunity, having conducted an in-depth examination of international practice and deduced the non-existence of a customary international norm attributing functional immunity to foreign officials for crimes committed in the territory of a host State or in a third State. In the *Abu Omar* case, the one of the accused claimed that the CIA agents prosecuted for the covert abduction of the Egyptian citizen Abu Omar in Milan should enjoy functional immunity from Italian criminal jurisdiction as foreign State officials. The Italian Court of Cassation, in its judgment of 2012,⁴⁹ clear-

⁴³ Bundesgerichtshof (9 October 1962) *Staschynskij*, *Entscheidungen des Bundesgerichtshof in Strafsachen* (1963) 87 ff.

⁴⁴ Lambeth Magistrates' Court (23 August 1984) *R v Lambert Justices, ex parte Yusufu* [1985] Crim L Rev 510. For a description of the case see Franey (n 14) 256-258.

⁴⁵ See *ibid* 253-256.

⁴⁶ *ibid* 210-214, 220-232. See also (1986) 25 ILM 1349 ff (1986) 90 *Revue générale de droit international public* 1004 ff; C Focarelli, *Lezioni di diritto internazionale, Prassi*, vol II (Cedam 2008) 633-637.

⁴⁷ For a reconstruction of the events see Franey (n 14) 244-248. See also Scottish High Court of Judiciary (31 January 2001) *Megrabi and Fhimah* (2001) 40 ILM 582 ff.

⁴⁸ High Court, Queen's Bench Division, *Kburts Bat* (n 31).

⁴⁹ Corte di Cassazione, sez V penale, *Nasr Osama Mustafá Hassan detto Abu Omar e altri* (n 29).



ly rejected this claim, affirming the non-existence in international law of a customary norm regarding the functional immunity of *all* foreign officials. According to the Court, such a customary norm does not exist: this is confirmed by the absence of uniform and consolidated case-law, of continuous and concordant official declarations of States, and of an unambiguous doctrinal interpretation. On the contrary, the Court espoused the theory according to which functional immunity is recognized by specific international norms only in favour of certain categories of State agents in the exercise of the typical duties of their office. This position was confirmed in 2013 by the Court of Appeal of Milan,⁵⁰ and in 2014 in another judgment of the Italian Court of Cassation.⁵¹

On the other hand, in contrast to this long list of judgments against the functional immunity of all foreign officials, some judgments have nonetheless favoured such immunity. The most famous one is represented by the 1997 decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Blaškić* case.⁵² In this decision the ICTY denied the possibility of issuing an injunction against foreign officials, maintaining that they enjoyed functional immunity on the basis of customary international law. However, this decision is open to criticism: not least because the Appeals Chamber cited four cases in support of its view that are either not pertinent or tend to deny, rather than substantiate the view. The Italian Court of Cassation also pronounced in favour of the functional immunity of all foreign officials in its 2008 judgment of the *Lozano* case:⁵³ again, this judgment was rather poorly grounded. Lastly, some scholars mention the 2008 judgment of the ICJ in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters*,⁵⁴ in which France and Djibouti maintained opposing views in respect of the existence of a customary

⁵⁰ Corte di Appello di Milano (1 February 2013) *Medero et al* <www.penalecontemporaneo.it>.

⁵¹ Corte di Cassazione, sez V penale (25 September 2014) n 39788 *Medero et al* <www.cassazione.it>.

⁵² *Prosecutor v Blaškić*, Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14 (29 October 1997) paras 38-41.

⁵³ Corte di Cassazione, sez I penale (4 July 2008) n 1171, *Lozano* <www.cassazione.it>.

⁵⁴ ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment of 4 June 2008) [2008] ICJ Rep 177.



norm on the functional immunity of all foreign officials. However, in actual fact, the Court avoided making a pronouncement on the matter.

In conclusion, international practice testifies, in a rather consistent and uniform way, to the non-existence of a customary norm regarding the functional immunity of *all* State officials from foreign criminal jurisdiction. The few judgments in favour of the existence of such a norm are based on erroneous or unconvincing grounds.

5.3.2. *Immunity from civil jurisdiction*

Moving now to the practice relating to the functional immunity of State officials from foreign civil jurisdiction, it should be noted, above all, that although it is extensive, it is far from uniform. Three main approaches can be distinguished within the case-law.

A first group of cases includes the judgments in which domestic courts have denied, in a fairly explicit way, the existence of a customary norm giving *all* foreign officials functional immunity from civil jurisdiction.⁵⁵

A second group of cases includes many United States court judgments, in which the judges have ruled on tort claims lodged against foreign officials, applying the 1789 *Alien Tort Statute* (ATS) and, on some occasions, the 1991 *Torture Victim Protection Act* (TVPA). In these judgments the courts have asserted their jurisdiction over foreign officials and rejected the declinatory exceptions raised by them.⁵⁶ In some

⁵⁵ See eg Court of Appeal (16 December 1921) *Fenton Textile Association Limited v Krassin*, (1919-22) 1 Annual Digest Rep Public Intl L Cases 295-298; Eire, Supreme Court (18 December 1944) *Saorstát and Continental Steamship Company Ltd v Rafael De Las Morenas* (1943-45) 12 Annual Digest Rep Public Intl L Cases 97 ff; Philippines, Supreme Court (28 May 1992) GR No 74135, *Wylie and Williams v Rarang*, <www.lawpgil.net>; Philippines, Supreme Court (1 March 1993) GR No 79253, *United States of America and Maxine Bradford v Luis R Reyes and Nelia T Montoya* <www.lawphil.net>.

⁵⁶ See eg Court of Appeals for the Second Circuit (30 June 1980) *Filartiga v Pena-Irala*, 630 F 2d 876, 889-890; District Court for the Northern District of California (6 October 1987) *Forti and Benchoam v Suarez-Mason*, 672 F Supp 1531, 1544-1547; Court of Appeals for the Second Circuit (13 October 1995) *Kadic v Karadžić*, 70 F 3d 232; District Court for the District of Maryland (26 February 2009) *Lizarbe and Others v Rondon*, 642 F Supp 2d 473, 487-489; Court of Appeals for the Ninth Circuit (21 October 1992) *Trajano v Marcos and Marcos Manotoc (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F 2d 493; District Court for the District of Massachusetts



cases these courts have rejected the ‘act of State’ defence, while in other cases they have decided that the immunity granted by the 1976 *Foreign Sovereign Immunity Act* (FSIA) is not applicable. Thus, they have not explicitly dealt with the problem of the existence or non-existence of a customary norm on functional immunity. However, it may be presumed that, by asserting their jurisdiction over foreign officials, these courts have implicitly denied the existence of a customary norm of functional immunity for officials – otherwise, such a norm would surely have been applied.

Lastly, a third group of cases includes several judgments, usually originating from common law countries (with the exception of the USA), in which the courts have granted functional immunity from civil jurisdiction to foreign officials.⁵⁷ However, it should be pointed out that these courts have usually maintained that the functional immunity of the officials is synonymous with the immunity of the State. In many common law countries this position derives from the existence of domestic laws dealing with the immunity of foreign States from civil jurisdiction.⁵⁸ Sometimes these laws also expressly establish the immunity of officials acting in the exercise of their duties; in other cases the same conclusion derives from an interpretation of the same laws. Therefore, the abovementioned judgments, being mostly based on domestic law,

(12 April 1995) *Teresa Xuncax and Others v Hector Gramajo*, 886 F Supp 162, 178-193; District Court for the Southern District of New York (18 April 1996) *Cabiri v Assasie Gyimab*, 921 F Supp 1189. See also US Supreme Court (1 June 2010) *Samantar v Yousuf and Others*, 147 ILR 726 ff; Court of Appeals for the Fourth Circuit, *Yousuf v Samantar*, 699 F 3d 763 (4th Cir 2012).

⁵⁷ Federal Republic of Germany, Federal Supreme Court (26 September 1978) *Church of Scientology Case* (1978) 65 ILR 193 ff; Ontario Court of Appeal (17 June 1993) *Jaffe v Miller and Others* (1993) 95 ILR 446 ff; Ireland, Supreme Court (5 December 1997) *Herron v Ireland and Others*; House of Lords (Appellate Committee) (14 June 2006) *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another; Mitchell and Others v Al-Dali and Others* (2006) 129 ILR 631 ff; New Zealand, High Court (21 December 2006) *Fang v Jiang* [2007] NZAR 420; Australia, Court of Appeal of New South Wales (5 October 2010) *Zhang v Zemin* [2010] NSWCA 255; Canada, Quebec Superior Court (25 January 2011) *Estate of the Late Kazemi and Hashemi v Islamic Republic of Iran and Others* (2011) 147 ILM 318 ff; Supreme Court of Canada (10 October 2014) *Kazemi Estate v Islamic Republic of Iran* [2014] SCC 62.

⁵⁸ See eg the 1978 *State Immunity Act* of the United Kingdom, the 1985 *State Immunity Act* of Canada, the 1985 *Foreign States Immunities Act* of Australia, in A Dickinson, R Lindsay, JP Loonam (eds), *State Immunity: Selected Materials and Commentary* (OUP 2004).



are not especially significant for the identification of customary international law.

It should be mentioned here that the European Court of Human Rights (ECtHR) recently espoused the approach typical of many common law countries. In fact, in the 2014 *Jones* judgment⁵⁹ the ECtHR affirmed the existence of a norm of general international law according to which the acts performed by State officials in the exercise of their duties are attributed, as far as immunity from civil jurisdiction is concerned, to the State for which they act. However, this judgment is open to criticism in respect of both its conceptual grounds and its very limited and partial examination of international practice.⁶⁰ In fact, from a conceptual point of view, the judgment again presents – without any critical examination – a theory connected to a now obsolete conception of functional immunity, which does not fit with contemporary international law. From a more empirical viewpoint, the judgment passively accepts the jurisprudential approach that identifies the immunity of an official with that of the State. This persists in some States but has no equivalent in many others.

What conclusion should therefore be drawn from the international practice relating to the functional immunity of State officials from foreign civil jurisdiction? The answer is complex, because a part of the practice seems to be in favour of immunity, while another part demonstrates the very opposite view. On the whole, considering the lack of extensive, consistent, consolidated and uniform practice, it is difficult to maintain the existence of both the *diuturnitas* and the *opinio iuris* necessary for the identification of a customary norm giving *all* State officials functional immunity from foreign civil jurisdiction.

⁵⁹ *Case of Jones and Others v The United Kingdom* App no 34356/06 and 40528/06 (ECtHR, 14 January 2014).

⁶⁰ See R Pisillo Mazzeschi, 'Le immunità degli Stati e degli organi statali precludono l'accesso alla giustizia anche alle vittime di tortura: il caso *Jones* dinanzi alla Corte europea dei diritti umani' (2014) 6 *Diritti umani e diritto internazionale* 215-223; P Pustorino, 'Immunità dello Stato, immunità degli organi e crimine di tortura: la sentenza della Corte europea dei diritti dell'uomo nel caso *Jones*' (2014) 97 *Rivista di diritto internazionale* 493 ff.

6. *Conclusion on the legal basis and scope of application of functional immunity*

The examination of international practice conducted above confirms the doctrinal approach according to which there are neither principles nor customary norms on functional immunity that are applicable to *all* foreign officials, but that there are, instead, a variety of *different norms*, which are applicable according to the roles of different officials and their respective duties.

With regard to the different officials, functional immunity is due to diplomatic agents; to heads of State, heads of Government and ministers of foreign affairs; to consular agents; and to members of special missions. These are, with the positive exception of consular agents, the same officials who enjoy personal immunity. Besides, other State officials – ie the members of military forces operating abroad – do not enjoy true functional immunity, but rather the sending State enjoys priority in the exercise of coercive, disciplinary and criminal jurisdiction on the basis of treaty law. Therefore, the categories of State officials that have a right to functional immunity are relatively limited in number, almost tending to coincide with the categories of officials who have a right to personal immunity.

With regard to the duties of the various officials, international practice shows that functional immunity is recognized broadly in relation to diplomatic agents and members of special missions; in a somewhat more restricted way in relation to the three most high ranking State representatives; and in an much more restrictive way to consular agents.

These two conclusions are important and suggest a radical change of mind about the foundations, goals and nature of functional immunity. First of all, it is highly significant that international practice disavows the numerous doctrinal views according to which functional immunity should be due to *any* individual who has the qualification of State official and who acts in that role. This completely undermines the conceptual premise on which the theory of functional immunity has long been grounded, that is to say: the idea that the immunity of State officials is a necessary corollary of the fact that they act as organs of the State; the idea that such immunity derives from the fact that the agent's official acts are not attributable to him/her because they are attributable only to the State for which he/she is acting; and, lastly, the idea – and the basis



of all the other concepts – that the very structure of international law only admits the collective responsibility of States. However, this latter idea has clearly been rendered obsolete by the development of international criminal law, which has established the ‘normality’ of the criminal responsibility of the individual agent besides that of the State and has brought about a structural change in the whole legal regime of international responsibility. In this author’s view, this also marks the final demise of the abovementioned conceptual premise behind the traditional theory of functional immunity.

Having rejected these premises, it becomes clear that the radical difference between the traditional theoretical foundations on which functional and personal immunity were respectively grounded no longer exists; consequently, the idea that any individual who acts for the State has a right to immunity for that reason alone must also be deemed obsolete. International practice, on the contrary, suggests another, more modern, *ratio* as the basis of functional immunity: ie that only some State officials, because of the particular nature of their duties, *which concern the external life and external activities of the State*, have a right to functional immunity.⁶¹ In other words, the modern *ratio* of the norms on functional immunity of foreign officials is not founded on the aim of protecting the State as such and, consequently, in the protection of all public functions; but, instead, in the protection of a limited number of State functions: those which are typically important for the external activities of every State. Under this perspective it is absolutely logical that functional immunity covers *only those State officials who are typically and normally required to perform duties concerning the external life and activities of the State*.

It should be pointed out that, for the purposes of functional immunity, these duties need not concern a true representation of the State in its relations with other States, or the management of international relations. The protection of such duties is entrusted to personal immunity, which is more extensive and significant because it covers both official and personal acts and protects only the officials who, during their mandates, fulfil the important function of representing their State at the international level or of managing its international relations. On the con-

⁶¹ For similar views see Nigro (n 15) 575-579; Amoroso (n 15) 1908; Cataldi, Serra (n 15) 155.

trary, it is logical that functional immunity, which is less extensive and important because it covers only official acts, be destined to protect the same State officials after the cessation of their mandate, as well as other State officials (ie consular agents) who do not represent the State at the international level nor manage its international relations, but have more limited duties concerning the State's external activities. Lastly, for those State officials who only occasionally perform public duties in foreign States (military forces), a lesser protection than that given by immunity seems sufficient: the priority and exclusive jurisdiction sometimes exercised by their national States on the basis of treaty law is a sufficient mechanism of protection in such cases.

In short, it is this author's view that in contemporary international law the whole legal regime of personal and functional immunity from jurisdiction has only one goal, of a single and unitary nature – that of protecting *certain specific functions* of the State in its external relations or activities, through the protection of the officials who, as a rule, perform those functions. This protection is graduated according to the importance of the functions performed by the different officials and according to whether or not the officials are effectively acting out their mandate at the time. If this is true, it prompts the question whether it is still useful or meaningful to make a clear and radical conceptual distinction between personal and functional immunity.

7. *Brief remarks on the relationship between functional immunity and international crimes*

As is well known, one of the most topical and controversial problems of contemporary international law is that of the relationship between the international norms on immunity (including those on the functional immunity of foreign officials) and international norms prohibiting gross violations of human rights, grave breaches of humanitarian law, and international crimes.⁶²

⁶² The international norms on immunities also raise the problem of their possible conflict with certain domestic norms or principles, especially with the norms protecting the right of access to justice. On this issue see Pisillo Mazzeschi (n 60) 790-792 and, recently, Corte Costituzionale (22 October 2014) n 238 <www.cortecostituzionale.it>.



This problem is too complex to be dealt with⁶³ thoroughly here and therefore will be dealt with only in some brief remarks on the international practice which relates to the conflict between the functional immunity of State officials from foreign (criminal and civil) jurisdiction and the pursuit of justice for international crimes. We must start by saying that the conflict only arises when the norms on immunity *totally prevent* the victim from having access to justice against a foreign official accused of an international crime, because the victim has no alternative means of redress (the so-called rule of ‘equivalent protection’).⁶⁴ In this case, the norms on immunity contrast not only with the norms on the prohibition of international crimes, but also (in a more direct way) with the victim’s right to access to justice and right to reparation. These latter rights are strictly and necessarily linked to the right not to suffer from the acts of an international crime. In fact, it is clear that an effective substantive right cannot be said to exist in the absence of remedies in the event of its breach; in other words, the victims of international crimes are effectively interested in having access to justice in order to obtain reparation and ensure the punishment of the persons responsible.

That said, international practice tends, on the whole, to deny functional immunity to foreign officials suspected or accused of international crimes.⁶⁵ This position emerged during the proceedings held by the allied military tribunals and by the domestic courts of the Allied States against foreign officials accused of having committed war crimes or crimes against humanity during World War II.⁶⁶

⁶³ See Pisillo Mazzeschi (n 60) 777 ff, also for a review of the doctrinal theories on the subject.

⁶⁴ As is well known, the rule of ‘equivalent protection’ or ‘alternative means of redress’ has been developed especially by the ECtHR in order to resolve the conflict between the right of access to justice and the immunity of international organizations. See eg *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999); *Beer and Regan v Germany* App no 28934/95 (ECtHR, 18 February 1999); *Naletilic v Croatia* (ECtHR, 4 May 2000); *Gasparini c Italie et Belgique* App no 10750/03 (ECtHR, 12 May 2009). This author believes that such a rule should also be applied to immunity of foreign officials and immunity of foreign States.

⁶⁵ On the contrary, international practice shows that there is no exception to the customary norm on the *personal* immunity of diplomatic agents, heads of State, heads of Government and ministers of foreign affairs, even when those officials are accused of international crimes. See Pisillo Mazzeschi (n 60) 783-785.

⁶⁶ See the judgments cited by Frulli (n 13) 82-92.



More recent developments in international practice are, however, more significant. Initially, we can cite the 1997 ICTY decision in the *Blaškić* case;⁶⁷ the first and third judgments of the House of Lords in the *Pinochet* case;⁶⁸ the proceedings against former heads of State started by the Dutch courts against *Bouterse*;⁶⁹ by the French, Swiss and Dutch courts against *Pinochet*;⁷⁰ by the Spanish courts against *Rios Montt*,⁷¹ *Lucas García* and *Mejía Victores*;⁷² and by the Spanish, German and Italian courts against *Bignone*, *Lambruschini*, *Massera* and *Videla*.⁷³

Subsequently, there seemed to be a tendency to deny functional immunity to foreign officials accused of international crimes, brought on by the famous *obiter dictum* contained in the 2000 ICJ judgment regarding the *Arrest Warrant* case. This apparently limited the exception to functional immunity in relation to international crimes to acts performed by State agents in the exercise of their duties, but only for private purposes.⁷⁴ The *obiter dictum* of the ICJ had a negative impact on subsequent practice, causing uncertainty among States and domestic courts about the relationship between functional immunity and international crimes.

Following that, international practice has been somewhat divided. Some domestic courts, especially in common law countries and with regard to *civil* proceedings, have granted functional immunity to foreign officials accused of international crimes and here we may mention the 2006 British judgment in the *Jones* case,⁷⁵ the 2006 New Zealand judg-

⁶⁷ ICTY, *Prosecutor v Blaškić* (n 52) para 41.

⁶⁸ See in the judgment *Pinochet I* (n 24) the statements by Lord Steyn (para 115) and Lord Nicholls of Birkenhead (paras 110-111); and in the judgment *Pinochet III* (n 24) the statements made by Lord Browne-Wilkinson (para 198), Lord Hope of Craighead (para 247), Lord Hutton (para 262), Lord Phillips of Worth Matravers (paras 289-290) and Lord Browne-Wilkinson (para 205).

⁶⁹ Gerechtshof Amsterdam (20 November 2000) *In re Bouterse* (2001) Netherlands YB Intl L 266 ff; (18 September 2001) *ibid* 282 ff.

⁷⁰ See N Roht-Arriaza, 'The Multiple Prosecutions of Augusto Pinochet' in EL Lutz and C Reiger (eds), *Prosecuting Heads of State* (CUP 2009) 77 ff.

⁷¹ See Frulli (n 13) 127-128.

⁷² See Lutz and Reiger (n 70) 295-298.

⁷³ *ibid* 295-298.

⁷⁴ *Case Concerning the Arrest Warrant of 11 April 2000* (n 25) para 61.

⁷⁵ House of Lords (Appellate Committee) *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another; Mitchell and Others v Al-Dali and Others* (n 57).



ment in the *Fang* case,⁷⁶ the 2010 Australian judgment in the *Zhang* case,⁷⁷ and the 2011 and 2014 Canadian judgments in the *Kazemi* case.⁷⁸ The ECtHR recently adopted the same position in the 2014 *Jones v UK* case,⁷⁹ but with a very poorly grounded judgment.

On the contrary, many other courts have continued to maintain that functional immunity does not apply to foreign officials accused of international crimes: here we may mention the 2004 *Ferrini* judgment of the Italian Court of Cassation;⁸⁰ the 2012 and 2014 judgments of the same Court in the *Abu Omar* case;⁸¹ the decisions of the Spanish *Audencia Nacional* of 2006 in the *Zemin* case⁸² and of 2008 in the *Kagame* case;⁸³ and the 2012 judgment of the Swiss Federal Criminal Tribunal in the *Nezzar* case.⁸⁴

The same position also emerged, on the whole, from the long diplomatic dispute between Belgium and Senegal in the case of the former Chadian Head of State *Habré*. In particular, the Report of the Committee of Eminent African Jurists, submitted to the African Union in 2006, explicitly stated that the functional immunity of heads of State cannot override the principle of the prohibition of impunity for international crimes;⁸⁵ and the 2012 ICJ judgment in the case *Belgium v. Senegal*,⁸⁶

⁷⁶ High Court, *Fang v Jiang* (n 57).

⁷⁷ Court of Appeal of New South Wales, *Zhang v Zemin* (n 57).

⁷⁸ Quebec Superior Court, *Estate of the Late Kazemi and Hashemi v Islamic Republic of Iran and Others* (n 57); Supreme Court of Canada *Kazemi Estate v Islamic Republic of Iran* (n 57).

⁷⁹ *Case of Jones and Others v The United Kingdom* (n 59).

⁸⁰ Corte di Cassazione (11 March 2004) n 5044, *Ferrini c Repubblica Federale Tedesca* (2004) 97 *Rivista di diritto internazionale* 550-551 para 11.

⁸¹ Corte di Cassazione, *Proc. Gen. Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri* (n 29); Corte di Cassazione, *Medero et al* (n 51).

⁸² Audiencia Nacional, Sala de lo Penal (10 January 2006) *Auto de admisión a trámite de la querrela por genocidio en el Caso Tibet* <www.derechos.org/nizkor/espana>.

⁸³ Audiencia Nacional (6 February 2008) *Auto del Juzgado Central de Instrucción No 4, 4º § No 1, 157*.

⁸⁴ Tribunal pénal fédéral (25 July 2012) BB.2011.140, *A. c Ministère Public de la Confédération, B. et C.* <www.bstger.ch>.

⁸⁵ 'Report of the Committee of Eminent African Jurists on the case of Hisséne Habré, submitted to the Summit of the African Union in July 2006' quoted in ILC, 'Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat' (31 March 2008) UN Doc A/CN.4/596, 121, fn 521.

⁸⁶ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment of 20 July 2012) [2012] ICJ Rep 422.

although not expressly dealing with immunity, affirmed many 'strong' principles on the prohibition of impunity for torture.

Lastly, the recent and very important judgment no 238/2014 of the Italian Constitutional Court is worth mentioning.⁸⁷ Even though the Court was dealing with the problem of State immunity and from the perspective of the conflict between such immunity and constitutional principles, it affirmed that State immunity cannot be applied to acts that are not related to the typical exercise of governmental authority but are expressly qualified as unlawful acts because they breach fundamental rights. This statement implicitly strengthens the view that the functional immunity of foreign officials cannot cover international crimes.

In conclusion, prevailing practice shows that there is an exception to the norms regarding the functional immunity of foreign officials from *criminal* jurisdiction in cases of officials accused of international crimes. In contrast, the practice is more uncertain with regard to the same exception in relation to immunity from *civil* jurisdiction. In this author's view, this depends particularly on the fact that the courts of some common law countries continue to uphold the 'Kelsenian theory', according to which the immunity of foreign officials from civil jurisdiction coincides with the immunity of the State for which they act. This paper has already outlined why this opinion is now conceptually outdated. Moreover, it contrasts with the principles and values that inspire the contemporary international community, which recognizes norms on the punishment of international crimes as belonging to customary *ius cogens*. In contrast, the international community does not grant the same value to the customary norms on functional immunity, even though they protect important values for the pacific development of international relations. Therefore, in the case of true and effective conflict between the two groups of norms, those of the first group should prevail.

It is to be hoped that, at some future date, the courts and States that still persist in defending traditional international law, based on a 'State-centred' approach, will revise their position on the relationship between the norms on functional immunity from *civil* jurisdiction on the one hand and, on the other hand, the norms regarding international crimes, access to justice and reparation for the victims of such crimes.

⁸⁷ Corte Costituzionale (22 October 2014) n 238 (n 62).



**The enduring validity of immunity *ratione materiae*:
A reply to Professor Pisillo Mazzeschi**

*Gionata P Buzzini**

1. *Introductory remarks*

Professor Riccardo Pisillo Mazzeschi has devoted a stimulating article to a specific aspect of the international law on immunities: the scope *ratione personae* of immunity *ratione materiae*. On the basis of a rich analysis, he concludes that not all State officials, but only certain categories thereof, benefit from immunity *ratione materiae*. I believe that the author's approach, which radically departs from the dominant view of international lawyers on the subject, is not only questionable from a methodological point of view, but also leads to an unsatisfactory normative result.

Hereinafter, I shall not attempt to discuss each and every precedent or argument that is aptly relied upon by Professor Pisillo Mazzeschi in support of his thesis. I shall rather focus on certain assumptions that seem to have played a decisive role in the author's approach to the issue, and then explain my position as to the (in)adequacy of the conclusions reached by him.

2. *Inductive and deductive reasoning in the identification of a rule of general international law*

One of the assumptions at the basis of Professor Pisillo Mazzeschi's analysis is that contemporary international law ought to be identified by

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relying on an inductive method, and not on deductive reasoning based on ‘general, aprioristic and unproven principles.’ A second, related assumption is that, in any event, the types of deductive arguments that could be advanced in support of the existence of the disputed rule (ie the traditional rule granting immunity *ratione materiae* to State officials in general) should be deemed obsolete in the light of the most recent evolutions of the international legal system.

On the level of principles, I should like to recall the obvious fact that the views of States and other subjects of international law on a given issue may well be influenced by deductive reasoning or considerations. Admittedly, one could argue that this aspect relates to the so-called ‘material sources’ of international law and would therefore have little relevance when assessing the existence of a ‘positive’ rule of international law. That would be, however, a simplistic way of addressing the question: for, if one accepts the idea that a rule of general international law can only exist in the *opinio juris sive necessitatis* of the generality of the subjects of the international legal system, one cannot but also accept the hypothesis that one or more subjects – or even the generality of them – may recognize the existence of a rule because they regard it as useful or necessary to preserve some fundamental features of the legal system. Consequently, recourse to deductive reasoning in identifying a rule of general international law may be acceptable, even in contemporary international law, in so far as there appear to be well-founded reasons for believing that the reasoning and the conclusions it entails are generally shared by States. That deductive arguments are not irrelevant in ascertaining rules of general international law, including in the field of immunities, is clearly demonstrated, for instance, by the well-known precedent of the *Arrest Warrant* case, where the International Court of Justice (ICJ) recognized the existence of a rule according personal immunity to a minister for foreign affairs on the basis of logical inferences relating to the nature of his or her functions, and not of an examination of practice and *opinio juris* relating to the matter.¹ The fact that States did not challenge the Court’s findings as to the actual existence of such

¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment of 14 February 2002) [2002] ICJ Rep 22, para 54: ‘[t]he Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.’



a rule only confirms the correctness of the Court's assumptions and, more generally, the admissibility of recourse to deductive reasoning in identifying rules of general international law.

As to the specific question of the personal scope of immunity *ratione materiae*, the general attitudes of States would seem to indicate that many – if not a large majority – of them might still share at least some of the considerations that Professor Pisillo Mazzeschi views as outdated in this context (such as those relating to the protection of the State's domestic organization; non-interference with the constitutional 'life' of a foreign State; or the protection of the State's 'exclusive jurisdiction' in its relationship with its own agents). In this regard, it is highly significant that, during the debates that took place in the Sixth Committee of the United Nations General Assembly, in 2008 and from 2011 to 2014, on the chapter of the report of the International Law Commission (ILC) dealing with 'Immunity of State officials from foreign criminal jurisdiction', the ILC view² that immunity *ratione materiae* accrues to State officials in general was widely supported by States. In particular, the two draft articles provisionally adopted in 2014, whereby the ILC confirmed its approach to this matter,³ were received favourably in the Sixth Committee.⁴

² As expressed by the ILC Chairman, Mr. Edmundo Vargas-Carreño, in his introduction of the 2008 ILC report; see UNGA, 'Summary record of the 22nd meeting' (20 November 2008) UN Doc A/C.6/63/SR.22 para 42: '[t]he ILC had supported the Special Rapporteur's view that all State officials should be covered by the topic, given that they all enjoyed immunity *ratione materiae*.' See also the two draft arts provisionally adopted by the ILC in 2014, reproduced in footnote 3 below. The opinion that immunity *ratione materiae* accrues to State officials in general was also espoused by the two successive Special Rapporteurs of the ILC; see, in particular, Roman A Kolodkin, 'Second report on the immunity of State officials from foreign criminal jurisdiction' (10 June 2010) UN Doc A/CN.4/631 11-12, para 21; as well as the ILC, 'Third report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández' (2 June 2014) UN doc A/CN.4/673 50-52, paras 145-151 (adopting as a criterion, however, the exercise of State prerogatives or governmental authority).

³ See ILC, 'Report of the International Law Commission on the Work of its 66th Session' (5 May – 6 June and 7 July – 8 August 2014) UN doc A/69/10 231-237, para 132:

Article 2 Definitions

For the purposes of the present draft articles:

...

(e) 'State official' means any individual who represents the State or who exercises State functions.



3. *Immunity ratione materiae as a form of 'procedural irresponsibility' subject to certain exceptions*

The question of the legal foundation of immunity *ratione materiae*, and in particular whether such immunity should be regarded as a substantive defence (based on the idea that official acts are attributable only to the State and not to the individual organ) or simply as a procedural bar to prosecution, should not be overemphasized in this context, as Professor Pisillo Mazzeschi appears to do. In my view, there is a very simple explanation, as to the rationale for immunity *ratione materiae*, which is likely to be shared by the generality of States: ie the fact that, as a general rule, State officials *may not be held responsible, before the authorities of another State*, for conduct performed by them in an official capacity. In that sense, immunity *ratione materiae* is indeed a question

Article 5 Persons enjoying immunity ratione materiae

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

The commentary to draft art 2 (e) indicates: '[f]rom this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (e), through the reference to the fact that the individual in question "represents the State or ... exercises State functions"' (ibid 234, para 9); '[t]he phrase "who represents" must be understood in a broad sense, as including any "State official" who performs representational functions' (ibid 234, para 10); "'State functions" must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State' (ibid 235, para 11); '[g]iven that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition. Although in many cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of State official' (ibid 235, para 14).

⁴ The few critical comments that were made related to the need for clarifying certain aspects of the definition of 'State official,' in particular, '[t]he question was asked whether personnel contractually mandated by a State to exercise certain functions would fall under the definition of "State official" and whether the term covered teachers and professors in State-run institutions of learning;' see ILC, 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat' (21 January 2015) UN Doc A/CN.4/678 para 42.



of ‘irresponsibility’, but only a relative one: States must, as a matter of principle, regard official conduct performed by an organ of a foreign State as being attributable to that State and not to the individual. In contrast, the State on behalf of which the conduct was performed remains free to hold, under its internal law and before its own authorities, the individual personally responsible (civilly, criminally or both) for such conduct. That State is also entitled to waive immunity *ratione materiae*, thereby allowing another State to prosecute the individual. Thus, it is probably right to state that immunity *ratione materiae* entails a type of ‘irresponsibility’ that is procedural, rather than substantive, in nature.⁵ All that being said, it remains difficult to understand why the alleged procedural nature of immunity *ratione materiae* should entail any limitation as to the circle of its beneficiaries.

Professor Pisillo Mazzeschi considers that the idea of ‘the necessary irresponsibility of individual State agents when acting in an “official capacity”’, idea ‘which belongs to the historical period in which international law only recognized the collective responsibility of the State’, ‘has lost all validity in contemporary international law, which admits the personal responsibility of the individuals, and especially of individual State agents, alongside with the collective responsibility of the States.’ Undoubtedly, as the author rightly points out in the last section of his article, the development of an extensive body of criminal international law has led to the formation of a general exception to immunity *ratione materiae* of foreign officials (at least from criminal jurisdiction), the operation of which is now excluded in respect of conduct constituting a crime under international law. However, there is no evidence that the evolutions having occurred in the field of criminal international law would have produced such a radical result as the disappearance of the traditional rule granting immunity *ratione materiae* to State officials in general. In fact, it would be difficult to understand why and how normative developments having affected the legal characterization of cer-

⁵ At the same time, we share the author’s view that immunity *ratione materiae* of State officials cannot be equated to the immunity of the State itself; it would otherwise follow that a State official would not benefit from immunity *ratione materiae* for conduct which, although official, is to be regarded as having been performed *jure gestionis* from the perspective of State immunity. On this issue, see GP Buzzini, ‘Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on *Djibouti v. France* case’ (2009) 22 *Leiden J Intl L* 455-483, 462-464.

tain conduct under international law could have produced any modification of the circle of potential beneficiaries of immunity *ratione materiae*.

4. *Assessing State practice in relation to immunity ratione materiae*

Professor Pisillo Mazzeschi's position is also grounded on the assumption that a rule granting immunity *ratione materiae* to all State officials could only exist if it were supported by 'extensive, constant, consolidated and uniform practice', and that such a practice would necessarily presuppose the existence of a sufficient number of cases in which State authorities would have granted immunity *ratione materiae* to a most diverse range of foreign State officials.

The author observes that few decisions can be found in support of the existence of a rule of general international law granting immunity *ratione materiae* to State officials other than diplomatic agents, certain high-ranking officials, consular agents and members of special missions, and even suggests – without much substantiation – that those judgments are based on erroneous or unconvincing grounds. At the same time, he does not mention some other judicial pronouncements that do recognize – albeit in abstract terms – the existence of a rule granting such immunity to State officials in general, including low-ranking ones. Amongst those pronouncements one could refer, for instance, to the recent decision of the Swiss Federal Criminal Tribunal in the *Nezzar* case⁶ (which Professor Pisillo Mazzeschi only cites as one of the judicial precedents pointing to the exclusion of functional immunity in respect of international crimes), or to the opinions expressed by several Lords in the *Pinochet* case before the United Kingdom House of Lords.⁷ In any event, the limited amount of (domestic) case law is not necessarily an

⁶ Swiss Federal Criminal Tribunal, Cour des plaintes (Decision of 25 July 2012) BB.2011.140, A. c. Ministère public de la Confédération, B. e C., para 5.3.2.

⁷ House of Lords, *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte* (24 March 1999) reproduced in (1999) 38 ILM 581-663. See the opinions of Lords Browne-Wilkinson (at 594), Goff of Chievely (at 606), Millet (at 644) and Phillips of Worth Matravers (at 657). For other decisions in support of the disputed rule, see also ILC, 'Immunity of State officials from foreign criminal jurisdiction, Memorandum by the Secretariat' UN Doc A/CN.4/596 para 169.



obstacle to the recognition of the existence of a rule of general international law, provided that the corresponding *opinio juris* can reasonably be inferred from other elements, including – as we have seen – the clear attitudes of States in international forums such as the Sixth Committee of the General Assembly.

In order to deny the existence of the rule granting immunity *ratione materiae* to State officials in general, Professor Pisillo Mazzeschi also points to a number of instances in which claims for that type of immunity were rejected by domestic courts. However, it is worth noting that most of those precedents appear to be of little relevance in determining the personal scope of immunity *ratione materiae*, as they concern situations where the inapplicability of immunity was due to reasons unrelated to the person of the potential beneficiary. Such is undoubtedly the case of the various pronouncements that rejected claims for immunity in relation to acts committed by State officials outside the territory of their State and without the consent of the territorial State (eg espionage; aerial intrusions or unlawful trespassing in foreign territories or maritime spaces; crimes such as murder, abduction or acts of terrorism committed in the territory of a host State or in a third State).⁸ The same is true with respect to other cases where claims for immunity *ratione materiae* were dismissed because the conduct at issue constituted a crime under international law (such as serious breaches of the law of war).⁹

5. *The inadequacy of the proposed normative solution*

In addition to these considerations, most of which are of a methodological nature as they relate to the broader question of the ways and means of identifying contemporary rules of general international law, I

⁸ On this question, see *ibid* paras 162-165. Admittedly, as pointed out by Professor Pisillo Mazzeschi, the Italian Court of Cassation, in two judgments relating to the abduction of Mr. Abu Omar, took the view that there is no rule of customary international law granting functional immunity to State officials in general (see footnotes 49 and 51 in Professor Pisillo Mazzeschi's article). However, in my opinion, these pronouncements should not be accorded too much weight as they were made in relation to acts committed in the territory of a foreign State and clearly exceeding the scope of consular or diplomatic functions, ie to acts presumably falling outside the scope of the traditional rule granting immunity *ratione materiae* to State officials.

⁹ See 'Immunity of State officials' (n 7) paras 180-212.



should point out that the normative solution proposed by Professor Pisillo Mazzeschi, which limits the benefit of immunity *ratione materiae* to a restricted number of State officials, raises concerns in terms of logic and substantive adequacy.

In my view, the main difficulty relates to the author's suggestion as to the existence of a 'more modern' *ratio* that would be at the basis of immunity *ratione materiae*, namely the protection of the external relations of the State (in his words, 'the protection of only some State functions: those which are typically important for the external activities of every State'). Following that approach, the rationale for immunity *ratione materiae* in contemporary international law would appear to be very similar – if not substantially identical – to that for immunity *ratione personae*. And this is not surprising, given that the author holds that 'the categories of State officials that have a right to functional immunity are relatively limited in number, almost tending to coincide with the categories of officials who have right to personal immunity.' However, if that approach were correct, it would be difficult to explain why immunity *ratione materiae* should also be accorded, as the author himself concedes, to *former* heads of State, heads of Government or ministers for foreign affairs as well as to *former* members of special missions, ie to individuals who usually no longer play a role in the conduct of the external relations of their State. Moreover, as regards incumbent State officials, immunity *ratione materiae* would retain some usefulness only for those officials (such as consular agents) who, while playing an active role in the external activities of their State, do not benefit from immunity *ratione personae* during their term of office.

As for the material scope of immunity *ratione materiae*, Professor Pisillo Mazzeschi seems to agree that the acts covered by such immunity are not limited to those pertaining to the conduct of foreign relations. This is, in itself, correct. At the same time, it reveals the weakness of the approach. For, the mere fact that immunity *ratione materiae* also covers 'internal acts' demonstrates that the real purpose of that type of immunity is to protect the State's organizational structure and its relationship with its own organs. And that is precisely the reason why former heads of State, heads of Government and ministers for foreign affairs, who no longer benefit from immunity *ratione personae*, continue to be afforded immunity *ratione materiae* in respect of official acts performed during their mandate (ie both their 'internal' acts and their acts relating to the



external activities of the State). Such being the case, it is hard to understand why State organs other than heads of State, heads of Government and ministers for foreign affairs should not be afforded the same kind of protection from the exercise of foreign jurisdiction over their official acts. From that perspective, one could even consider that the rationale for immunity *ratione materiae* is stronger in respect of an *incumbent* middle-ranking or low-ranking State official, than in respect of a *former* high-level State official who used to perform – but not longer does – functions pertaining to the State’s foreign relations.

6. *Some remaining uncertainties about the notion of State ‘official’*

Admittedly, stating that immunity *ratione materiae* applies to State officials in general does not yet tell us precisely who should be considered a State official for that purpose. In this regard, it has been suggested that only those officials who are deemed to exercise some elements of governmental authority enjoy immunity *ratione materiae*.¹⁰ As we have already seen, draft article 2 (e) on immunity of State officials from foreign criminal jurisdiction, as provisionally adopted by the ILC at its 2014 session, follows a cautious approach on this matter, by defining a State official as ‘any individual who represents the State or who exercises State functions.’¹¹ That being said, there is a significant difference between possibly restricting the notion of ‘State officials’ enjoying immunity *ratione materiae* to those officials who exercise elements of governmental authority, and radically limiting the scope of immunity *ratione materiae* – with the only exception of consular agents – to the same

¹⁰ See ILC, ‘Third report on the immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur’ (2 June 2014) UN Doc A/CN.4/673 50-52, paras 145-151. The point had already been raised in the ILC during the 2008 debate; see ILC, ‘Report of the International Law Commission on its Work of the 60th Session’ (5 May-6 June and 7 July-8 August 2008) UN Doc A/63/10 333, para 288: ‘A view was expressed that the scope of persons covered could be narrowed down to those who exercise the specific powers of the State (a criterion which would make it possible to exclude from the scope of the topic certain categories of officials, such as teachers, medical workers, etc.); reference was made in this regard to the notion of “public service” used by the Court of Justice of the European Communities.’ See also ‘Topical Summary’ (n 4).

¹¹ See ‘ILC Report’ (n 3).



small circle of State officials who already benefit from immunity *ratione personae*.

7. Conclusion: in defense of the alleged evil of immunity

In short, I do not share the author's approach and conclusions, as they would be tantamount to stating that, apart from the specific case of consular agents, the only meaningful role that is played by immunity *ratione materiae* in contemporary international law is to afford a residual protection to a handful of former State officials who have ceased their functions, relating to the external activities of the State, for the protection of which they were deemed to need the benefit of such immunity (although they already enjoyed immunity *ratione personae*)...

This line of reasoning vaguely reminds me of another curious idea: that according to which immunity *ratione materiae* from foreign criminal jurisdiction would only apply to conduct that is not *ultra vires* (in other words, to conduct that is fundamentally legal!); an idea which, in spite of its normative inadequacy,¹² has become widespread among those who consider that the best way to pursue the laudable goal of combating impunity is to fight the evil of immunity in all its forms and manifestations, even at the cost of relying on dubious legal arguments.

¹² On this question, see Buzzini (n 5) 466: '[i]n any event, it is submitted that excluding in general terms *ultra vires* acts from the scope of immunity *ratione materiae* from foreign criminal jurisdiction would be problematic, since this might lead to defeating the whole purpose of such immunity; for it would seem that, in most cases, official conduct giving rise to a criminal offence should probably also be regarded as *ultra vires*.'



Comment on ‘The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories’

*Philippa Webb**

1. *Introduction*

Riccardo Pisillo Mazzeschi has written an impressively researched and thought-provoking article that challenges the traditional theories on functional immunity of State officials. He not only challenges the conceptual premise that the immunity of State officials is a necessary corollary of the immunity of the State, but also questions the scope of functional immunity and the long-held distinction between functional and personal immunity.

Pisillo Mazzeschi’s arguments could spark a multitude of conversations. I will focus on four points.

2. *The concept of the State official*

It would seem that the very term ‘State official’ used by Pisillo Mazzeschi through the article is overly narrow. Individuals enjoy functional immunity when they act on behalf of the State, regardless of whether they are government employees, seconded officials, contractors, sub-contractors, agents, or some other kind of authorised individuals. It seems advisable to focus on the *act* rather than the person.

I agree with the definition of functional immunity adopted by Foakes: ‘[s]uch immunity is determined by reference to the nature of the acts in question rather than the particular office of the official who

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performed them. As such, it covers a narrower range of acts but a much wider range of actors' than immunity *ratione personae*.¹

In focusing on 'State officials', Pisillo Mazzeschi aligns himself with the International Law Commission's (ILC) work on the immunity of foreign State officials from criminal jurisdiction (of which he is otherwise critical). In the Third Report of the Special Rapporteur, it is evident that ILC members have been divided over whether the draft articles should include a definition of 'State official.' At present, draft Article 2(e) defines 'State official' as 'any individual who represents the State or who exercises State functions.'²

The ILC Commentary emphasises that 'it must be borne in mind that the definition of "State official" has *no bearing* on the type of acts covered by immunity. Consequently, the terms "represent" and "exercise State functions" may not be interpreted as defining *in any way* the substantive scope of immunity.'³ But representing the State or exercising its functions are intimately linked to whether a person is acting on behalf of the State or in an official capacity. It seems very hard to draw a line between defining the person by reference to their acts and defining the type of act that is protected by functional immunity.

One radical way in which Pisillo Mazzeschi departs from the ILC, Foakes and other commentators is in his limited definition of the scope of functional immunity. In his view, such immunity is due to 'diplomatic agents; to heads of State, heads of Government and minister of foreign affairs; to consular agents; and to members of special missions' rather than a broader range of State officials.

This position is puzzling for three reasons. First, most of these officials (diplomats, 'the troika', special missions) enjoy personal rather than functional immunity. Functional immunity only becomes relevant once they have left office. Pisillo Mazzeschi's approach would seem to limit functional immunity to a cadre of retired officials rather than incumbent officials and other individuals acting on behalf of the State. Second, most of the officials in Pisillo Mazzeschi's list enjoy personal immunity pursuant to specific treaty regimes, which makes it hard to

¹ J Foakes, *The Position of Heads of State and Senior Officials in International Law* (OUP 2014) 7.

² ILC, 'Report of the International Law Commission on the work of its sixty-sixth session' (5 May-6 June and 7 July-8 August) UN Doc A/69/10 (2014) 231.

³ *ibid* 235. Emphasis added.



extrapolate a customary rule pertaining to functional immunity.⁴ Third, it is not always the case that members of special missions enjoy functional immunity after the cessation of the mission. A member of a special mission need not be a State official. It may also be an ad hoc representative. The key requirement is that the State recognizes the 'special nature of the mission and the status of inviolability and immunity which participation in that Special Mission confers on the visitors.'⁵

I share Pisillo Mazzeschi's view that functional immunity may not be due to *all* foreign State officials in respect of *all* their 'official' acts. But I would draw the circle wider than the list of officials he proposes. Functional immunity is enjoyed by individuals acting on behalf of the State. There is an element of authorization by the State of the performance of State acts to bring the representative within that immunity. It is not enjoyed by a chance individual who performs an act of State.⁶

3. 'External life and activities of the State'

Pisillo Mazzeschi endorses a 'more modern' *ratio* for functional immunity, namely that it applies to some State officials, because of the official nature of their duties, 'which concern the external life and activities of the State.' He explains that this is not limited to the management of international relations, but it is not clear what other activities would be considered 'external.' Indeed, it is increasingly difficult to draw the line between the internal and external life of the State. Decisions that may appear to be internal in nature – domestic legislation, policies on employment, housing or education, budgetary choices, homeland security – can have ramifications on foreign States or nationals.

It is true that there has been some kind of *rapprochement* between personal and functional immunity in the sense that both have come to have a functional justification. The ICJ *Arrest Warrant* Judgment justi-

⁴ For the same reason, Pisillo Mazzeschi finds it is not possible to infer a customary norm on immunity from bilateral and multilateral treaties on the immunity of members of missions representing States in their relations with international organizations or in international conferences.

⁵ *Khurts Bat v The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin) paras 27, 29.

⁶ H Fox, P Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 368.



fied the enjoyment of personal immunity by a Minister for Foreign Affairs on the basis that such immunity ‘ensure[s] the effective performance of their functions on behalf of their respective States.’⁷ But this *rapprochement* does not go so far as to limit both types of immunity to outward-facing official acts. The critical test for functional immunity is not the status of the person (as it is for personal immunity), but the nature of their act.

4. *The position of military officials*

In my view, Pisillo Mazzeschi’s argument on the immunity of military forces places too much emphasis on bilateral treaties. In his view, there is no customary norm granting functional immunity to military officials and regard must be had to treaties only.

In my view, the functional immunity of military officials is part of customary international law and derived from first principles. It is an established principle of customary international law that functional immunity attaches to a person who acts on behalf of a State in relation to conduct performed in their official capacity.⁸ The rationale is that State immunity would be undermined if individuals could be prosecuted for matters of State conduct in respect of which the State they were serving

⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 22 para 53.

⁸ See eg *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (‘Pinochet No 1’), House of Lords (25 November 1998) 37 ILR 1302, 1309-1311; *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (‘Pinochet No 3’), House of Lords (24 March 1999) reproduced in (1999) 38 ILR 581, 621-622, 641 and 644; *Jones v Saudi Arabia* [2006] UKHL 26; Arrêt de la Cour de Cassation, chambre criminelle (23 November 2004) published in (2004) Bulletin Criminel no 292, 1096; United States District Court for the District of Columbia, *Belhas et Others v Moshe Ya’alon* (14 December 2006) 466 F Supp. 2d 127; Corte Suprema di Cassazione, I Sezione Penale (24 July 2008) no 31117/2008; Bouzari v Iran, 2004, CanLII 871 (Court of Appeal for Ontario) paras 40, 85; P Gaeta, ‘Official Capacities and Immunities’ in A Cassese, P Gaeta, J Jones (eds), *Commentary on the International Criminal Court* (OUP 2002) 975; C Wickremasinghe, ‘Immunities Enjoyed by Officials of States and International Organizations’ in MD Evans (ed), *International Law* (2nd edn, OUP 2006) 395, 397.



had immunity.⁹ The clearest example of an individual benefiting from functional immunity is a military officer on official duty.¹⁰

Parallels may be drawn from the law of State immunity. The ICJ in the *Jurisdictional Immunities* Judgment upheld the immunity of visiting armed forces on a customary basis:

'customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict.'¹¹

The Court left open the question of immunity of State officials from criminal proceedings,¹² but it endorsed the principle of the special protection accorded to military forces.

There is some State practice where persons have been prosecuted for acts committed within the forum State's territory without its consent to the act or to the presence of the persons. Pisillo Mazzeschi refers to some of this practice, including the *Kburts Bat* case. As he observes, these cases tend to concern espionage, sabotage, and kidnapping. Often the State of nationality of the alleged perpetrator does not even assert the immunity of their official before the courts of the forum State.¹³ The *Kburts Bat* case held that a State official did not enjoy functional immunity when he entered the territory of a foreign State without its

⁹ *Propend Finance Pty Ltd v Sing* (17 April 1997) CA, (1997) 111 ILR 611, 669 (Commissioner of Australian Federal Police could not be sued for contempt of court in the UK). See also *Jones v Minister of Interior of Kingdom of Saudi Arabia* [2006] UKHL 26 para 30.

¹⁰ A UK court has called the operation of an air force base 'about as imperial an activity as could be imagined.' *Littrell v United States (No 2)* [1995] 1 WLR 82.

¹¹ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99 para 79.

¹² *ibid* para 91.

¹³ A Kolodkin, 'Second report on the immunity of State officials from foreign criminal jurisdiction' (10 June 2010) UN Doc A/CN.4/63 para 81. *Francis Gary Powers* case, Hearing before the Senate Committee on Foreign Relations, 86th Congress, 2nd Sess 175 (1960). See I de Lupis, 'Foreign Warships and Immunity for Espionage' (1984) 78 AJIL 61, 69. In *Rainbow Warrior (New Zealand v France)* case, France-New Zealand Arbitration Tribunal (30 April 1990) 82 ILR 500: although France considered the detention in New Zealand of the two agents was unjustified as France was ready to give an apology and pay compensation, the agents did not plead immunity to charges of manslaughter and wilful damage.



knowledge and committed acts (abduction of a national) against the order and security of the foreign State.¹⁴ I would suggest that these cases are guided by the fact that the act was committed on the territory of the forum State and do not represent a general denial of the existence of a customary norm regarding immunity from criminal jurisdiction applicable to all foreign officials.

From a policy perspective, States deploy their military and law enforcement officials overseas with increasing frequency, whether as part of UN peacekeeping missions, as members of visiting armed forces, or pursuant to mutual legal assistance schemes. It is vital that the immunity of such officials is respected, even in the absence of a State of Forces Agreement. This would not equate to impunity for any violations of international law, as the sending State would retain jurisdiction over such officials.

Finally, Pisillo Mazzeschi makes two references to the Judgment of the High Court of Kerala in the *Enrica Lexie* case. It should be noted that the State of Kerala was found by the Indian Supreme Court wrongly to have assumed jurisdiction over the *Enrica Lexie* incident. The immunity of the Italian Marines was addressed in argument before the Indian Supreme Court, but it was not the subject of comment in the Court's Judgment of 18 January 2013. Indeed, the Supreme Court of India expressly left the question of jurisdiction open to be re-agitated.¹⁵

5. *Interpreting State practice*

Pisillo Mazzeschi's survey of doctrine and practice is extensive and scholarly. Some of the practice relied on, however, might not be compelling evidence of a customary rule if the State of nationality did not claim immunity on behalf of the individual. Although domestic courts are supposed to consider immunity *in limine litis*, they are less likely to do so if the State of nationality does not invoke immunity.¹⁶

¹⁴ *Khurts Bat v The Investigating Judge of the German Federal Court and Others* [2011] EWHC 2029 (Admin).

¹⁵ Indian Supreme Court, *Latorre and Others v Union of India and Others* (Judgment of 18 January 2013) para 102.

¹⁶ In *Djibouti v France*, the ICJ observed that '[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State



Pisillo Mazzeschi relies, for example on a series of cases to assert that functional immunity does not apply to foreign officials accused of international crimes. The 2004 *Ferrini* Judgment concerned primarily State immunity rather than functional immunity, but it was also found to be in violation of international law in the 2012 ICJ *Jurisdictional Immunities* Judgment. As for the 2012 and 2014 Italian Judgments in the *Abu Omar* case, the US did not claim immunity on behalf of its CIA officials. As for the Audiencia Nacional decisions, the *Kagame* case relates to personal immunity rather than functional immunity. Finally, in the *Nezzar* case, Algeria did not invoke immunity on behalf of the former Minister of Defence.¹⁷

The *Habre* and *Pinochet* cases, important as they are, are expressly limited to the wording of the Torture Convention rather than carving out a general 'international crimes' exception to functional immunity.

These points may be pedantic, but in an area of law in which a small number of cases can change the landscape, it is important to assess State practice and *opinio juris* on a case by case basis.

Pisillo Mazzeschi's arguments should be taken seriously. While I do not believe that they represent *lex lata*, I hope that they will form a vital part of the dialogue as the *lex ferenda* develops.

concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State'. See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) ICJ Rep 2008 177 para 196.

¹⁷ For an evaluation of national litigation that concludes most cases relied upon to demonstrate a human rights exception to immunity actually says nothing about immunity, see I Wuerth, 'Pinochet's Legacy Reassessed' (2012) 106 AJIL 731.



Functional immunity of State officials before the International Law Commission: The ‘who’ and the ‘what’

*Chimène I Keitner**

1. Introduction

Riccardo Pisillo Mazzeschi offers an interesting proposal to merge *ratione personae* and *ratione materiae* immunity for current and former State officials from the jurisdiction of foreign States. He argues that the traditional distinction between these forms of immunity ‘demands a critical review’ because, in contemporary international practice, both types of immunity are rooted *solely* in the international community’s need to protect individuals’ ability to ‘perform duties pertaining to their States’ international relations.’ Put boldly: ‘in contemporary international law the whole legal regime of personal and functional immunity from jurisdiction has only one goal, of a single and unitary nature: that of protecting *certain specific functions* of the State concerning its external relations or activities, through the protection of the officials who, as a rule, perform those functions.’ In his view, justifications for immunity that do not serve this ‘single and unitary’ goal are invalid as both a matter of legal principle and State practice.

I find Professor Pisillo Mazzeschi’s argument intriguing, but I do not find it persuasive. Most fundamentally, I do not believe the practice he cites shows that *ratione materiae* immunity invariably serves, or ought to serve, the same purpose as *ratione personae* immunity. Perhaps this makes me distinctly ‘old school’, but the difference between personal (or ‘status-based’) and functional (or ‘conduct-based’) immunities is firmly entrenched and, in my view, well-founded.¹ That said, I agree

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¹ In another context, I have taken pains to clarify the distinction between these forms of immunity. See CI Keitner, ‘The Common Law of Foreign Official Immunity’

that *ratione materiae* immunity does not, and should not, shield individuals from foreign jurisdiction for any and all acts that are attributable to a State. The question is where, and how, to draw the line.

As its name suggests, functional immunity focuses primarily on the 'what', rather than the 'who.' The Special Rapporteur has not yet tackled the 'what' aspect of functional immunity. Draft Article 2(e) adopts a functional definition of 'State official' to mean 'any individual who represents the State or who exercises State functions.'² However, the commentary to Draft Article 2(e) emphasizes that 'the definition of 'State official' has no bearing on the type of acts covered by immunity. Consequently, the terms 'represent' and 'exercise State functions' may not be interpreted as defining in any way the substantive scope of immunity.'³ Similarly, Draft Article 5 on 'persons enjoying immunity *ratione materiae*' delineates the 'who', not the 'what', of functional immunity. Draft Article 5 provides that: 'State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.'⁴ The commentary states that Draft Article 5 is 'intended to define the subjective scope of this category of immunity' – that is, the 'who.'⁵ Thus, in order to enjoy functional immunity for a given act, an individual must be a State official who was acting 'as such.' According to the commentary, this phrase 'says nothing about the acts that might be covered by such immunity, which are to be covered in a separate Draft Article.'⁶ I take this to mean that not all acts performed by State officials with actual or apparent authority will necessarily fall within the scope of *ratione materiae* immunity as defined in future reports. Special Rapporteur

(2010) 14 Green Bag 2d 61, 63-68, <www.greenbag.org/v14n1/v14n1_articles_keitner.pdf>. I previously authored an amicus brief in the US Supreme Court case *Samantar v Yousuf*, the annotated version of which details the arguments about functional immunity presented in the course of that litigation. See CI Keitner, 'Annotated Brief of Professors of Public International Law and Comparative Law as *Amici Curiae* in Support of Respondents in *Samantar v Yousuf*' (2011) 15 Lewis & Clark L. Rev 609, <<https://law.lclark.edu/live/files/9130-lcb153keitnerpdf>>. I have provided citations to some of my other work on immunity in the footnotes for readers who are interested.

² ILC, 'Report of the International Law Commission on the Work of its 66th Session' (5 May–6 June and 7 July–8 August 2014) UN Doc A/69/10 231.

³ *ibid* 235, para 15.

⁴ *ibid* 236.

⁵ *ibid* 236, para 1.

⁶ *ibid* 237, para 3.



Concepción Escobar Hernández appears to be contemplating a more nuanced and context-sensitive approach than her predecessor Roman Kolodkin, perhaps in light of many States' discomfort with endorsing blanket immunity, particularly for international crimes.⁷

Professor Pisillo Mazzeschi frames his analysis as a critique of an overly inclusive 'who' in the work of the International Law Commission (ILC) on functional immunity. Yet, his arguments also highlight the potential for the ILC's work to entrench uncritically expansive 'what.' This concern merits close attention, since what the ILC has called the 'material scope' (rather than the 'subjective scope') of functional immunity will be the subject of the Special Rapporteur's next report,⁸ and will likely be delineated in future Draft Articles.

I agree with Professor Pisillo Mazzeschi's observation that three interrelated ideas have been invoked with insufficient scrutiny to support an expansive definition of functional immunity:

- 'the idea that the immunity of State officials is a necessary corollary of the fact that they act as organs of the State';
- 'the idea that such immunity derives from the fact that the agent's official acts are not attributable to him/her because they are attributable only to the State for which he/she is acting';
- 'the idea – at the basis of all the other concepts – that the very structure of international law only admits the collective responsibility of States.'

I also agree that international law 'admits the *personal responsibility of individuals*, and especially of individual State agents, alongside the collective responsibility of the State', although I do not see this as a particularly new or revolutionary development.

I would also add to this list another assumption that has received insufficient scrutiny:

- the idea that the burden rests on those seeking to demonstrate an *exception* to immunity for acts performed with actual or apparent State authority.

⁷ For expressions of concern with an absolutist approach, see ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10 221-224.

⁸ ILC, 'Report of the International Law Commission on the Work of its 66th Session' (n 2) 230, para 127.



I will consider each of these assumptions in the rest of this brief response.

2. *'The idea that the immunity of State officials is a necessary corollary of the fact that they act as organs of the State'*

The reality that States can only act through individuals does not necessarily mean that individuals enjoy functional immunity for all acts they perform on behalf of States. In some instances, the individual might be acting purely as an organ of the State and thus bear no personal responsibility for a given act. This explains why individual officials are not personally liable for most commercial transactions they perform on behalf of States, even though States themselves are subject to suit under the restrictive theory of immunity. It also explains why the ICTY declined to issue a subpoena to a foreign official, since the *State*, not the official, was the actual target of the subpoena, and the ICTY lacked the power to sanction the State itself for non-compliance.⁹ In these scenarios, the individual is merely a 'stand-in' for the State; the State, not the individual, is what might be called the 'real party in interest.' This is not the case when an individual official engages in conduct for which she also bears personal responsibility. This is not to say that a State has no interest in proceedings against its current or former officials, but simply that the types of State interest at stake when the State is the real party in interest and when it is not are distinguishable, both conceptually and doctrinally. As the United States Supreme Court recognized in *Samantar v Yousuf*, proceedings against individual officials do not invariably implead the State.¹⁰

⁹ *Prosecutor v Blaskic* (Judgment) ICTY-95-14 (29 October 1997) para 38, <www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

¹⁰ *Samantar v Yousuf*, 130 S Ct 2278 (2010). I explore the reasoning and implications of the *Samantar* case in CI Keitner, 'Foreign Official Immunity after *Samantar*' (2011) 44 *Vanderbilt J Intl L* 837, <www.vanderbilt.edu/jotl/manage/wp-content/uploads/Keitner.pdf>.



3. *'The idea that such immunity derives from the fact that the agent's official acts are not attributable to him/her because they are attributable only to the State for which he/she is acting'*

The idea that all acts performed under colour of law – and not just acts such as entering into commercial agreements, signing treaties, or answering subpoenas addressed to the State – are attributable *only* to the State, and not to the individual official, is untenable in the era of international criminal tribunals and universal jurisdiction for crimes such as torture. It was also untenable in the late eighteenth century, when individual defendants were sued in US courts for acts performed under colour of foreign law.¹¹ The ILC recognized this in Draft Article 58 of its 2001 Draft Articles on the Responsibility of States, which provides: '[t]hese articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' Such responsibility can take the form of criminal responsibility (as evidenced by the ILC's current focus on immunity from foreign criminal jurisdiction) and may also take the form of civil responsibility in some legal systems. Immigration proceedings against individuals who are ineligible for asylum because of internationally unlawful acts committed on behalf of foreign States, and the recent rise of targeted sanctions against such individuals, also represent manifestations of the international recognition of personal responsibility for certain 'official' acts.¹²

The idea of personal responsibility has little meaning without some realistic possibility that a State official will incur consequences as a result of her unlawful acts. In this sense, the 'Kelsenian' observation (to use Professor Pisillo Mazzeschi's term) that States are legal fictions comprised of individuals actually supports the notion, which was central to the judgment at Nuremberg, that the effectiveness of international law depends on the ability to impose consequences on individuals for the acts they perform on behalf of States.

¹¹ I recount the history of these cases in CI Keitner, 'The Forgotten History of Foreign Official Immunity' (2012) 87 *New York University L Rev* 804, <www.nyulawreview.org/sites/default/files/pdf/NYULawReview-87-3-Keitner.pdf>.

¹² I explore this idea in a short draft article entitled CI Keitner, 'Prosecute, Sue, or Deport? Transnational Accountability in International Law' (2015) 164 *University of Pennsylvania L.R.*



4. *'The idea – at the basis of all the other concepts – that the very structure of international law only admits the collective responsibility of States'*

The existence of individual responsibility under international law can no longer seriously be questioned, although its precise nature and implications remain underexplored.¹³ The difficult question is not whether individuals bear responsibility, but rather what types of accountability regimes States are willing to support (or at least tolerate). Although the ILC has been tasked with examining immunity, the danger with this exclusive focus is that immunity doctrines may be thought to bear the entire burden of allocating authority horizontally among States over internationally unlawful conduct. Other important mechanisms can and do perform this function, such as prosecutorial discretion and jurisdictional limits in criminal proceedings, and exhaustion of remedies and forum selection doctrines in civil proceedings.

Rather than attempting to identify generalizable immunity norms in customary international law, it might be advisable to focus on building understandings about immunity into particular treaties with respect to specific conduct (as done explicitly in the Rome Statute for the International Criminal Court, and arguably implicitly in the Convention Against Torture), just as other treaties (such as the Vienna Convention on Diplomatic Relations) explicitly codify the contours of immunity in particular contexts.

5. *The idea that the burden rests on those seeking to demonstrate an exception to immunity for acts performed with actual or apparent State authority*

Professor Pisillo Mazzeschi rejects a baseline of functional immunity, concluding that 'considering the lack of extensive, constant, consolidated and uniform practice, it is difficult to maintain the existence of both the *diuturnitas* and the *opinio iuris* necessary for the identification of a customary norm giving *all* State officials functional immunity from

¹³ Lorna McGregor and I have recently co-founded an ILA Study Group on Individual Responsibility in International Law to foster collaborative investigation in this area. See <www.ila-hq.org/en/committees/study_groups.cfm/cid/1054>.

foreign civil jurisdiction.’ Although my own approach would focus less on *who* has benefited from *ratione materiae* immunity and more on *what* type of acts have been deemed immune in various contexts, I agree that the proponents of blanket functional immunity should bear the burden of demonstrating that such immunity is required by customary international law.

Although we have grown accustomed to speaking in terms of ‘exceptions’ to immunity, the assumption that immunity – rather than territorial sovereignty – represents the appropriate baseline should not escape scrutiny.¹⁴ Professor Pisillo Mazzeschi cites Ingrid Wuerth’s recent work on official immunity.¹⁵ Professor Wuerth, like many others, begins from a baseline of immunity, and then looks for evidence of State practice and *opinio juris* sufficient to override this background norm.¹⁶ Professor Beth Stephens, by contrast, takes a different approach.¹⁷ As students of customary international law learn by studying the *Lotus* case, the choice of baseline, and the resulting allocation of the burden of proof, often predetermines outcomes. It might be advisable to spend more time debating and unpacking our assumptions about baselines, and less time debating what may inevitably amount to somewhat disparate practice.

Given that individual officials’ actions are not always attributable *only* to the State (in perhaps the most elementary example of what we now call ‘dual attribution’ or ‘shared responsibility’), the notion that State immunity and *ratione materiae* immunity should always be congruent seems puzzling. Professor Pisillo Mazzeschi’s challenge to this presumed congruence has stimulated welcome debate, but my sense is that debates about the ‘what’ rather than the ‘who’ will prove more fruitful going forward.

¹⁴ I have written on this question in relation to cases in the United Kingdom, New Zealand, Australia, Canada, and the United States. CI Keitner, ‘Foreign Official Immunity and the “Baseline” Problem’ (2011) 80 Fordham L Rev 605, <http://fordhamlawreview.org/assets/pdfs/Vol_80/Keitner_November.pdf>.

¹⁵ I Wuerth, ‘Pinochet’s Legacy Reassessed’ (2012) 106 AJIL 731.

¹⁶ *ibid* 744.

¹⁷ B Stephens, ‘Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses’ (2011) 44 Vanderbilt J Transnational L 1163, 1175-76.



The immunity of State organs – A reply to Pisillo Mazzeschi

Natalino Ronzitti*

1. *Pisillo Mazzeschi's main thesis*

Pisillo Mazzeschi has carried out an in depth enquiry of the topic of immunity. One should not only take into account the piece he wrote for *Questions of International Law*, but also the substantive contribution he has made to an Italian legal encyclopedia.¹ His findings have already been critically analysed by Gionata Buzzini, Philippa Webb and Chimène I. Keitner and may be summarized as following: the distinction between immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity) still holds good in international law, since the first covers an organ only in the discharge of its function; the second, in contrast, covers an organ once it has completed its mandate. Pisillo Mazzeschi seems to imply that the two kinds of immunities do not coexist when the organ is discharging its function, since it is entitled to personal immunity, a view which cannot be shared by this author. During its mandate the organ is protected both by personal immunity for any act performed outside its function and by functional immunity for acts falling within its official duties. The difference is that functional immunity endures even after the organ completes its official functions, whilst personal immunity ends.

While the majority of international lawyers affirm that the category of persons entitled to functional immunity is wider than the category of those holding personal immunity, Pisillo Mazzeschi argues that the category of persons entitled to both types of immunity *tends* to be identical. Personal immunity and functional immunity are enjoyed by the so called troika (Head of State, Head of Government, Minister for foreign affairs),

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¹ R Pisillo Mazzeschi, 'Organi degli Stati Stranieri (Immunità giurisdizionale degli)' (2014) *Enciclopedia del Diritto*, Annali 735-794.



diplomatic agents and members of special missions, whilst consular agents hold only functional immunity. However according to Pisillo Mazzeschi functional immunity is not the same for all the categories of organs mentioned above. He says that '[w]ith regard to the duties of the various officials, international practice shows that functional immunity is recognised broadly to diplomatic agents and members of special missions; in a more restricted way to the three most high ranking State representatives; and in an even more limited way to consular agents.' Outside the troika, diplomatic agents, members of special missions and consular agents, nobody else would be entitled to functional immunity according to customary international law.

I do not share this opinion which Pisillo Mazzeschi illustrates, after having criticised a number of authors with an impressive review of theories and sub-theories which on occasions are difficult to grasp. All State organs are entitled to functional immunity, whilst only a few of them (the troika, diplomatic agents and member of special missions) enjoy personal immunity.

2. *The foundation of functional immunity*

The rationale of functional immunity is grounded on the attribution to the State of the acts of its organs. The State as a legal person cannot act on its own, but rather does so through its organs. This means that an act performed on official duty is an act that is attributed to the State for which the organ operates and does not remain its own (but for a few exceptions). This simple truth is supported by logic and by State practice, as we shall see.

In sanctioning functional immunity, the international legal order protects the State domestic organization shielding it under the principle of non-interference /non-intervention. A State is entitled under international law to be respected as far as its internal and external structure is concerned (ie its organization). It does not matter that this, as Pisillo Mazzeschi points out, is a deductive reasoning, it is a presumption that is a consequence of principles of international law. Functional immunity (or immunity *ratione materiae*) stems from the fact that the acts performed by an official are attributed to the State to which he belongs. Disregarding functional immunity means an infringement of the sovereignty



and independence of the foreign State. If the act performed by the State official amounts to an international wrong, only the State is responsible and not the State official (unless an international crime has been committed). The issue of functional immunity has been the object of a resolution of the *Institut de droit international* (Naples session 2009). The Resolution affirms in Article II, paragraph 1, that:

‘[i]mmunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.’²

It is not possible here to perform an enquiry on the notion of State organs and whether functional immunity also covers acts performed *ultra vires*. As far as the determination of a State organ, whose conduct is attributed to the State, Article 4 of the Draft Articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission (ILC) in 2001 and widely regarded as declaratory of customary international law, after having attributed to the State the conduct of its organs (paragraph 1), affirms in paragraph 2 that ‘[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.’ It is thus undisputed that the status of the organ is determined by the internal law of the State. In the commentary to Article 4(2) the ILC says that ‘Where the law of a State characterizes an entity as an organ, no difficulty will arise.’³ The ILC Draft Articles attribute the act committed *ultra vires* to the State (Article 7). This does not mean that the organ is automatically entitled to functional immunity.

The topic of the immunity of State officials from criminal jurisdiction is currently under investigation by the ILC. In the Memorandum prepared by the United Nations Secretary General, as well in the reports prepared by the Rapporteurs (Roman A. Kolodkin and thereafter Con-

² IDI, ‘Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crime’ (Napoli 2009) (IDI, Napoli 2009) <http://www.idi-iil.org/app/uploads/2017/06/2009_naples_01_en.pdf>.

³ ILC, ‘Report of the International Law Commission on the work of the fifty-third session (23 April-1 June and 2 July-10 August 2001)’ UN Doc A/56/10, 90.



ception Escobar Hernandez) the distinction between personal and functional immunity is absolutely clear. What is more important is that the assumption that State officials enjoy functional immunity from criminal jurisdiction is affirmed in the Memorandum and Reports and is supported by a consistent body of practice. Article 5, as provisionally adopted by the ILC, affirms that ‘State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.’ The draft provisionally adopted also deals with the notion of State official and State function which are employed instead of State organs.

3. *Exceptions to functional immunity*

There are two exceptions to functional immunity. The first is the commission of an international crime. In case of commission of an international crime, the act is attributed to the State for which the organ is performing its activity and at the same time remains an act of the organ. The consequence is a dual responsibility: the State is internationally responsible for having committed a violation of international law; the organ bears criminal responsibility for having committed an international crime and may be judged according to the principle of universal criminal jurisdiction. There is no necessity to refer to specific case-law, since the principle of criminal responsibility in case of commission of an international crime is a doctrine universally accepted.

The second exception relates to clandestine activities. The spy (in time of peace) or the intruder in a foreign country may be a State organ, but he cannot shield under the principle of functional immunity. Therefore one cannot invoke precedents on clandestine activities to prove, as Pisillo Mazzeschi does, the non-existence of the rule on functional immunity for all State organs. In the case of *Rainbow Warrior*, France asserted that their secret agents (who were military personnel) were organs of the French State entitled to functional immunity, a plea which was not accepted by New Zealand since the French agents behaved in a clandestine way when intruding in the port of call of the *Rainbow Warrior*. In the *Abu Omar* case, the Italian Court of Cassation held the US agents



responsible for the extraordinary rendition of Abu Omar.⁴ The judgment is correct, but erroneously motivated. The existence of the Italian jurisdiction was due to the fact that the US agents, who did not enjoy personal immunity, performed a clandestine activity (they were CIA agents) and not, as the Court of Cassation argued, because of non-existence of the doctrine of functional immunity.⁵

4. *Armed forces and functional immunity*

Military forces deserve, according to Pisillo Mazzeschi, a separate treatment. He takes into account the status of military forces abroad in time of peace and in wartime, including occupation and UN peace-keeping forces.

Peace and wartime/armed conflict need to be kept separate and cannot be dealt with in the same way. The basic feature is that in times of peace, armed forces enter foreign territory with the consent of the territorial State, whilst in a situation of wartime/armed conflict this condition is absent, unless a State is intervening with the consent/request of the constituted Government in a territory where a civil war takes place.

In time of peace, the status of foreign forces is usually regulated by a SOFA. This does not mean that a member of a visiting armed force is deprived of immunity *ratione materiae* in the absence of a SOFA when performing his functions. Usually a SOFA grants immunities that are wider than those connected with the activity of the armed forces and/or details the allocation of jurisdiction between the visiting and the receiving State.

Completely different is a situation of armed conflict. In such a circumstance, members of armed forces cannot be tried by the enemy unless a crime of war has been committed. If captured, they enjoy the status of

⁴ Corte di Cassazione, sez V penale, sent n 46340 (29 November 2012) *Proc Gen Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri* in (2013) 96 *Rivista di diritto internazionale* 272.

⁵ The same goes for the case *Medero et al* judged by the Court of Cassation on 11 March 2014, n. 39788. The Court held Medero et al responsible for the extraordinary rendition of Abu Omar since the diplomatic immunity was terminated and the rendition did not fall under the category of acts covered by immunity. Even this judgment neglects the argument of clandestine activity.

prisoners of war. A different treatment is granted to spies and saboteurs (war treason), but this point is also regulated by the law of armed conflict.

In a situation of occupation (or similar situations), where there are contingents belonging to different nations, the real problem is the allocation of jurisdiction between the occupying armed forces. As a matter of fact SOFAs regulate the relationship between the foreign forces and the receiving State (if its authority has been re-construed), but not between the foreign forces present on the ground. As the *Lozano* case⁶ proves, in the absence of such an agreement, the principle to be applied is that of functional immunity.

As far the *Enrica Lexie* incident is concerned it is true that the High Court of Kerala repelled the theory of functional immunity. The Supreme Court of India in its judgment of 18 January 2013 voided the Kerala judgment asserting at the same time the Indian jurisdiction and refusing to endorse the Italian claim of functional immunity for the two marines. However the Court left the door open stating that the principle of functional immunity could be raised before the Special Court instituted for dealing with the case. Thus the case is not yet concluded.

5. *The choice of case law*

The case-law quoted by Pisillo Mazzeschi to substantiate the denial of functional immunity is almost all comprised of examples of clandestine activities (espionage) or international crimes, ie activities falling under the exceptions to functional immunities. Pisillo Mazzeschi also quotes recent judgments of the Italian Court of Cassation affirming that those stating functional immunity (eg *Lozano* case) are poorly motivated. For my part, I find poorly motivated those judgments that deny functional immunity like the *Abu Omar* judgment where the Court of Cassation erroneously held that the only precedents were the *Lozano* case and the *McLeod* case, which *inter alia* was incorrectly referred to. Also the recent judgment on *Mendero et al*, that is confirming the *Abu Omar* judgement, is a follow up of the issue on extraordinary renditions and thus falls under the exception to functional immunity.

⁶ Corte di Cassazione, sez I pen, sent n 31171 (24 July 2008) *Lozano*.



I prefer to stick with the *Blaskic* case, which Pisillo Mazzeschi quotes as one of the few cases supporting functional immunity but that he does not adequately underline. It is worth emphasizing the following passage of the judgement:

‘The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called “functional immunity.” This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since. More recently, France adopted a position based on that rule in the Rainbow Warrior case. The rule was also clearly set out by the Supreme Court of Israel in the Eichmann case.’⁷

In addition to the case law, one also has to refer to other elements of State practice which reveal the *opinio juris* of States. One important manifestation is the statement contained in the Background Paper on ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ presented at the Inter-sessional meeting of Legal Experts to discuss Matters Relating to International Law Commission held on 10 April 2012 at AALCO (Asian-African Legal Consultative Organization) Secretariat, New Delhi.⁸ The Report states:

‘Unlike immunity *ratione personae* dealt with in the previous pages, immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature and has been confirmed by domestic

⁷ *Prosecutor v Blaskic* (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) ICTY-95-14 (29 October 1997) para 38.

⁸ AALCO, ‘H. Inter-Sessional Meeting of Legal Experts to Discuss Matters relating to the ILC’ (10 April 2012) <www.aalco.int/Meeting%20of%20Legal%20Experts%20on%20ILC%202012.pdf>. The AALCO serves as an advisory body to its member States.



courts. In its recent judgment in the *Djibouti v France* case, the International Court of Justice referred in this context to acts within the scope of [the] duties [of the officials concerned] as organs of State.⁹

6. *Authors' view*

It is not insignificant that among the authors who have up till now commented on Pisillo Mazzeschi's paper, not one has supported his stance. On the contrary, Pisillo Mazzeschi's arguments have been widely criticised. The extensive notion of immunity *ratione materiae* has been also endorsed by Pierre d'Argent in a recent contribution.⁹ Learned authors support this finding, for instance Jean Salmon¹⁰ and Brownlie.¹¹ P-M Dupuy, in the 12th edition of his manual also seems to share the broad notion of functional immunity.¹² There may be other learned authors (few?) who share the opposite view and express their doubts about the wider notion of functional immunity. The most celebrated example is Conforti.¹³ However Pisillo Mazzeschi has taken to the extreme an opinion that Conforti only submits cautiously and nonetheless with some doubt.

7. *Immunity and human rights*

Is immunity an obstacle to the enjoyment of human rights of the victim and in particular to the right to compensation? The answer is both yes and no. Yes, in the sense that the wrongdoer cannot be sued by the victim in a foreign State. No, in the sense that the wrongdoer is not immune within its own legal order: immunity is not impunity. The victim

⁹ P d'Argent, 'Immunity of State Officials and the Obligations to Prosecute' in A Peters, E Lagrange, S Oeter, C Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2014) 248-249.

¹⁰ J Salmon, 'Representatives of States in International Relations' in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP 2007) paras 32-44, <<http://opil.oup.com>>.

¹¹ J Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 688-689.

¹² PM Dupuy, Y Kerbrat, *Droit international public* (12th edn, Dalloz 2014) 155-156.

¹³ B Conforti, *Diritto Internazionale* (10th edn, Editoriale Scientifica 2014) 263-265.



has the choice to sue the wrongdoer before his nation State and/or to sue the State for which the organ is acting before a tribunal of a foreign State. In this second case the tribunal should decline its jurisdiction if the activity is to be qualified as *jure imperii* as it usually does in the majority of the cases involving functional immunity. Unfortunately the ICJ, in its judgment on *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, did not endorse the argument according to which the immunity of a foreign State should not be recognised if the activity *jure imperii* is in contrast with a peremptory norm of general international law. In this case the victim can always ask his State to intervene in diplomatic protection to vindicate his rights, as has been pointed out in the judgment on *Jurisdictional Immunities*.

8. Conclusion

The reasoning according to which personal immunity and functional immunity should be kept together is not convincing. Personal immunity should be kept separate from functional immunity. It may be that an organ, such a diplomatic agent, enjoys both immunities, but in such a case the immunities cover different acts and function in different ways, with the consequence that after the termination of the mission the agent is no longer immune for acts accomplished in his personal capacity, whilst he continues to enjoy functional immunity for acts accomplished in his official capacity.

Unlike personal immunity, which belongs to a small number of State officials, functional immunity belongs to all State officials for acts performed on behalf of the State, since it, as a legal person, can act only through its organs. The customary international norm is aimed at protecting the organization of the State from external interference and the State may pretend that the acts carried out by its organs be attributable to it. The functional immunity is disregarded if the organ commits an international crime or is carrying out clandestine activities. In such cases there is a dual attribution: the act is attributable to the State but it also remains an act of the individual committing it.

A few remarks on the functional immunity of the organs of foreign States

*Benedetto Conforti**

1. *Introduction*

I read with great interest the article by Pisillo Mazzeschi and the subsequent reactions to it, all of which were stimulating in terms of the variety of views expressed and the arguments supporting them. That said, no one, myself included, should make the presumption that the opinions he expressed are necessarily the right ones, especially when it comes to unwritten international law.

For my part, I can only share in general terms the thesis put forward by Pisillo Mazzeschi, who argues, with some exceptions, that State organs do not enjoy functional immunity in foreign courts. The reason for me holding this opinion is very simple: I also supported this opinion in a number of my own academic writings, albeit solely with regard to immunity from *criminal* jurisdiction.¹ I would also recall that the same thesis has already been well supported by De Sena who put forward a wealth of arguments in a book published back in 1996.²

It is perhaps appropriate to recall that functional immunity is enjoyed, according to settled practice, by diplomatic and consular officers, Heads of State, Heads of Government, and foreign ministers, ie those whose roles

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¹ B Conforti, 'In tema di immunità funzionale degli organi statali stranieri' (2010) 93 *Rivista di diritto internazionale* 5 ff; see also B Conforti, *Diritto Internazionale* (10th edn, Editoriale Scientifica 2014) 266 ff.

² P De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè 1996). By this Author, see also 'Immunità dell'individuo-organo dalla giurisdizione e responsabilità dello Stato: rapporti e problemi di ccordinamento' in M Spinedi, A Giannelli, ML Alaimo (eds), *La codificazione della responsabilità internazionale alla prova dei fatti* (Giuffrè 2007) 467.



primarily involve international relations. Foreign troops, which are present in a State which has given permission for them to stay and to perform their functions within its territory also enjoy, in my opinion, functional immunity on account of an old customary rule;³ but I acknowledge that not everyone is of the same opinion. The question of whether immunity may be enjoyed by the organs of foreign States is, therefore, residual.

My reflections will concern only immunity (or rather the non-immunity) from criminal jurisdiction of State bodies other than those belonging to the categories of organs mentioned above. As for civil jurisdiction, and despite the uncertainties of the practice identified by Pisillo Mazzeschi, I am of the opinion that the responsibility for acts performed by the organs rests upon their State, possibly falling within the immunity of the latter from the jurisdiction of foreign States. I shall return to this point in the following paragraph.

2. *The deductive and inductive methods*

According to Pisillo Mazzeschi, a customary rule, or its fall into desuetude, can only depend on the practice, that is to say (and I apologise for recalling a scholastic definition of custom) on behaviour repeated over time by States (*diuturnitas*), supported (though not all are in agreement on this second element) by the opinion that it is necessary or that it conforms to the law (*opinio juris sive necessitatis*). The International Court of Justice (ICJ) has also repeatedly used this notion, which in my view indicates no more than the application of the inductive method. Obviously, a thorough examination of the practice cannot be carried out by every domestic or international judgment; this is rather a task for the doctrine. Courts, when they do not refer to their precedents, speak *purely and simply* of customary law, or of old established rules, etc. But, by doing so, they do not adopt a deductive method. In this regard, I have some doubt that, as was argued in one comment, that the ICJ judgment in *Arrest Warrant* is an example of the use of the deductive method, since the old rule favouring the immunity of foreign ministers is exactly a product of practice.

³ On this point, I agree with the view taken by P Webb, ‘Comment on “The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories”’ (2015) 17 QIL-Questions of International Law 43-49, 46 ff.

The critique of Pisillo Mazzeschi concerning doctrine that followed a dogmatic line, ie according to ‘aprioristic and unproven principles’, such as the principle of respect for the organisation of foreign States, the principle of the protection of the State’s ‘exclusive jurisdiction’ in its relationship with its own agents, and the like, is a valid one.

It must be said, however, that, if the method is questionable, it remains to be asked what indeed is the value of principles, in particular, the general principles of law recognised by civilized Nations, ie the only source of international law aside from customs and agreements. According to the *communis opinio*, such principles may be used to fill gaps in international law, on a matter for which practice is non-existent and where there are no treaties applicable to the case. In my view, they are also applicable when the practice is uncertain and, consequently, a customary rule cannot be detected. Neither of these instances occurs as regards the immunity of State organs from foreign *criminal* jurisdiction, except for the categories of diplomatic agents and some supreme organs mentioned above, which are surely immune. It seems to me that the practice identified by Pisillo Mazzeschi, and pertaining to this kind of jurisdiction, is sufficient for the conclusion that a custom is in force. In my view, the matter of immunity from civil jurisdiction is different, since it is characterised by uncertain practice, as Pisillo Mazzeschi recognises. I believe, in this case, that the general principle of law, whereby a legal person must respond when one of its organs is acting within its powers, is applicable. Therefore it is the State, and not the organ which has carried out private or public acts in its name, which is responsible for the civil consequences of such acts. Consequently, the State, and not the organ, may be called to respond before foreign judges, provided that such acts are not immune from civil jurisdiction.

3. *Practice. But which practice?*

Pisillo Mazzeschi focuses mainly on internal case law, which is not, for the most part, favourable to immunity.⁴ As I have indicated, I agree

⁴ Among these judgments, I would not say, as has been affirmed, that there is no room for the judgment of the Indian Supreme Court of 18 January 2013 in the case of *Enrica Lexie* in which two members of the Italian military, according to investigations



with the results of his research because, among other things, the number of State judgments that were collected for the research outnumbers that of the decisions which I found in the above-cited 2010 article.

It is of a great importance to emphasise the fact that the practice gathered consists of State judgments. This is, in fact, the *true practice of States* on all matters relating to immunities. In contrast, what States say at international level, the statements of representatives of governments within the relevant international organs, and the consensus expressed by delegates within the Sixth Committee of the General Assembly of the United Nations with regard to the reports of the International Law Commission, are not conclusive.

It is important to stress this point. In matters where the domestic courts are called upon to rule, international cases, and even the ICJ, seem to be more worried about the resilience of international relations than the interests of any victim, who is sacrificed to immunity.

Emblematic, though not strictly pertinent to our subject, is the well-known story that began with the numerous judgments of the Italian Court of Cassation issued between 2004 and 2011, which denied immunity to Germany for compensation to victims of war crimes committed by German troops in Italy. We cannot say that the subsequent decision of the ICJ of 3 February 2012, favouring immunity, was wrong, since it was founded precisely on a clear practice of domestic courts, albeit not the

carried out in India, allegedly killed two Indian fishermen. It is true that in the opinions of the two judges to whom we owe the judgment, Chief Justice Altmar and Judge J Chelameswar, only the issue of lack of jurisdiction under the rules of the Indian and international Law of the Sea is dealt with, and answered in the negative. It is also true, however, that, in the introductory part of the first of the two opinions, in paras 44 and 66-70, we can read the argument for the defence of the two Italian soldiers and a wide response from the 'Additional Solicitor General', one favourable and the other opposed to the applicability of the principle of functional immunity. I wonder why, if the Court had accepted the Italian view, it would not have said so in order to close the case and make a final decision on the fate of the two soldiers, one of whom remains in custody. I acknowledge, however, that, *formally*, the final word will only come at the end of this thorny story. It has also been said that some judgments about secret service agents should not be quoted, since the immunity from criminal jurisdiction of such persons is universally considered to be already excluded. The fact is that in some judgments the non-immunity is precisely considered an application of the general rule on State organs. So ruled the Italian Court of Cassation, in its judgment of 29 November 2013 (reprinted in (2013) 96 *Rivista di diritto internazionale* 272), in the case of Abu Omar, an Egyptian citizen accused of terrorism and seized by Italian and US agents to be sent back to Egypt where he faced a strong possibility of torture.



Italian ones. But the decision was open to criticism, in another respect, namely for not giving a signal at least regarding the need for the practice to evolve on a matter in which, in the absence of damages, the victims of serious violations of human rights remain without any form of satisfaction⁵. A signal in favour of victims later came from the decision of the Italian Constitutional Court of 22 October 2014, which we can only hope will be supported and confirmed by courts in other countries.

Some other examples could be made here. For instance, the jurisprudence of the European Court of Human Rights still applies the distinction between *acta jure imperii* and *acta jure gestionis* to labour relations with foreign States, notwithstanding that immunity is now excluded in various States as far as retribution disputes are concerned. But, to go on with other such examples would lead us too far away from our subject.

In conclusion, in a number of fields, old international norms concerning the immunity of States and their organs persist, compressing the rights of victims arising from the activities of these entities. It is hoped that there will be some erosion of such norms at least in the most serious cases. Then, in cases where practice has already progressively developed, such as the immunity from criminal jurisdiction of most of the State organs, it seems to me that insisting on immunity is, with all due respect, somewhat backward-looking.

⁵ For a more detailed treatment see B Conforti, 'The ICJ Judgment in Jurisdictional Immunities of the State' (2011) 31 *Italian YB Intl L* 136 ff.



Part II. ZOOM IN

The Question:

The inclusion of emissions from aviation in the EU ETS: Unilateralism vs multilateralism in international environmental governance

Introduced by Elena Carpanelli, Annalisa Savaresi and Francesco Sindico

When drafting the Kyoto Protocol, Parties to the UN Framework Convention on Climate Change deferred the issue of emissions from aviation to the International Civil Aviation Organisation (ICAO), a specialised UN agency with global responsibility for various aspects of international civil aviation. Over the years, the debate on emissions from aviation within ICAO made no significant progress. Disappointed with the limited progress within ICAO, the European Union (EU) decided to act unilaterally. Its Directive 2008/101/EC controversially included the aviation sector in the EU Emission Trading Scheme. As a result, starting with 2012, all large operators whose aircraft take off from or land at EU airports are required to acquire emission allowances.

The inclusion of emissions from aviation in the ETS has raised numerous objections. Among others, China, India, Russia and the US have vehemently opposed the unilateral initiative by the EU as inconsistent with international law. A group of leading US airlines and their trade association even brought a case before British courts, arguing that UK measures implementing Directive 2008/101/EC infringed third States' sovereign rights, the 1944 Chicago Convention, the Kyoto Protocol and the 'Open Skies' bilateral agreement between the US and the EU (Reference for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 8 July 2010, received at the Court on 22 July 2010).

The Court of Justice of the European Union (CJEU), however, upheld the validity of the Directive, finding no incompatibility with international law (Case C-366/10 *Air Transport Association of America and*

Others v Secretary of State for Energy and Climate (21 December 2011) ECLI:EU:C:2011:864). The CJEU's findings did not end all controversies. Against the threat of retaliatory measures and the risk of a 'trade war', in April 2013 the EU decided to suspend the implementation of Directive 2008/101/EC for flights from or to non-European countries, in anticipation of the outcome of ICAO negotiations in Autumn 2013.

In October 2013, the ICAO Assembly agreed to develop a global market-based mechanism addressing international aviation emissions by 2016, to be applied from 2020. In light of the agreement reached within ICAO, the European Commission proposed that, until the implementation of the global market-based mechanism, all emissions from flights taking place within the EU be included in the EU ETS, regardless of the country of origin.

The ICAO Assembly's Resolution and the proposal by the European Commission are unlikely to be the final words in this long-lasting *saga*. From the perspective of international law, this sequence of events raises a series of interesting questions:

When and how can a State (or regional organization) legitimately take unilateral measures to protect the environment? Does multilateralism represent the only 'way', even when it brings to inaction? How do we define 'inaction'? Is a declaration of intents (such as that made in the context of ICAO) enough to constitute 'action'?

How does the CJEU judgment compare with decisions concerning questions of unilateralism related to the protection of the environment, such as the GATT and WTO Appellate Body decisions in *Tuna-Dolphin* and *Shrimp-Turtle*?

QIL has invited two authors renowned for their work on the debate on emissions from aviation, Kati Kulovesi and Jacques Hartmann, to provide a response to these intricate questions.



Unilateral extraterritorial action or ‘minilateralism’ within territorial jurisdiction? The EU Emissions Trading Scheme for aviation emissions and international law

*Kati Kulovesi**

1. *Introduction*

For the battle against dangerous anthropogenic climate change, the rapid growth of global aviation emissions is a considerable challenge. While the share of aviation emissions of global total emission is modest, the growth projections for greenhouse gas emissions in this sector are remarkable. These scenarios are at odds with the recent report by the Intergovernmental Panel on Climate Change (IPCC) showing that global greenhouse gas emissions should be reduced to close to zero by the end of this century to avoid dangerous climate change.¹

The question of where and how to regulate global aviation emissions has been a difficult one internationally. Over the past two decades, the issue has been subject to slow-moving negotiations in two distinct multilateral fora, under the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, and at the International Civil Aviation Organization (ICAO). To date, neither of the two bodies has been able to agree on meaningful and effective measures to control greenhouse gas emissions from international aviation.

Frustrated by the lack of multilateral progress to address an urgent global problem, the European Union (EU) took a decision in 2008 to include emissions from all flights departing from, or landing to EU air-

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¹ Intergovernmental Panel on Climate Change, ‘Summary for Policymakers’ in O Edenhofer et al (eds), *Climate Change 2014: Mitigation of Climate Change – Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014)12.



ports into its Emissions Trading Scheme (ETS). This initiative generated considerable international controversy and has surfaced questions concerning the compatibility with international law of unilateral action to address global environmental problems through extraterritorial measures. One of the key questions to which this piece has been asked to answer is the following: *'When and how can a State (or regional organization) legitimately take unilateral measures to protect the environment?'*

2. *Unilateralism, 'minilateralism' and multilateralism in global climate policy*

The first issue that arises from the question above concerns the definition of 'unilateralism.' I have argued elsewhere that the EU measure could also be classified as 'minilateralism.'² The notion of minilateralism has been used, for example, in the context of regional or otherwise selective economic cooperation between countries, of which the EU is the most important example.³ In his famous article, Naím argued that minilateralism essentially means getting together the 'smallest possible number of countries needed to have the largest possible impact on solving a particular problem.'⁴ According to him, 'agreements reached by the small number of countries whose actions are needed to generate real solutions can provide the foundation on which more-inclusive deals can be subsequently built.'⁵ A similar vision can be detected underlying the EU aviation scheme. Directive 2008/101/EC indicates that the 'scheme may serve as a model for the use of emissions trading worldwide' while stressing that the EU and its Member States 'should continue to seek an agreement on global measures to reduce greenhouse gas emissions from

² K Kulovesi, 'Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?' (2012) *Rev Eur Comparative Intl Environmental L* 193.

³ *ibid.* See also C Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering Are Redefining Economic Statecraft* (CUP 2014).

⁴ M Naím, 'Minilateralism: The Magic Number to Get Real' *Foreign Policy* (22 June 2009) <<http://foreignpolicy.com/2009/06/21/minilateralism/>>.

⁵ *ibid.*



aviation.⁶ Against this background, it is clear that the EU approach to international aviation emissions corresponds with at least some definitions of minilateralism. To my mind, it is also relevant here that the aviation scheme is implemented in more than 30 countries, some of which are not members of the EU.⁷ These countries do not hold uniform views on climate policy, environmental protection or EU external relations. The EU climate policy is therefore based on compromises within a relatively divergent group of countries. Against this background, in my view, the EU action on aviation emissions could well also be characterized as minilateralism.

At the same time, the EU is a *sui generis* international actor and its Member States are legally required to speak with one voice on environmental policy internationally.⁸ Hence, in the lively international debate on the EU regulation of aviation emissions, the scheme has often been characterized as ‘unilateralism.’ Scott and Rajamani have argued that the unilateralism in which the EU is engaging here is ‘of a peculiar and interesting kind.’⁹ They have characterized it as ‘contingent unilateralism’ in the sense that ‘the global extension of EU climate change law depends upon there being no adequate international agreement or third country climate action in place.’¹⁰ According to them, ‘the EU should be viewed as a reluctant unilateralist and as deploying contingent unilateralism as a means of incentivizing urgently needed climate action elsewhere.’¹¹ The reference to ‘reluctant unilateralism’ reflects the fact that in international legal discourse, unilateralism tends to have a negative connotation: ‘to characterize an action unilateral is to condemn it.’¹²

⁶ Directive 2008/101/EC, Preamble, para 17.

⁷ The three non-EU countries in which the aviation scheme is implemented are Norway, Liechtenstein and Iceland. These countries are members of the European Economic Area.

⁸ K Kulovesi, M Cremona, ‘The Evolution of EU Competences in the Field of External Relations and Its Impact on Environmental Governance Policies’ in C Bakker, F Francioni (eds), *The EU, the US and Global Climate Governance* (Ashgate 2014) 81, 86-87.

⁹ J Scott, L Rajamani, ‘Contingent Unilateralism: International Aviation in the European Emissions Trading Scheme’ in B Van Vooren, S Blockmans, J Wouters (eds), *The EU’s Role in Global Governance. The Legal Dimension* (OUP 2013).

¹⁰ *ibid.*

¹¹ *ibid.*

¹² D Bodansky, ‘What’s so Bad about Unilateral Action to Protect the Environment’ (2000) *Eur J Intl L* 339.



Bodansky has rightly stressed, however, that a unilateral act is not the same as an act violating international law, but ‘in most instances States are entitled to act unilaterally. That is the essence of sovereignty.’¹³ He further indicates that ‘the issue to define is when a State’s right to act as sovereign – that is, to act unilaterally – is appropriate and when it should yield to an international decision-making process.’¹⁴

This brings me to my second point concerning unilateralism: it is important to note that the international legal criticism against the EU aviation scheme arose not only from its allegedly unilateral nature but also from *the territorial scope* of the measure. To stress the point, it is well established under international law that the EU and its Member States are free to address global environmental problems unilaterally within their territorial jurisdiction. Thus, since 2005, the EU has subjected its energy-intensive economic sectors to a carbon price under the EU ETS with no international objections. In contrast, the key source of criticism against the EU aviation scheme has been the fact that in its original form, Directive 2008/101/EC applied to greenhouse gas emissions from all flights landing in or taking off from EU airports (with certain limited exceptions). The obligation to surrender emission allowances to the EU authorities applied to greenhouse gas emissions calculated from the duration of *the entire flight*, including segments taking place outside European airspace. This also applied to emissions by *non-European airlines* operating flights within or to the EU.

In response to international developments, the EU modified the territorial scope of the aviation scheme.¹⁵ Accordingly, during the period from 2013 to 2016 the scheme applies only to flights within the 30 countries participating in the scheme. Exemptions were also introduced for flight operators with low emissions. The official reason for this modification relates to negotiations launched under the ICAO to develop by 2016 a global market-based mechanism addressing international aviation emissions, which should be operational by 2020. In practice, political pressure from various powerful countries opposing the scheme is

¹³ *ibid* 340.

¹⁴ *ibid*.

¹⁵ Decision no 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [25 April 2013] OJ L 113, 1-14.



likely to have played a role as well.¹⁶ The current modification is temporary and further measures will be considered in light of international developments. Thus, the Commission must report in 2017 to the European Parliament and Council on the outcome of the next ICAO Assembly in 2016 and propose appropriate measures regarding the EU aviation scheme.

3. International law and extraterritorial measures to protect the environment

In light of the above discussion, one of the key questions arising from the EU aviation scheme concerns the compatibility with international law of measures taken by States to protect the environment outside their territory. Territorial jurisdiction is the classical starting point under public international law.¹⁷ Accordingly, States exercise sovereignty and supreme authority over activities and actors within their territorial boundaries. One of the leading textbooks of public international law emphasizes ‘the presumption that jurisdiction (in all its forms) is territorial, and may not be exercised extra-territorially without some specific basis in international law.’¹⁸ The book notes, however, that ‘what amounts to extraterritorial jurisdiction is to some extent a matter of appreciation.’¹⁹ Principles of extraterritorial jurisdiction were originally developed in the field of criminal law.²⁰ In accordance with the nationality principle, States often exercise jurisdiction over their own nationals with respect to serious crimes they may have committed in foreign countries. Less accepted jurisdictional principles include the protective principle²¹ and passive personality principle.²² A considerable

¹⁶ A Vihma, H Van Asselt, ‘The Conflict over Aviation Emissions. A Case of Retreating EU Leadership?’ (2014) Briefing Paper 150, FIIA <www.fiaa.fi/en/publication/404/the_conflict_over_aviation_emissions/>.

¹⁷ J Crawford, *Brownlie’s Principles of Public International Law* (OUP 2012) 456.

¹⁸ *ibid.*

¹⁹ *ibid.* 457.

²⁰ E Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (OUP 2009) 99-100.

²¹ Jurisdiction over alien over acts done abroad which affect the internal or external security or other key interests of the State. See Crawford (n 17) 461.



number of States also claim universal jurisdiction in the interest of public policy concerning certain serious crimes regardless of where they were committed and nationalities of the people involved.²³

State sovereignty, along with the principle of non-intervention enshrined in the Charter of the United Nations, has been used as the basis for drawing limits to the exercise of extraterritorial jurisdiction.²⁴ It has been argued that ‘a State has a right to extraterritorial jurisdiction where its legitimate interests are concerned, but the right may be abused and it is abused when it becomes essentially an interference with the exercise of local jurisdiction.’²⁵ However, as Vranes has pointed out, the principles of State sovereignty and non-intervention are ultimately incapable of answering whether extraterritorial regulation is compatible with international law.²⁶ This is because ‘by exercising extraterritorial jurisdiction, the regulating State risks interfering with the sovereignty (or right to self-determination) of another State and thereby with its territorial competence; yet, the regulating State, as well, *prima facie* makes use of its right to self-determination.’²⁷ Vranes therefore proceeds to explore the usefulness of proportionality and other means of balancing situations where the sovereign interests of two States are juxtaposed.²⁸ As discussed in Sections 3 and 4 below, also other, perhaps more nuanced, tests can be drawn from both case law and literature for distinguishing between territorial and extraterritorial jurisdiction.

3.1. *Extraterritorial environmental measures under international trade law*

In recent years, questions concerning the exercise of extraterritorial jurisdiction to protect the environment and shared natural resources have been particularly hotly debated in context of international trade

²² This means punishing aliens for acts abroad harmful to national of the forum. See Vranes (n 20).

²³ *ibid* 467.

²⁴ See *ibid* for detailed discussion 111 ff.

²⁵ RY Jennings, ‘Extraterritorial Jurisdiction and the United States Antitrust Law’ (1957) *BYIL* 146, 153. The quote is from Vranes (n 20) 127.

²⁶ *ibid* 129.

²⁷ *ibid*.

²⁸ *ibid*.



law. In the famous *Tuna-Dolphin* dispute of 1991, the US prohibited the imports of tuna caught by certain fishing methods with the objective of protecting dolphins and Mexico challenged this under the General Agreement on Tariffs and Trade (GATT). Mexico argued that ‘permitting one contracting party to impose trade restrictions to conserve the resources of others would introduce the concept of extraterritoriality into the GATT.’²⁹ This, then, ‘would threaten all contracting parties, especially when restrictions were established unilaterally and arbitrarily.’³⁰ The US responded by claiming that there was nothing in its measure that was extraterritorial; it ‘simply specified the products that could be marketed in the territory of the United States.’³¹ The US also stressed that the measures were aimed at protecting a shared natural resources:

‘Without conservation measures, dolphins, a common natural resource, would be exhausted. Without these measures on imports, the restrictions on domestic production would be ineffective at conserving dolphins. Dolphins were highly migratory species that roamed the high seas. The interpretation urged by Mexico would mean that a country must allow access to its market to serve as an incentive to deplete the populations of species that are vital components of the ecosystem.’³²

Thus, both Mexico and the US implicitly invoked sovereignty as a justification for their argument. According to Mexico, the US initiative to restrict fishing methods used by Mexican fisherman to catch tuna destined for export to the US was illegal extraterritoriality and interfered with Mexican sovereignty. The US, in turn, emphasized its sovereign rights to determine what products could access its market and close its borders to products that are environmentally harmful. In this case, balancing between the two conflicting claims of sovereignty took place within the legal framework provided by the General Agreement on Tariffs and Trade (GATT). One of its key provisions was Article XX(g), containing a general exception to countries’ international trade obligations to protect exhaustible natural resources. In interpreting this provision, the *Tuna-Dolphin* panel sided with Mexico:

²⁹ GATT Panel Report, *Tuna-Dolphin* (September 1991) para 3.48.

³⁰ *ibid.*

³¹ *ibid* para 3.49.

³² *ibid.*



‘The Panel considered that if the extrajurisdictional interpretation of Article XX(g) suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which the other party could not deviate without jeopardizing their rights under the General Agreement.’³³

Many drew from this ruling the conclusion that extraterritorial trade measures to protect the environment are prohibited under international law. This conception has taken a surprisingly strong hold even if this *Tuna-Dolphin* panel report was never formally adopted and subsequent case law points towards a different direction.³⁴ In the words of Pauwelyn, some of the legal findings by the *Tuna-Dolphin* panel gave rise to what he has characterized as environmental ‘myths’ that years later kept ‘haunting’ the World Trade Organization (WTO).³⁵

Indeed, an environmental trade measure of a very similar design has subsequently been found to be compatible with WTO law in the *Shrimp-Turtle* case. This dispute also arose under the GATT when the US restricted imports of shrimp caught by fishing methods harmful to sea turtles. One of the key differences between the *Shrimp-Turtle* and *Tuna-Dolphin* cases is that sea turtles are recognized as endangered under international environmental law, while dolphins are not.³⁶ Also relevant for the outcome was probably the fact that the *Shrimp-Turtle* case was decided by the WTO Appellate Body, credited for recognizing that WTO law does not exist ‘in clinical isolation’ of other rules of international law.³⁷ Thus, in the *Shrimp-Turtle* case, the Appellate Body emphasized the reference to sustainable development in the preamble of the WTO Agreement and cited various instruments of international environmental law to support its interpretation of GATT Article XX.³⁸

The Appellate Body did not take a direct stance on the question of

³³ *ibid* para 5.32.

³⁴ J Pauwelyn, ‘Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO’ (2004) *Eur J Intl L* 575, 585.

³⁵ *ibid*.

³⁶ K Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Kluwer Law International 2011).

³⁷ WTO, ‘The United States: Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body’ (29 April 1996) WT/DS2/AB/R 17.

³⁸ WTO, ‘United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body’ (12 October 1998) WT/DS58/AB/R para 133.



extraterritorial measures in the *Shrimp-Turtle* dispute, it simply identified ‘a sufficient nexus’ between the US and migratory species of sea turtles. It ruled that:

[w]e do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).³⁹

Two possible interpretations of the Appellate Body’s ruling are that the ‘sufficient nexus’ brought the endangered species of sea turtles under US territorial jurisdiction, or that it justified the exercise of extraterritorial jurisdiction.⁴⁰ In any case, from the Appellate Body two *Shrimp-Turtle* decisions it is possible to identify certain factors that were relevant for the finding that the unilateral trade measure designed to protect migratory species of sea turtles outside US territorial waters was compatible with WTO law. In other words:

- sea turtles are recognized as endangered under international environmental law;
- the US modified its measure so that its application was not a mere rigid extension of the US territorial jurisdiction to third countries through the requirement of uniform measures to protect sea turtles.⁴¹ Instead, the modified US measure left room for countries to design such sea turtle protection policies that are suitable to their national circumstances, an approach that is more appropriate for the conservation of global environmental resources;⁴² and
- the US engaged in good faith efforts to negotiate an agreement with all

³⁹ *ibid.*

⁴⁰ Vranes (n 20) 161. I have discussed these questions also in K Kulovesi, ‘Make Your Own Special Song Even If Nobody Else Sings Along: International Aviation Emissions and the EU Emissions Trading Scheme’ (2012) *Climate Law* 535, 545 ff.

⁴¹ R Howse, ‘The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate’ (2002) *Columbia J Intl Environmental L* 489, 510.

⁴² *ibid.*

countries affected by its trade measure on the conservation of sea turtles.⁴³

In the continuing lively scholarly discussion on environmental trade measures, some scholars have argued that trade measures restricting, for instance, imports based on the way a product has been produced abroad are territorial rather than extraterritorial measures since they are applied within or at the border.⁴⁴ Another line of argument on extraterritorial measures emphasizes the ‘coercive’ effect of trade measures. In other words, the relevant tests for the legality of extraterritorial measures include whether the regulation commands or compels results beyond national borders, or merely induces or influences results.⁴⁵ Both views are reflected in the debate about the EU ETS for aviation emissions.

3.2. The EU aviation scheme and the question concerning its extraterritorial nature

The compatibility of the EU ETS for aviation emissions with international law has been explored in depth in the *ATA Case* before the Court of Justice of the EU (CJEU) in Luxembourg. In 2009, American Airlines, Continental Airlines, United Airlines and the Airport Transport Association of America (ATA) launched a legal challenge against the UK Minister of Energy and Climate Change concerning the EU’s trading scheme for aviation emissions. They argued that the EU aviation scheme violated, *inter alia*, the following principles of customary international law:

- (a) The principle of customary international law that each State has complete and exclusive sovereignty over its air space;
- (b) The principle of customary international law that no State may validly purport to subject any part of the high seas to its sovereignty;
- (c) The principle of customary international law of freedom to fly over the high seas; and
- (d) The principle of customary international law (the existence of which was not accepted by the EU) that aircraft overflying the high seas

⁴³ I have discussed the *Shrimp-Turtle* case in detail in Kulovesi, *The WTO Dispute Settlement System* (n 36).

⁴⁴ Vranes (n 20).

⁴⁵ *ibid.*



are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty.

In its decision in December 2011, the CJEU affirmed the validity of Directive 2008/101/EC. Concerning the scheme's compatibility with international law the Court ruled:

'[t]he fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory.'⁴⁶

The Court also ruled that:

'... as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature *may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union* and are designed to fulfill the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.'⁴⁷

The Advocate General's opinion preceding the decision by the CJEU also included some interesting perspectives on questions concerning extraterritoriality and exercise of EU jurisdiction. The opinion highlighted that Directive 2008/101/EC is concerned solely with arrivals at, and departures from, EU airports, and any exercise of sovereignty occurs only with respect to such flights.⁴⁸ It also emphasized that activities of airlines within the airspace of third countries 'are not made

⁴⁶ Case C-366/10, *Air Transport of America et al v Secretary of State for Energy and Climate Change* [2011] ERC-I-13755.

⁴⁷ *ibid* (emphasis added).

⁴⁸ *ibid* Opinion of AG Kokott (6 October 2011).

subject to any mandatory provisions of EU law.⁴⁹ The Advocate General argued that:

‘The fact that the calculation of emission allowances to be surrendered is based on the whole flight in each case does not bestow upon Directive 2008/101 any extraterritorial effect. Admittedly, it is undoubtedly true that, to some extent, *account is thus taken of events* that take place over the high seas or on the territory of third countries. This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas or [in] the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible. However, there is no concrete *rule* regarding their conduct within the airspace outside the European Union’⁵⁰ (emphasis added).

The Advocate General’s latter argument reflects the scholarly view discussed above that places the emphasis on the ‘coercive effect’ of the trade measure. In other words, she argues that since the EU ETS for aviation emissions merely influences or induces results outside the EU without compelling them, it is seen as compatible with international law. Otherwise, the CJEU and the Advocate General’s Opinion reflect the view that the exercise of EU jurisdiction in regulating aviation emissions is based on *territorial connection between* the aircrafts being regulated and the EU; only aircraft that enter the EU territory and markets are included in the ETS for aviation emissions. Thus, the ‘trigger’ for the EU to exercise its jurisdiction is the fact that an aircraft lands at, or takes off from an EU airport.⁵¹ Following such a logic, the measure can be seen as respecting territorial jurisdiction as an established principle of international law.

According to Scott, what the EU does with, *inter alia*, its aviation scheme is ‘pushing at the boundaries of territorial jurisdiction.’⁵² Introducing a new concept of ‘territorial extension’, Scott argues that, the EU ‘uses the existence of a territorial connection with the EU (notably but not only market access) to shape conduct that takes place outside

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ J Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 *American Journal of Comparative Law* 87.

⁵² *ibid.* 123.



the EU.⁵³ She also indicates that the EU ‘only very rarely enacts extra-territorial legislation’⁵⁴ but regards ‘territorial extension’ as consistent with customary international law and the territoriality principle.⁵⁵ Scott also emphasizes that the EU’s reliance on ‘territorial extension’ of its law entails an international orientation⁵⁶ and an obligation for the EU regulator to take into account conduct or circumstances abroad.⁵⁷ This is significant ‘because it reflects a commitment on the part of the EU to respect the limits on prescriptive jurisdiction laid down by public international law.’⁵⁸ Indeed, the sensitivity to international developments with respect to the EU ETS for aviation emissions is reflected in provisions of Directive 2008/101/EC concerning, for example, the possibility to exclude from the scheme aircrafts originating from countries implementing equivalent measures to cut greenhouse gas emissions from international aviation. It is also evident from the way in which the EU aviation scheme has been modified in response to recent international developments, including giving time for the ICAO to negotiate a global market-based mechanism for international aviation emissions.

4. *Conclusions*

The discussion above shows that while many countries have criticized the EU aviation scheme, it is possible to defend the scheme’s compatibility with international law. Looking at the EU ETS for aviation emissions from a broader perspective, it surfaces some interesting regulatory challenges that are increasingly reflected in scholarly discussion on topics, such as global environmental law and legal pluralism. In the era of globalization, it seems that the traditional interpretation of the international legal principle of territorial jurisdiction does not capture the full range of ways in which States exercise jurisdiction in practice. The question of jurisdictional boundaries obviously remains im-

⁵³ J. Scott, ‘The New EU “Extraterritoriality”’ (2014) 51 *Common Market Law Review* 2.

⁵⁴ Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (n 51) 89.

⁵⁵ *ibid* 115.

⁵⁶ *ibid* 115.

⁵⁷ *ibid* 13.

⁵⁸ *ibid* 14.



portant, while accusations of the exercise of illegal extraterritorial jurisdiction are sometimes too hastily made.

I have argued elsewhere that ‘the global legal landscape is no longer characterized by clear-cut distinctions between the “international” and “national” legal orders, or “multilateral” and “unilateral” actions.’⁵⁹ Against this background, the EU scheme for aviation emissions reflects a complex trend whereby environmental law is becoming globalised and legal systems interact, complement each other and sometimes also seek to influence each other.⁶⁰ I have thus argued that it would be useful for the debate to move to the next level, turning away from the traditional focus on the permissibility of extraterritoriality and unilateralism towards international rules, principles and procedures that curtail EU-type ‘minilateral’ action that seeks to advance multilateral objectives in the absence of a global agreement.⁶¹ With Morgera, we have subsequently explored the way in which the EU has sought to contribute to the development of international standards in the field of climate change, also assessing the legitimacy of such efforts.⁶² Morgera has also developed a ‘good faith test to assess the legitimacy of ongoing and future EU initiatives aimed at contributing to the development and implementation of international environmental law.’⁶³

Thus, to come back to the questions that this piece was asked to answer, I have argued that unilateralism as such does not violate international law, but the problems normally arise if measures decided unilaterally interfere with established jurisdictional principles under international law, especially the territoriality principle. Thus, in the EU aviation case, I would rather characterize the measure as ‘minilateral’ and

⁵⁹ K Kulovesi, ‘Addressing Sectoral Emissions outside the United Nations Framework Convention on Climate Change: What Roles for Multilateralism, Minilateralism and Unilateralism?’ (2012) *Rev Eur Comparative Intl Environmental L* 193, 201.

⁶⁰ *ibid* 202.

⁶¹ *ibid*.

⁶² E Morgera, K Kulovesi, ‘The Role of the EU in Promoting International Standards in the Area of Climate Change’ in I Govaere, S Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill 2014).

⁶³ E Morgera, ‘The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test’ (2014) 16 *Cambridge Yearbook of European Legal Studies* 109. The four-pronged test includes the following elements: Respect for the objective of multilateral environmental agreements; responsiveness to intervening multilateral developments; dialogue; and mutual supportiveness.



see the key legal challenge as deriving from the way in which the territorial boundaries of the scheme were originally drawn. However, as seen above, the CJEU emphasized the territorial connection between the EU and the aircraft being regulated and accepted that the scheme did not constitute an illegal extraterritorial measure. As also seen above, the WTO Appellate Body found a ‘sufficient nexus’ between the US and its measure to protect endangered species of sea turtles outside its territory. It therefore seems that States can implement environmental protection measures with implications outside their territory if there is a sufficient territorial link and if international collaborative endeavours are being respected.



Unilateralism in international law: Implications of the inclusion of emissions from aviation in the EU ETS

Jacques Hartmann*

1. Introduction

The 1997 Kyoto Protocol deferred negotiations on emissions from aviation to the International Civil Aviation Organization (ICAO).¹ Also within this specialised body, agreement on how to deal with emissions from aviation has been difficult to reach.² Frustrated by the lack of progress, the European Union (EU) decided to act unilaterally to reduce emission from aviation, by including aviation within its Emission Trading System (ETS). Initially, the EU set out to include in the ETS emissions from all major aircraft flying to or from European airports, even when these fly over the high seas or foreign territory.³ Many States, however, viewed the EU's initiative as a unilateral act in violation of their sovereignty. The EU has since suspended the application of the ETS to foreign aircraft.⁴ Even so, this incident raises important questions concerning the legality of unilateral acts under international law. This note considers when and how a State or a regional organisation may legitimately take unilateral measures to protect the environment. The note will not consid-

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¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998), art 2(2).

² Cf European Federation for Transport and Environment, *Grounded: How ICAO failed to tackle aviation and climate change and what should happen now* (September–October 2010).

³ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community [2009] OJ L8/3.

⁴ European Commission, 'Stopping the Clock of ETS and Aviation Emissions Following Last Week's International Civil Aviation Organisation (ICAO) Council' MEMO/12/854 (12 November 2012).



er the legality of including foreign aircraft within the ETS, which has been dealt with elsewhere.⁵ Instead, it will focus on the legality and importance of unilateral acts for the development of international law.

2. Terminology

Before delving into the matter of the legality of unilateral acts in international law, it is necessary to say a few words of clarification about the term ‘unilateral act’. In international law, this term is often used to refer to formal declarations formulated by a State with the intent to produce obligations under international law.⁶ Such declarations generally fall into two categories. The first category concerns declarations that have an explicit legal consequence, such as an objection or a protest.⁷ The other category has no specific recipient and its legal consequences are open to interpretation.⁸ This note, however, concerns a third type of unilateral act, i.e. cases in which a State acts alone without coordinating with other States that may be impacted by its action. The term unilateral act (or action) is here used to refer to cases when States choose to act alone in addressing a particular global or regional challenge, rather than participating in collective action. And while unilateralism in international law may take many forms, this note mainly considers the exercise of legislative jurisdiction.

3. Unilateralism

The word ‘unilateralism’ has a strong negative connotation, and is used almost as a synonym for illegality.⁹ But unilateral acts are not un-

⁵ See J Hartmann, ‘A Battle for the Skies: Applying the European Emissions Trading System to International Aviation’ (2013) 82 *Nordic J Intl L* 187.

⁶ Cf International Law Commission, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto’ (2006) *YB Intl L Commission* vol II 370.

⁷ See eg Vienna Convention on the Law of Treaties (1969) art 21.

⁸ The best know example is the case of *Nuclear Tests (Australia v France; New Zealand v France)* [1974] *ICJ Rep* 457 paras 46, 49.

⁹ D Bodansky, ‘What’s so Bad About Unilateral Action to Protect the Environment?’ (2000) 11 *Eur J Intl L* 339.



lawful *per se*. The adjective ‘unilateral’ simply indicates that a State is acting alone, rather than in concert with others. Whether a State acts alone or in concert says nothing about the legitimacy of its actions. An illegitimate action by a State does not, for example, become legitimate simply because it is carried out with others. What matters is not whether States act alone or in concert, but whether the act in question respects the rights of other States.

The EU decision to include emissions from foreign aircraft within the ETS was widely condemned as a unilateral act.¹⁰ But strictly speaking the EU does not act unilaterally. The EU is, after all, a union of 28 States.¹¹ Moreover, the ETS has been joined by three non-EU Member States, namely Iceland, Liechtenstein and Norway.¹² Thus the heart of the matter was not whether the EU was acting alone or in concert with others, but rather concerned its exercise of legislative jurisdiction, ie its competence to regulate emissions taking place outside of the territory of EU Member States. In other words, at the heart of this controversy is the question of when and how a State or international organisation can legitimately regulate events beyond its territory.

3.1. *Examples of unilateralism*

Unilateral acts by States are far from uncommon.¹³ In fact, States take unilateral measures all the time, and some of these measures even contribute to the development of international law. There are so many examples to choose from that one hardly knows where to start, but the classical example is the 1945 Truman proclamation.

¹⁰ See eg *Joint Statement Between the Civil Aviation Administration of the People’s Republic of China and the Ministry of Transport of The Russian Federation on European Union’s Inclusion of Aviation into European Union Emission Trading Scheme* (27 September 2011).

¹¹ Art 47 of the Treaty on European Union (2008) (previously art 281 of the Treaty Establishing the European Community (2002)) states that ‘The Union shall have legal personality’, which has been interpreted to mean international legal personality. See case 22/70 *Commission v Council* [1971] ECR 263.

¹² Decision of the EEA Joint Committee no 146/2007 of 26 October 2007 amending Annex XX (Environment) to the EEA Agreement.

¹³ P Sands, ‘Unilateralism’, Values, and International Law’ (2000) 11 *Eur J Intl L* 291.



In 1945 international law only allowed States to claim a narrow belt of coastal water stretching three nautical miles from the shore. This limitation was widely accepted and the belt of water was known as the territorial sea. Beyond three nautical miles laid the high seas, over which no State could claim any exclusive rights. Driven by their increasing interest in oil, much of which was beyond the territorial sea, in 1945 the United States laid claim to the continental shelf and the natural resources of the subsoil and sea bed beneath the high seas, far beyond three nautical miles.¹⁴ The Truman proclamation was followed by similar claims by other States and soon came to be seen as the starting point of the law giving coastal States an exclusive right to their continental shelf.¹⁵ In other words, an important part of the law of the sea was instigated by a unilateral act by the United States.

Another prominent example of a unilateral act transforming international law was Canada's extensive claim of legislative jurisdiction over arctic waters. In 1970 Canada claimed competence to regulate environmental issues 100 nautical miles from its shore.¹⁶ The act was clearly inconsistent with pre-existing international law.¹⁷ Crucially, however, only the United States objected, whereas most other States accepted Canada's assertion of jurisdiction and its unilateral act was regarded as an important factor in changing the law. Today, the United Nations Convention on the Law of the Sea accords coastal States the right to legislate and enforce rules on marine pollution in ice-covered areas up to 200 nautical miles from their coast.¹⁸

Both acts are examples of unilateral measures leading to developments in the law of the sea. Byers suggest that these changes were accepted because they were relatively limited in scope and apparently rea-

¹⁴ US Proclamation 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (28 September 1945).

¹⁵ *North Sea Continental Shelf case (Federal Republic of Germany v Denmark/Netherlands)* [1969] ICJ Rep 3 para 47. See also DR Rothwell, T Stephens, *The International Law of the Sea* (Hart Publishing 2010) 195.

¹⁶ By enacting the 1970 Arctic Water Pollution Prevention Act. See generally RB Bilder, 'The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea' (1970) 69 *Michigan L Rev* 1.

¹⁷ M Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 93.

¹⁸ The United Nations Convention of the Law of the Sea (1982), art 234. See also art 220.



sonable.¹⁹ Whatever the reason for their acceptance, these examples are far from unique to the law of the sea. The importance of unilateral measures for preventing international environmental injury has, for example, long attracted the attention of scholars.²⁰ Bodansky emphasises how unilateral acts helped catalyse developments in various areas of international environmental law.²¹ Today, international environmental law textbooks typically devote several pages, if not an entire section, to the role of unilateral measures for the development of the law.²² The seminal example is the Pacific Fur Seal Arbitration of 1893, where the United States' unilateral action to protect seals in the Bering Sea *inter alia* led to recognition of the need for conservation to prevent overexploitation and decline in hunted species.²³

Again, the importance of unilateralism is not unique to international environmental law. Almost any area of international law has been shaped by unilateralism. The introduction of many new technologies, for example, has led to the adoption of unilateral measures. The first State to exercise legislative jurisdiction over an aircraft flying over the high seas was acting unilaterally, as was the first State to fly a satellite over the territory of another State. Changes in values may likewise lead to unilateralism. The first State to stop slave trade was acting unilaterally, as was the first State to prohibit piracy. While some unilateral acts have been met with protest, others have been readily accepted. This naturally raises the question: when may a State act unilaterally and when are unilateral acts likely to be accepted by other States?

4. *Legitimate unilateral measures*

In international law, the notion of legitimacy is often related to the

¹⁹ Byers (n 17) 95.

²⁰ See eg RB Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' (1981) 14 *Vanderbilt J Transnational L* 51.

²¹ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969). Bodansky (n 9) 334.

²² See eg P Sands, J Peel, *Principles of International Environmental Law* (CUP 2012) 399.

²³ P Birnie, A Boyle, C Redgwell, *International Law and the Environment* (3 edn, OUP 2009) 707.



acceptance of an act by other States. When unilateral acts are accepted, they may lead to a change in the law. But not every State's exercise of sovereign rights that may have effect in the territory of another is necessarily contrary to international law. Indeed, unilateral acts interfering with the rights of other States are far from uncommon. In an increasingly globalised world, where the effects of actions carried out in one State may easily reach and be felt in others, jurisdictional conflict is almost unavoidable. Traditionally, the exercise of legislative jurisdiction is only considered contrary to international law if it represents a usurpation of the sovereign powers of a third State.²⁴

4.1. *When may a State act unilaterally?*

The world is divided into jurisdictional spheres.²⁵ The most important division is that based on the acceptance that the powers of a State to legislate, adjudicate and enforce its rules generally end at the national border. Each State is, in other words, delegated a portion of the globe within which it has the right, to the exclusion of any other State, to exercise the functions of a State.²⁶

This neat division works well in theory, but is not always easy to apply in practice.²⁷ The continued reliance on territorial factors in determining the scope of a State's legislative jurisdiction has been increasingly called into question. This is due primarily to the growing complexity and diffusion of transactions and events that trigger jurisdictional inquiry.²⁸ Even so, territoriality is still the most common legal basis for the exercise of legislative jurisdiction.²⁹

²⁴ M Akehurst, 'Jurisdiction in International Law' (1972) 46 *British YB Intl L* 145, 146-147. See also FA Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Recueil des Cours de l'Académie de Droit International* 20.

²⁵ Cf FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 30.

²⁶ As famously expressed by Max Huber in the *Island of Palmas Arbitration (Netherlands v USA)* (1928) 2 *RIAA* 829, 838.

²⁷ The classical example of a dispute is *The Case of the SS 'Lotus' (France v Turkey)* PCIJ Rep Series A No 10.

²⁸ H Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 *American J Comparative L* 631, 632.

²⁹ As stated by the UK Home secretary: 'As a general rule the UK courts only have jurisdiction in respect of offences committed within the UK but there are a number of

The jurisdictional sphere of a State is not, however, impenetrable nor is it entirely territorial. In addition to territory, a State may legislate for extraterritorial events whenever there is a clear connecting factor between itself and the conduct that it seeks to regulate.³⁰ Three additional connecting factors are generally accepted in international law: the principle of personality (both active and passive), the protective principle and the universal principle.³¹

The requirement of a connecting factor is supported by State practice, as argued, for example, by the United Kingdom and the Netherlands in their intervention in *Esther Kiobel et al v Royal Dutch Shell Petroleum Company* before the US Supreme Court:

‘... it is axiomatic that the exercise of civil jurisdiction by a State will always depend on there being between the subject matter and the State exercising jurisdiction a sufficiently close connection to justify that State in regulating the matter and perhaps also to override any competing rights of other States.’³²

Where there is a strong connection, the exercise of legislative jurisdiction is legitimate and should not raise the objections of other States. This is so regardless of whether the act is unilateral or not. In practice, however, it is not always easy to establish a clear threshold for when a State can regulate extraterritorial conduct without being met by protest.

This is particularly noticeable in the dispute over the EU ETS. Several States objected to the inclusion of foreign aircraft within the system as a violation of their sovereignty. In stark contrast, the European Court of Justice found that the EU was merely exercising legislative jurisdiction based on the principle of territoriality.³³ There was, in other words, no agreement on a very basic question: does regulation of aircraft emissions carried out outside of the territory of the regulating State satisfy

exceptions.’ For the exceptions, see United Kingdom Materials of International Law (2006) 77 British YB Intl L 751.

³⁰ C Staker, ‘Jurisdiction’ in M Evans (ed), *International Law* (4th edn, OUP 2014) 315.

³¹ *ibid.*

³² Reproduced in United Kingdom Materials of International Law (2012) 83 British YB Intl L 463.

³³ Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate* [2011] ECR I-13755, para 125.



the territorial principle of jurisdiction? Disagreement on this seemingly basic question indicates that the doctrine of jurisdiction conceals a significant amount of uncertainty.

This uncertainty is also reflected in the literature. Scholars have long debated various ways of assessing the legislative limits of States' actions.³⁴ Some have suggested that all forms of extraterritorial legislative jurisdiction are against international law.³⁵ However, this assertion is contrary to State practice. Most States, for example, prohibit anticompetitive behaviour that has economic effects within their territory, or even behaviour that is intended to have such an effect.³⁶ Others have suggested that international law only imposes restrictions in the criminal sphere.³⁷ This proposition is, again, contradicted by State practice, such as the UK Criminal Justice Act 1988, whereby the offence of torture can be tried by English courts, regardless of the nationality of the offender and of where the act took place.³⁸ The 1988 Act is not the only example of States extending the reach of their criminal law beyond their borders, and indeed several States have adopted similar measures.³⁹ Views on this issue are far and wide apart, although many scholars agree on the requirement of a 'connecting' factor,⁴⁰ whereby a State that is not affected by an activity has no right to regulate it.

The requirement of a connecting factor reflects the traditional view that the doctrine of jurisdiction serves to limit friction and promote orderly relations among States.⁴¹ This makes good sense, but one could

³⁴ For a longer discussion, see Hartmann (n 5) 209-212.

³⁵ Cf Akehurst (n 24) 181 and citations therein. See also BF Havel, JQ Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air and Space L* 3.

³⁶ Cf MM Dabbah, *International and Comparative Competition Law* (CUP 2010) 418 ff.

³⁷ *ibid* 177; G Fitzmaurice, 'The General Principles of International Law' (1957) 92 *Recueil des Cours de l'Academie de Droit International* 218; P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 110.

³⁸ To date, there has only been one successful prosecution for torture under section 134 of the Criminal Justice Act 1988. *R v Zardad* [2007] EWCA Crim 279.

³⁹ See Report of the International Bar Association, 'Legal Practice Division Task Force on Extraterritorial Jurisdiction' (February 2009) 133-200.

⁴⁰ The obvious exception being conduct subject to universal jurisdiction.

⁴¹ Cf R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 56.



question its cogency in relation to global environmental threats, where no one State is principally affected and therefore no State may have a legitimate base on which to act – global warming being the preeminent example.

4.2. *When are unilateral acts likely to be accepted?*

Sometimes competing jurisdictional claims become the object of a dispute between the legislating State and those objecting to the exercise of jurisdiction. While such disputes may be resolved by international tribunals, more frequently they are resolved by acquiescence or agreement between the involved States.

Importantly, agreement may be reached even where the unilateral act was contrary to international law. In fact, in most cases a dispute arises exactly because a unilateral act is perceived to be unlawful. Given the uncertainty surrounding the doctrine of jurisdiction, a State acting unilaterally may not always know in advance how its act will be received. In some cases the response might be obvious. This especially so when unilateral acts are precipitated by lack of consensus in international negotiations, such as those on emissions from aviation, which have so far achieved little in the way of concrete results.

Unilateralism can have a destabilising effect on international relations. When facing the prospect of protest, it is up to each State to weigh the benefits of unilateral action against the costs of that action to the stability of the international law system, and to their national interest.⁴² In this connection, Bodansky suggests several factors that should be taken into account, such as the necessity of the action; the effect on other States; whether a State acts to protect its own environment; and whether the unilateral action could turn into a general rule of international law.⁴³

These all are reasonable considerations, and reasonableness itself has been regarded as an important element in assessing whether a State may exercise jurisdiction.⁴⁴ This does not mean that a State may exercise

⁴² Cf Bodansky (n 9) 346.

⁴³ *ibid* 347.

⁴⁴ See eg *Third Restatement of the Foreign Relations Law of the United States* para 402 (1986). C Ryngaert, *Jurisdiction in International Law* (OUP 2008) 36.



legislative jurisdiction when it is objectively reasonable for it to do so, but rather when it can point to a rule of international law that allows it to do so. These rules may be based on reasonable claims, but it is the practice of States that creates the rule, not the reasonableness of their actions. Thus, even where the exercise of jurisdiction may seem reasonable, it may still be met by protest.

Emissions from aviation are a case in point. The latest report of the Intergovernmental Panel on Climate Change notes how the use of market policies to reduce emissions from aviation is ‘compelling’ to address the rapidly raising emission in this sector.⁴⁵ The EU has vigorously pursued multilateral avenues to address this problem, and eventually chose unilateralism as sub-optimal approach, rather than leaving this rapidly growing source of emissions completely unregulated.⁴⁶ Yet, its actions were still met by strong protests.

5. *An obligation to cooperate?*

When assessing the legality of a unilateral act, international tribunals will often refer to the obligation to cooperate.⁴⁷ This obligation was emphasised by the World Trade Organization’s (WTO) Appellate Body in the *Shrimp-Turtle* cases.⁴⁸ The first case concerned a dispute engendered by the United States’ prohibition of the import of shrimp that had not been caught in compliance with domestic rules protecting endangered sea turtles. Even though the US famously lost this case because its acts were deemed to be discriminatory, the Appellate Body found that there was a sufficient nexus between the migratory and en-

⁴⁵ IPCC, *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014) 63.

⁴⁶ L Rajamani, ‘European Union, Climate Action Hero?’ *The Indian Express* (3 August 2012).

⁴⁷ See eg ITLOS, *Mox Plant Case (Ireland v United Kingdom)* (Provisional Measure Order 3 December 2001) para 82. See also the separate opinion of Judge Rudiger Wolfrum in the case concerning *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Order 8 October 2003) para 92.

⁴⁸ WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R (22 October 2001) WT/DS58/AB/RW.



dangered marine populations involved and the United States.⁴⁹

However, in 2001, the WTO Appellate Body introduced a qualifier concerning its reasoning on the legitimacy of the unilateral act to protect exhaustible natural resources. In this second case, Malaysia argued that the United States had not complied with the original decision, where the Appellate Body had noted the US' failure to engage WTO Members exporting shrimp in 'serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles.'⁵⁰ In Malaysia's view, the Appellate Body's reasoning entailed that unilateral measures were to be regarded as unjustified whenever multilateral avenues had not first been exhausted. The Appellate Body did not reject this argument, but found that, in light of the 'serious, good faith efforts' to negotiate an international agreement, the disputed law no longer constituted a means of unjustifiable or arbitrary discrimination.⁵¹ Thus, at least within the WTO regime, the legitimacy of unilateral acts seems to require prior good faith efforts to reach a multilateral agreement.

In case of the inclusion of emissions from aviation in the EU ETS, it can hardly be disputed that the EU has sought to follow a multilateral approach. After the ICAO Council meeting in November 2012, the EU deferred the application of the ETS to foreign operators for one year, as a 'gesture of good faith'.⁵² Its Commissioner for Climate Action warned that if the ICAO negotiations did not deliver, the EU would revert to its original position.⁵³ However, after the 2013 ICAO decision to produce a proposal for a global market-based measure for aircraft emissions to be implemented by 2020,⁵⁴ the EU ETS was amended so as to cover only emissions from flights within the European Economic Area.⁵⁵ Still,

⁴⁹ *ibid* para 133.

⁵⁰ *ibid* para 166.

⁵¹ *ibid* para 134.

⁵² European Commission (n 4).

⁵³ *ibid*.

⁵⁴ ICAO Press release, 'Dramatic MBM Agreement and Solid Global Plan Endorsements Help Deliver Landmark ICAO 38th Assembly' (4 October 2013).

⁵⁵ Regulation (EU) no 421/2014 of The European Parliament and of The Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions [2014] OJ L129/1.



the amendment requires the EU Commission to report to the European Parliament and Council on the outcome of the ICAO process and propose measures, as appropriate.⁵⁶

It is difficult to tell whether the EU ‘wait and see’ approach was motivated by a perceived legal obligation to cooperate in good faith with other States, or by mere *realpolitik*. The EU was probably driven by both.⁵⁷ The EU ETS amendment explicitly states that the ‘Union is endeavouring to secure a future international agreement to control greenhouse gas emissions from aviation’ and that in order to ensure this objective ‘it is appropriate to take account of developments’ in international fora.⁵⁸ Thus, if there is a general obligation to pursue multilateral avenues, the EU cannot be accused of having failed to comply with it.

The pursuit of multilateral avenues may not, however, be an option in especially urgent or problematic circumstances, such as those of the 1967 British bombing of the *Torrey Canyon* to protect its coastal waters from oil spill. Many unilateral acts that have led to changes in international law have, moreover, been accepted even where were no prior attempts at international negotiations had been made, such as the Truman proclamation and the Canadian protection of arctic waters. In relation to environmental law, some have suggested that there is a customary obligation to cooperate with other States whose interests may be affected.⁵⁹ The WTO Appellate Bodies’ reasoning in the *Shrimp-Turtle* cases seem to suggest that this requirement always applies, regardless of motive. Arguably, however, a distinction should be made between unilateral acts taken for an altruistic motive such as the pursuit of global public goods, as opposed to narrow national interests, although such a distinction may be difficult to make.

6. Conclusion

This note has considered when and how a State or a regional organisation may legitimately take unilateral measures to protect the envi-

⁵⁶ *ibid* para 14.

⁵⁷ Cf A Vihma, A van Asselt, ‘The Conflict Over Aviation Emissions’ [2014] FIIA Briefing Paper 6.

⁵⁸ Regulation (EU) no 421/2014 (n 55).

⁵⁹ See Judge Rudiger Wolfrum (n 47).



ronment. While the term ‘unilateralism’ is often used almost synonymously with illegality, it is not the unilateral nature of an act that determines its legitimacy. Instead, the legitimacy of a unilateral act depends on a series of circumstances and, in some cases, on other States’ reaction.

Where a unilateral act does not affect the rights of other States, it will almost always be legitimate. No State, for example, has complained about the inclusion of emissions from intra-European flights within the ETS. But where a unilateral act affects other States, they might protest. In those cases, the State perceived to be acting unilaterally must show that it has respected the rights of other States. This may be a rather straightforward matter when the State can point to a rule of international law that allows it to act. Reference to the principle of territorial jurisdiction will not, however, necessarily stop the controversy. Firstly, because the application of the principle of territorial jurisdiction does not always lead to clear-cut outcomes. Secondly, because protests might not always be made in good faith.

Prior good faith efforts to negotiate an international agreement may help prevent an international dispute, but they are not always necessary. In this regard, a distinction should be drawn between unilateral acts designed to address a situation in lack of a specific treaty; and unilateral acts designed to pressurise other States into raising environmental standards within an existing treaty regime. In the first kind of instances, unilateral action may lead to the negotiation of a new treaty or the formation of a rule of customary international law. The EU’s inclusion of aviation emissions within the ETS clearly falls within this first category, as at present there is no treaty that specifically regulates emissions from aircraft. In the second kind of instances, instead, the matter is not the negotiation of a new treaty or the formation of customary international law, but the interpretation of extant treaty law. The *Shrimp-Turtle* cases clearly fall within this second category, as WTO law contains detailed rules on free trade, allowing exceptions for the protection of the environment. The cases focused on the interpretation to be given to such exceptions. In sum, the dispute concerning the inclusion of aviation emissions in the EU ETS addressed an altogether different matter than that under consideration in the *Shrimp-Turtle* cases.

Another consideration that is of interest to answer the questions under consideration here is that, even in cases where a State cannot



point to a rule of international law that allows it to act, its action might still be accepted. Indeed, sometimes States have to break the rules to change international law. It might even be argued that in some cases law-breaking is an essential method of law-making. Unilateral acts can lead to developments of both treaty and customary international law. A single unilateral act does not in itself establish a new norm of customary international law, although, if accepted by other States, it might provide evidence of relevant State practice. In most cases when States act unilaterally, their acts are to be interpreted as an 'offer' to change the law.⁶⁰ Seen in this light, the Truman proclamation was an offer for a new way of dealing with ownership of seabed resources, while the inclusion of aviation emissions in the EU ETS may be seen as an offer for a new way of dealing with this specific emissions source.

To conclude, while some unilateral acts may be at odds with extant international law, lawlessness is not in itself an impeding factor to the establishment of a new legal paradigm. Indeed, the traditional doctrine of jurisdiction seems to be increasingly at odds with the need to tackle global environmental problems, such as climate change. At present, the requirement of a link between the State legislating and the matter that it seeks to regulate often leaves multilateralism as the only solution to global problems. While multilateralism is the preferable option, however, the alternative inaction might not be. In other words, in the face of continued inaction, unilateralism may be the only way forward. When a State acts unilaterally without engendering protests, it may succeed in prompting a change in the law, as happened with the Truman proclamation. It remains to be seen whether, with hindsight, the EU's inclusion of emissions from aviation in the ETS will turn out to be another Truman moment.

⁶⁰ AV Lowe, *International Law* (OUP 2007) 39.



The Question:

Towards an Asylum Law of armed conflicts? The Diakité judgment of the Court of Justice of the European Union and its implications

Introduced by Marco Pertile

On 30 January 2014, in the *Diakité* judgment, the Court of Justice of the European Union clearly took position on an issue that lies at the intersection between Asylum Law and International Humanitarian Law. The case concerned the definition of the concept of ‘internal armed conflict’ for the purposes of the granting of subsidiary protection under Council Directive 2004/83/EC of 29 April 2004 (the so-called Qualification Directive).

As is well known, under this directive the recognition of refugee status for nationals of third countries and stateless persons is complemented by measures of subsidiary protection, which are conditioned on the existence of a specific situation of risk for the concerned person. More precisely, a person who does not qualify for refugee status can still be the beneficiary of subsidiary protection if ‘substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm’ (Article 2(e)). The concept of serious harm is then defined by Article 15 of the Qualification Directive which mentions three hypotheses: the death penalty or execution; torture and inhuman treatment; and a final circumstance described as ‘serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.

In the case at hand, Aboubakar Diakité, a national of Ghana, had unsuccessfully sought the recognition of his status as a refugee and, alternatively, the granting of subsidiary protection by the Belgian authorities. In the proceedings at the national level, Mr Diakité claimed that ‘by reason of his participation in protest movements against the ruling

regime' he had endured repression and violence in his country. On a point of law, he argued, *inter alia*, that the situation in Ghana amounted to an internal armed conflict in the sense of Article 15. He also maintained that the concept of internal armed conflict in the Qualification Directive should be interpreted independently of its meaning under International Humanitarian Law.

Faced with the problem of defining the concept of armed conflict in EU Asylum Law, the Belgian *Conseil d'Etat* referred the case to the European Court of Justice. As will be clarified below, the Court did not shy away from dealing with the question and took a bold step affirming the existence of an autonomous concept of 'internal armed conflict' under EU Law. In a nutshell, according to the decision in *Diakité*, the qualification of the concept mentioned by Article 15 needs to be looked for in EU Law rather than in the international law of armed conflict, the very body of rules which finds in the regulation of armed conflicts its *raison d'être* and in the concept of armed conflict its threshold of applicability. The European Judges took the view that the letter of the text of the directive and its teleological interpretation militated in favour of the existence of a concept of armed conflict detached from IHL.

As so often happens with issues related to the interaction between different bodies of rules, the *Diakité* judgment has quickly given rise to an interesting debate on blogs and in legal journals. However, QIL editors are persuaded that there is room to investigate the issue further and that a number of aspects are worth outlining and discussing. What are the precise legal bases of the reasoning of the Court? Is such reasoning persuasive? What are the criteria set out by the Court to identify the existence of an armed conflict? Are they meaningful? What are the consequences of the decision of the Court in terms of protection for asylum seekers? What are the consequences of such a decision for IHL and the interaction between IHL and EU Law?



With a view to answering these questions and stimulating the continuation of a debate on the *Diakité* judgment, QIL asked Alessandro Bufalini (University of Milan-Bicocca) and Claudio Matera (University of Twente) to take a position on (some of) these questions.

As the reader will see, our Authors have different – but not irreconcilable – views on this judgment.



Another parochial decision? The Common European Asylum System at the crossroad between IHL and refugee law in *Diakité*

Claudio Matera*

1. Introduction

The relationship between the EU legal order and the international one has been the focus of attention in recent years. Whilst triggered by the ‘insurrectionist’ attitude of the Court of Justice of the European Union (CJEU) in the *Kadi* saga,¹ the study of the relationship between EU law and the international legal order has covered a plurality of perspectives and approaches.² Without entering into such discussions here, it could be nonetheless concluded that such a relationship is based on the duty to respect international law and the principle of consistent interpretation³ and that the application of these two obligations is conditioned by sector-specific nuances and, ultimately, by the constitutional foundations of EU law.⁴

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¹ Cases T-315/01, *Kadi* and T-306/01, *Yusuf and Al Barakaat*, judgments of the European Court of First Instance of 21 September 2005, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, [2008] ECR I-6351, Case T-85/09, *Kadi v Commission* [2010] ECR II-05177, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v Kadi (Kadi II)*, Judgment 18 July 2013.

² See, for example, E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 416 and S Blockmans and RA Wessel, *Between Autonomy and Dependence. The EU Legal Order Under the Influence of International Organizations* (Springer-T.M.C. Asser Press 2013) 304.

³ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019 para 9.

⁴ This appears to be the significance of the 2008 *Kadi* judgement (n 1). See RA Wessel, ‘Reconsidering the relationship between international and EU Law: towards a content-based approach?’ in E Cannizzaro, P Palchetti and RA Wessel (n 2) 7-33. See also S Blockmans and RA Wessel, ‘The Influence of International organisations on the EU and its legal order: between autonomy and dependence’ in S Blockmans and RA



The present contribution takes its cue from the decision of the CJEU in the *Diakité* case.⁵ In *Diakité*, the CJEU was asked to provide guidance to a national court on the interrelations between a provision of the Qualification Directive⁶ and the notion of ‘internal armed conflict’ stemming from international humanitarian law. The purpose of the request for a preliminary ruling was to assess whether Mr Diakité was entitled to benefit from subsidiary protection, a form of complementary protection that is granted under EU law to third country nationals who do not qualify as refugees.⁷

With its decision on the *Diakité* case, the CJEU seemingly delivered another judgment in which it disconnected the EU legal order from the international one, when it held that the definition of armed conflict provided in international humanitarian law is not designed to identify the situations in which international protection ex Articles 2(e) and 15 of the Qualification Directive are applicable.⁸ This contribution will assess the extent to which the decision of the CJEU can be interpreted as another example of the parochial attitude the CJEU has displayed when called upon to apply notions or rules stemming from international law for the purpose of clarifying the scope of an internal (EU) provision.

Wessel (n 2) 297-312. For a critical analysis of the impact that the Kadi decision of 2008 had see G de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 *Harvard Intl L J* 1. For an analysis of the relationship between the EU legal order and the international one in relation to the development of the Common European Asylum System see V Moreno-Lax, ‘Of Autonomy, Autarky, Purposiveness and fragmentation: The relationship between EU Asylum law and International Humanitarian Law’ in DJ Cantor and JF Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 295-344.

⁵ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, Judgment 30 January 2014.

⁶ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 30 September 2004. That Directive has now been repealed by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 20 December 2011 L337/9. In this contribution references to the Qualification Directive regard the 2004 Directive.

⁷ Art 2 (f) of the Qualification Directive (n 6).

⁸ *Diakité* (n 5) para 23.



This contribution will offer a short overview of the positions that IHL and international refugee law have within the EU legal system (section 2), before turning to the analysis of the *Diakité* affair in which the CJEU found itself at the crossroad between IHL and international refugee law for the purpose of applying the Qualification Directive (section 3). Section 4 will then look into the institutional and substantive consequences of the CJEU decision in *Diakité* and with some conclusions being drawn in section 5.

2. *IHL and the Geneva Convention on the status of Refugees in the EU legal order*

The Geneva Convention of 1951 relating to the status of refugees holds a special position within the EU legal system. By adopting a technique similar to that used in the Maastricht Treaty in relation to the European Convention on Human Rights, Article 78 TFEU is a provision of EU primary law authorising the influence of an external source. More precisely, Article 78 TFEU affirms that for the purpose of developing a common policy on asylum, subsidiary protection and temporary protection to third country nationals the European Union is bound to abide by the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.⁹ This provision makes clear that any legislative instrument or international agreement concluded by the EU must be in accordance with the Geneva Convention and the latter thus emerges as a benchmark of legality, or a normative parameter, that can be invoked to challenge the legitimacy of EU secondary norms under Articles 263 and 267 (b) TFEU. Secondly, the Geneva Convention of 1951 is used as the source of a substantive individual right under Article 18 of the EU Charter of Fundamental Rights

⁹ Art 78 (1) TFEU: The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

(EUCFR).¹⁰ Indeed, Article 18 EUCFR introduces the right to asylum within the EU legal order; however, this innovation must be read in conjunction with, and limited by, the scope of Article 78 TFEU and the existing legislative *acquis* in the field, with the result that the right contained in Article 18 cannot be interpreted as an absolute right independent from secondary legislative acts.¹¹ Yet, it must also be emphasised that Article 18 EUCFR goes beyond the equation between ‘the right to asylum’ and the status of refugee under the Geneva Convention of 1951 since it affirms that the said right ‘shall be guaranteed with due respect for’ the Geneva Convention. This means that the right to asylum ex Article 18 includes a plurality of protection mechanisms (national or international) in which the status of refugee is but one example.¹²

In addition to Article 78 TFEU and Article 18 EUCFR, secondary instruments also systematically refer to the Geneva Convention of 1951 either as a normative source or as a source of interpretation. This is reflected, for example, in the preamble of the Qualification Directive of 2004 and in its recast of 2011¹³ and, more specifically, in a number of provisions of the 2004 and 2011 Directives.¹⁴ As a consequence, the special status of the Geneva Convention of 1951 is also reflected in the case law of the CJEU,¹⁵ but the Court often refers to the Convention in rather general terms and does not renounce the autonomous development of the interpretation of the EU asylum instruments, thus preserving its ‘herme-

¹⁰ Art 18 EUCFR: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.

¹¹ See M den Heijer, ‘Article 18’ in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014) 519-541.

¹² *ibid* 533.

¹³ Paras (2) and (3) of the two instruments are identical and affirm: (2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution. (3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

¹⁴ See, for example, art 12 (1) (a) and art 20 (6) of the 2004 Directive.

¹⁵ See, for example, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salabadin Abdulla and Others v Germany* [2010] ECR I-01493 para 53.



neutic monopoly'.¹⁶ At the same time, it must be borne in mind that the CJEU operates in a fragmented system since the Geneva Convention 'contains no centralized judicial or other enforcement mechanisms, with the exception of the potential interpretative role of the International Court of Justice (ICJ) and the supervisory role of the United Nations High Commissioner for Refugees (UNCHR).'¹⁷ Therefore, the combination of the express references to the Geneva Convention of 1951 in the Treaties and in secondary provisions on the one hand, and the lack of a centralised system of enforcement and interpretation of the Geneva Convention on the other, characterize the special relationship that the Geneva Convention of 1951 has within the EU legal system and make the CJEU, at least potentially, a catalyst for uniform interpretation of asylum law in Europe. Yet, the recent decision of the CJEU in *Qurbani* casts some doubt on the implications arising from the express references to the Geneva Convention of 1951 in the Treaties, since the Court argued, albeit in a slightly tautological manner,¹⁸ that the combined reading of Article 78 TFEU and 18 EUCFR does not unequivocally confer on the CJEU the jurisdiction to interpret any provision of the 1951 convention.¹⁹

Inversely, the position of IHL within the EU legal order is not expressly qualified or defined by the Treaties or the EUCFR; yet, the European Union as a polity first and *qua* legal system second, is increasingly intertwined with the rules stemming from the *corpus iuris* of the Ge-

¹⁶ GF Mancini, 'The free movement of workers in the case law of the European Court of Justice' in D Curtin, TF O'Higgins, D O'Keeffe (eds), *Constitutional Adjudication in European Community and national law* (Butterworths 1992) 67.

¹⁷ G de Baere, 'The Court of Justice of the EU as a European and International Asylum Court', Working Paper 118/2013, Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp111-120/wp118-de-baere.pdf>. See also E Tsourdi, 'What Role for the Court of Justice of the EU in the Development of a European Asylum Policy? The Case of Loss and Denial of International Protection' in (2013) 2/3 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 212-228.

¹⁸ Case C-481/13 *Mohammad Ferooz Qurbani*, Judgment 17 July 2014, paras 24-25.

¹⁹ *ibid.* The decision, however, could be interpreted in the sense that the exclusion of jurisdiction only exists inasmuch as a given provision of the Geneva Convention of 1951 is not expressly mentioned in the relevant piece of EU secondary legislation (para 28); it remains to be seen the extent to which this decision will be consolidated in the future. For an analysis of the *Qurbani* decision see Y Holiday, 'Penalising Refugees: when should the CJEU have jurisdiction to interpret Article 31 of the Refugee Convention?', EU Law Analysis, <<http://eulawanalysis.blogspot.co.uk/2014/07/penalising-refugees-when-should-cjeu.html>>.



neva system.²⁰ Indeed, the EU proactively contributes to the promotion of international humanitarian law (IHL) in a number of ways. First, the EU endorses and promotes the application of IHL with its partners at bilateral level²¹ as well as unilaterally²² and engages with a number of international actors and institutions in this regard.²³ Moreover, IHL influences the development and the implementation of the Union's Common Security and Defence Policy (CSDP). Even though, as observed by Naert, CSDP operations are unlikely to occur in situations that constitute an armed conflict and, as a consequence, IHL rules are unlikely to apply to EU forces, IHL rules may nonetheless be relevant for the parties involved in a crisis in which a CSDP mission operates.²⁴ The proactive role that the EU has carved for itself in the promotion of IHL, however, is not detached from any provision of primary law and, as Garrido-Muñoz suggests, IHL is being constitutionalised within the EU legal order.²⁵ Indeed, there are a number of primary law provisions

²⁰ See A Garrido-Muñoz, 'La Constitutionnalisation du ius in bello dans le droit de l'Union Européenne: vers l'"humanitarisation" progressive de l'action extérieure?' *Revue Suisse de Droit International et Européen* (forthcoming); AS Millet-Devalle (ed), *L'Union Européenne et le droit international humanitaire* (Pedone 2010) 302.

²¹ See for instance IHL-related clauses in a number of recent agreements. For Association Agreements see art 12 of the EU-Georgia Association Agreement: '... 2. The Parties agree that the fight against terrorism must be conducted with full respect for the rule of law and in full conformity with international law including international human rights law, international refugee law and international humanitarian law, the principles of the Charter of the United Nations, and all relevant international counter-terrorism related instruments', OJ 30 August 2014 L261/4 and, in relation to Partnership And Cooperation Agreements, see art 86 (2) (c) of the EU-Iraq Agreement whereby the Parties agree to cooperate on the promotion of human rights and IHL.

²² See, for example, the 2009 Updated European Union Guidelines on promoting compliance with international humanitarian law, OJ 15 December 2009 C 303/12, the 2012 EU Strategic Framework on Human Rights and Democracy of 25 June 2012 (<www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>) and the statements of the spokespersons of the High Representative of the European Union for Foreign Affairs and Security Policy and Vice President of the Commission and of the EU Commissioner for International Cooperation, Humanitarian Aid and Crisis Response on the on the killing of civilians in the Central African Republic of the 28 April 2014 <http://europa.eu/rapid/press-release_MEMO-14-324_en.htm>.

²³ See the volume edited by Millet-Devalle (n 20) for a detailed analysis of the different ways in which the EU interacts with international organisations, NGOs and institutions on IHL issues.

²⁴ F Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations' in E Cannizzaro, P Palchetti and RA Wessel (n 2) 198.

²⁵ Garrido-Muñoz (n 20).



that can be interpreted not only to legitimise the initiatives of the EU in the field of IHL, but also to argue in favour of the existence of a constitutional obligation of the EU to respect IHL rules.²⁶ The constitutional tie between IHL and the EU legal order can be inferred from Articles 3(5) and 21 TEU, which require that the EU must ‘respect the principles of the United Nations Charter and international law’. Far from being a rhetorical exercise, the provisions mentioned above have a normative function and impose, so far as possible, the consistent interpretation of EU secondary norms to international law including, naturally, rules of customary law.²⁷ The constitutional significance of this interpretation of Articles 3 (5) and 21 TEU resides in the fact that, as noted by AG Mengozzi in his Opinion in the *Diakité* case, the application of the principle of consistent interpretation does not depend on the express provision of an act of the institution in that sense, but stems from the constitutional position that the Treaties attribute to international law in the hierarchy of the sources within the EU legal order.²⁸ As a consequence, because the ICJ has recognised the *corpus iuris* of the four conventions as ‘intransgressible principles of international customary law’²⁹, the EU is bound to respect those instruments independently from the fact that the EU is not party to the Geneva Conventions of 1949. As a result of this, it is clear that the EU, as well as national authorities applying EU norms have an obligation, under EU law to respect IHL and interpret, so far as possible, EU legislation in conformity with the four Geneva Conventions of 1949.

Lastly, the constitutional relevance of IHL also emerges in relation to the protection of the right to life under Article 2 EUCFR, Article 2 ECHR and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Again, without entering into the thorny issue concerning the relationship between IHL and human rights,³⁰ suffice it to say that from an EU perspective, the right to life and other non-derogable fundamental rights, as recognised to be applicable also dur-

²⁶ *ibid.*

²⁷ See *Poulsen and Diva Navigation* (n 3).

²⁸ See Opinion of AG Mengozzi in *Diakité* (n 5), delivered on 18 July 2013, para 23.

²⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 79.

³⁰ See, among others, N Ronzitti, *Diritto internazionale dei conflitti armati* (Giappicchelli 2011) 159-163.



ing an armed conflict by international or regional courts, will inevitably impact the EU, either under its activities under the Common Security and Defence Policy (CSDP) or by virtue of the obligation to respect international law and the ECHR.³¹ Moreover, and as argued by Naert, specific obligations pertaining to the protection of human rights during an armed conflict may derive, autonomously, through EU human rights law and with the consequence that these rules would also affect Member States when they execute CSDP operations.³²

The constitutional relevance that IHL and the Geneva Convention of 1951 have in the EU legal order as sketched out above reveals a legal system open to the influence of international sources and respectful of international obligations. However, taking into consideration the fact that IHL and the Geneva Convention of 1951 have an equal standing within the hierarchy of norms of the EU, the question concerning the relationship and the effects of these two international sources within the EU legal order remains open. In other words, the ways in which these two sources affect EU legislation and its application remains to be assessed, especially in relation to the application of the Common European Asylum System. The next section will analyse the *Diakité* case in which the CJEU was seemingly asked to rule, *inter alia*, on the relationship between IHL and the application of the Qualification Directive, a central instrument of the Common European Asylum System (CEAS).

3. On the relevance of IHL for the interpretation and application of the Qualification Directive in the Diakité case

The EU's Qualification Directive establishes (minimum)³³ standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection and establishes two mechanisms of protection. While the first is firmly anchored to the Geneva Convention of 1951, the second is specific to EU law and con-

³¹ In relation to the right to life see the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (n 29) para 25.

³² Naert (n 24) 208-209.

³³ The 2004 Directive was expressly titled as establishing minimum standards for the qualification of refugees and persons entitled to international protection, the 2011 recast of the Directive has repealed such qualitative threshold.



stitutes a subsidiary means of protection established for third country nationals that do not qualify as a refugee, but in respect of whom there are substantial grounds for believing that such persons would face a real risk of suffering serious harm if returned to their country of origin.³⁴ Mr Diakité, a Guinean national who took part in the protest movements against the ruling regime in his country, applied for asylum in Belgium at the beginning of 2008.³⁵ As his applications were rejected by Belgian authorities, Mr Diakité filed a last appeal for cassation before the Belgian *Conseil d'Etat*, in so far as the appealed decisions 'relied on the definition of "armed conflict" used by the International Criminal Tribunal for the Former Yugoslavia [ICTY]' to assess his request for protection under national and EU law.³⁶

Article 15 (c) of the Qualification Directive provides a specific notion of 'serious harm' for the purposes of subsidiary protection under Article 2 (e) of the Qualification Directive.³⁷ In order to qualify for subsidiary protection a third country national needs to demonstrate substantial grounds for believing he or she would face a real risk of suffering *serious harm* if returned to his or her country of origin³⁸ and, more specifically, that he or she would face a serious harm consisting of: (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³⁹

In order to ascertain whether Mr Diakité could be granted subsidiary protection, the Belgian referring court asked the CJEU how subparagraph (c) of Article 15 of the Qualification Directive was to be interpreted. As paragraph 16 of the judgment reveals, the Belgian *Conseil d'Etat* expressly asked the CJEU to ascertain whether

'Article 15(c) of [Directive 2004/83] (must) be interpreted as meaning that that provision offers protection only in a situation of "inter-

³⁴ Art 2 (e) of the Qualification Directive of 2004, now art 2 (f) in the 2011 recast (n 6).

³⁵ *Diakité* (n 5) para 9.

³⁶ *ibid* para 14.

³⁷ Art 2 (e) of the 2004 Qualification Directive (n 6).

³⁸ *ibid*.

³⁹ Art 15 of the Qualification Directive (n 6).

nal armed conflict”, as interpreted by international humanitarian law, and, in particular, by reference to Common Article 3 of the four Geneva Conventions⁴⁰

or whether the notion of ‘internal armed conflict’ ex Article 15 (c) of the Qualification Directive had to be interpreted independently from the IHL definition.

The notion of armed conflict has a pivotal role in IHL insofar as, as Bauloz recently argued, not only do ‘armed conflicts form the contextual background of this branch of international law, but more fundamentally armed conflicts trigger its application.’⁴¹ In the seminal decision on the *Tadic* case,⁴² the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled that ‘an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.’⁴³ Consequently, to speak of an armed conflict not of an international character it is necessary that the conflict reaches a certain intensity and that the armed groups involved display a minimum of organisation.⁴⁴ Article 1 (2) of the Additional Protocol II of 1977 to the Geneva Conventions specifies further that ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’ cannot be considered as armed conflicts (not of an international nature). In the case of Mr Diakité it was precisely the latter threshold that was key for the assessment of his claim for subsidiary protection. Indeed, because the turmoil characterising the last years of the presidency of Lansana Conté and the violence emerging after the *coup d’Etat* of Captian Moussa Dadis Camara in December of 2008 never reached the threshold required by the notion of armed conflict emerging from the *Tadic* decision, the context upon which Mr Diakité was applying for protection resembled a case of internal disturbances.

⁴⁰ *Diakité* (n 5) para 16.

⁴¹ C Bauloz, ‘The Definition of Armed Conflict in Asylum Law’ (2014) 12 *J Intl Criminal J* 836.

⁴² *Prosecutor v Tadic* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (Appeals Chamber, 2 October 1995) para 70.

⁴³ *ibid.*

⁴⁴ *ibid.* The ICTY speaks of ‘protracted and large-scale violence’.



With its decision of the 30 January 2014 the CJEU held that the IHL definition of armed conflict was not designed to identify situations in which subsidiary protection ex Article 15 (c) of the Qualification Directive has to be granted and thus disconnected the application of the Qualification Directive from the notion of ‘armed conflict not of an international character’ used in IHL. The Court of Justice based its reasoning on two main points. Firstly the CJEU considered that the EU legislature used in Article 15 (c) the phrase ‘international or internal armed conflict’ as opposed to the existing distinction made by IHL between ‘international armed conflict and armed conflict not of an international character’. On the basis of this distinction the CJEU concluded that the ‘EU legislature wished to grant subsidiary protection not only to persons affected by “international armed conflicts” and by “armed conflict not of an international character”, as defined in international humanitarian law, but also to persons affected by internal armed conflict, provided that such conflict involves indiscriminate violence.’⁴⁵ However, this semantic rationale is not very convincing. Indeed, national courts of EU Member States and scholars have used other expressions of Article 15 (c) to argue the opposite, i.e. the relevance of IHL for the interpretation and application of Article 15 (c) by virtue of the fact that the EU provision mirrors some of the IHL terminology.⁴⁶ Moreover, the semantic distinction established by the CJEU appears even less convincing if one takes into consideration that in the *Tadic* decision, the ICTY uses the expression ‘international or internal armed conflict’ and not the formula ‘armed conflict not of an international character’ codified in the Geneva system.⁴⁷

With its second point the CJEU developed a more convincing argument. The CJEU argued, similarly to Advocate General Mengozzi, that Article 15 (c) of the Qualification Directive should not be interpreted on the basis of IHL because the two notions ‘pursue different aims and establish quite distinct protection mechanisms.’⁴⁸ Two aspects of this argumentation can be further analysed, as emerges from the following paragraph:

⁴⁵ *Diakité* (n 5) para 21.

⁴⁶ See Bauloz (n 41) 841.

⁴⁷ In the second indent of paragraph 70 of the *Tadic* decision the Tribunal affirms: ‘These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts.’

⁴⁸ *Diakité* (n 5) para 24.

‘While international humanitarian law is designed, *inter alia*, to provide protection for civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not – by contrast with Article 2(e) of Directive 2004/83, read in conjunction with Article 15(c) of that directive – provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties. As a consequence, the definitions of ‘armed conflict’ provided in international humanitarian law are not designed to identify situations in which such international protection would be necessary and would thus have to be granted by the competent authorities of the Member States.’⁴⁹

In this paragraph the CJEU appears to develop and strengthen its distinction based on the different objectives of the IHL definition of ‘armed conflict not of an international character’ and the definition of ‘internal armed conflict’ under Article 15 (c) of the Qualification Directive. First, the CJEU operates its distinction *ratione materiae*: affirming that the disconnection between the notion applicable in IHL and the one applicable for the purpose of Article 15 (c) resides in the fact that the IHL definition governs the conduct of belligerents during an armed conflict with a view, *inter alia*, to protecting civilians and restricting the effects of war. The second distinction introduced by the CJEU is, on the other hand, *ratione territorii*: the CJEU affirms that whilst IHL regulates the conduct of national authorities and belligerent groups that are present in the territory where the armed conflict takes place with a view, *inter alia*, to protecting civilians residing within the conflict areas and other territories controlled by the parties to the conflict, the Qualification Directive seeks to provide assistance and protection to those individuals who are *outside* ‘both the conflict zone and the territory of the conflicting parties’.

On the basis of the aforementioned arguments the CJEU finally concluded that it was not possible, without disregarding the different objectives of IHL and the Qualification Directive, to ‘make eligibility for subsidiary protection conditional upon a finding that the conditions for applying international humanitarian law have been met’⁵⁰ and put forward the definition of internal armed conflict for the purpose of ap-

⁴⁹ *ibid* para 23.

⁵⁰ *ibid* para 26.



plying Article 15 (c) of the Qualification Directive, affirming that “internal armed conflict” is a situation in which a State’s armed forces confront one or more armed groups or in which two or more armed groups confront each other.”⁵¹ The next section will analyse the extent to which the disconnection established by the CJEU served the purpose of enhancing the scope of application of Article 15 (c) of the Qualification Directive and will also assess the extent to which this decision could be interpreted as another claim of autonomy by the CJEU.

4. *More than a parochial attitude: extending protection beyond the international legal framework*

The judgment of the CJEU in *Diakité* innovatively widens the scope of the application of Article 15 (c) of the Qualification Directive in two ways. In relation to the first aspect, the CJEU has signalled to all national authorities called upon to apply the Qualification Directive, that the reference to internal armed conflicts contained therein must be disconnected from the notion applicable according to IHL and provided an autonomous definition of internal armed conflict to be applied for the purpose of granting subsidiary protection to third country nationals. In the previous section it was argued that the semantic rationale used by the CJEU to depart from the notion of internal armed conflict was not convincing and, conversely, the arguments of the CJEU appeared more convincing when it anchored its reasoning to the different purposes of the two regimes in question.

Looking into the definition provided by the CJEU, it could be argued that it borders on the obvious, since it does not provide parameters concerning the intensity or the duration of a given confrontation in order to qualify it as an internal conflict.⁵² Yet, as Carlier has recently observed, it is precisely in this simplicity that the importance of the decision resides.⁵³ Indeed, with its definition, the CJEU has stripped down

⁵¹ *ibid* para 28.

⁵² The CJEU defined an internal armed conflict as ‘a situation in which a State’s armed forces confront one or more armed groups or in which two or more armed groups confront each other’ para 28.

⁵³ JY Carlier, ‘Guerre et paix pour les demandeurs d’asile. A propos de l’arrêt *Diakité* de la Cour de Justice’ (2014) 14 *Journal des Tribunaux* 237-239. The author

the notion of internal armed conflict to its minimum, so as to exclude the necessity of having to assess the intensity of such confrontations, the level of organisation of the armed forces involved and whether the conflict has lasted for a specific length of time.⁵⁴ Conversely, the CJEU affirms that for the purpose of applying Article 15 (c) of the Qualification Directive the central element is constituted by another threshold contained therein: the notion of ‘indiscriminate violence’. In this regard, and building upon its previous decision in the *Elgafaji* case,⁵⁵ the CJEU held that the protection mechanism of Article 15 (c) is triggered whenever the degree of indiscriminate violence of an internal armed conflict ‘reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or, as the case may be, to the relevant region, would – solely on account of his presence in the territory of that country or region – face a real risk of being subject to that threat.’⁵⁶ However, it remains to be seen how the CJEU and national courts will interpret, from a substantive perspective, the seemingly oxymoronic relationship between ‘serious and individual threat’ on the one side and a situation of ‘indiscriminate violence’ on the other. To date, the CJEU has shied away from clarifying this crucial aspect for the application of the subsidiary protection mechanism, with the result that national authorities called to apply Article 15 (c) of the Qualification Directive have no guidance from the CJEU.

Paragraph 31 of the *Diakité* judgment, considers the relationship between individual threat and indiscriminate violence in the following manner: ‘the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.’⁵⁷ The variable dynamic described by the CJEU, however, remains undefined since the CJEU does not pro-

argues that: ‘Si la définition paraît simple et évidente, c’est bien par son ombre qu’elle importe. Il faut y lire en creux les critères que la Cour n’impose pas pour qu’il y ait conflit armé interne, critères qu’elle exclut même expressément dans la suite de l’arrêt et dans son dispositif’(at 238).

⁵⁴ *Diakité* (n 5) paras 32, 34.

⁵⁵ Case C-465/07 *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921.

⁵⁶ *Diakité* (n 5) para 30.

⁵⁷ *ibid* para 31.



vide the criteria to determine the level of indiscriminate violence nor the level to which a person seeking protection must be impacted in order to be recognised as a person in need of subsidiary protection.⁵⁸ As a result of this decision, the application of Article 15 (c) remains an equation with variables on both sides, for which the CJEU does not provide the concrete criteria to solve the jigsaw. And even though it could be inferred that when Article 15 (c) mentions a ‘civilian’s *life or person*’, it intends to refer to fundamental rights, such as those protected by the EUCFR, the types of rights covered by this provision and the level of threat to their enjoyment remain questions to be defined. It is on the other hand evident that the solution to these crucial issues cannot be left to the dispersed application of national jurisdictions without posing problems of consistency and legitimacy within the CEAS.⁵⁹

With the intention of maximising the scope of subsidiary protection, the disconnection established by the CJEU between Article 15 (c) of the Qualification Directive and IHL has been welcomed by scholars concerned with EU asylum law.⁶⁰ In this respect the *Diakité* decision contributes to the achievement of a higher level of approximation of the rules on the recognition and content of international protection on the one side,⁶¹ and harmonises a key notion for the purpose of applying Article 15 (c) amongst the Member States of the European Union on the other. Yet, one might wonder whether these two results could also have been achieved without operating such a disconnection. Whilst there is no doubt that the different purposes of IHL and the Qualification Di-

⁵⁸ For a critical analysis of these substantive aspects see See V Moreno-Lax (n 4) and JF Durieux, ‘Of War, Flows and Flaws: A reply to Hugo Storey’ (2012) 31 Refugee Survey Q 161-176.

⁵⁹ For an analysis of the different approaches emerged within two EU Member States see H Lambert, T Farrel, ‘The Changing Character of Armed Conflict and the Implications For Refugee Protection Jurisprudence’ (2010) 22 Intl J Refugee L 237. Already the 2007 UNHCR report showed that art 15 (c) of the Qualification Directive was being interpreted and applied divergently within the EU, also in relation to applicants coming from the same region. See UN High Commissioner for Refugees (UNHCR), *Asylum in the European Union. A Study of the Implementation of the Qualification Directive* (November 2007) 76 <www.refworld.org/docid/473050632.html>.

⁶⁰ See C Bauloz (n 41), JY Carlier (n 53) and J Larik, ‘Protection from internal armed conflict in EU law: the Diakité case’ in European Law Blog, 12 February 2014 <<http://europeanlawblog.eu/?p=2191>>.

⁶¹ See recital (10) of the 2011 recast of the Qualification Directive (n 6).



rective were analysed and convincingly used as an argument to operate the said disconnection,⁶² the CJEU could have alternatively acknowledged the existing IHL rules and decisions of international tribunals on the definition of internal armed conflict as an ‘indicative framework’ from which the specific rules on the application of the Qualification Directive could be derived. However, by doing so the CJEU would have entered troubled waters and could have jeopardised the uniform application of the Qualification Directive internally, since with this solution, national authorities would have been empowered to condition the application of EU law on the basis of their interpretation of the different IHL rules; therefore, this solution would likely have blurred the relationship between IHL rules and the Qualification Directive in the long run. Finally, another possibility would have been to consider, for the purpose of defining when and where an internal armed conflict occurs, and at least as a reference, the determinations ex Article 39 of the UN Charter made by the UN Security Council. Since the latter case covers also and *inter alia*, internal armed conflicts the CJEU could have used this bridge to uphold its commitments towards the international community and the UN ex Articles 3 (5) and 21 TEU. However, and again, using this path would also have posed greater challenges to the CJEU. Indeed, because of the level of discretion retained by the Security Council on the matter, choosing such a path would have been to the detriment of the effective and uniform application of EU law on the one hand, and the effective protection of individuals on the other. Possibly, then, by operating the disconnect between the Qualification Directive and IHL the CJEU has opted for the simplest and most effective way to attain the objectives of the EU whilst avoiding any substantive future tension between the EU legal order and the international one in relation to the definition of ‘internal armed conflict’. In this sense, the decision of the CJEU to disconnect the Qualification Directive from IHL is to be welcomed for having preserved the proper functions of the two branches of law in question from undue influences rather than as a manifestation of the autonomy of the EU legal order against external influences.

⁶² Especially in the detailed Opinion of AG Mengozzi (n 28), paras 17-80.



5. *Conclusion: the ambiguous results of disconnecting the Qualification Directive from IHL*

This contribution took its cue from the growing scholarly attention given to the relationship between the EU legal order and the international one and sought to analyse the extent to which the *Diakité* decision could be interpreted as another parochial decision of the CJEU to the detriment of the principle of respect of international law as established by the EU Treaties. While it was argued that the EU legal order is open, in principle, to the influence of the Geneva Convention of 1951 and IHL, it was also argued that the *Diakité* case was less connected to these two external sources than what could be inferred *prima facie*. As a result of this, the disconnection established by the CJEU was convincingly anchored to the specific objective of helping national authorities in the application of Article 15 (c) of the Qualification Directive, and the Court chose to set aside the question on the relationship between IHL and subsidiary protection, in order to maximise the scope of protection offered by the Directive. Moreover, the decision of the CJEU should bring to an end the existing discrepancies on the application of Article 15 (c) of the Qualification Directive by the national authorities of the EU Member States.⁶³

However, it also emerged that the decision of the CJEU in *Diakité* and the disconnection established between IHL and EU asylum law leaves a number of questions unanswered. Firstly, in relation to the disconnection itself, the CJEU has not clarified what the autonomous notion of internal armed conflict entails for the purpose of applying Article 15 (c) of the Qualification Directive. Secondly, the CJEU also missed an opportunity to clarify the relationship between the notion of indiscriminate violence and the level to which a person seeking subsidiary protection within the EU, must prove that they are affected by it. Taking these two factors into account, one could argue that the CJEU actually lifted the only substantive, and relatively clear, point of reference that national authorities had to apply Article 15 (c) of the Qualification Directive, ie the notion of internal armed conflict as developed within the context of IHL. Indeed, whilst the disconnection offered the CJEU the opportunity to develop a holistic and EU-centred approach

⁶³ See (n 59).

for the interpretation and application of Article 15 (c) of the Qualification Directive, the CJEU has actually failed to seize this opportunity. Instead, interpreters and practitioners of EU asylum law are left without any clear indication on the substantive conditions upon which Article 15 (c) can be applied.

In conclusion, the outcome of the *Diakité* decision raises mixed feelings. Far from being a parochial decision regarding the relationship between the EU legal order and the international one, *Diakité* emerges as an incautious one. Taking into consideration the existing gaps within the Common European Asylum System on the one hand, and the constitutional relevance that IHL, the Geneva Convention of 1951 and regional instruments on human rights protection have on the EU legal system on the other, European Union asylum law will undoubtedly need to integrate external norms to enhance its legitimacy in the future; from this point of view, *Diakité* stands out as a missed opportunity.



An autonomous notion of non-international armed conflict in EU Asylum Law: Is there any role for International Humanitarian Law?

*Alessandro Bufalini**

1. Introduction

Under the law of the European Union, establishing the scope and extent of the concept of non-international armed conflict is essential in determining the limits and the extension of the subsidiary protection granted to those people fleeing their country, who are not protected by the Geneva Convention on the status of refugees. In the application of the EU Qualification Directive of 29 April 2004¹ which sets out the standards for granting that protection for asylum seekers, domestic jurisdictions have often fluctuated between a notion of internal armed conflict which reflects the definition existing in international humanitarian law and a wider interpretation which would allow a more extensive application of the European Directive. Negative consequences in terms of equal treatment of persons eligible for subsidiary protection are self-evident. To face these incoherencies, the Recast Qualification Directive of 13 December 2011 underlines as a main objective of European legislation that of ‘ensur[ing] that Member States apply common criteria for the identification of persons genuinely in need of international protection.’²

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¹ Directive 2004/83/EC of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 30 September 2004.

² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or



Departing from the concept existing under international humanitarian law, the Court of Justice of the European Union (CJEU) has recently spelt out an autonomous notion of internal armed conflict.³ The purpose of the present contribution is to show in which measure the case law of the CJEU and that of international criminal tribunals adopts a differing definition of non-international armed conflict. After examining these different interpretations of the notion of ‘conflict not of an international character’, attention will be given to the potential fragilities and drawbacks in terms of legal certainty in adopting a definition that diverges from the concept that has already acquired a precise meaning in international humanitarian law. From a more general perspective, notwithstanding the fundamental goal of granting wider protection for asylum seekers in light of the object and purpose of the Qualification Directive, the legal reasoning underlying the adoption of an autonomous concept raises some concerns and possible criticisms as regards the relationship between international and EU law.

2. *The definition of non-international armed conflict in international humanitarian law*

In determining the notion of armed conflict not of an international character, the thorniest issue has traditionally been related to the assessment of the threshold of violence required. As is well-known, the distinction focuses on whether the situation of violence is merely one of internal strife or civil disturbance or rather whether it should be classified as a non-international armed conflict, leading to the application of international humanitarian law.

Common Article 3 to all four 1949 Geneva Conventions does not contain a precise notion of armed conflict not of an international character. Like many other concepts, the specific meaning has been elaborated upon by the judicial activity of international criminal tribunals.

for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L337/9 20 December 2011.

³ Case C- 285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, Judgment 30 January 2014.



According to the International Tribunal for the Former Yugoslavia (ICTY) in its seminal *Tadic* decision of 2 October 1995, a non-international armed conflict is ‘a situation of protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.’ In other words, the armed conflict has to exceed a certain threshold of intensity and an organised armed group has to be engaged.⁴ These are the criteria to determine whether an internal armed conflict is taking place and, as a consequence, whether Common Article 3 to all four 1949 Geneva Conventions applies.

The elements of the notion have since then been refined through further judicial decisions. In particular, a great number of factors have been identified to meet the two criteria. Among many others, the duration of the confrontation, the type of weapons and the number of casualties are relevant elements in assessing the intensity of the armed conflict. Other elements concerning the organisational requirement include a command structure, the control of certain territories or the capacity to plan and coordinate military operations.⁵

As noted by the Pre-Trial Chamber I of the International Criminal Court in the *Lubanga* case, the threshold for the application of Common Article 3 which emerged from the ICTY jurisprudence, partly echoes the notion set forth in Additional Protocol II to the Geneva Convention of 8 June 1977 as regards the two fundamental criteria, the intensity of the conflict and the organization of the parties. However, in the definition fleshed out by the ICTY, ‘the ability to carry out sustained and concerted military operations is no longer linked to territorial control.’⁶ Nor, according to the Pre-Trial Chamber, is territorial control part of the definition contained in the Rome Statute.⁷ In addition, from the Pre-Trial

⁴ In fact, as regards the Former Yugoslavia, ‘[T]here has been *protracted, large-scale* violence between the armed forces of different States and between governmental forces and *organized* insurgent groups’, *Prosecutor v Tadic* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (Appeals Chamber, 2 October 1995) para 70 (emphasis added).

⁵ *Prosecutor v Ramush Haradinaj, Idriz Blaj & Lahi Brahimaj* (Judgment) IT-04-84-T (Trial Chamber I, 3 April 2008) paras 49, 60.

⁶ *Prosecutor v Lubanga Dyilo* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) paras 229–237.

⁷ *ibid*: ‘the lack of a necessary link with the control of a certain territory in relation to the requirement of an organizational structure of the parties is also confirmed in the

Chamber's perspective, this statutory provision does not include the requirement that the organised armed groups are 'under responsible command', as set out in Article 1 (1) of Additional Protocol II.⁸

Indeed, the definition set forth in Additional Protocol II was already narrower than the one provided for in Common Article 3 to the Geneva Conventions of 1949. The difference was based not only on the territorial control requirement and the command structure of the organised armed group, but also, and in particular, on the scope of the notion contained in the Geneva Conventions which – as reflected in Article 8(2)(f) of the Rome Statute – can be applied to conflicts between non-State armed groups and not necessarily imply the involvement of State armed forces. Apart from some criticisms on the ambiguous drafting of the Rome Statute, the prevailing doctrine recognizes that the notions of non-international armed conflict in the Rome Statute and the one emerging from the case law of the international criminal tribunals specifying the scope of application of Common Article 3 are 'substantially the same.'⁹

As regards the definition of non-international armed conflict in international humanitarian law, it is therefore possible to assert that the notion contained in Common Article 3, as significantly clarified and specified by the case law of international criminal tribunals, undoubted-

interpretation of art 8(2)(f) of the Rome Statute which broadly defines the notion of conflicts not of an international character.'

⁸ *Prosecutor v Lubanga Dyilo* (Judgment Pursuant to Article 74) ICC-01/04-01/06-2842 (Trial Chamber I, 14 March 2012) para 536. The material field of application of the Additional Protocol II relates to a conflict 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol' (art 1(1)). Para 2 – reflected in art 8 (d) ICC Statute – specifies that '[T]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

⁹ D Fleck, *The Handbook of International Humanitarian Law* (OUP 2013) 589; C Kress, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel YB Human Rights* 175; for a detailed analysis of this approach see A Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8 (2)(f)' (2008) 12 *J Conflict Security* L 419 and D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012).



ly includes prolonged armed confrontations between governmental authorities and organised armed group or between such groups.¹⁰ The notion instead has a different and narrower meaning according to Additional Protocol II, limiting its scope of application.

3. *The notion of internal armed conflict in EU asylum law and its application by domestic courts*

The European Union grants asylum-seekers more extensive protection than the one provided for in the 1951 Refugee Convention. Whereas the latter is notoriously focused on the discriminatory character of the persecution suffered by the people fleeing their country, the wider protection offered by the European Union directives is grounded on more general and inclusive humanitarian principles and the idea of *de facto* refugees.¹¹ In particular, the Qualification Directive of 29 April 2004 introduced a form of complementary and subsidiary protection for people who face a real risk of suffering serious harm, irrespective of the discriminatory character of the threat (Article 2(e)).

The definition of serious harm relevant for our purposes is contained in Article 15 (c). According to this provision, serious harm could arise from a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’

The first decision related to the interpretation of the scope of the subsidiary protection granted under Article 15 (c) resulted from the *Elgafaji* case. In this ruling, the ECJ clarified and importantly interpreted crucial terms of Article 15 (c) such as those of ‘individual threat’ and ‘indiscriminate violence’. Even though the Court did not directly deal with the notion of internal armed conflict, it paid crucial attention to ‘the degree of indiscriminate violence characterizing the armed conflict’ in order to test ‘the existence of a serious and individual threat’ for the

¹⁰ In this sense, International Committee of the Red Cross, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law’, Opinion Paper, March 2008, <www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

¹¹ H Lambert, ‘The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence’ (2013) 25 Intl J Refugee L 208.



civilian returning to his country.¹² From this perspective, the relevance of the intensity of violence seems to prevail over other elements which could determine the existence of an armed conflict.

In the same case, the ECJ insisted on the nature of Article 15 (c) as an ‘autonomous concept’.¹³ It might be a consequence of this conceptual autonomy that the Court did not make any reference to the notion of armed conflict in international humanitarian law or to other possibly relevant concepts stemming from international criminal law. For instance, as regards the applicable definition of armed conflict, no relevance was given to the parties involved in the conflict, nor to the elements identified by the ICTY in order to test the degree of intensity of the armed confrontations.

Among EU Member States, various domestic jurisdictions have been confronted with the application of the Qualification Directive and as a consequence with the relevant interpretation of the notion of internal armed conflict.

In 2009, the United Kingdom Asylum and Immigration Tribunal offered further confirmation of the importance given to the intensity of the violence rather than to the peculiar nature and origins of the armed conflict or the structure and organisation of the parties involved. In denying the humanitarian protection granted under the Qualification Directive in relation to the situation in Afghanistan, the Tribunal held that ‘the real focus of attention is on the intensity of the indiscriminate violence, rather than on the nature of the conflict giving rise to the situation in which such violence exists.’¹⁴

More clearly, this approach was followed by the Court of Appeal of the United Kingdom¹⁵ and then elaborated upon by the Asylum and Immigration Chamber, which stated that ‘armed conflict and indiscrim-

¹² Case C-465/07 *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921 para 43. For an accurate analysis of the case and further considerations on national jurisprudence see R Errera, ‘The CJEU and Subsidiary Protection: Reflections on Elgafaji – and After’ (2011) 23 *Intl J Refugee L* 93 and H Lambert, T Farrell, ‘The Changing Character of Armed Conflict and the Implication for Refugee Protection Jurisprudence’ (2010) 22 *Intl J Refugee L* 237.

¹³ *Elgafaji* (n 12) para 28.

¹⁴ *GS (Article 8 – public interest not a fixity) Serbia and Montenegro* [2005] UKAIT 121 para 56, <https://moj-tribunals-documents-prod.s3.amazonaws.com/decision/pdf_file/38081/2005_ukait_00121_gs_serbiaandmontenegro.pdf>.

¹⁵ *QD (Iraq) v Secretary of State for Home Department* [2009] EWCA Civ 620.



inate violence are not terms of art governed by IHL, but are terms to be generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice.¹⁶ In this case, the pivotal elements to determine the outline of the notion of internal armed conflict are the purpose and the objective that the Directive is meant to fulfil.

In a subsequent proceeding, the Federal Administrative Court of Germany had a similar but more nuanced approach. In fact, it deemed it incorrect to determine ‘the characteristic of an armed conflict entirely in isolation from the previous understanding of this concept in international humanitarian law.’¹⁷ However, even though these characteristics can ‘be of significance as an indicator of the intensity and constancy of the conflict’, they are not decisive in assessing the existence of an internal armed conflict under the Qualification Directive.¹⁸ For instance, the parties do not need to have ‘such a high level of organisation as is necessary to satisfy the requirements under the Geneva Conventions of 1949 and for the intervention of the International Red Cross’, nor ‘must [they] exercise effective control over a portion of the state’s territory.’¹⁹

Conversely, other national tribunals consider the notion of internal armed conflict under the Qualification Directive as reflecting the characteristics of the existing definition in international humanitarian law. As regards the situation in Darfur, for example, the former French *Commission des recours des réfugiés* (now succeeded by the *Cour nationale du droit d’asile*) has recognised the application of the Qualification Directive on the grounds that the conflict matched the ‘critères de conflit armé interne énoncés à l’article 3 de la convention de Genève du 12 août 1949.’²⁰ Also the Dutch Supreme Court in Asylum Law, denying the existence of an internal armed conflict in Kosovo in November

¹⁶ Upper Chamber (Immigration and Asylum Chamber), *HM et al (Article 15(c) Iraq* GC 2010 UKUT 331(IAC) para 89.

¹⁷ *Z.G. v The Federal Republic of Germany*, Federal Administrative Court, Judgment of the Tenth Division of 27 April 2010 – BVerwG 10 C 4.09 para 24, see translation in ‘Case Law, *Z.G. v The Federal Republic of Germany*’ (2011) 23 Intl J Refugee L 113.

¹⁸ *ibid* para 23.

¹⁹ *ibid*.

²⁰ CRR, Case 538807, *Azine Ahmed* (22 November 2005) 54, <www.refworld.org/docid/4dad9c022.html> (summary).

2006, ruled that ‘on the basis of Common Article 3 of the 1949 Geneva Conventions and Article 1 of the Second Protocol, it must be concluded that there is an internal armed conflict as meant in Article 15(c) if an organised armed group under responsible commanding order is capable of executing, on the territory of a country or a part thereof, military operations against the armed forces of the authorities of that country.’²¹

In the same vein, the Swedish Migration Court of Appeal adopted a similar restrictive definition of internal armed conflict requiring, in addition to a certain level of intensity of the violence against the civilian population, the involvement of an organized group which, as envisaged by the Additional Protocol II, must also have territorial control.²²

This brief overview of a few domestic interpretations of the meaning of internal armed conflict reveals the lack of clarity in the definition contained in the Qualification Directive and the need to ascertain whether the notion has to be intended as reflecting the concept emerging from the case law of the international criminal tribunals (or an even a narrower one stemming from Additional Protocol II) or rather a different and possibly wider definition.

On 30 January 2014, the Court of Justice of the European Union answered this question. In the *Diakité* case, in fact, the Court had specifically been asked to clarify the exact meaning of the expression ‘internal armed conflict.’ The Court, following its previous line of reasoning grounded on the autonomy of the concept of armed conflict, held it unnecessary that the conflict ‘be categorised as “armed conflict not of an international character” under international humanitarian law.’²³ According to the ruling of the Court, quite basic conditions have to be ascertained in order to state the existence of an armed conflict under the Qualification Directive, that is ‘if a State’s armed forces confront one or more armed groups or if two or more armed groups confront each oth-

²¹ Dutch Council of State, Case 200608939 *ABRvS* (20 July 2007) 1 Administratiefrechtelijke Beslissingen 271, reported in the Study on the ‘Conformity Checking of the Transposition by Member States of 10 EC Directives in the sector of asylum and immigration’ done for DG JLS of the European Commission (contract JLS/B4/2006/03).

²² Swedish Migration Court of Appeal, 22 February 2011, UM 10061-09 <www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-22-february-2011-um-10061-09#content>.

²³ *Diakité* (n 3) para 26. The reference to the use of an autonomous notion has been explicitly affirmed in Advocate General’s Opinion, delivered on the 18 July 2013, para 81.



er.²⁴ In addition, as has already emerged, important attention has to be paid to the intensity of the generalized violence existing in the country, more so than to the level of gravity of the armed conflict. From the Court's perspective, in fact, it is not essential

‘to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organization of the armed forces involved or the duration of the conflict.’²⁵

In other words, the Court's idea of the existence of an internal armed conflict solely focuses on the level of generalized and indiscriminate violence to which the individual would be exposed. Any assessment concerning the nature or the intensity of the armed conflict, the parties involved or their organizational structure is irrelevant. Comparing the ‘European’ definition of internal armed conflict with the notion stemming from international humanitarian law, differences might thus be summarized into three main elements. The threshold identified to assess the existence of an internal armed conflict is lower inasmuch as it does not require an organised group, an assessment of the intensity of the armed violence and, strictly related to this second parameter, a particular duration of the conflict. The first element is probably the most relevant since it allows the inclusion of cases of protest movements in the notion. As regards the second criterion, it is not easy to concretely distinguish the intensity of the armed violence from the more general level of violence existing in the country due to confrontations among armed groups. In this regard, recourse to the indicators already spelt out in the case law of the international criminal tribunals might be necessary. Admittedly, and in contrast to the Court's perspective, the third element is not considered a constitutive element of the existence of a non-international armed conflict in international humanitarian law, even though it could be a relevant criterion when assessing the intensity of the conflict. On the contrary, it has to be observed that the temporal factor could be decisive in light of the aims of the subsidiary protection

²⁴ *Diakité* (n 3) para 28.

²⁵ *Diakité* (n 3) para 35.

which can be granted only on condition that the individual is threatened by the risk of serious harm.

Although the final result of this approach aimed at expanding the notion of internal armed conflict and, consequently, the protective scope of the European legislation is appreciable, not all the arguments supporting the line of reasoning of the Court are convincing. In particular, it is difficult to share the insistence of the Court on the particular wording of the Qualification Directive which would induce the interpreting body to consider the reference to the notion of internal armed conflict as neatly separate from the international humanitarian law concept of armed conflict not of an international character. For the sake of clarity, let us consider the relevant part of the judgment. According to the Court,

‘the EU legislature has used the phrase “international or internal armed conflict”, as opposed to the concepts on which international humanitarian law is based (international humanitarian law distinguishes between “international armed conflict” and “armed conflict not of an international character”).’

Considering the different wording of Article 15 (c) as a departure from the notion of armed conflict not of an international character appears to be a specious and unfounded argument, particularly bearing in mind that international criminal tribunals have frequently employed the expression ‘internal armed conflict’ as equivalent to that of conflict not of an international character normally used in drafting the relevant treaties.²⁶ Moreover, since the common understanding of a conflict not of an international character is basically an internal conflict, and since this meaning has always been intended, it is sufficient to visit the website of the International Committee of the Red Cross to see how these terms can be used interchangeably.²⁷ The drafting of Article 15 (c) should have been clearer in underlining the reasons for the linguistic choice, if the real aim of such a different wording was to depart from the com-

²⁶ For example, in *Tadic* (n 4) para 30 or in *Prosecutor v Furundzija* (Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment, Lack of Subject Matter Jurisdiction) IT-95-17/1 (29 May 1998) paras 5-6.

²⁷ For example at <www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>.



monly intended meaning of internal armed conflict, ie conflict not of an international character. The ‘textual’ argument seems thus to be unconvincing, whereas a particular element emerging from the *travaux préparatoires* could have been emphasized more. The Court, in fact, could instead have insisted on the deletion of an explicit *renvoi* to the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War contained in a previous draft of Article 15 (c).²⁸

Despite the weaknesses of the first argument offered by the Court, the final result of the decision appears to be convincingly supported by the second rationale which basically focuses on the distinct functions of the two areas of international law.²⁹ From this perspective, international humanitarian law and the subsidiary protection mechanism provided for under Directive 2004/83 ‘pursue different aims and establish quite distinct protection mechanisms.’³⁰ According to the Court, therefore, in determining the extent of the notion of internal armed conflict it is crucial to take into account ‘the context in which it occurs and the purposes of the rules of which it is part.’³¹

It should be noted that this ‘sectorial’ approach as to the meaning of terms used in different contexts is not new. The International Court of Justice had a similar approach in determining the required degree of intensity of the State’s control over a non-official organ. In fact, the Court held that the test to be satisfied could vary according to the particular legal framework in which the notion has to be applied – the determination of the international or non-international character of a conflict or the attribution of State responsibility – as they ‘are very different in nature.’³² The conclusion of the Court was aimed at justifying its refusal to

²⁸ In this sense also C Bauloz, ‘The Definition of Internal Armed Conflict in Asylum Law’ (2014) 12 J Intl Criminal J 841.

²⁹ A similar approach had already been hoped for by some scholars, see C Bauloz, ‘The (Mis)use of International Humanitarian Law Under Article 15(c) of the EU Qualification Directive’ in D J Cantor and JF Durieux (eds), *Refuge From Inhumanity? War Refugees and International Humanitarian Law* (Martinus Nijhoff 2014) 265. However, according to this author, ‘it cannot but be regretted that the CJEU did not take the opportunity of this preliminary ruling to discard the utility of IHL-based interpretation of any of the terms of Article 15(c)’, at 269.

³⁰ *Diakité* (n 3) para 24.

³¹ *ibid* para 27.

³² *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 405.



depart from its settled jurisprudence on the application of the ‘effective control’ standard.

As affirmed in the 2011 Recast Qualification Directive, the objective of the subsidiary protection is to ‘achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards.’³³ In light of the general purpose of the normative framework in which Article 15 (c) has to be applied, it is reasonable to adapt the notion of internal armed conflict to the exigencies of protection ‘on the basis of higher standards’ that the Directive aims to comply with.

4. *The relationship between international and EU law: finding the proper balance between autonomous notions and consistent interpretation*

While the application of a wider definition of internal armed conflict appears to be reasonable in light of the specific function it has to cope with, the fact that this notion is deemed to be unrelated to the concept stemming from international humanitarian law demands some reflections on the intricate relationship between international law and EU law.

Traditionally, the use of autonomous notions at the European Union level aims to create a common interpretation of a given concept among the diverging notions deriving from national laws of member States. At the same time, and in more general terms, the autonomy of EU law intends to grant it prevalence over these possibly conflicting rules of domestic law.³⁴ In other words, in this ‘internal’ perspective – ie in the relationship between EU law and the law of its member states – the rationale of autonomy would be harmonisation of EU law and its primacy over national laws.

In its ‘external’ dimension, ie in the relationship with international law, however, this autonomy does not pursue the same goals. It is difficult to maintain that a departure from international law could guarantee greater harmonisation in the domestic law of EU Member States; nor

³³ Recital 10 of the 2011 EU Recast Directive (n 3).

³⁴ B de Witte, ‘European Union Law: How Autonomous Is Its Legal Order’ (2010) 65 *Zeitschrift für Öffentliches Recht* 142.



could the autonomy of EU law vis-à-vis international law be appraised in terms of hierarchical relations.³⁵ However, as already stated in light of the jurisprudence of the International Court of Justice, the use of autonomous notions can be justified by the different normative contexts in which these concepts are intended to be applied. At the same time, it is worth observing that an independent and autonomous interpretation of a notion is not always unavoidable or automatically legitimised by the specificity of the normative aims at issue. On the contrary, there could be valid reasons to construe EU law in conformity with public international law.

It is undeniable that the reference to a notion which has already acquired a specific and determined meaning in international law could lead to a greater degree of certainty of law, granting it uniform and coherent application. In this perspective, harmonisation among national systems could result from the consistent interpretation of EU law in light of international law. After all, the principle of consistent interpretation represents the most important method for granting coherence and removing divergences among different legal systems and, as it is well-known, the CJEU has widely resorted to it in relation to national law.³⁶

In its case law, the Court has already explicitly referred to customary international law as a relevant tool in construing European legislation. For example, in *Poulsen and Diva Corporation*, it was stated that a regulation adopted in the context of the conservation of fishery resources ‘must be interpreted, and its scope limited, in the light of the relevant rules of the law of the sea’ and, more interestingly, the juris-

³⁵ It is certainly true that claiming the autonomy of the EU legal order has been recently aimed at maintaining EU law as the legal framework of reference in order to assess the validity of EU acts (cf Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat v Council* [2008] ECR I-6351). However, the general independent and self-governing character of a normative system is not strictly related to the possibility of independently and autonomously interpreting the meaning of a legal notion.

³⁶ See, for instance, Joined Cases C-397/01 *Pfeiffer and Others v Deutsches Rotes Kreuz, Kresiverband Waldshut eV* [2004] ECR I-8835 and F Casolari, ‘Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation’ in E Cannizzaro, P Palchetti and RA Wessel (eds) *International Law as Law of the European Union* (Martinus Nijhoff 2012) 395.



prudence of the International Court of Justice was taken into account in order to determine the content and the scope of the applicable law.³⁷

An interpretation of EU law in light of international law could have some advantages even in cases – such as the one in question, related to the notion of armed conflict – where reference to international law is not particularly required because of the similarity of the normative context. Construing the meaning of a concept in light of international law has, in fact, been done independently of the overlapping nature of the normative context or of the legal aims of the rules implied.³⁸ In order to establish the meaning of the term ‘damage’ referred to in the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, for instance, the European Court of Justice invoked Article 31 (2) of the Articles on Responsibility of States for Internationally Wrongful Acts as ‘expressing the ordinary meaning to be given to the concept of damage in international law’ which ‘is common to all the international law sub-systems.’³⁹ In a different case, the notion of ‘international organization’ has been deemed relevant in order to ascertain whether EU competition law was applicable to certain entities.⁴⁰

From a different perspective, the Court of Justice of the European Union may influence the content of international law through its interpretive activity. In particular, European jurisprudence could confirm the existence of a certain rule of customary international law or clarify the meaning of its constitutive elements. It is in fact generally admitted that the duty to respect international law goes together with the EU role in determining and contributing to its development as reflected in the terms expressly employed in Article 3 (5) of the Treaty on European

³⁷ Case C-286-90, *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* (1992) ECR I-601924 November 1992, para 10. O Elias, ‘General International Law in the European Court of Justice: From Hypothesis to Reality?’ (2000) 31 *Netherlands YB Intl L* 11-13. See also, more generally, A Gianelli, ‘Customary International Law in the European Union’ in E Cannizzaro, P Palchetti and RA Wessel (n 36) 93.

³⁸ According to Advocate General Mengozzi, the duty to interpret EU law in accordance with customary international law would cease when not required by a hermeneutical exigency (n 23) para 27.

³⁹ Case C-63/09 A *Walz v Clickair SA* [2010] ECR I-4239 paras 27-28.

⁴⁰ Case C-113/07 *P Selex Sistemi Integrati v Commission* [2009] ECR I-2207 para 110.



Union.⁴¹ In the *Racke* case, for example, the Court applied the *rebus sic stantibus* rule both upholding its existence as a norm of customary international law and importantly clarifying its scope of application.⁴²

Coming back to the notion of internal armed conflict, it is unquestionable that international humanitarian law remains the legal framework of reference when the existence of an armed conflict or the content of many other notions related to the law of armed conflict have to be assessed. More generally, it is a field of law where judicial developments have already led to an appreciable degree of specification and determination of complex concepts on which European law could also possibly rely.⁴³

It is thus possible to argue that the same attempt at harmonizing domestic jurisprudence and establishing common criteria in the application of the European directives⁴⁴ – and, as a main consequence, granting wider protection to asylum seekers – could have been reached through a more ‘dialogical’ and open attitude towards international humanitarian law. This attitude should have been aimed at finding a proper balance between the use of an autonomous notion of armed conflict and the consistent interpretation of EU law in light of interna-

⁴¹ Art 3 (5) TUE: ‘In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the *strict observance and the development of international law*, including respect for the principles of the United Nations Charter’ (emphasis added). See also, for example, *Poulsen* (n 32) para 9 and Case T-115/94 *Opel Austria GmbH v Council* [1997] ECR II-39 para 90.

⁴² Case C162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655. For a commentary and some criticisms of the Court’s analysis of the *rebus sic stantibus* doctrine see J Klabbers, ‘Case C162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz, judgment of 16 June 1998’ (1999) 36 CMLR 179.

⁴³ As regards the relevance of customary international humanitarian law in construing the notion of persecution see V Holzer, ‘Persecution and the Nexus to a Refugee Convention Ground in Non-International Armed Conflict: Insight from Customary International Humanitarian Law’, in DJ Cantor and JF Durieux (n 29) 101 and E Fripp, ‘International Humanitarian Law and the Interpretation of “Persecution” in Article 1A(2) CSR51’ (2014) 26 Intl J Refugee L 382.

⁴⁴ A notion of armed conflict completely disconnected from international humanitarian law would not favour harmonisation among Member States, nor would it prevent asylum shopping, see H Storey, ‘Armed Conflict in Asylum Law: The “War-Flaw”’ (2012) 31 Refugee Survey Q 27-30.



tional law. International law, in fact, may provide interpretive directions and useful instruments to the application of EU law. Furthermore, applying the notion of armed conflict in the different normative framework of refugee law does not automatically put aside the opportunity to construe its meaning in relation to international law.

At the end of the day, justifying the application of a different notion of armed conflict could have hinged on various aspects that could maintain the European concept of internal armed conflict that was not completely disconnected from international law. In other words, the line of reasoning could have been partly different and aimed at establishing a form of integrated relationship with the law of armed conflict. Firstly, given that international humanitarian law does not have a unitary notion of non-international armed conflict and sets forth different thresholds for assessing the existence of an armed conflict, it is not untenable that EU asylum-law might also be primarily built on lower and looser criteria. Secondly, as the Court has stated, the reason for lowering this threshold is explicable in light of the specific purposes that the European directive pursues compared to international humanitarian law. Finally, the 'European' notion of internal armed conflict could have been framed in the broad realm of international humanitarian law. In fact, in its essential meaning, ie violent confrontation between armed groups, this basic definition of internal armed conflict is certainly encompassed in the notion detected in the *Tadic* decision.

Maintaining the notion in the broader context of international humanitarian law has the advantage of allowing future references and possibly finding common indicators to concretely define the vague contours of the concept. In order to assess the intensity of generalised violence, for example, the elements detected by the ICTY jurisprudence as regards the required threshold of armed conflict could be of some relevance. From this perspective, indicative factors might be, among others, 'the number and intensity of individual confrontations, the type of weapons used, the extent of material destruction or the number of civilians fleeing combat zones.'⁴⁵ For its part, perceiving the two normative systems as completely separate, the CJEU renounces the gradual refinement of the changing constitutive elements and defining factors of such a fundamental notion of international law.

⁴⁵ All these elements have been spelt out in *Haradinaj* (n 5) para 49.



The Question:

The MONUSCO Intervention Brigade: A test-case for the application of International Humanitarian Law and International Criminal Law to a robust UN peace-keeping operation

Introduced by Giulio Bartolini and Marco Pertile

On 18 March 2013 the UN Security Council (SC) adopted resolution 2098, establishing an Intervention Brigade within the peacekeeping force MONUSCO. The trigger event was the seizure of Goma by the armed group M23 in November 2012.

The Intervention Brigade is part of the around 20,000-strong troops that form MONUSCO and is composed of three infantry battalions, one artillery and one Special force and Reconnaissance company, with troops mainly provided by South Africa, Tanzania and Malawi. For the first time, the mandate of a UN peacekeeping mission speaks openly of 'targeted offensive operations' with the aim to 'neutralize' and 'disarm' a number of armed groups. Such a mandate has been reiterated by UNSC resolution 2147 (2014) adopted on 28th March 2014, which has extended the UN operation in Congo up to the end of March 2015. The armed groups to be neutralized and disarmed are mentioned, in a seemingly non-exhaustive list, in the preamble of resolutions 2098 and 2147.

Following its deployment, the Intervention Brigade has achieved considerable success. The insurgents of M23 have been defeated and the operations of the Intervention Brigade have turned towards other militia groups operating in the region. The Intervention Brigade may even become a model for other peacekeeping/peace enforcement operations such as UNMISS in South Sudan and MINUSMA in Mali.

It is also of note that, for the first time, a UN force has been equipped with unarmed drones for intelligence gathering. As maintained by the UN Secretary-General (SG) in its last report on the mission, the planning of offensive operations against the FDRL, one of the

organized armed groups located in the region, 'has been supported by information provided by the MONUSCO unarmed, unmanned aerial system' (UN Doc S/2014/157, para 39).

While the UN SG Reports on the Intervention Brigade are rather vague, not permitting an observer to clearly picture the dynamic military operations carried out against organized armed groups in support of the Congolese armed forces, they nonetheless confirm the direct involvement of UN personnel in clashes with non-state actors and, furthermore, the escalation of those clashes, which have also led to some casualties among the UN contingent. For instance, the UN SG Report published in March 2014 at the occasion of adoption of UN SC resolution 2147 affirms that 'Though purely offensive operations have yet to be undertaken by MONUSCO, the Mission is currently providing support to the offensive operations of the Congolese armed forces against ADF ... (and) is also supporting armed forces operations currently under way against FRPI ...' through critical logistic support (UN Doc S/2014/157, paras 39-40). The UN SG Report of June 2014 confirms the increasing involvement of UN troops on the ground in military operations. It makes reference to support provided to the FARDC by the UN through 'attack helicopter(s) and ground troop(s)' resulting in their involvement in a series of operations marked by heavy fighting and the capture of a significant number of elements belonging to organized armed groups (UN Doc S/2014/450, paras 53-55). Subsequent reports, which are far from satisfactory in terms of transparency and precision, confirm nonetheless that 'MONUSCO supported FARDC operations ... through joint planning, situational awareness, logistics and fire support' against a vast array of organized armed groups (see, in similar terms, UN Doc S/2014/956, para 32; UN Doc S/2014/698, para 56).

Understandably, such a scenario has led to increased interest in the legal issues surrounding the direct involvement of UN troops in military activities. Whereas the discussion of the applicability and the application of IHL to peacekeeping missions has become to a certain extent a threadbare issue, the unprecedented nature of the mandate established by UN SC resolutions 2098 and 2147 has given rise to a lively academic debate. Indeed, it is submitted that there are reasons to strengthen the debate on the Intervention Brigade, as several legal questions still deserve clarification.



A first group of questions concerns the applicability of International Humanitarian Law (IHL) to the Intervention Brigade and to MONUSCO. Under this perspective, one should probably start from the assumption that when peacekeepers engage in combat operations they become a party to the conflict and can be lawfully targeted. Similarly, the action of a peace enforcement unit such as the Intervention Brigade is covered by IHL and must fulfill its requirements. However, considering that the Brigade is part of MONUSCO, one might wonder what the effects of such participation to the conflict may be for the peacekeeping mission as a whole. Should one take the view that MONUSCO itself is now a party to the conflict? Or is participation to the conflict limited to the position of the Intervention Brigade? In relation to this, one should also understand what kind of armed conflict MONUSCO and the organized armed groups are involved in and what is the proper legal framework regulating the conduct of the hostilities. Additional questions should also be addressed to competent UN organs and contributing States. In particular, in light of the unprecedented role assumed by the Intervention Brigade, can one still take the view that the 1999 UN SG Bulletin on the observance by UN forces of IHL is sufficient to address current enforcement operations carried out by the UN? Would it be opportune to revise it to some extent?

A second group of questions concerns the qualification of the activities of the Intervention Brigade under International Criminal Law (ICL). Indeed, it is quite clear that the involvement of UN troops in an armed conflict has implications for ICL. More precisely, what is the impact of a direct involvement of UN troops in military activities for the application of the 1994 Convention on the Safety of United Nations Personnel and Associated Personnel (even if the Democratic Republic of Congo is not a party to this treaty) and Article 8 of the ICC Statute? Is the uncertain wording of the 1994 Convention apt to address legal problems arising from the nature of the conflict involving the UN? And again, along the same lines, what is the role of the SOFA concluded by MONUSCO in the repression of crimes committed against its personnel?

With a view to answering some of these questions, QIL asked Barbara Sonczyk and Yutaka Arai to take part in the growing debate on MONUSCO and the Intervention Brigade. Whereas Yutaka Arai focuses on issues concerning the applicability and the application of IHL,

Barbara Sonczyk addresses issues of ICL with specific reference to the protection of peacekeepers under Article 8(2)(e)(iii) of the Rome Statute of the International Criminal Court. As our readers will see, both authors share the same starting point in their analyses: according to which the applicability of the relevant legal framework depends on issues of fact, such as the actual behaviour of the peacekeepers on the ground, rather than on legal issues such as the nature of their mandate.



**The intervention brigade within the MONUSCO.
The legal challenges of applicability and application of IHL**

*Yutaka Arai-Takahashi**

1. *Introduction*

The Intervention Brigade was established by UN Security Council Resolution 2098¹ in 2013, within the framework of the United Nations Stabilization Mission in the Democratic Republic of Congo (*Mission de l'Organisation des Nations Unies pour la stabilisation en République démocratique du Congo* – MONUSCO). MONUSCO, a UN-commanded mission pursuant to Chapter VII of the UN Charter, is comprised of both military and civilian components. The Brigade's mandate, to employ all necessary means to 'neutralize' armed groups, goes beyond the mandate of the existing military wing of MONUSCO, which can be engaged in non-frontline operations (such as planning and coordination of military operations envisaged by the governmental forces).² Indeed, the Brigade is heralded as the first-ever offensive force under the control and command of the United Nations,³ straddling the dynamic of peace enforcement operations in unprecedented fashion.

This short essay will examine the question of the applicability of international humanitarian law (IHL) to the Intervention Brigade, taking into account the ramifications that its distinctive mandate may entail. The diagnosis will first deal with issues relating to the applicability of

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¹ UNSC Res 2098 (28 March 2013) S/RES/2098. This has been renewed by UNSC Res 2147 (28 March 2014) S/RES/2147.

² Cf T Ferraro, 'The Applicability and Application of International Humanitarian law to Multinational Forces' (2013) 95 Intl Rev Red Cross 561, 583.

³ S Sheeran, S Case, 'The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo' (November 2014) 2 <http://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_legal_issues_drc_brigade.pdf>.



IHL to UN peace forces in general. In this respect, inquiries will address two intertwined, preliminary questions, namely: how to determine the existence of armed conflict, international armed conflict (IAC) or non-international armed conflict (NIAC); and when UN peace forces are understood as becoming a party to the armed conflict in question. Consideration will then turn to specific issues that may surface when the 'atypical' mandates of the Brigade are tested against the generic framework of IHL surrounding the UN peace troops.

2. *Little relevance of the distinction in the mandates to the question of applicability of IHL*

As is widely known, the UN-commanded operations can be divided into two types: peacekeeping operations established under Chapter VI of the UN Charter; and those pursuant to Chapter VII of the Charter (which can be termed 'peace enforcement' operations).⁴ Peacekeeping missions, on the one hand, are premised on three principles: consent; impartiality; and non-use of force save in case of self-defence.⁵ The deployment of UN peace troops in this context has depended on the consent of a territorial state.⁶ Now under the so-called Capstone Doctrine,

⁴ The term UN 'peacekeeping' is routinely used in a generic manner to encompass all UN peace operations (starting with the earlier peacekeeping operations created by the General Assembly, and covering the majority established by the Security Council, whether under Chapter VI or Chapter VII of the UN Charter: J Sloan, 'The Evolution of the Use of Force in UN Peacekeeping' (2014) 37 *Journal of Strategic Studies* 674, 692. However, this essay employs this term narrowly to refer to the operations put in place under Chapter VI. In contrast, here, the term UN 'peace enforcement' forces is reserved only for the Chapter VII-based multinational peace troops under UN command and control (excluding UN mandated forces and 'coalition of the willing'). See, R Glick, 'Lip Service to the Laws of War: Humanitarian Law and the United Nations Armed Forces' (1995-6) 17 *Michigan J Intl L* 53, 55; R. Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?' (2003) 14 *Crim L Forum* 153, 166-167.

⁵ The continuing validity of these three traditional elements was underscored by UN General Assembly and Security Council, *Report of the Panel on United Nations Peace Operations (the Brahimi Report)* UN Doc A/55/305 and S/2000/809 (21 August 2000) ix and para 48.

⁶ Nevertheless, ONUC in Congo and UNOSOM II in Somalia were two outstanding cases in which the UN could not obtain the consent of host states: K



the focus of appraisal has shifted to ‘the consent of the main parties to the conflict.’⁷ Insofar as this consent is valid, peacekeepers enjoy the protected status akin to civilians’ under IHL. Peace enforcement operations, on the other hand, founded on the authority of Chapter VII of the Charter, have been undertaken without the consent of a territorial (host) state.⁸ Generally, two interlocking consequences will ensue. First, the UN peace forces become a party to the conflict that is underway on the ground, turning their members into combatants in the juridical sense, even when they are deployed in a NIAC.⁹ Secondly, as a result, the IHL rules on conduct of hostilities apply to such an operation.

However, this paper’s underlying premise is that the procedural question of whether peace support operations are based on Chapter VI or Chapter VII of the UN Charter is hardly significant for assessing the applicability of IHL to peacekeepers. Determining the applicability of IHL on the basis of the mandates of the Security Council would erode the assumption that issues of *jus ad bellum* have little bearing on the principle of equal application of *jus in bello* to parties to an armed conflict. This is a logical corollary of the underlying premise of IHL, which segregates those two branches of international law.¹⁰ Moreover, the di-

Okimoto, ‘Violations of International Humanitarian Law by United Nations Forces and Their Legal Consequences’ (2003) 6 YB Intl Humanitarian L 199, 217.

⁷ United Nations Peacekeeping Operations – Principles and Guidelines (Capstone Doctrine) (2008) 31-32.

⁸ GJ F van Hegelsom, ‘The Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcing Operations’ (1993) 6 Hague YB Intl L 45, 57 (using the existence of consent to distinguish peacekeeping forces from peace enforcement).

⁹ This essay surmises that in a NIAC context, the notion ‘combatants’ may be recognized with respect to members of governmental forces, and *mutatis mutandis*, to those of UN troops. Compare JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, vol I (CUP 2005) 12 (Rule 3).

¹⁰ US Military Tribunal at Nuremberg, *Trial of Wilhelm List and Others (The Hostages Trial)* (1949) 8 Law R of Trials of War Criminals vol VIII, 59. See also Sassòli, ‘*Ius Ad Bellum* and *Ius in Bello*, the Separation between the legality of the use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?’, M Schmitt, J Pejic (eds), *International Law and Armed Conflict* (Martinus Nijhoff 2007) 241-264; Sassòli, ‘International Humanitarian Law and Peace Operations, Scope of Application *ratione materiae*’, in GL Beruto (ed), *International Humanitarian Law, Human Rights and Peace Operations*, 31st Round Table on Current Problems of International Humanitarian Law (International Institute of Humanitarian Law 2009), 100, 103; J Moussa, ‘Can “*Jus ad Bellum*” Override “*Jus in Bello*”? Reaffirming the Separation of the Two Bodies of Law’, (2008) 90 Intl Rev Red Cross 963.



chotomised approach to this question, based on the distinction between peacekeeping and peace enforcement is challenged by the operational reality. The very division between these two genres may be blurred in many instances. In volatile circumstances, there is a tendency to give peacekeeping operations 'robust' mandates to 'use all necessary means' to pursue purposes on tactical ground: (i) deterring any forcible attempts to hamper political process; (ii) shielding civilians from imminent threat of physical attack; and/or (iii) helping national authorities maintain law and order.¹¹ Admittedly, their use of force remains at the tactical level, as compared with the peace enforcement operations which may be mandated to deploy military force at the strategic level.¹² The use of force by 'robust peacekeeping troops' at the tactical level aims to safeguard civilians from militias or criminal gangs. Still, one issue is that robust peacekeeping may involve the 'proactive' use of force to defend the mandates (including the force to ensure the environment for long-term peacebuilding).¹³ Further, even peacekeeping operations that are initially deployed pursuant to Chapter VI with the consent of the host state may be drawn into hostilities¹⁴ so that they become a party to the conflict.¹⁵ Such a transmutation into a *de facto* peace enforcement framework, a 'mission-creep' scenario,¹⁶ may be brought about by the deterioration of the relationship between the population in the relevant terrain and the peacekeeping forces. In such situations, the UN-authorized multinational forces can be considered to have become parties to the conflict, calling into play the normative paradigm of IHL re-

¹¹ Capstone Doctrine (n 7) 19, 34.

¹² *ibid.*

¹³ There is a suggestion that such a 'proactive' use of force seen in robust peacekeeping may even justify pre-emptive or offensive use of force: T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 14-15, 74, 356.

¹⁴ Apart from the ONUC discussed here, note should be taken of UNOSOM II, which was authorized by Security Council Resolution 837 of 6 June 1993, adopted under Chapter VII of the UN Charter, to take 'all necessary measures against all those responsible for the armed attack' on UNSOM II personnel. R Kolb, 'Background Document 1: Applicability of International Humanitarian Law to Forces under the Command of an International Organisation', in A Faite and J Labbé Grenier, *Report to the Expert Meeting on Multinational Peace Operations, Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (ICRC 2004) 68.

¹⁵ Murphy (n 4) 184-185; Sloan (n 4) 675, 694.

¹⁶ *ibid.* 685-690.



lating to conduct of hostilities.¹⁷ To propose otherwise would be counterfactual. It also may well be that *de jure*, the mandate for a peacekeeping mission is transformed, over time, into a full-blown Chapter VII-based enforcement operation.¹⁸ The so-called ‘widened peacekeeping’ missions, as in the case of UN Operation in the Congo (*Opération des Nations Unies au Congo* – ONUC) in Katanga province,¹⁹ may create a grey area verging on peace enforcement. Moreover, multinational forces may be equipped with ‘hybrid mandates’ derived from both Chapters VI and VII.²⁰ In all those circumstances, it is reasonable that upon becoming parties to the conflict, the UN-based multinational forces be divested of the civilian protection they have been granted.²¹

Overall, this paper submits that determining the applicability of IHL depends entirely on the specific factual events on the ground. The gist is to verify the existence (eruption or continuation) of hostilities.²² While peacekeepers may be vested with the mandate to use force purely for a self-defensive purpose, or with a view to defending the mandated mission, their actual recourse to force may reveal a varying level of force.²³ Irrespective of this, whenever defensive measures invoked by peacekeeping forces have brought about an armed confrontation reaching the level of an armed conflict, this should be considered to trigger the application of IHL on conduct of hostilities.²⁴

¹⁷ *ibid* 565.

¹⁸ M Cottier, ‘Attacks on Humanitarian Assistance or Peacekeeping Missions’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck/Hart 1999) 187, 195. Such an adjustment is salutary to avoid the charge of *ultra-vires*.

¹⁹ The ICJ, in its advisory opinion on *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, found that ONUC was not an enforcement action under Chapter VII of the UN Charter. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 166. Yet, it can be averred that the Security Council implicitly invoked Chapter VII, because Resolution 161 of 21 February 1961 and Resolution 169 of 24 November 1961 granted ONUC the authority to take ‘all appropriate measures’ and to use necessary force within the parameters of self-defence: Sloan (n 4) 686.

²⁰ Murphy (n 4) 186; Ferraro (n 2) 565.

²¹ Cottier (n 18) 195.

²² Ferraro (n 2) 565, 573; O Engdahl, ‘A Rebuttal to Eric David’ (2014) 95 Intl Rev Red Cross 667, at 669.

²³ Sloan (n 4) 675-676, 687, 691.

²⁴ Sassòli, ‘International Humanitarian Law’ (n 10) 103.



3. *Determining the existence of armed conflict*

Generally, in cases where UN peacekeeping forces intervene to fight against armed forces of a territorial state, this constitutes an IAC.²⁵ The rationale is that the two opposing parties are entities that enjoy international legal personalities.²⁶ In contrast, when multinational forces including UN peacekeepers are involved in clashes against one or more non-state armed groups, or to combat against such insurgent groups alongside or in support of armed forces of a host state, this can be classified as a NIAC.²⁷ However, there is a policy-oriented view that because of the inadequacy of IHL rules on NIAC, the mere involvement of a multinational force 'should' internationalize the nature of armed conflict,²⁸ or that UN peace forces must observe IHL rules on IAC irrespective of the legal characterisation of the conflict.²⁹ Yet, this paper argues that the simple presence of multinational forces under the UN Security Council's mandate does not transmogrify the multinational NIAC into an IAC,³⁰ and that in customary IHL there is a tendency to converge the rules applicable to NIACs and those applicable to IACs.

For the purpose of ascertaining if there exists an NIAC, analysis should focus on three criteria. First, as laid down in Article 1(2) Additional Protocol II (APII) and Article 8(2)(d) Rome Statute of the International Criminal Court (Rome Statute), violence must reach a minimum level of intensity that exceeds the level of internal disturbances and tensions that are commonly observable in case of riots, isolated and

²⁵ Engdahl (n 22) 672, 674.

²⁶ Ferraro (n 2) 596.

²⁷ See, for instance, ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', Report for the 31 International Conference of the Red Cross and Red Crescent (October 2011) 10.

²⁸ See, for instance, Sassòli, 'International Humanitarian Law' (n 10) 100; E David, 'How Does the Involvement of a Multinational Peacekeeping Force Affect the Classification of a Situation' (2013) 95 *Intl Rev Red Cross* 659, 661, 665.

²⁹ See Sassòli, 'International Humanitarian Law' (n 10) 104; and J Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' (2007) 58 *Hastings LJ* 479, 513.

³⁰ For the same view, see E Wilmschurst, 'Conclusions' in E Wilmschurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 487 and Ferraro (n 2) 598.



sporadic acts of violence.³¹ The threshold for assessing the occurrence of a NIAC may be considered higher than that for evaluating an IAC under common Article 2 to the Geneva Conventions (GCs),³² the provision that attaches less importance to the criteria of duration and intensity of hostilities.³³ Still, this understanding is tempered by a ‘tendency’ to lower the threshold of intensity required for ascertaining the existence of a NIAC within the meaning of Article 3 common to the Geneva Conventions.³⁴ Second, while not spelt out in the conventional text itself, it is implicitly assumed that for a NIAC to be identified, an armed opposition group must attain a certain level of organisation.³⁵ The element of organisation is crucial for an armed group to implement military operations in accordance with IHL rules.³⁶ Third, there is controversy over whether NIACs must be of sufficient duration. Article 8(2)(f) Rome Statute explains that NIACs within the meaning of Article 8(2)(e) must be ‘protracted’, as affirmed in *Tadic* by the ICTY.³⁷ For all the contrary inference that may be drawn from the *travaux préparatoires*,³⁸ the absence of the express *renvoi* to the category of NIACs contemplated in Article 8(2)(d) favours the argument that the Rome Statute assumes not a unified notion of NIACs but two distinct genres of them: the one contemplated by Article 8(2)(d) Rome Statute (and common Article 3 GCs), which undercuts the significance of the temporal requirement; and the other envisaged by Article 8(2)(e) Rome Statute, which must be of ‘protracted’ nature. Even supposing that this temporal criterion is necessary, this does not necessitate a ‘sustained’ or

³¹ K Grenfell, ‘Perspective on the Applicability and Application of International Humanitarian Law: the UN Context’ (2013) 95 Intl Rev Red Cross 645, 647.

³² S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 Intl Rev Red Cross 69, 76.

³³ Ferraro (n 2) 575-576.

³⁴ Vité (n 32) 81-82; O Engdahl, ‘The Status of Peace Operation Personnel under International Humanitarian Law’ (2008) 11 YB Intl Humanitarian L 117.

³⁵ J Pejic, ‘The Protective Scope of Common Article 3: More Than Meets the Eye’ (2011) 93 Intl Rev Red Cross 1, 3-4, 11 and 35.

³⁶ *Prosecutor v Limaj et al* (Judgment) IT-03-66-T (30 November 2005) para 90; and *Prosecutor v Haradinaj et al* (Judgment) IT-04-84-T (3 April 2008) para 60.

³⁷ *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (2 October 1995) para 70.

³⁸ Vité (n 32) 81, n 49.



‘continuous’ military operation.³⁹ It can involve repeated or intermittent armed confrontations straddling some lulls.⁴⁰ In that light, the UN peacekeepers’ defensive force against sporadic attacks by an armed group may cross a lower hurdle of NIACs within the meaning of Article 8(2)(d) Rome Statute, but also the hurdle applicable for NIACs under Article 8(2)(e) Rome Statute.⁴¹

4. *Implications of the UN Safety Convention*

The 1994 UN Convention on the Safety of the United Nations and Associated Personnel appears to distinguish between enforcement action on one hand, and what it defines as a ‘United Nations operation’ on the other. Article 2(2) makes clear that it does not apply to ‘a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.’ This exclusion clause raises questions as to the parameters of UN peace operations that are debarred from the coverage of the Convention.

On careful inspection, one finds that Article 2(2) does not speak of all forms of peace enforcement operations. The enforcement operations mentioned in that paragraph are attended by the strings consisting of three normative elements: (i) engagement of the UN personnel as ‘combatants’; (ii) fighting against ‘organized armed forces’; and (iii) application of the law of *international* armed conflict (IAC). With respect to (i), it should be remarked that not all peace enforcement troops get involved in actual fighting.⁴² It is not inconceivable that hostilities in the

³⁹ S Boelaert-Suominen, ‘Commentary: the Yugoslav Tribunal and the Common Core of Humanitarian Law Applicable to All Conflicts’ (2000) 13 *Leiden J Intl L* 619, at 634-635.

⁴⁰ Ferraro (n 2) 579.

⁴¹ Kolb (n 14) 68. *Contra*, *Prosecutor v Sesay et al (RUF Case)* (Judgment) SCSL-04-15-T (2 March 2009) para 233; *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 83.

⁴² Ferraro (n 2) 565, n 9 (referring to the EU forces deployed in the DRC in 2003, which was an enforcement action authorized under Security Council Resolution 1484, but was not drawn into hostilities and hence not subject to IHL).



territory may have subsided by the time that the peace enforcement troops are deployed, or even that these forces end up staying out of hostilities. Clearly, in those circumstances, the peace enforcement forces fall short of constituting ‘parties to the hostilities’.

As regards (ii) and (iii), on the face of it, Article 2(2) seems to preclude the application of the Safety Convention where UN enforcement troops are confronted with ‘organized armed forces’ in the conflict regulated by ‘the law of *international* armed conflict’. The literary construction might suggest that the UN enforcement troops are bereft of protection under the Safety Convention only when involved in IACs.⁴³ Accordingly, it might be argued that the applicability of the Safety Convention is preserved in relation to UN peace enforcement forces deployed in NIACs so that it would be a crime to launch attacks against them.⁴⁴ On this reading, the breadth of application of the Safety Convention would not be limited to Chapter VI-based peacekeeping operations. However, ostensibly, this is incongruent. This dissonance can be explained by the fact that when the Safety Convention was adopted, the drafters did not envisage peace enforcement to take shape in the context of NIACs.⁴⁵ For the sake of systemic interpretation, Article 2(2) of the Safety Convention should be considered to foreclose peace enforcement operations conducted in NIACs as well.

4.1. *Repercussions of the saving clause of the UN Safety Convention*

The thesis that the UN Safety Convention and IHL are mutually exclusive normative regimes appears irreconcilable with the savings clauses of the Safety Convention (Article 20). Article 20(a) stipulates that nothing in the Convention shall affect ‘the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.’ The crux of the matter is how to read this provision consistently with Article 2(2). First, it may be argued that this saving clause

⁴³ Grenfell (n 31) 650.

⁴⁴ Engdahl (n 22) 672.

⁴⁵ Sheeran, Case (n 3) 11.



does not add anything new to Article 2(2) of the Convention.⁴⁶ According to this interpretation, the normative impact of Article 20(a) is only 'declaratory'. This clause is considered merely to reiterate that UN military personnel must respect IHL where the Convention is not applicable under Article 2(2). In contrast, the second view suggests that notwithstanding Article 2(2), the saving clause under Article 20(a) does envisage the concurrent application of IHL and the Safety Convention.⁴⁷ There is even an assertion that the mutually non-exclusive nature of IHL and the Safety Convention, not only in NIAC but in the IAC context is inferable from the negotiations leading up to the adoption of Article 20(a) and from the textual tenor of the Safety Convention (Article 8 in particular).⁴⁸

4.2. *Reconciling the UN Safety Convention with the applicability of IHL to UN peace forces*

The problem with the convergent application of IHL and the Safety Convention to UN peacekeeping forces is that it may give rise to asymmetrical consequences. The UN peace mission's military personnel may be caught in recurrent defensive operations against non-state armed groups. Yet, under the Safety Convention, it is unlawful for such groups to deliver attacks against the UN personnel, with the attendant risk of incurring criminal responsibility. This would strain the efficacy of the principle that IHL must apply equally to the parties to the conflict.⁴⁹ This invidious outcome would give them little incentive to abide by IHL.⁵⁰ To overcome this, it is important, as proposed above, to recognise that using force in self-defence may in certain situations trigger hostilities, so that even UN peacekeeping troops may become parties to the

⁴⁶ M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) 171.

⁴⁷ C Bourloyannis-Vrailas, 'The Convention on the Safety of United Nations and Associated Personnel' (1995) 44 ICLQ 561, 583-584; Murphy (n 4) 186-187.

⁴⁸ A Bouvier, 'Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis' (1995) 35 Intl Rev Red Cross 638, 663.

⁴⁹ See A Roberts, 'The Equal Application of the Laws of War: a Principle Under Pressure' (2008) 90 Intl Rev Red Cross 931, 952-956.

⁵⁰ Compare *ibid* 948 and 955; and Sassòli, 'International Humanitarian Law' (n 10) 105-106.



conflict as ‘combatants’ bound by IHL rules.⁵¹ Indeed, the viability of this approach is borne out by Article 8(2)(b)(iii) and (e)(iii) Rome Statute, which makes the materialisation of the relevant war crimes conditional upon the entitlement of the UN peacekeeping personnel to civilian protections under IHL.

As one author has suggested, the effect of Article 2(2) of the UN Safety Convention ‘is that the threshold for the application of international humanitarian law is also the ceiling for the application of the Convention.’⁵² This strand of argument is predicated on the hypothesis that the Safety Convention and IHL are mutually exclusive. However, this must be refuted in that the correlation between the Safety Convention and IHL is more intricate and strained.

This essay proposes that the typology of this relationship be discerned in four patterns: (i) the ‘calm’ situations where self-defensive measures opted for by peacekeepers fall short of reaching the threshold of an armed conflict (be it IAC or NIAC) and where the Safety Convention applies; (ii) the ‘volatile’ non-enforcement context in which the co-application of the Safety Convention and IHL is feasible; (iii) the IAC context in which UN peace enforcement troops that have been deployed fail to be engaged ‘as combatants’,⁵³ or the NIAC context in which intervening UN peace enforcement forces fail to be involved in combat operations, so that the application of the Safety Convention (where appropriate, jointly with the body of IHL rules regulating occupation) is not excluded;⁵⁴ (iv) the enforcement context in which UN forces have actually been embroiled in a combat operation, the context that Article 2(2) specifically considers beyond the purview of application of the Safety Convention and exposed to the full vigour of IHL alone.

⁵¹ Murphy (n 4) 185-188.

⁵² C Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 1 YB Intl Humanitarian L 3, 16, 24-25. See also International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, Committee on the Use of Force (The Hague, 2010) 17.

⁵³ Being ‘engaged as combatants against organized armed forces’ is a proviso contained in Article 2(2) of the Safety Convention.

⁵⁴ See, however, Murphy (n 4) 186-187 (suggesting that the Safety Convention apply to peace enforcement operations as deployed in Somalia).



5. *When the UN peace operations are considered to become a party to an armed conflict – UN Secretary-General’s Bulletin on observance by UN forces of IHL*

The UN Secretary-General’s *Bulletin on Observance by United Nations Forces of International Humanitarian Law* (1999)⁵⁵ recognises the need for multinational forces conducting operations under UN command and control to comply with ‘fundamental principles and rules of international humanitarian law.’⁵⁶ It states that these principles and rules are applicable in enforcement actions, or in peacekeeping operations when the use of force is allowed in self-defence. In terms of the ambit of application *ratione materiae*, the *Bulletin*⁵⁷ sets forth the fundamental rules and principles of IHL, without differentiating between IAC and NIAC. Yet, for the purpose of ascertaining the applicability of IHL, the UN has devised a criterion that is distinct from the threshold applicable to any other groups involved in armed conflict. Section 1.1 of the *Bulletin* enunciates that:

‘The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.’

The second sentence of Section 1.1. includes the adverb ‘accordingly’ to clarify that the application of IHL to ‘peacekeeping operations when the use of force is permitted in self-defence’ is contingent upon meeting the proviso in the first sentence that ‘in situations of armed conflict they [UN peace operation forces] are *actively engaged therein* as

⁵⁵ UN Secretary-General’s *Bulletin on the Observance by United Nations Forces of International Humanitarian Law* (6 August 1999) UN Doc ST/SGB/1999/13 (hereinafter ‘*Bulletin*’).

⁵⁶ *ibid.* See also *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations - Report of the Secretary-General* (1 June 2001) A/55/977 (so-called *Brabimi Report*) 59.

⁵⁷ The *Bulletin* refers only to general principles derived from the Geneva Law and the Hague Law.



*combatants, to the extent and for the duration of their engagement.*⁵⁸ Hence, the applicability of IHL rules is subject to the criterion ‘active engagement as combatants.’

One salient effect of the *Bulletin’s* criterion is to endorse a higher threshold for ascertaining the existence of armed conflict when UN peacekeepers are involved.⁵⁹ Generally, at what point armed forces have become a party to an armed conflict and therefore attract the application of IHL is a question of factual and hence ‘declaratory’ nature. However, in the case of UN peacekeeping forces under Chapter VI, an inquiry into empirical data is needed to address the two interlocking preliminary questions: if there is an armed confrontation involving a sufficient level of intensity;⁶⁰ and if they have become a party to the conflict. This prerequisite helps differentiate defensive action in hostilities from self-defence in law enforcement scenarios. Accordingly, as compared with enforcement action that *often* (though certainly not always) presupposes that there is an ongoing armed conflict in which UN peace troops are deployed, the determination of an armed conflict can be rated as a question of ‘constitutive’ nature, in the event of peacekeepers resorting to self-defence measures.⁶¹ Along this line, Shraga, who has helped draft the *Bulletin*, stresses the importance of identifying the existence of an armed conflict (of whatever nature) as a criterion for ascertaining applicability of IHL to UN peace forces.⁶² One spinoff argument is that this extra criterion requires that ‘the conflict had to be ongoing *prior to* their deployment’, so that the level for assessing when IHL binds UN forces may be further heightened.⁶³ Still, this essay submits that the application of IHL to UN peace forces be recognised whenever they are caught up, before or *after* their deployment, in armed confrontations that have risen to the level of an armed conflict.

⁵⁸ *Bulletin* (n 55) s.1.1, (emphasis added).

⁵⁹ Ferraro (n 2) 580-581.

⁶⁰ For the same view, see Grenfell (n 31) 650.

⁶¹ *ibid.*

⁶² D Shraga, ‘The Applicability of International Humanitarian Law to Peace Operations, from Rejection to Acceptance’, in Beruto (n 10) 90, 94 (arguing that this is one of the two cumulative conditions (‘double-key’ test), apart from the condition of ‘active engagement as combatants’).

⁶³ Ferraro (n 2) 581-582 (emphasis added). See also M Zwanenburg, ‘The Secretary General’s Bulletin on Observance by UN Forces of IHL: a Pyrrhic Victory?’ (2000) *Military L and L War Rev* 14, 21.

5.1. *Criticisms against the Bulletin's criterion*

The *Bulletin* fails to adduce guidelines on how the criterion 'active engagement as combatants' can be assessed together with the preliminary issues relating to the identification of an armed conflict as governed by common Articles 2 and 3 GCs (respectively for IAC and NIAC).⁶⁴ Moreover, it may be asked if the conceptual boundaries of the term 'combatants' in the *Bulletin* are qualified, due to its linkage to the notion 'active engagement', which entails the effect of delimiting the temporal span. Put differently, the question is if the concept 'combatants' would take on different (and narrower) meanings when applied to UN peace forces. Further, assuming that the *Bulletin* confines the temporal scope of application of IHL to the duration of *active* engagement, this span proves to be more restrictive than that contemplated in Articles 43-44 Additional Protocol I (API). The expression 'active engagement' indicates only the period in which they are involved in fighting (or directly participating in hostilities). Plausibly, it intimates that the protected status of UN peace troops is, akin to the ICRC's approach to civilians taking a direct part in hostilities,⁶⁵ recoverable once the engagement is over.⁶⁶ The *Bulletin* may be read as suggesting that the application of IHL ceases upon the termination of their combat mission, even though the armed conflict on the ground persists.⁶⁷ The limited temporal parameters of 'combatant' status of UN peace forces were endorsed by some war crimes tribunals.⁶⁸ However, this approach betrays a confusion between the temporal limit of civilians directly participating in hostilities with the notion of 'combatants' into which the soldiers of

⁶⁴ Ferraro (n 2) 581.

⁶⁵ See also ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009) 70; see also D Akande, 'Clearing the Fog of War? – The ICRC's Guidance on Direct Participation in Hostilities' (2010) 59 ICLQ 180, 189-91.

⁶⁶ Sheeran, Case (n 3) 8.

⁶⁷ D Shraga, 'The Secretary General's Bulletin on the Observance by UN Forces of International Humanitarian Law: A Decade Later' (2009) 39 Israel YB Human Rights 358-359. See also Ferraro (n 2) 604.

⁶⁸ *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC 02/05-02/09 (8 February 2010) para 83; *Prosecutor v Abdallah Banda Abakaer Nourain et al* (Decision on the Confirmation of Charges) ICC 02/05-03/09 (7 March 2011) para 66; and *Prosecutor v Sasay et al.* (Judgment) SCSL 04-15-T (2 March 2009) para 233.



UN peace missions (have come to) turn.⁶⁹ This essay asserts that the UN forces are governed by IHL until and unless their forces cease to be a party to the armed conflict, as at a general close of military operations.⁷⁰

6. *Applicability of IHL to the Intervention Brigade*

Within the framework of peace enforcement, the military component of MONUSCO is tasked with the mandate to employ force against armed groups, albeit its involvement in hostilities is confined only for the purpose of protecting civilians.⁷¹ In contrast, the mandate assigned to the Intervention Brigade is distinguishable, transcending the horizon of these peace enforcement operations. Security Council Resolution 2098 expressly states that the Brigade be engaged to support one party to the armed conflict(s) (the governmental forces, the FARDC) in ‘targeted offensive operations’ against armed opposition groups.⁷² The gist of the legal implication is that vested with a specific ‘responsibility of neutralizing’ non-state armed groups, the Brigade is purported to become an active party to an armed conflict, with its members as combatants. Two overarching objectives of the Brigade are: (i) ‘contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC’; and (ii) ‘mak[ing] space for stabilization activities.’⁷³ It is pursuant to these general objectives that the Intervention Brigade’s remit is extended to cover action of offensive nature, namely, neutralizing and disarming armed groups.⁷⁴

⁶⁹ This conflation undermines the ‘mutual exclusiveness’ of the distinction between ‘spontaneous, sporadic or unorganised action carried out by civilians’ and the ‘continuous and status-based or function-based loss of protection’ for armed forces: Ferraro (n 2) 605.

⁷⁰ *ibid* 606-607.

⁷¹ Sheeran, Case (n 3) 1.

⁷² This leaves questions of legitimacy for the Congolese in the areas under non-state governance: A Ponthieu, C Vogel, K Derderian, ‘Without Precedent or Prejudice? – UNSC Resolution 2098 and its Potential Implications for Humanitarian Space in Eastern Congo and Beyond’ (21 January 2014) J Humanitarian Assistance, <<http://sites.tufts.edu/jha/archives/2032>>.

⁷³ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, operative paras 9, 12(b).

⁷⁴ *ibid* operative para 12(b). Before that, recourse to offensive force by UN forces to protect civilians was seen as an exception rather than as the rule: K Okimoto, ‘Protection of Civilians in International Humanitarian Law and by the Use of Force

Empirically, there is hardly any question about the parallel existence of several NIACs in the DRC. Moreover, the Brigade, conceived as it was as a special *combat* force, has succeeded in routing the M23 rebels.⁷⁵ This factual evidence alone is sufficient to arrive at the conclusion that the Brigade has become a party to the armed conflict, with its members being fully-fledged combatants and bound by IHL. Being actively engaged in combat operations, these members have also satisfied the requirement for the triggering of the application of IHL as envisaged in the UN Secretary-General's *Bulletin*. As a corollary, they are excluded from the protection of the Safety Convention.⁷⁶ However, when authorising the establishment of the Intervention Brigade in 2013 (and renewing its mandate in Resolution 2147 in 2014), the Council misjudged the ramifications of the Safety Convention on the question of applicability of IHL. In the preamble, Resolution 2098 highlighted the need to bring to justice those responsible for attacks against the MONUSCO peace troops.⁷⁷ This unmask the Council's remissness in overlooking that MONUSCO peace forces deployed pursuant to enforcement action became combatants as a party to the conflicts.⁷⁸

The Intervention Brigade might feel justified, in its mandate, in giving primacy to defeating armed groups. If so, this would depart from the hitherto consistent policy of the MONUC and MONUSCO in according the safeguarding of civilians 'the highest priority.' A perturbing implication of the Brigade's mandates is that the objective of 'neutralizing' armed groups might be sought at the expense of the hitherto sacrosanct mandate to ensure the safety of civilian population.⁷⁹ However, the introduction of this special force is designed to remedy the deficiency of the 'regular' MONUSCO force in achieving the protection-of-civilian mandate. Against the backdrop of the reluctance of some troop contributing countries (TCCs) to risking the security of their troops, the

under Chapter VII of the Charter of the United Nations' (2008-11) 4 Asia-Pacific YB Intl Humanitarian L 1, 59.

⁷⁵ N Kulish, S Sengupta, 'New U.N. Brigade's Aggressive Stance in Africa Brings Success, and Risks', *New York Times* (12 November 2013).

⁷⁶ Sheeran, Case (n 3) 11-12.

⁷⁷ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, preamble.

⁷⁸ Security Council, Press Statement on Democratic Republic of Congo (29 August 2013) UN Doc SC/11108.

⁷⁹ Compare Sheeran, Case (n 3) 17.



Security Council's resolve to reinforce the protection of civilians was confirmed by Resolution 2147 (2014), which lowered the threshold for resorting to use of force to protect civilians. This resolution dispensed with the condition requiring the 'imminence' of a threat,⁸⁰ the condition contained in similar circumstances elsewhere,⁸¹ enabling the Intervention Brigade to take preventive measures to forestall attacks against civilians.⁸² Reportedly, the Brigade's military operations against M23 and ADF (Allied Democratic Forces) have not culminated in major civilian casualties or humanitarian displacement.⁸³ In contrast, its ongoing offensives against APCLS are considered more hazardous in that they have enmeshed MONUSCO in a much more volatile area.⁸⁴

7. The personal scope of application of IHL to the Intervention Brigade

The UN peace missions are often made up of a mosaic of organisations comprised of military, civilian and police personnel. The general assumption is that IHL applies only to the military components when they become a party to an armed conflict. In contrast, with respect to international civilian personnel, they are protected as civilians under IHL, unless they are considered to participate directly in hostilities.⁸⁵

To examine whether the Intervention Brigade can be considered a party to the conflict(s) in the DRC, three strands of thought can be put forward. First, it may be suggested that the MONUSCO as a whole be seen as a party to the conflict. This across-the-board approach is bolstered by the fact that the Brigade falls under the command and control

⁸⁰ See UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147, operative para 4(a).

⁸¹ See, for instance, UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975, operative para 6; and UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100, para 16(c)(i).

⁸² See also Sheeran, Case (n 3) 18.

⁸³ C Vogel, 'DRC: Assessing the Performance of MONUSCO's Force Intervention Brigade', in African Arguments blog posted on 14 July 2014, <<http://africanarguments.org>>.

⁸⁴ Similarly, the offensive operations against FDLR are deemed as politically very sensitive: *ibid.*

⁸⁵ Ferraro (n 2) 601-602.



of the MONUSCO Force Commander.⁸⁶ The Brigade is not formed as a distinct legal entity. Even on operations, its members act within a single military force (clad in the identical UN emblems and blue helmets) and under a single force commander, whilst relying on the same military bases and logistics as other MONUSCO troops.⁸⁷ Article 2(2) of the UN Safety Convention might be interpreted as corroborating this approach, excluding *in toto* the application of this treaty and depriving even non-military personnel of UN peace missions of special protection, once any UN personnel are engaged as combatants.⁸⁸ However, this overall approach squarely runs counter to the general assumption outlined immediately above. Further, a pitfall is that the civilian personnel, who constitute the minority of the MONUSCO staff, are exposed to the risk of *direct* attacks, as they are stationed in the bases used by the Intervention Brigade and other MONUSCO troops.⁸⁹

Secondly, it may be asserted that apart from the Intervention Brigade, only the military personnel of the MONUSCO should be deemed combatants when actively engaged in hostilities. Thirdly, as a variant of the second view, one may call for an even more nuanced analysis, differentiating between the units of 'regular forces' of MONUSCO which are engaged in combat operations alongside or in support of the Brigade, and the units of the military personnel focusing on humanitarian relief operations. According to this approach, those 'regular' military units dealing with tasks which are short of combat operations would be classified as civilians under IHL.⁹⁰ Together with the Brigade, only the former category of the military personnel would become a party to the armed conflicts.⁹¹ Nevertheless, such a nuanced approach is riddled with complex empirical evaluations, dissuading armed opposition

⁸⁶ B O Oswald, 'The Security Council and the Intervention Brigade: Some Legal Issues' (2013) 17 *ASIL Insights* 15 (6 June 2013).

⁸⁷ Sheeran, Case (n 3) 9, 10. Compare Engdahl (n 22) 671 (arguing that 'the operation itself (such as ISAF or MONUSCO) is not capable of becoming a party to an armed conflict, since it does not possess the necessary independence from the subjects of international law of either troop-contributing states, or the involved organisations').

⁸⁸ C Greenwood, 'Protection of Peacekeepers: The Legal Regime' (1996) 7 *Duke J Comparative Intl L* 207; D Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 *Intl Rev Red Cross* 613, 625.

⁸⁹ Sheeran, Case (n 3) 7.

⁹⁰ See Oswald (n 86).

⁹¹ Grenfell (n 31) 646-647.



groups to observe the principle of distinction or the IHL rules in general. It is more reasonable to assert that the entire military contingent, irrespective of diverse functions which each of specific units may assume, should be governed by IHL upon the active participation of the military in hostilities.⁹²

8. Conclusion

Notwithstanding the Security Council's circumspection in stating that it is created 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping',⁹³ the Intervention Brigade will leave an indelible imprint in the historical trajectory of peace enforcement operations as the first UN peace mission of overtly offensive nature. Relative clarity over the applicability of IHL to the Brigade (whether based on the Safety Convention or on the UN Secretary-General's *Bulletin*) may be contrasted to uncertainty surrounding the line between the Brigade and the 'regular' force, and the personal ambit of application of IHL to the different components (military, civil and police personnel) of MONUSCO. Such opacity in the allocation of powers and duties may hamper the operational efficacy of this peace mission tasked with multi-dimensional mandates.⁹⁴ It is recommended that the Security Council elucidate the legal direction on these overarching issues,⁹⁵ and on other unresolved questions such as the detention of fighting members of armed groups, and the distribution of responsibility between the UN and the TCCs for violations of IHL and human rights perpetrated by Brigade members.

⁹² Ferraro (n 2) 600.

⁹³ UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098, operative para 9.

⁹⁴ Grenfell (n 31) 651.

⁹⁵ For a similar recommendation in the context of South Sudan, see R Mamiya, 'Legal Challenges for UN Peacekeepers Protecting Civilians in South Sudan' (2014) 18 ASIL Insight 26 (9 December 2014).



The protection of the Intervention Brigade under Article 8 (2)(e)(iii) of the Rome Statute of the International Criminal Court

*Barbara Sonczyk**

1. *Introduction*

As a non-international armed conflict continued in the eastern Democratic Republic of the Congo between the DRC armed forces and non-state armed groups, the United Nations Security Council acting on the recommendation of the Secretary-General Ban Ki-moon and in response to the call of the governments in Africa's Great Lakes region, adopted Resolution 2098 on 28 March 2013, which extended the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) and authorised the creation of an 'Intervention Brigade' to conduct offensive operations against armed rebel groups. The Brigade is a 'first-ever offensive combat force' intended to carry out targeted operations against 23 March Movement (M23) and other Congolese rebels and foreign armed groups in eastern DRC.¹ As stressed in the resolution, the Intervention Brigade is established within the operation's existing force 'on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping.'² With reference to Chapter VII of the UN Charter, the resolution authorises MONUSCO to take 'all necessary measures' to perform the mandated tasks, through its military component – its regular forces and its Intervention Brigade as appropriate. Specifically, MONUSCO is authorised, in support of the authorities of

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¹ UNSC Press Release "Intervention Brigade" Authorized as Security Council Grants Mandate Renewal' (28 March 2013) UN Doc SC/10964 <www.un.org/News/Press/docs/2013/sc10964.doc.htm>.

² UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 (2013) para 9.



DRC and taking full account of the need to protect civilians, to carry out:

‘... targeted offensive operations through the Intervention Brigade ... either unilaterally or jointly with the FARDC, in a robust, highly mobile and versatile manner and in strict compliance with international law, including international humanitarian law and with the human rights due diligence policy on UN-support to non-UN forces (HRDDP), to prevent the expansion of all armed groups, neutralize these groups, and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups on state authority and civilian security in eastern DRC and to make space for stabilization activities.’³

In October and November 2013 MONUSCO participated in robust Congolese-led operations against the M23, which led to the military defeat of the movement.⁴ MONUSCO support included combat operations by ground troops from the Intervention Brigade, attack helicopters, artillery and mortar fire, and logistics support.⁵ On 28 March 2014 the Security Council acting under Chapter VII of the UN Charter unanimously renewed the mandate of MONUSCO, including its Intervention Brigade, until 31 March 2015.⁶ The period following the extension of the mandate was characterised by further momentum in the efforts of MONUSCO to neutralise armed rebel groups in support of the Congolese armed forces.⁷ The Mission provided support to FARDC operations against various military factions in the eastern Congo and these operations were marked by heavy fighting, with significant casualties sustained by both the rebels and FARDC.⁸ As announced by a senior

³ *ibid* para 12(b).

⁴ *The Report of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (17 December 2013) UN Doc S/2013/757 para 17.

⁵ *ibid* para 40.

⁶ UNSC Res 2147 (28 March 2014) UN Doc S/RES/2147 (2014) para 1.

⁷ *The Report of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (5 March 2014) UN Doc S/2014/157 para 39 and *The Report of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* (30 June 2014) UN Doc S/2014/450 para 28.

⁸ UN Doc S/2014/450 (n 7) para 53.

UN envoy on 8 January 2015, the DRC government jointly with MONUSCO and its Intervention Brigade will continue the military offensive against the Forces for the Liberation of Rwanda (FDLR), the Rwandan Hutu rebels in the DRC. The FDLR refused to disarm and surrender unconditionally by 2 January 2015 and the Secretary-General has urged for 'decisive action' against them.⁹

As noted above, the Intervention Brigade has been involved in a number of combat operations since its creation,¹⁰ which gives rise to legal questions regarding the applicability of international humanitarian law (IHL) to such use of force, the status of its personnel and consequently the lawfulness of attacks against them. This contribution will analyse these issues from the perspective of the protection afforded to peacekeeping missions under the Rome Statute of the International Criminal Court (ICC). Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute proscribe as a war crime in international and non-international armed conflicts respectively:

'... intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.'

This contribution examines the question of whether MONUSCO with its Intervention Brigade, a 'first-ever offensive combat force', can be regarded as a 'peacekeeping mission' covered by the protective regime of Article 8(2)(e)(iii) of the Rome Statute applicable in non-international armed conflict.¹¹ The main argument is that regardless of

⁹ <www.unmultimedia.org/radio/english/2015/01/un-priority-for-2015-disarming-rebels-in-the-congo/#.VMGJ4ih8vww>.

¹⁰ See also press releases eg: D Oliver, 'How M23 was rolled back', *African Defence Review* (October 2013) <www.africandefence.net/analysis-how-m23-was-rolled-back/>; J Stupart, 'Squaring Up Against the ADF', *African Defence Review* (6 March 2014) <www.africandefence.net/squaring-up-against-the-adf/>; S Raghavan 'In Congo, trapped in violence and forgotten', *The Washington Post* (27 September 2014) <www.washingtonpost.com/sf/world/2014/09/27/in-congo-trapped-in-violence-and-forgotten/>.

¹¹ The DRC is a State-party to the Rome Statute and the conflict in its territory is classified as non-international. The author shares the majority view that the involvement of multinational armed forces, such as UN peace operations, in a non-international armed



its peacekeeping mandate, MONUSCO including its Intervention Brigade is bound by IHL when the conditions for its application have been met. The fact that it is a peacekeeping mission and its actions are authorised by the UN Security Council, and therefore legal under *ius ad bellum*, does not grant the immunity under *ius in bello* or in any way modify the applicability of the latter regime. The status of peacekeeping personnel under IHL should be determined exclusively based on their actions and facts on the ground. The distinction should also be made between civilian and military personnel of the mission. If military personnel from MONUSCO engage in hostilities with non-state armed groups and become a party to a non-international armed conflict, they are subject to IHL rules like any other armed force. This effectively means that peacekeeping military personnel should be considered combatants for the purpose of the principle of distinction and therefore legitimate targets for as long as the mission is a party to the conflict. It also means that they will not be covered by Article 8(2)(e)(iii) of the Rome Statute of the ICC.

The above argument is built upon the analysis of two major issues, and this is reflected in the structure of the article. First, it considers whether MONUSCO and its Intervention Brigade can be regarded as ‘a peacekeeping mission in accordance with the Charter of the United Nations’ for the purpose of the Rome Statute. Secondly, it examines the status of peacekeeping personnel under international humanitarian law and the conditions under which they can enjoy protection of Article 8(2)(e)(iii) of the Rome Statute. Finally, it applies the conclusions of this analysis to MONUSCO and its Intervention Brigade and recapitulates the main argument of the paper.

conflict in support of governmental forces against non-state armed groups does not internationalise the conflict, see eg: ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Report of the 31st International Conference of the Red Cross and Red Crescent (ICRC, Geneva 2011) <www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>; S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 Intl Rev Red Cross 69.



2. 'A peacekeeping mission in accordance with the Charter of the United Nations'

Neither the Rome Statute nor the Elements of Crimes thereto provide a definition of a 'peacekeeping mission in accordance with the Charter of the United Nations.' Defining 'peacekeeping' is not an easy task since the concept was not conceived as a part of a well-considered theoretical framework or a coherent doctrine. It was born in practice, or rather the term 'peacekeeping' was invented after the practice had already begun.¹² Peacekeeping was developed during the Cold War when, due to ideological differences, the Security Council was unable to perform collective security actions.¹³ It is not mentioned anywhere in the UN Charter and the Organization itself was for years disinclined to define it, most likely because 'to define peace-keeping was to impose a strait-jacket on a concept whose flexibility made it the most pragmatic instrument at the disposal of the world organization.'¹⁴ Although there is still no single and authoritative UN definition of peacekeeping, there is an agreement regarding three constitutional principles that have traditionally governed UN peacekeeping operations, namely: consent of the parties to the conflict to the deployment of a peacekeeping mission, impartiality, and non-use of force except in self-defence and defence of the mandate.¹⁵ These principles were derived from the experiences of

¹² T Findlay, *The Use of Force in UN Peace Operations* (OUP 2002) 4; WJ Durch, ML England, *The Purposes of Peace Operations* (Center on International Cooperation 2009) 9.

¹³ For a general discussion see eg: O Schachter, C Joyner (eds), *United Nations Legal Order* (CUP 1995); H McCoubrey, ND White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (Dartmouth 1996); M Bothe, 'Peacekeeping' in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 661; N MacQueen, *Peacekeeping and the International System* (Routledge 2006).

¹⁴ As remarked by Shashi Tharoor, the Special Assistant to the Under-Secretary-General for Special Political Affairs/Peacekeeping Operations in 1989-1996 'peacekeeping was an activity that the United Nations had always been politically reluctant to define.' S Tharoor, 'The Changing Face of Peace-keeping and Peace-enforcement' (1995) 19 *Fordham Intl L J* 408, 414.

¹⁵ United Nations, Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations, Principles and Guidelines* (2008) 6 <http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> [hereinafter: *United Nations Peacekeeping Operations, Principles and Guidelines*] 31 ff.



traditional ceasefire-monitoring missions¹⁶ and they are rooted in the purposes and principles of the UN Charter. They are in line with the principles of sovereignty, territorial integrity and political independence of States and non-intervention in matters that are essentially within their domestic jurisdiction. They also underline a conceptual and constitutional distinction between peacekeeping and (peace) enforcement. The clear demarcation line between these two types of operations was drawn by the International Court of Justice in *Certain Expenses of the United Nations* Advisory Opinion (1962) at the beginning of a peacekeeping practice.¹⁷ Peacekeeping is conceptually different from (peace) enforcement because it does not involve ‘preventive or enforcement measures’ under Chapter VII of the UN Charter against a State. Enforcement action, on the other hand, is an exception to the prohibition of the use of force in Article 2(4) of the UN Charter as it uses force against a culpable State or States to enforce peace or impose a political solution without their consent.

Traditional peacekeeping principles of consent, impartiality and non-use of force except in self-defence continue to apply despite the evolution and transformation that peacekeeping has undergone moving beyond traditional ceasefire monitoring. However, they do not apply in their original form; they had to be re-defined in response to new and evolving political and operational challenges.¹⁸ For example, the principle of consent has its origins in the early UN peacekeeping practice of deploying observer missions in inter-state conflicts. The United Nations was dealing with two or more sovereign States and needed their consent to the measure to deprive the action of enforcement character. The

¹⁶ The UN Secretary General Dag Hammarskjöld elaborated on the characteristics of the first armed peacekeeping mission, the United Nations Emergency Force (UNEF I) established in 1956 in response to the Suez Crisis, in his Reports to the General Assembly, which consequently became the defining legal principles of UN peacekeeping in the coming decades; see eg: *Second and final report of the Secretary-General on the plan for an emergency international United Nations force requested in resolution 998 (ES-I), adopted by the General Assembly on 4 November 1956* (06 November 1956) UN Doc A/3302.

¹⁷ *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 166, 177.

¹⁸ N Tsagourias, ‘Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension’ (2007) 11 J Conflict Security Studies 465; AJ Bellamy, PD Williams, *Understanding Peacekeeping* (2nd edn, Polity Press 2010) 173.



changing nature of conflicts and new circumstances of internal strife with which peacekeepers are confronted have influenced the understanding of the consent requirement. As stipulated in UN reports, in a non-international armed conflict, consent must be obtained from a host-State, whereas consent from local factions, who are parties to such conflict should be sought as a practical measure to facilitate the operation of the mission, but not out of a legal obligation.¹⁹ This approach appears sound, as non-state actors do not have a standing equal to States under international law. The traditional position of international law admits the existence of the right of a recognised government to invite foreign forces to assist it in combatting rebels.²⁰

The second principle of impartiality also dates back to the early peacekeeping missions and the realities of that time and, similarly to the principle of consent, has undergone a number of modifications since then. As stressed in UN peacekeeping doctrine, impartiality does not mean neutrality in the sense of inactivity or treating the parties as moral equals – following bitter lessons learned from the experience in the former Yugoslavia and Rwanda. Impartiality now refers to the way the mandate should be implemented by a peacekeeping mission at the operational level. Peacekeeping missions must be impartial in their dealings with the parties and rigorously execute the mandate without favour or prejudice to any party.²¹ Also the principle of non-use of force except in self-defence has changed under UN law – it has been transformed from its narrow origins of personal self-defence to include ‘defence of the mission’ or ‘defence of the mandate’. Peacekeeping is still distinct from peace enforcement as it does not use force against a State at the international or strategic level. It might, however, take a robust form at the tactical level to support the peace process, to defend the mission and the mandate from spoilers and criminals.²² The core business of peacekeeping is to create a secure and stable environment to facilitate the political process. Within this context the primary distinction be-

¹⁹ Eg: *The Report of the Panel on United Nations Peace Operations* (October 2000) UN Doc A/55/305-S/2000/809 (*The Brahimi Report*).

²⁰ The International Court of Justice referred to this principle in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 para 246.

²¹ *United Nations Peacekeeping Operations, Principles and Guidelines* (n 15) 33.

²² *ibid* 35.



tween peace enforcement and robust peacekeeping is thus more about the objectives of the use of force and less about how much force is being used, although certain caveats apply.²³ A mission might be authorised by the Security Council acting under Chapter VII of the UN Charter to ‘use all necessary means’ against criminal gangs and spoilers ‘to deter forceful attempts to disrupt the political process, to protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order.’²⁴ The use of force to defend the mandate must be seen as a concept distinct from personal self-defence as they rest on two different legal bases. Defence of the mandate derives its validity from a binding resolution of the Security Council and it has to be authorised each time, whereas the right to personal self-defence is an inherent right of every individual and exists independently of such authorisations.

The continuing relevance of these three constitutional principles of peacekeeping has been confirmed by the Special Court for Sierra Leone (SCSL) and the International Criminal Court when they were seized on cases concerning attacks against peacekeeping missions.²⁵ The similar test should also be applied to MONUSCO and its Intervention Brigade in order to establish whether the mission is a peacekeeping mission and therefore whether it could be covered by the protective regime of the Rome Statute.

3. *MONUSCO as a peacekeeping mission*

MONUSCO was established by Security Council resolution 1925 of 28 May 2010 to take over from an earlier mission deployed in the DRC - the United Nations Organization Mission in Democratic Republic of the Congo (MONUC). It was authorised to use ‘all necessary means’ to

²³ C de Coning, J Detzel, P Hojem, ‘UN Peacekeeping Operations Capstone Doctrine. Report of the TFP Oslo Doctrine Seminar 14 & 15 May 2008, Oslo, Norway’ (2008) 14 Norwegian Institute of International Affairs, NUPI Report Security in Practice 4.

²⁴ *United Nations Peacekeeping Operations, Principles and Guidelines* (n 15) 34.

²⁵ *The Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, (Judgment) SCSL-04-15-T (2 March 2009); *The Prosecutor v Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010).



carry out its mandate relating, *inter alia*, to the protection of civilians and humanitarian personnel under imminent threat of physical violence and to support the government of the DRC in its stabilisation and peace consolidation efforts.²⁶ The mission was deployed with the consent of the government of the DRC and the Security Council has continuously stressed ‘its commitment to the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo.’²⁷ In line with the principle of impartiality in execution of a peacekeeping mandate, which should not be confused with neutrality, and in accordance with *Human rights due diligence policy on United Nations support to non-United Nations security forces*,²⁸ the mission must ensure that any support provided to DRC forces is consistent with the purposes and principles set out in the UN Charter and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law.²⁹ The Chapter VII authorisation to use ‘all necessary means’ to fulfil the mandate, which in Security Council parlance stands for the use of force beyond self-defence,³⁰ is consistent with peacekeeping principles on the use of force, as long as force is not employed against a State at the strategic or international level. If this condition is met, ‘robustness’ and proactive use of force against spoilers and criminals does not turn MONUSCO into an enforcement tool. With these considerations in mind it seems justified to conclude that MONUSCO is a ‘peacekeeping mission in accordance with the Charter of the United Nations.’ As regards the Intervention Brigade, Resolution 2098 (2013) stresses that the Brigade has been established as an integral part of MONUSCO and remains under the same command and control arrangements.³¹ Specifically, it is not meant to be an enforcement measure operating alongside the existing peacekeeping operation and sup-

²⁶ The original mandate of MONUSCO was further detailed in UNSC Res 2053 (27 June 2012) S/RES/2053.

²⁷ See eg: UNSC Res 1925 (28 May 2010) UN Doc S/RES/1925 (2010), UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053 (2012), UNSC Res (28 March 2014) UN Doc S/RES/2147 (2014).

²⁸ UN Doc A/67/775-S/2013/110 (5 March 2013).

²⁹ *ibid.*

³⁰ T Findlay (n 12) 7-9; R McLaughlin, ‘The Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising “All Necessary Means”’ (2008) 12 *J Conflict Security L* 389.

³¹ UNSC Res 2098 (n 2) para 9.



portive to it, but rather under the command and control of participating states, as was the case in the former Yugoslavia and Somalia.³² Resolutions 2098 (2013) and 2147 (2014) reaffirm in their preambles ‘the basic principles of peacekeeping, including consent of the parties, impartiality, and non-use of force, except in self-defence and defence of the mandate.’³³ Given the structural integration of the Brigade with the existing peacekeeping operation, as well as the consent of the host state, DRC, to its newly transformed mandate,³⁴ MONUSCO as a whole can be regarded a peacekeeping mission for the purpose of Article 8(2)(e)(iii) of the Rome Statute.

4. Status of peacekeeping personnel under international humanitarian law

There is no specific reference to peacekeeping missions in any of the 1949 Geneva Conventions or their Additional Protocols.³⁵ An indirect reference in Article 37(1)(d) of the 1977 Additional Protocol I relates to the prohibition of perfidy and bans ‘the feigning of protected status by the use of signs emblems or uniforms of the United Nations or of neutral or other States not Parties to the Conflict’. This provision suggests the implied protected status of persons entitled to use these signs and

³² IFOR, UNITAF

³³ UNSC Res 2098 (n 2), UNSC Res 2147 (28 March 2014) S/RES/2147.

³⁴ The Minister for Foreign Affairs, Cooperation and La Francophonie of the Democratic Republic of the Congo expressed his gratitude on behalf of his Government and people for United Nations efforts to help protect their country’s territorial integrity and foster peace and stability over the past 15 years. He said that the Security Council’s ‘innovative decision’ should help the country put a definitive end to the repeated cycles of violence and lead to the ‘dawning of a new era’ of human rights and security for all. See Press Release, UN Security Council, ‘“Intervention Brigade” Authorized as Security Council Grants Mandate Renewal’ (March 28 2013) UN Doc SC/10964 available at <www.un.org/News/Press/docs/2013/sc10964.doc.htm>.

³⁵ M Cottier, ‘War Crimes – para. 2(b)(iii)’ in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (2 edn, Beck 2008) 335; K Dorman, *Elements of War Crimes under the Rome Statute of the International Criminal Law. Sources and Commentary* (ICRC/CUP 2003) 154, 452.

has been so assessed by scholars.³⁶ Cottier compares it to the protected status of civilians and persons *hors de combat*.³⁷ However, it should be noted that the same article contains a separate paragraph prohibiting ‘the feigning of an intent to surrender, or an incapacitation by wounds or sickness, or civilian, non-combatant status’,³⁸ which suggests that the protected status related to the UN might be of a distinct nature. Despite the lack of the explicit qualification of peacekeeping personnel in core IHL treaties, peacekeepers will belong either to the category of combatants or the category of civilians, as the two are complementary and mutually exclusive and there is no intermediate status between them. It should be noted though that following the concept of ‘integrated missions’, most contemporary peacekeeping operations consist of a number of different components: military, police and civilian.³⁹ The Rome Statute does not make any reference to this fact as it speaks only of a ‘peacekeeping mission’ as a whole. Articles 8(2)(b)(iii) and 8(2)(e)(iii) prohibit intentionally directing attacks against peacekeeping personnel and objects ‘as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict’, which implies that such personnel and objects should be considered civilians and civilian objects. While the status of civilian police and civilian personnel such as administrative and humanitarian staff should not cause much controversy, the same is not true for military personnel, who consist of armed forces of troop-contributing countries. The issue

³⁶ M Cottier (n 35) 336; J Doria, ‘Attacks on UN and Regional Organisations Peacekeepers: Potential Legal Issues Before the International Criminal Court’ (2008) 5 *Intl Studies J* 65-66.

³⁷ *ibid.*

³⁸ Art 37(1)(a), (b) and (c) of the 1977 Additional Protocol I. See also: *Commentary on the Additional Protocols* (n 137) 439-440; C Greenwood ‘Protection of Peacekeepers: The Legal Regime’ (1996) 7 *Duke J Comp Intl L* 185, 190. The protective rules explicitly applying to peacekeepers can also be found in the 1980 Conventional Weapons Convention (Article 9) and its Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Article 8).

³⁹ The concept of ‘integration’ of the UN activities in the field was formally introduced in 1997, although various efforts aiming at achieving greater coherence within the UN system were undertaken long before. Calling for ‘unity of purpose’, the Secretary-General Kofi Annan initiated in 1997 a programme for UN reform centred on ‘integration’ between its humanitarian, peace-keeping and political structures. See: ‘Renewing the United Nations: A Programme for Reform. Report of the Secretary General’ (14 July 1997) UN Doc A/51/950.



of personal scope of the application of IHL should therefore be assessed for each category of personnel separately. The SCSL and the ICC, both seized of the attacks against peacekeeping missions, did not distinguish between different categories of personnel nor explain why all of them should be protected as civilians.⁴⁰ The courts simply ruled that both peace operations under consideration were peacekeeping missions in accordance with the UN Charter and therefore their personnel and objects should enjoy the protection given to civilians and civilian objects. It should be noted that such an approach has a direct impact on the temporal scope of application of IHL to peacekeeping personnel. As civilians, they would benefit from the protection against direct attacks unless and for such time as they directly participate in the hostilities. The notion of direct participation in hostilities refers to specific hostile acts carried out in the course of armed conflict by individual civilians not associated with armed forces of the parties to the conflict.⁴¹ Such civilians lose their protection only temporarily for the duration of specific hostile acts. This necessarily creates a ‘revolving-door’ effect, but since civilian involvement in hostilities occurs on a sporadic, spontaneous or unorganized basis, such temporary and activity-based loss of protection is justified. It would not be justified, however, if the participation in hostilities continues in a commanded and organized way, which might be the case for a military component of a peacekeeping mission, especially if it is mandated to carry out ‘targeted offensive operations’ against rebel armed groups.

For the purpose of determining whether peacekeepers are entitled to the protection of civilians, an alternative approach to the one taken by the international courts should be considered, namely whether or not peacekeepers qualify as combatants.⁴² This approach is informed by the way the definitions of the combatant and civilian statuses are constructed in IHL treaties. Combatants have the right to participate directly in hostilities and they can be targeted at all times. They are defined in Article 43 of the Additional Protocol I as members of the

⁴⁰ *Sesay et al* (n 25) para 233; *Abu Garda case* (n 25) para 126.

⁴¹ See eg: the ICRC study by N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

⁴² See the analysis of international jurisprudence in O Engdahl, ‘Prosecution of Attacks against Peacekeepers in International Courts and Tribunals’ (2012) 51 *Military L and L War Rev* 249, 275-276.



armed forces of a party to a conflict consisting of all organized armed forces, groups and units under a command responsible to that party for the conduct of its subordinates. Such armed forces shall be subject to an internal disciplinary system to enforce their compliance with the rules of international humanitarian law.⁴³ This definition of armed forces is based on the qualifications of belligerents in the Hague Regulations and the qualifications of prisoners of war in the Third Geneva Convention.⁴⁴ Civilians, on the other hand, are defined negatively/by exclusion, as persons who are not members of the armed forces, as set forth in Article 50 of the Additional Protocol I.⁴⁵ As already stated above, civilians enjoy the protection from direct attacks unless and for such time as they take a direct part in hostilities.⁴⁶ There is no formal combatant status in non-international armed conflict. Treaties applicable to this type of armed conflict use the terms ‘civilian’, ‘armed forces’ and ‘organized armed group’ but do not define them. These concepts should, nevertheless, be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.⁴⁷ Since the protection of persons who are not or are no longer participating in the hostilities is one of the main goals of international humanitarian law and the principle of distinction applies in all armed conflicts,⁴⁸ the parties to a non-international armed conflict

⁴³ State practice has established this rule as a norm of customary international law applicable in international armed conflicts. For the purposes of the principle of distinction, it may also apply to State armed forces in non-international armed conflicts; see JM Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law*, vol I (ICRC/CUP 2005) Rule 4.

⁴⁴ Art 1 of Annex to the Hague Convention IV: Regulations respecting the laws and customs of war on land (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 227, art 4 A (1), (2), (3) and (6) of the Third Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

⁴⁵ Art 50 of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

⁴⁶ Art 51(3) of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3.

⁴⁷ Art 31(1) of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁴⁸ The ICRC Customary International Law Study recognised the principle of distinction as a customary international law norm applicable to both types of armed



must draw a distinction between combatants understood in a generic sense as those who fight ('fighters')⁴⁹ and non-combatants, including civilians, who do not fight.⁵⁰

The analysis of the status of peacekeeping forces under IHL should start with examining whether they can qualify as armed forces belonging to a party to a conflict; it is only if that is resolved in the negative, that they should be considered as falling into the category of civilians. The fact that peacekeeping operations are often deployed in situations of armed conflict does not automatically make them warring parties. There are certain conditions that must be fulfilled to determine the existence of an armed conflict involving peacekeeping forces and triggering the applicable legal framework. In the case of a non-international armed conflict, the fighting must occur between two or more parties demonstrating a certain level of organization and it must have reached a certain threshold of intensity.⁵¹ A military component of a peacekeeping mission easily fulfils the requirement of internal structure and organization, yet it should not be considered a party to the conflict unless it engages in sustained combat with an organized armed group or groups reaching the threshold of intensity required by IHL. If that happens, members of the military component will become combatants for the purposes of the principle of distinction and lose the protection against direct attacks as long as the peacekeeping mission is a party to that conflict.⁵² Their loss of protection will be status-based, hence they will be legitimate targets at all times, not only when directly participating in

conflicts, see: Rule 1 (Distinction between Civilians and Combatants) and Rule 7 (Distinction between Civilian Objects and Military Objectives) of and commentary to these rules. For a general discussion on the customary status of the principle of distinction see e.g.: C Greenwood 'Customary Law Status of the 1977 Additional Protocols' in AJM Delissen, GJ Tanja (eds) *Humanitarian Law of Armed Conflict-Challenges Ahead* (Martinus Nijhoff 1991) 108; Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 82.

⁴⁹ Eg: the term 'fighters' is used in the Manual on the Law of Non-International Armed Conflict, International Institute of Humanitarian Law (Sanremo 2006) 4.

⁵⁰ Common Art 3 to the 1949 Geneva Conventions, Arts 1(1) and 13 of the Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International armed conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

⁵¹ T Ferraro, 'The applicability and application of international humanitarian law to multinational forces' (2013) 95 *Intl Rev Red Cross* 561, 576.

⁵² *ibid* 606.



hostilities. This conclusion will apply to all military personnel of peacekeeping forces regardless of their specific function, which is consistent with the logic of IHL and the principle of distinction. Accordingly, all other non-military personnel of a peacekeeping mission must be regarded as civilians for the purposes of IHL. Thus they will benefit from the protection against direct attacks unless and for such time as they directly participate in the hostilities.

5. *Concluding remarks*

In line with the considerations above, when MONUSCO's forces, including its Intervention Brigade, engage in hostilities with non-state armed groups in the eastern DRC while pursuing the mandate of 'neutralizing' and disarming them and when fighting reaches the threshold for the applicability of IHL, they should be regarded as combatants (in a generic sense) and therefore legitimate military targets. The fact that their actions are undertaken in the fulfilment of the peacekeeping mandate and are legal under *ius ad bellum* is irrelevant for the applicability of IHL. Neither combatant nor civilian status depends on the decision of the Security Council to establish a peacekeeping mission but on the fulfilment of the criteria stipulated by international humanitarian law and actual conduct of the members of the mission. The Secretary-General's reports on MONUSCO from 2013 and 2014 seem to confirm that the criteria for the applicability of IHL have been met, as the reports talk about on-going combat operations by the Congolese armed forces supported by MONUSCO and its Intervention Brigade against various armed groups in the eastern DRC. These operations have been described as 'robust', involving ground troops, attack helicopters, artillery and mortar fire and marked by heavy fighting, with significant casualties on both sides.⁵³ If it is concluded that MONUSCO has become a party to a non-international armed conflict in the DRC, this will not

⁵³ See the *Reports of the Secretary General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo* UN Doc S/2013/757 (17 December 2013); UN doc S/2013/773 (23 December 2013); UN Doc S/2014/157 (05 March 2014); UN Doc S/2014/450 (30 June 2014); UN doc S/2014/698 (25 September 2014); UN Doc S/2014/956 (30 December 2014); UN Doc S/2014/957 (30 December 2014).



change the characterisation of the mission as a peacekeeping mission since the robust use of force is allowed at the tactical level against spoilers and criminals. In such circumstances, however, the mission's military personnel, including the Intervention Brigade, as well as other brigades, whether or not actually engaged in combat, will not benefit from the protection of Article 8(2)(e)(iii) of the Rome Statute of the International Criminal Court. The protective regime of the Rome Statute will only cover civilian personnel unless and for such time as they take a direct part in hostilities.



The Question:

**The role of experts before the International Court of Justice:
The *Whaling in the Antarctic* case**

Introduced by Chiara Ragni

On 31 March 2014 the International Court of Justice (ICJ) issued its judgment relating to *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* ((Judgment) [2014] ICJ Rep 226), in which it held that Japan's Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II) contravenes the 1946 International Convention for the Regulation of Whaling and must therefore be ceased.

Key to the dispute was whether Japan's use of lethal means in its whaling programme could be justified under Article VIII(1) of the Convention, which provides any Contracting Governments with the possibility to 'grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research ...' The ICJ addressed, first, the question of how to interpret the term 'scientific research', which is not defined by the Convention and, second, whether the programme's design and implementation were reasonable in relation to its stated objectives. While it found that JARPA II could be characterized as scientific research based on its objectives (which are within the scope of the Scientific Committee's research categories), in order to pronounce on the latter question the ICJ made first-time recourse to scientific evidence provided for by experts appointed by the parties according to Article 63 of its Rules. It is worth noting in this regard that the ICJ has so far been reluctant to use external resources in order to address issues raising scientific problems. The Court's approach in this respect was strongly criticized several years before. In the Joint Dissenting Opinion attached to the *Pulp Mills* Judgment, Judges Al-Khasawneh and Simma observed: 'The adjudication of disputes in which the assessment of scientific questions by experts is indispensable ... requires an interweaving of legal process with knowledge and expertise that can only be



drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court. The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties.’ (*Case Concerning Pulp Mills* [2010] ICJ Rep 110 para 3).

In principle, the task of experts is to elucidate the facts, and that of the Court is to assess them according to the law, but what about cases, such as the one at issue, where the distinction between scientific and legal problems is not so clear-cut? Is the definition of ‘scientific research’ a problem of treaty interpretation or a question that needs scientific knowledge in order to be addressed? Does the issue of whether lethal methods are necessary or reasonable with respect to stated scientific objectives raise only technical or scientific matters of fact? Should it be treated as a legal issue or as a mixed question of fact and of law? And in the latter case, what is respectively the role of the ICJ and of the experts? As regards the role of experts in clarifying legal or mixed questions, Judges Al-Khasawneh and Simma considered that they ‘will be drawn into questions of legal interpretation through their involvement in the application of legal terms. The conclusions of scientific experts might be indispensable in distilling the essence of what legal concepts ... come to mean in a given case.’ (*Case Concerning Pulp Mills* [2010] ICJ Rep 116 para 17). However, with regard to this last point it could be questioned whether resorting to an expert opinion concerning questions also involving legal issues would undermine the role of the ICJ and what guarantees could be adopted in order to avoid this risk.

Even once it is established that, as the ICJ in the *Whaling* case clearly suggested, the question whether the scientific programme authorized by Japan complies with Article VIII is an objective one and that it is therefore primarily for the judges to pronounce thereon, one still might wonder why the Court decided to rely on the evidence provided by the parties instead of appointing its own experts. What are the reasons – if any – for this cautious approach?

QIL asked Makane Moïse Mbengue (University of Geneva) and Tullio Scovazzi (University of Milan-Bicocca) to address these questions. By examining different aspects of the ICJ’s practice concerning the use of experts, the two authors offer a comprehensive overview of the problems encountered by the World Court when it is called upon to address legal disputes involving complex scientific questions.



Between law and science: A commentary on the *Whaling in the Antarctic* case

Makane Moïse Mbengue*

1. *Introduction*

In March 2014, the International Court of Justice (ICJ, the Court) issued its judgment on the merits in the dispute between Australia and Japan, with New Zealand intervening, regarding Japan's whaling programme in the Antarctic.¹ Australia's primary contention in its application was that Japan's whaling programme in the southern hemisphere (JARPA II) breached certain provisions of the International Convention for the Regulation of Whaling (ICRW).² Japan contended, however, that JARPA II fell within the exception carved into Article VIII of the ICRW,³ which authorises Contracting Governments to issue special permits to its nationals to kill whales 'for purposes of scientific research'.⁴ The crux of the issue to be decided by the ICJ was whether JARPA II benefited from Article VIII, and therefore, whether the killing of whales under this programme was 'for purposes of scientific research'. The Court, by a majority of twelve votes to four, found the answer to be in the negative, thus deciding against Japan.⁵

Several questions of vital importance to international dispute-settlement proceedings have been raised as a result of the way the proceedings were conducted and the way the Court reasoned its decision.

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¹ *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Judgment) [2014] ICJ Rep 226.

² International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 (ICRW).

³ *ibid* art VIII(1).

⁴ *Whaling in the Antarctic* (n 1) 49.

⁵ *Whaling in the Antarctic* (n 1) 247(2).



In this case, complex scientific issues⁶ arose and were intertwined with legal issues. Questions involved the definition of ‘scientific research’ in Article VIII of the ICRW, a term, the meaning and scope of which were crucial to the dispute.⁷ A further important question was whether lethal methods were necessary or reasonable with respect to the stated scientific objectives of JARPA II.⁸ In such situations, especially when deciding mixed questions of law and fact, it is not easy to determine the respective roles of the Court and of the experts appointed either by the parties or by the Court. It is equally important to consider whether the Court should rely on evidence provided by party-appointed experts, or whether it should appoint experts of its own.

2. *The blurred distinction between factual and legal issues*

The function of the ICJ is to decide disputes ‘in accordance with international law’.⁹ However, fact-finding is also an essential, indeed indispensable component of the Court’s function. Without facts, law as ‘clarified’¹⁰ or ‘developed’¹¹ by international courts and tribunals would be a mere abstraction. Sound fact-finding is required to deal efficiently with ‘the complexities involved in the serious and rigorous sifting of evidence’.¹² Indeed, if the ‘law lies within the judicial knowledge of’¹³ the

⁶ Scientific facts cover the broad array of facts pertaining to ‘the structure and behaviour of the physical and natural world’: *Concise Oxford English Dictionary* (11th edn, OUP 2008) 1287.

⁷ *Whaling in the Antarctic* (n 1) 73-86.

⁸ *ibid* 88.

⁹ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1).

¹⁰ On the idea of international courts and tribunals acting as ‘law-clarifiers’ and not as ‘law-makers’, see, for example, *United States – Measures Affecting the Imports of Wool Shirts and Blouses from India – Report of the Appellate Body* (25 April 1997) WT/DS33/AB/R para 19. See also *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections, Judgment of 21 December 1962) (Joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice) [1962] ICJ Rep 540.

¹¹ See E Lauterpacht, *The Development of International Law by the International Court* (CUP 1958) xiii.

¹² E Lauterpacht, *Aspects of the Administration of International Justice* (CUP 1991) 18.



‘international judge’¹⁴ (*jura novit curia*), facts lie at the periphery of judicial control and demand to be rationalised through the adjudicatory process.¹⁵

Judges cannot be expected to be well-informed on all subjects that require specialised knowledge, such as science.¹⁶ At the same time, scientists, regardless of their potential contribution to the international dispute-settlement process, cannot be expected to settle disputes ‘by the application of principles and rules of international law’.¹⁷ It certainly remains the duty of the judge to adjudicate on legal issues, and not of the scientist acting as an expert.

An important task for the Court is thus to clearly identify scientific issues, as separate from legal issues. The situation is further complicated if the question to be decided involves interwoven scientific and legal issues. Two situations, which merit discussion as examples of each of the above scenarios, arose in the *Whaling Case* and are analysed below.

2.1. Definition of ‘scientific research’ – a legal or factual question?

As mentioned above, crucial to deciding the *Whaling* dispute was the definition of the term ‘scientific research’ in Article VIII of the ICRW. Being a term in a treaty, it could be a legal exercise for the Court – an exercise of treaty interpretation. On the other hand, as necessitated by the first step of treaty interpretation,¹⁸ the term has an ordinary meaning, which could arguably require scientific expertise to interpret.

¹³ *Fisheries Jurisdiction Case (Germany v. Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 56.

¹⁴ D Terris, CP Romano, L Swigart, S Sotomayor, *The International Judge: An Introduction to the Men and Women who decide the World’s Cases* (Brandeis University Press 2007) xi–xii.

¹⁵ See C Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burdens of Proof and Finality* (CUP 2011) 5.

¹⁶ See, e.g., *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 236-237.

¹⁷ *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (Jurisdiction and Admissibility, Judgment) [1988] ICJ Rep 91.

¹⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(1): ‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’



Counsel for Australia had put forth the views of one of its scientific experts to define this term in the context of the ICRW,¹⁹ while Japan countered that this was a question of treaty interpretation.²⁰ In its majority decision, the Court was not persuaded by the criteria put forth by Australia, to constitute ‘scientific research’. According to the Court, this definition merely reflected scientific opinion, and did not serve to interpret the term in the context of the ICRW.²¹ However, the Court did not go on to define the term,²² predicating its decision instead on the reasoning that JARPA II was not ‘for purposes of’ scientific research, even if the programme included scientific research.²³

In making this determination, the Court used, in its own words, an ‘objective standard of review’.²⁴ Thus, although the definition of ‘scientific research’ in the context of this dispute was certainly an exercise of treaty interpretation, it was an exercise that the Court did not explicitly undertake. One reason for this could be a concern that there was, among the judges, a lack of certainty as to whether this was, after all, an issue within the purview of their judicial function. It is certainly evident from several separate and dissenting opinions that a number of members of the Court did not think it appropriate for the Court to determine whether a research programme constituted ‘scientific research’,²⁵ a task that ‘befits scientists, not jurists.’²⁶

Nevertheless, the Court need not have shied away from interpreting the phrase, since a certain technical aspect of the question does not preclude the Court adjudicating upon what is primarily a legal issue.

¹⁹ *Whaling in the Antarctic* (n 1) 74.

²⁰ *ibid* 75.

²¹ *ibid* 82: ‘Their conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court.’

²² *ibid* 86: ‘Nor does the Court consider it necessary to devise alternative criteria or to offer a general definition of scientific research.’

²³ *ibid* 247(2).

²⁴ *ibid* 67.

²⁵ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment) (Dissenting Opinion of Judge Owada) 2014 <www.icj-cij.org/docket/files/148/18138.pdf> para 25; (Dissenting Opinion of Judge Abrahams) <www.icj-cij.org/docket/files/148/18141.pdf> para 36; (Dissenting Opinion of Judge Yusuf) <www.icj-cij.org/docket/files/148/18148.pdf> para 44; (Separate Opinion of Judge Xue) <www.icj-cij.org/docket/files/148/18152.pdf> para 15; (Separate Opinion of Judge Sebutinde) <www.icj-cij.org/docket/files/148/18154.pdf> para 9.

²⁶ *Whaling in the Antarctic* (Dissenting Opinion of Judge Yusuf) *ibid* para 44.

2.2. *The problem of necessity of lethal methods – a legal issue or a mixed question of law and fact?*

A slightly more complicated question arose in analysing whether the use of lethal methods was necessary or reasonable with respect to the stated scientific objectives of JARPA II. The Court considered this a necessary enquiry since, according to the majority opinion, in order to ascertain whether a programme's use of lethal methods was 'for purposes of scientific research',²⁷ it had to consider whether the elements of the programme's design and implementation were reasonable in relation to its stated scientific objectives.²⁸

A question of legal interpretation certainly arises here, since it is a matter of interpretation of a treaty provision. However, it is by no means a purely legal question, as evidenced by the criteria that the Court used to assess whether JARPA II was 'for purposes of scientific research'. The Court went into great detail on these criteria, including decisions regarding the use of lethal methods, the scale of the programme's use of lethal sampling, the methodology used to select sample sizes, a comparison of the target sample sizes and the actual take, the time frame associated with a programme, the programme's scientific output, and the degree to which a programme co-ordinates its activities with related research projects.²⁹

These various factors demand a level of expertise that goes beyond the Court's judicial decision-making capacity, as an adjudicator of legal issues. It is clear that the Court realised this, since it relied heavily on presentations of experts from both Australia and Japan's legal teams when examining relevant elements of the programme's design and implementation, using that part of the expert testimonies that both sides agreed upon.³⁰

The issue of necessity of lethal methods is thus a mixed question of law and fact, one that the Court must decide with assistance from experts in the field. This brings us to a related and important considera-

²⁷ ICRW (n 2) art VIII.

²⁸ *Whaling in the Antarctic* (n 1) 67.

²⁹ *ibid* 88.

³⁰ Nick Gales and Marc Mangel called by Australia and Lars Wallje called by Japan.



tion – the delineation of the roles of judge and expert while deciding the issue.

3. *The role of the ICJ and of experts in deciding mixed questions of law and fact*

As succinctly summed up by judges Al Khasawneh and Simma in their joint dissent in the *Pulp Mills* dispute,

‘the adjudication of disputes in which the assessment of scientific questions by experts is indispensable ... requires an interweaving of legal process with knowledge and expertise that can only be drawn from experts properly trained to evaluate the increasingly complex nature of the facts put before the Court. ... The Court on its own is not in a position adequately to assess and weigh complex scientific evidence of the type presented by the Parties.’³¹

Thus, legal disputes raising complex technical issues require an application of both the judicial mind, as well as expert opinions. However, the Court must be careful to ensure that the dispute remains, at its core, a legal dispute before a court of law, and hence the judges must remain in control of the proceedings. The purpose of the expert opinion is only to assist the Court in establishing and elucidating the facts to adjudicate upon the issues presented to it.³² Even when expert advice is sought, it is in principle always the Court that must determine the significance of the factual dimension of a case.³³ Judges thus remain in control of the proceedings as well as the decision-making, carefully considering all evidence presented to the Court, drawing conclusions from it, making

³¹ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) (Joint Dissenting Opinion of Judges Al Khasawneh and Simma) [2010] ICJ Rep 110 (*Pulp Mills* Joint Dissent).

³² *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)* (Judgment) [1985] ICJ Rep 228; see also *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) (Declaration of Judge Yusuf) [2010] ICJ Rep 219.

³³ G White, *The Use of Experts by International Tribunals* (Syracuse University Press 1965) 164.



their own determination of the facts and applying relevant rules of international law to those facts which they have found to exist.³⁴ It remains for the Court to discharge exclusively judicial functions, such as interpretation of legal terms, legal categorization of factual issues, and assessment of the burden of proof.³⁵

Such recourse to expert assistance, even on issues that are inherently legal, in no way undermines the role of the ICJ as a judicial organ. The Statute of the Court clearly permits it to seek expert opinion at any time.³⁶ Further provisions on experts include allowing them to participate in oral hearings³⁷ and permitting the questioning of experts following the procedure laid down in the Rules.³⁸ The Rules make it evident that parties are permitted to call experts of their own³⁹ and that experts may be subject to questioning by parties as well as judges.⁴⁰ The Court may appoint or call for experts of its own accord as well.⁴¹ Indeed, the Court's legitimacy is most likely to be enhanced through the taking of independent expert evidence.⁴²

As the illustration of the *Whaling* case demonstrates, even *prima facie* legal questions may require the inferences of scientific experts to render a well-reasoned judgment. Thus it is imperative that international courts (and not only the ICJ) rule on such mixed scientific and legal issues after due consultation with experts.

Simultaneously, the method of appointing experts and the procedure for taking expert evidence during the proceedings are all vital considerations that could strengthen or undermine the ICJ's role in dispute

³⁴ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, 72-73.

³⁵ *Pulp Mills* Joint Dissent (n 31) 113; S Rosenne, 'Fact-Finding before the International Court of Justice' in *Essays on International Law and Practice* (Martinus Nijhoff 2007) 235, 250.

³⁶ ICJ Statute (n 9) art 50.

³⁷ *ibid* art 43.

³⁸ *ibid* art 51.

³⁹ Rules of the International Court of Justice, 1978, as amended in 2005, in *Acts and Documents No. 6* (2007) (ICJ Rules) art 57, 63.

⁴⁰ ICJ Rules (n 39) art 65.

⁴¹ *ibid* art 62, 67.

⁴² C Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' (2014) 5 *J Intl Dispute Settlement* 144.



settlement.⁴³ At the first stage, the Court is presented with a choice – of consulting experts that are part of the legal teams of the parties, or of using independent Court appointed experts.

4. *Who should appoint experts – the parties or the Court?*

In the *Whaling* case the ICJ solely relied on experts put forth by the parties, as part of their respective legal teams. Whether the Court should rely solely upon evidence presented by the parties in cases involving scientific issues is also an important issue in such litigation. Such a course of action is not new for the ICJ, and caused much concern to several dissenting judges in the *Pulp Mills* case.⁴⁴

Though the Statute and Rules of Court envisage the appointment of experts by either the parties or the Court, there are notable differences in the procedure for hearing each category of expert. Experts appointed by parties under Article 43 of the Statute act as counsel before the Court.⁴⁵ In contrast, experts appointed under Rule 62 can be cross-examined by parties, as well as questioned by the Court.⁴⁶ These essential procedural safeguards make it preferable for the appearance of experts as witnesses rather than as part of the party's legal team. The Court is also at liberty to appoint any individual or organisation to prepare an expert report,⁴⁷ which parties are given the opportunity to comment on.⁴⁸ Although a better alternative to experts appearing as counsel, this is probably not as useful a procedure as the one laid down in Rule 62, which, in providing for cross-examination, leads to greater

⁴³ F Romanin Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes' in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds), *International Courts and the Development of International Law* (TMC Asser Press 2013) 444; Foster (n 42) 152.

⁴⁴ *Pulp Mills* Joint Dissent (n 31) 111: 'We are not convinced by the claim that, in a case like the present one, scientific expertise can satisfactorily be supplied, and acted upon by the Court, by experts acting as counsel on behalf of the Parties under Article 43 of the Statute.' See also, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment of 20 April 2010) (Separate Opinion of Judge Greenwood) [2010] ICJ Rep 221, 231.

⁴⁵ *Pulp Mills* Joint Dissent (n 31) 111.

⁴⁶ ICJ Rules (n 39) art 65.

⁴⁷ ICJ Statute (n 9) art 50.

⁴⁸ ICJ Rules (n 39) art 67.

transparency. A greater flexibility available under Article 50, however, is that the Court can call for such a report at any time during the dispute, even when oral proceedings are not on-going.

The ICJ has also taken recourse to ‘invisible’ experts or ‘experts fantômes’ (ie experts retained by the Court for purely internal consultation) in certain boundary or maritime delimitation cases.⁴⁹ However, it is not only important that the Court consult experts in deciding complex scientific disputes, it is also important that the parties are given the opportunity to comment on the Court’s choice of expert and the evidence produced by the expert, leading to overall transparency in the proceedings. These concerns are based on the good administration of justice.⁵⁰

However, in the *Whaling* case, the Court may have relied on evidence provided by parties instead of calling for its own experts, because with respect to science, where opinions and discoveries are often overturned by new research and conflicting opinions exist, it would be helpful for the Court to assess evidence put forth by opposing parties and to come to its own conclusions with the assistance of diverse experts. These experts could also be cross-examined in court. This should not necessarily be seen as a ‘cautious’ approach, rather a prudent one, affording the Court with the opportunity to survey a wide array of scientific opinions before deciding on the legal issues.

5. *Conclusion: coherent procedures for experts at the ICJ*

The need for the appointment of experts is an inescapable reality of litigating international disputes involving complex scientific issues. Several disputes where such experts proved indispensable have already been decided by the ICJ. However, these do not demonstrate a pattern with respect to appointment of experts and the procedure followed thereafter.

⁴⁹ *Pulp Mills* Joint Dissent (n 31) 114.

⁵⁰ C Tams, ‘Article 50’ in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 1118; *Pulp Mills* Joint Dissent (n 31) 114.



It is useful to look to the World Trade Organisation (WTO) dispute settlement organs for guidance, since the WTO is one organisation which has developed sophisticated procedures for the appointment of independent experts and the collection and examination of scientific evidence. The WTO Appellate Body (AB) has also addressed the requirements of due process in appointing experts.⁵¹ ICJ judges have also cited the WTO expert consultation process with approval.⁵² Most importantly, experts are appointed by a WTO panel in a two-step consultation process, with both written and oral phases. In the latter phase, parties, during a 'joint meeting', comment on the expert reports as well as comments of the opposing party. This phase gives the opportunity to the panel and parties to understand the principles underlying the scientific arguments in a given case.⁵³ However, the WTO AB has not favoured an investigative approach, warning panels against finding in favour of a complainant that has not established a *prima facie* case.⁵⁴

Some, like Caroline Foster, have favoured the process under Article 50 of the Statute, advocating close interaction between the Court and experts, while ensuring that the Court remains in charge of deciding the case.⁵⁵ Another important factor that cannot be stressed enough is ensuring due process and transparency throughout the process, thus permitting cross-examination of experts and comments by parties on reports, if any. Foster also suggests that the Court should take an investigative approach, rather than an adversarial one, since this 'may better enable the court or tribunal to build up a solid and coherent understanding of the science.'⁵⁶

⁵¹ *United States – Continued Suspension of Obligations in the EC – Hormones Dispute - Report of the Appellate Body* (16 October 2008) WT/DS320/AB/R para 436.

⁵² *Pulp Mills* Joint Dissent (n 31) 115-116.

⁵³ *ibid.*

⁵⁴ *Japan – Measures Affecting Agricultural Products*, Report of the Appellate Body (22 February 1999) WT/DS76/AB/R paras 129–130; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products - Report of the Panel* (18 September 2000) WT/DS135/R para 8.81.

⁵⁵ Foster (n 42) 152; Romanin Jacur (n 43) 442.

⁵⁶ Foster (n 15) 101.

**Between law and science: Some considerations
inspired by the *Whaling in the Antarctic* judgment**

Tullio Scovazzi *

1. *An attitude of reluctance*

The judgment rendered on 31 March 2014 by the International Court of Justice (ICJ) on the *Whaling in the Antarctic* case (*Australia v Japan, New Zealand intervening*) raises the issue of scientific or technical matters in the proceedings before the ICJ. Usually guidance on such issues is given by experts. They can be appointed by the Court and, if so, are required to be as impartial and independent as the Court itself. They can also be provided by the parties and included in their delegations in charge of the discussion of the case.

So far, the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have been rather reluctant in making use of Article 50 of the Statute, which gives them a broad margin of discretion in appointing experts¹ that can be entrusted to clarify scientific questions or determine specific issues of fact:

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¹ See G White, 'The Use of Experts by the International Court of Justice' in V Lowe, M Fitzmaurice (eds), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (CUP 1996) 528; C Foster, *New Clothes for the Emperor? Consultation of Experts by the International Court of Justice* (2014) 5 *J Intl Dispute Settlement* 139; F Romanin Jacur, 'Remarks on the Role of Ex Curia Scientific Experts in International Environmental Disputes', in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds), *International Courts and the Development of International Law – Essays in Honour of Tullio Treves* (TMC Asser 2013) 441; D Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' (2014) 84 *British YB Intl L* 271.

‘The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.’²

Experts have been appointed by the ICJ or the PCIJ in only four instances to date, namely:

a) in *The Factory at Chorzów* case (*Germany v Poland*), where the PCIJ arranged for an enquiry, to be entrusted to a committee of three experts, on the value at a certain date of an undertaking for the manufacture of nitrate products, on the financial results which would probably have been given by that undertaking during a specified period of time, as well as on the value at the date of the judgment of the same undertaking if it had remained in the hands of its previous owner;³

b) in *The Corfu Channel* case (*United Kingdom v Albania*), where the ICJ appointed a committee of three experts to answer questions relating to the laying of a minefield in the waters of a strait, in particular ‘the possibility of mooring those mines with those means without the Albanian authorities being aware of it, having regard to the extent of the measures of vigilance existing in the Saranda region’;⁴

c) again in *The Corfu Channel* case, where the ICJ appointed two experts to examine the figures and estimates of a claim relating to the loss of a warship and damage to another;⁵

² See C Tams, ‘Article 50’ in A Zimmermann, C Tomuschat, K Oellers-Frahm (eds), *The Statute of the International Court of Justice – A Commentary* (OUP 2006) 1109. In this paper no distinction will be made between individuals, bodies, bureaus, commissions or organizations entrusted with the task of making an enquiry or giving an opinion. They will be all called ‘experts.’

³ See *Case Concerning the Factory at Chorzów (Germany v Poland)* (Judgment) PCIJ Series A No 17, 51. The parties settled by agreement the question of the damage before the delivery of the report by the committee of experts.

⁴ See *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 21. The committee was composed of Commodore J Bull of the Royal Norwegian Navy, Commodore SA Forshell of the Royal Swedish Navy and Lieutenant-Commander SJ Elfferich of the Royal Netherlands Navy (ibid 9). After a first report, the committee made a visit to Saranda and in the second report stated that ‘if a normal look-out was kept at Cape Kiephali, Denta Point, and St. George’s Monastery, and if the look-outs were equipped with binoculars as has been stated, under normal weather conditions for this area, the minelaying operations (...) must have been noticed by these coastguards’ (ibid 21).

⁵ See *Corfu Channel (UK v Albania)* (Assessment of the Amount of Compensation) ibid 247. The experts were Rear-Admiral JB Berck and Mr G de Rooy, both of the Royal Netherlands Navy.



d) in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (*Canada v United States*), where the parties agreed in advance that the ICJ Chamber to which the dispute was brought would have appointed an expert to assist it ‘in respect of technical matters and, in particular, in preparing the description of the maritime boundary and the charts.’⁶

In fact, the work of the court-appointed experts had an important influence on the final decision only in the *Corfu Channel* case. In other instances where scientific and technical questions were at issue the ICJ preferred not to make use of Article 50. The reluctance of the ICJ to appoint experts has been the subject of proposals for amendments to Article 50,⁷ as well as of criticism by dissenting judges and writers.

The considerations developed hereunder are intended to show that judges should not neglect the contribution that can be provided by experts. However scientific and technical elaboration should not take the lead over legal analysis and categorisation. While scientists aim to seize and describe complex realities, lawyers need to simplify the facts in order to adapt and fit them to the idealistic models of legal provisions.

2. *General considerations on the use of experts by courts*

The handling of matters of fact is within the typical exercise of the judiciary function, be it in a domestic or in the international legal system. To take a decision, a court is called to determine the relevant facts and to qualify them in connection with the relevant legal provisions (legal categorisation of factual issues). Evidence, especially the documentary evidence, available to the court is not always sufficient to reach a conclusion on the occurrence and causes of certain facts whose deter-

⁶ See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case (*Canada v United States*) [1984] ICJ Rep 246. The Chamber appointed for this task the British Commander Peter Bryan Beazley (ibid 256).

⁷ See Peat (n 1) 300: ‘The solution, which may be termed ‘pre-trial procedure’, would involve a separate pre-trial process led by three members of the Court, to determine the facts pertinent to the selection and application of the rules of law necessary for the Court to perform its function in the case at hand. The members of the Court would have an institutionalized framework through which to appoint experts, drawing upon lists of experts maintained by competent specialised international organisations within defined fields.’



mination is needed to decide whether a rule has been violated or complied with (for example, to decide whether the customary rule on the prohibition of transboundary pollution has been violated, a court must be sure that a river is seriously polluted and that the pollution has its source from a given plant). Nor can the members of a court, who are experts in law, be supposed to have a universal knowledge, in order to reach by themselves conclusions that require scientific and technical expertise. Here scientific and technical experts have a role to play.

For example, there is no doubt that naval officers are better suited than anyone else to clarify whether the operation of laying of mines in a given strait by a third subject can be seen and heard by the look-out posts on the coast. Judges sitting in courts are not likely to engage themselves in activities of investigation on moonless nights, such as the test of visibility carried out by the committee of experts in the Strait of Corfu:

‘A motor ship, 27 metres long, and with no bridge, wheel-house, or funnel, and very low on the water, was used. The ship was completely blacked out, and on a moonless night, i.e., under the most favourable conditions for avoiding discovery, it was clearly seen and heard from St. George’s Monastery. The noise of the motor was heard at a distance of 1,800 metres, and the ship itself was sighted at 670 metres and remained visible up to about 1,900 metres.’⁸

Also in cases where it appoints an expert, the court has the power to retain full control over the legal proceeding and the final decision. There is no delegation of power from the judge to the expert. Sometimes, once the factual question has been solved, there is not much room for subsequent legal discussion, as the decision stems almost automatically from the determination of the facts. This happens merely because questions of fact are mostly crucial in certain disputes, while in others emphasis is put on legal questions. However, the court retains the power to evaluate the conclusions presented by the expert and to disregard them if for any reason it is not convinced that they are accurate or reliable, to appoint another expert or to adapt the conclusions to the legal provisions that it deems applicable.

⁸ *Corfu Channel Case* (n 4) para 21.



For example, in the *Corfu Channel* case, the ICJ asked the committee of experts to make a visit to the locality where the accident occurred and prepare a second report, as the first ‘did not seem entirely conclusive.’⁹ During the second part of the same case, the United Kingdom submitted a claim of £700,087 for the total loss of a destroyer of the British navy, while the experts estimated the same damage at a higher amount (£716,780). The Court decided that it could not award more than what was claimed by the party that suffered the damage.¹⁰ It chose to apply a legal principle and to partially disregard the experts’ conclusions.

If the expert can play a useful role and does not excessively encroach on the function of the Court, why does the ICJ make use of Article 50 so seldom? Some tentative explanations are provided hereunder.

3. *Tentative Explanations of the Reluctance to Appoint Court-Experts*

Legal tradition could have a role in explaining the infrequent application of Article 50 by the ICJ. As a result of inquisitorial approach to evidence, civil-law jurisdictions make a greater use of court-appointed experts, while common-law jurisdictions, moving from an adversarial approach, often refrain from taking similar action and rely on evidence adduced by the experts of the parties.¹¹ This could influence the attitude of ICJ judges who come from common-law countries.

Another reason could be that the relevant scientific evidence does not exist or, to put it in a less radical way, does not exist in any circumstance.¹² It is well-known that on some scientific questions of general

⁹ *ibid.*

¹⁰ *Corfu Channel Case* (Assessment of the Amount of Compensation) (n 5) 248. The amount claimed by the United Kingdom was found to be ‘justified.’

¹¹ See Peat (n 1) 274. In certain cases before common-law courts, the opposing experts are asked by the court to proceed in a cooperative manner and to present a joint report on points of agreement and points of disagreement.

¹² See the separate opinion appended by Judge Cançado Trindade to the ICJ judgment on the *Whaling in the Antarctic* (*Australia v Japan, New Zealand Intervening*) (Judgment) [2014] ICJ Rep 226: “Scientific research’ is surrounded by uncertainties; it is undertaken on the basis of uncertainties. Suffice it here to recall the legacy of Karl Popper, who used to ponder wisely that scientific knowledge can only be uncertain or

character, such as the causes of global warming, different scientists have different opinions. The work of the Scientific Committee established by the International Whaling Commission shows how scientists can disagree on questions relating to the abundance of whale species and the measures needed for their conservation. If disputes relating to global warming or whaling were brought to an international court – as was indeed the case in relation to whaling brought before the ICJ – the choice of experts would become a delicate issue for the court, as their positions could be predictable in advance.

On occasions, especially where the experts of the parties put forward contrary views, the ICJ was not prepared to enter into the discussions of a scientific and technical nature raised by the parties and found them irrelevant for the purposes of its decision.

For example, in the judgment in the *Continental Shelf* case (*Tunisia v Libya*) of 24 February 1982, the ICJ remarked that the character of the seabed where the delimitation had to be effected was the subject of abundant examination and of detailed scientific studies by the experts of the parties.¹³ Both States relied on the assumption that the continental shelf was the ‘natural prolongation’ of their land territory into and under the sea, as held by the ICJ itself in the previous judgment of 20 February 1969 on the *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*).¹⁴ However the experts of the parties reached contrary conclusions on the State to which the natural prolongation of the disputed

conjectural, while ignorance is infinite. Scientific research is a search for truth, amidst conjectures, and, given one’s fallibility, one has to learn with mistakes incurred into. One can hope to be coming closer to truth, but without knowing for sure whether one is distant from, or near it. Without the ineluctable refutations, science would fall into stagnation, losing its empirical character. Conjectures and refutations are needed, for science to keep on advancing in its empirical path. As to the *cas d’espèce*, would this mean that whales could keep on being killed, and increasingly so, for ‘scientific purposes’ and amidst scientific uncertainty? I do not think so; there are also non-lethal methods, and, after all, living marine resources are not inexhaustible’ (*Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Separate Opinion of Judge Cançado Trindade) [2014] ICJ Rep 376 para 74).

¹³ *Case Concerning the Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* (Judgement) [1982] ICJ Rep 41.

¹⁴ *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 54.



seabed area was to be attributed.¹⁵ Instead of appointing a court expert to clarify the question, the ICJ held that the geological and geomorphological elaborations of the parties were irrelevant, since for the purposes of a legal delimitation there was a single continental shelf which constituted the prolongation of the territory of both States and which was to be delimited according to other criteria:¹⁶

‘The conclusion which, in the Court’s view, has ineluctably to be drawn from this analysis is that, despite the confident assertions of the geologists on both sides that a given area is ‘an evident prolongation’ or ‘the real prolongation’ of the one or the other State, for legal purposes it is not possible to define the areas of continental shelf appertaining to Tunisia and to Libya by reference solely or mainly to geological considerations.’¹⁷

‘The submarine area of the Pelagian Block which constitutes the natural prolongation of Libya substantially coincides with an area which constitutes the natural submarine extension of Tunisia. Which parts of the submarine area appertain to Libya and which to Tunisia can therefore not be determined by criteria provided by a determination of how far the natural prolongation of one of the Parties extends in relation to the natural prolongation of the other. In the present case, in which Libya and Tunisia both derive continental shelf title from a natural prolongation common to both territories, the ascertainment of the ex-

¹⁵ ‘Thus the Court is in effect invited to choose between two interpretations of ‘natural prolongation’ as a geological concept which in fact highlight two aspects of geology as a science. On the one hand, geology involves the study of the components of the earth’s structure as they now are, the analysis and classification of minerals, rocks and fossils, the observance of trends and continuities; and in harmony with this approach Tunisia, in so far as it bases its argument on geological considerations, invites the Court to deduce the ‘natural prolongation’ of Tunisia from the identity of deposits in the bed of the Pelagian Sea with those found under the land territory of Tunisia, and the continuation of strata and features from that territory seawards in a generally west-east direction. On the other hand, geology in its historical aspect involves deducing the history of the earth from the physical evidence now present, and ascertaining, so far as human knowledge permits, what were the processes and events which gave rise to the existence of the observed features on and beneath the earth’s surface; and it is in this historical spirit that Libya has pointed to the rifting process which, in Libya’s contention, marked the Pelagian Block with the permanent character of the ‘natural prolongation’ of the African landmass’ *Case Concerning the Continental Shelf* (n 13) 53.

¹⁶ It is beyond the scope of this short paper to elaborate on what the other criteria were.

¹⁷ *Case Concerning the Continental Shelf* (n 13) 53.



tent of the areas of shelf appertaining to each State must be governed by criteria of international law other than those taken from physical features.¹⁸

As the ICJ remarked, ‘the function of the Court is to make use of geology only so far as required for the application of international law.’¹⁹ Indeed the technical complications of the case contributed to a substantive change in the rule that the ICJ decided to apply to maritime delimitations. Without saying it in the judgment, the Court probably realised that the assumption that the continental shelf is the natural prolongation of the land territory of State was wrong, as far as maritime delimitations are concerned. Yet it took it for granted that States negotiate their land boundaries on the basis of the geology and geomorphology of the seabed adjacent to the coast, which is a highly unlikely event.

The ICJ confirmed its position in the judgment of 3 June 1985 on the *Continental Shelf* case (*Libya v Malta*). Facing again a situation of strong disagreement between the experts of the parties, the ICJ declined to adjudicate on scientific questions, as they were irrelevant for the purpose of effecting a legal delimitation:

‘The Court is unable to accept the position that in order to decide this case, it must first make a determination upon a disagreement between scientists of distinction as to the more plausibly correct interpretation of apparently incomplete scientific data; for a criterion that depends upon such a judgment or estimate having to be made by a court, or perhaps also by negotiating governments, is clearly inapt to a general legal rule of delimitation.’²⁰

‘... since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to

¹⁸ *ibid* 58.

¹⁹ ‘The function of the Court is to make use of geology only so far as required for the application of international law. It is of the view that what must be taken into account in the delimitation of shelf areas are the physical circumstances as they are today; that just as it is the geographical configuration of the present-day coasts, so also it is the present-day sea-bed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance’ (*ibid* 54).

²⁰ Case Concerning the *Continental Shelf (Libya v Malta)* (Judgment) [1985] ICJ Rep 36.



geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims.²¹

In these kind of situations, where it is possible to simplify excessively complex questions for the sake of legal clarity, one cannot but agree with the approach taken by the ICJ in disregarding scientific discussions and experts' elaborations – be they appointed by the parties or by the Court.

In other cases that involved scientific and technical questions, the ICJ held that the parties were under a legal obligation to negotiate in good faith to find an equitable solution to the technical aspects of their differences.

For example, in deciding on 25 July 1974 the merits of the two *Fisheries Jurisdiction* cases (*United Kingdom v Iceland*; *Federal Republic of Germany v Iceland*), the ICJ held that the parties were 'under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights', taking into account a number of factors, such as the preferential rights of the coastal State, the established rights of the fishing States, the interests of other States, the need for conservation and development of fishery resources and the obligation of the parties to keep under review such resources.²² The ICJ found that 'the obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case.'²³

Also in the judgment of 25 September 1997 on the *Gabcikovo-Nagymaros Project* case (*Hungary v Slovakia*) the ICJ concluded that the parties were under an obligation to negotiate in good faith in the light of the prevailing situation and to take all necessary measures to ensure

²¹ *ibid* 35.

²² *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Judgement) [1974] ICJ Rep 175; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)* [1974] ICJ Rep 3.

²³ *ibid* (*Federal Republic of Germany v Iceland*) 34, *ibid* (*United Kingdom of Great Britain and Northern Ireland v Iceland*) 205.



the achievement of the objectives of a treaty in force for them and relating to the construction and operation of a barrage.²⁴

It is beyond the scope of this paper to discuss here whether and to what extent a court, to which the litigants present themselves precisely because they are not able to reach an agreement, is empowered to oblige them to conclude an agreement. It is sufficient to remark that, if such an approach is taken, there is no need to enter into scientific and technical elaboration and appoint experts.

4. *The 'Ghost-Experts'*

However, it is not always possible for a court to achieve a legal simplification of very complex scientific and technical questions. The *Pulp Mills on the River Uruguay* case (*Argentina v Uruguay*) is probably one of the cases where expert advice would have been needed before taking a decision, as remarked upon in the joint dissenting opinion attached by judges and al-Khasawneh and Simma to the ICJ judgment of 20 April 2010:

'Yet, the Court has an unfortunate history of persisting, when faced with sophisticated scientific and technical evidence in support of the legal claims made by States before it, in resolving these issues purely through the application of its traditional legal techniques; and it has come under considerable criticism in this regard, particularly in very recent scholarly commentary on its working methods ...'

'Quite aside from academic criticism, so long as the Court persists in resolving complex scientific disputes without recourse to outside expertise in an appropriate institutional framework such as that offered under Article 50 of the Statute, it willingly deprives itself of the ability

²⁴ *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 83. 'For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses' (ibid 78).

fully to consider the facts submitted to it and loses several advantages of such recourse: the interaction with experts in their capacity as experts and not as counsel ... the advantage of giving the parties a voice in establishing the manner in which those experts would have been used, a chance for the parties to review the Court's choice of experts (and for which subject-matter experts were needed); and the chance for the parties to comment on any expert conclusions emerging from that process. It would also have given the Court the opportunity of combining the rigour of the scientific community with the requirements of the courtroom — a blend which is indispensable for the application of the international rules for the protection of the environment and for other disputes concerning scientific evidence.²⁵

Besides stressing the lack of Court-appointed experts, the dissenting judges also referred to cases where experts did participate, but in the form of 'ghosts', to ICJ proceedings. They rightly qualified such a surprising practice as a departure from the principles of transparency, openness and procedural fairness:

'It would not be sufficient if the Court, in disputes with a complex scientific component, were to continue having recourse to internal 'experts-fantômes', as appears to have been the case, *inter alia*, in certain boundary or maritime delimitation cases ... While such consultation of 'invisible' experts may be pardonable if the input they provide relates to the scientific margins of a case, the situation is quite different in complex scientific disputes, as is the case here. Under circumstances such as in the present case, adopting such a practice would deprive the Court of the above-mentioned advantages of transparency, openness, procedural fairness, and the ability for the Parties to comment upon or otherwise assist the Court in understanding the evidence before it. These are concerns based not purely on abstract principle, but on the good administration of justice ... Transparency and procedural fairness are important because they require the Court to assume its overall duty for facilitating the production of evidence and to reach the best

²⁵ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 113. The dissenting Judges quote in this regard S Rosenne, 'Fact-Finding before the International Court of Justice' in *Essays on International Law and Practice* (Martinus Nijhoff 2007) 245.



representation of the essential facts in a case, in order best to resolve a dispute.²⁶

5. *Whaling 'for the Purposes of Scientific Research'*

It is now time to return – better late than never – to our starting point, which is the *Whaling in the Antarctic* case.²⁷ The main question in discussion before the ICJ was whether the whaling activities under the Second Phase of the Japanese Whale Research Programme under Special Permit in the Antarctic (JARPA II) were carried out ‘for purposes of scientific research’, as permitted by Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling (Washington, 1946),²⁸ or rather for other purposes, specifically commercial purposes. Indeed such a question has little scientific or technical nature – and, in fact, there was no need to engage a court-appointed expert. As empha-

²⁶ *Pulp Mills* (n 25) 114: ‘The Court’s Registrar, Philippe Couvreur, has defined the role of experts retained by the Court for purely internal consultation as that of temporary Registry staff members, entrusted with the giving of internal scientific opinions under the oath of confidentiality demanded of full-time Registry staff. As he explains, their conclusions would never be made public.’ The dissenting Judges quote in this regard R Jennings, ‘International Lawyers and the Progressive Development of International Law’ in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer 1996) 416 and P Couvreur, ‘Le règlement juridictionnel’ in SFDI (ed) *Le processus de délimitation maritime: étude d’un cas fictive* (Pedone 2004) 349, 384.

²⁷ To the judgment are appended the dissenting opinions of Judges Abraham, Bennouna, Owada and Yusuf, the separate opinions of Judges Bhandari, Cançado Trindade, Charlesworth, Greenwood, Sebutinde and Xue and the declaration of Judge Keith.

²⁸ International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 (Whaling Convention) Art VIII: ‘1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted. 2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.’

sised in the dissenting opinion of Judge Yusuf, the definition of a the term ‘scientific research’ used in a treaty provision was a legal question related to the interpretation of an international treaty.²⁹ However strange it might seem at first glance, scientists are not in the best position to define what ‘scientific research’ is, at least not when these words are used in a treaty.

While not endorsing the notion of ‘scientific research’ formulated by one of the scientific experts of Australia,³⁰ the ICJ did not find it necessary to provide its own definition of the term:

‘... the Court is not persuaded that activities must satisfy the four criteria advanced by Australia in order to constitute ‘scientific research’ in the context of Article VIII. As formulated by Australia, these criteria appear largely to reflect what one of the experts that it called regards as well-conceived scientific research, rather than serving as an interpretation of the term as used in the Convention. Nor does the Court consider it necessary to devise alternative criteria or to offer a general definition of ‘scientific research’.’³¹

²⁹ *Whaling in the Antarctic (Separate Opinion of Judge Cançado Trindade)* (n 12) para 3. As pointed out in the separate opinion of Judge Sebutinde, ‘whilst I accept that the Court should not attempt a forensic definition of what is or is not ‘scientific research’ (a task more suited to scientists rather than lawyers), in my view, the Court should at least have considered the ordinary grammatical (dictionary) meaning of the phrase, as a basis for the reasoning and analysis that follows in the Judgment. Although the concept of ‘science’ is inherently vague, ‘scientific research’ must, in its most basic sense, involve ‘a systematic pursuit of knowledge concerning the structure and behaviour of the physical and natural world through observation and experiment’ (*The Oxford English Dictionary*). In my view, this is a workable definition that could have been adopted as a basis for the Court’s reasoning and analysis’ (*Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Separate Opinion of Judge Sebutinde) [2014] ICJ Rep 433 para 9).

³⁰ According to the expert, ‘scientific research (in the context of the Convention) has four essential characteristics: defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; ‘appropriate methods’, including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock’ (*Whaling in the Antarctic* (n 12) para 74).

³¹ *Whaling in the Antarctic* (n 12) para 86.



The lack of a starting point, that is the definition of scientific research for the purposes of the Whaling Convention,³² may be the reason why the ICJ judgment followed a complex and perhaps convoluted reasoning. The Court assessed JARPA II according to a two-step process (so-called standard of review):³³

‘When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives.’³⁴

The two reviews led to different results that seem rather contradictory and it is hard to understand how something that the ICJ found to be ‘scientific research’ could be carried out ‘not for purposes of scientific research’:

³² According to Judge Yusuf, the ICJ should have addressed three questions in the following sequence: ‘Is the primary purpose of the special permit issued to JARPA II to undertake scientific research or to facilitate the supply of whale meat to a commercial market? Is there evidence to support that JARPA II was granted special permit for a purpose other than scientific research? What are the criteria for determining whether a programme is for purposes of scientific research under the ICRW?’ (*Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Separate Opinion of Judge Yusuf) [2014] ICJ Rep 392 para 29). Judge Yusuf puts the dispute in the perspective of the evolving and presently conservationist objectives of the Whaling Convention: ‘The real issue is whether the evolving regulatory framework of the Convention in setting zero catch limits and establishing the Southern Ocean sanctuary should be taken into account in interpreting Article VIII of the Convention and the legality of the special permits granted by Japan under that provision for purposes of scientific research, and the extent to which Article VIII and the use of lethal methods for purposes of scientific research might have been restricted by the fact that the optimum utilization of whale resources has been set aside as one of the central objectives of the Convention’ (ibid para 60). However, the dissenting judge does not provide in the opinion an answer to these crucial questions. For a broad analysis of the case in the perspective of international environmental law, see the separate opinion of Judge Cançado Trindade.

³³ According to Judge Yusuf, ‘the Court does not, however, use that applicable law to evaluate whether the special permits issued by Japan for JARPA II are for purposes of scientific research. Instead of using those parameters, the Court comes up with a standard of review that is extraneous to the Convention’ (*Whaling in the Antarctic* (Separate Opinion of Judge Yusuf) (n 32) para 12).

³⁴ *Whaling in the Antarctic* (n 12) para 67.

‘Taken as a whole, the Court considers that JARPA II involves activities that can broadly be characterized as scientific research ... but that the evidence does not establish that the programme’s design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not ‘for purposes of scientific research’ pursuant to Article VIII, paragraph 1, of the Convention.’³⁵

If whaling is carried out for purposes different from scientific research (what purposes? are they commercial purposes?), how can it be called ‘scientific research’ (and not commercial whaling in disguise)?³⁶ For reasons that are not entirely clear, the ICJ avoided the more straightforward approach that may be found in the opinions of some of its members:

‘The principal reason why Japan is unable to rely upon the exemption conferred by Article VIII, paragraph 1, is that the numbers of whales authorized to be killed under JARPA II are not objectively reasonable in the light of the objectives of JARPA II.’³⁷

‘... in response to Australia’s claim that Japan’s real intention in conducting JARPA II is to maintain its whaling operation and that the programme is commercial whaling in disguise, Japan’s rebuttal is weak and unpersuasive.’³⁸

In fact, the ICJ chose not to directly enter into the question of whether JARPA II could be qualified as commercial whaling in disguise³⁹ and, consequently as an abuse of right.⁴⁰ It preferred to remark,

³⁵ *Whaling in the Antarctic* (n 12) para 227.

³⁶ As stated by Judge Yusuf, ‘it appears to me paradoxical that a programme that is broadly characterized as scientific research is considered by the majority not to be ‘for purposes of scientific research’” (*Whaling in the Antarctic* (Separate Opinion of Judge Yusuf) (n 32) para 5). ‘It also gives the impression that serendipity was at work here and that JARPA II, though not designed for purposes of scientific research, accidentally stumbled into scientific research activities’ (ibid 51).

³⁷ *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Separate Opinion of Judge Greenwood) [2014] ICJ Rep 414 para 24.

³⁸ *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Separate Opinion of Judge Xue) [2014] ICJ Rep 428 para 27.

³⁹ ‘It appears, however, that both the review and the conclusions of the Judgment entail a finding of bad faith which is not explicitly expressed, since JARPA II is consid-

inter alia, that there was no evidence of studies by Japan of the feasibility or practicability of non-lethal methods,⁴¹ that there was no comparison of costs between lethal and non-lethal methods,⁴² that the decision to proceed with the JARPA II sample sizes prior to the final review of the previous JARPA lends support to the view that Japan's priority was to maintain whaling operations without any pause,⁴³ that the results of a programme which involved the killing of about 3,600 whales in a six-year period were quite modest at the scientific level,⁴⁴ that the Director-General of Japan's Fisheries Agency had stated that the meat of minke whale – *Balaenoptera bonearensis*, the main, if not sole, target of JARPA II – is 'prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like' and that 'the scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat.'⁴⁵

ered to be in violation of the commercial whaling provisions of the ICRW' (the Whaling Convention) (*Whaling in the Antarctic* (Dissenting Opinion of Judge Yusuf) (n 32) para 54).

⁴⁰ The prohibition of abusing of rights can be considered a general principle of law. Under Art 300 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397, 'States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.'

⁴¹ *Whaling in the Antarctic* (n 12) para 141.

⁴² *Whaling in the Antarctic* (n 12) para 143.

⁴³ *Whaling in the Antarctic* (n 12) para 156.

⁴⁴ 'The Court notes that the Research Plan uses a six-year period to obtain statistically useful information for minke whales and a 12-year period for the other two species, and that it can be expected that the main scientific output of JARPA II would follow these periods. It nevertheless observes that the first research phase of JARPA II (2005-2006 to 2010-2011) has already been completed (...), but that Japan points to only two peer-reviewed papers that have resulted from JARPA II to date. These papers do not relate to the JARPA II objectives and rely on data collected from respectively seven and two minke whales caught during the JARPA II feasibility study. While Japan also refers to three presentations made at scientific symposia and to eight papers it has submitted to the Scientific Committee, six of the latter are JARPA II cruise reports, one of the two remaining papers is an evaluation of the JARPA II feasibility study and the other relates to the programme's non-lethal photo identification of blue whales. In light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited' (*Whaling in the Antarctic* (n 12) para 219).

⁴⁵ *Whaling in the Antarctic* (n 12) para 197. However, according to the dissenting opinion of Judge Owada, 'the issue is not whether the programme of JARPA II has



Also in the *Whaling in the Antarctic* case the ICJ took note of the disagreement among the experts of the parties:

‘The Court observes that, as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use. Their conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court.’⁴⁶

The different opinions expressed by the experts of the parties were evaluated in different ways by the judges who attached their opinions to the decision. Sometimes the views provided by scientists appointed by Japan were met with approval,⁴⁷ while at other times it was those of scientists appointed by Australia.⁴⁸

attained a level of excellence as a project for scientific research for achieving the object and purpose of the Convention, which is a matter to be considered and examined by the Scientific Committee. It may also be true that the JARPA II programme is far from being perfect for attaining such objective and may need improvements to achieve that purpose. Such criticism of JARPA II could appropriately be valuable in the review process, with a view to remodelling or redesigning these activities in accordance with what the regulatory framework of the Convention prescribes, but this cannot be the ground for the Court to declare that the activities of the programme are unreasonable for purposes of scientific research’ (*Whaling in the Antarctic Case* (n 12) para 49).

⁴⁶ *Whaling in the Antarctic* (n 12) para 82.

⁴⁷ ‘Je n’ignore pas que le professeur Walløe étant un expert cité par l’une des Parties, la Cour ne pouvait pas tenir pour vraies, sans autre examen, toutes ses déclarations, alors même que d’autres experts, cités par la Partie adverse, exprimaient des avis différents. Mais je pense que le fait qu’un homme de science de cette réputation exprime sans ambages son appréciation positive quant à l’intérêt scientifique des recherches conduites dans le cadre de JARPA II et quant au caractère raisonnable des tailles d’échantillons fixées (sauf, a-t-il dit, pour l’espèce des rorquals communs dont le nombre de captures prévues était trop faible pour donner des résultats significatifs) aurait dû peser grandement dans le jugement porté par la Cour sur la nature même de JARPA II’ *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Dissenting Opinion of Judge Abraham) [2014] ICJ Rep 335 para 48).

⁴⁸ ‘Contrary to the view of the majority, I believe that the conspicuous dearth of peer review by scientists of other nations seriously undermines any conclusion that Japan has complied with its duty to co-operate under paragraph 30 (c) of the Schedule. In this regard I endorse the opinion of the witness-expert for Australia, Professor Mangel, who testified that ‘scientific opinion can be wrong, but reliable science responds to valid criticism, which is how science advances’” (*Whaling in the Antarctic (Australia v Japan,*

While not particularly relevant to a deep study in the relationship between law and science, the *Whaling in the Antarctic* judgment is notable for its content. Although not entirely convincing, from a logical point of view, the ICJ reached the most credible conclusion, namely that the special permits granted by Japan in connection with JARPA II did not fall within the provisions of Article VIII, paragraph 1, of the Whaling Convention.

The scientific programme in question had, *inter alia*, the purpose of assessing whether certain species of whales, especially minke whale, were today so abundant – also as a consequence of the moratorium on commercial whaling established by the International Whaling Commission⁴⁹ – that they enter into competition with other marine species. In order to do so, the whales were killed and their stomachs were opened and investigated to measure the quantity and type of marine animals that they had eaten. Subsequently, as they were then available, the whales themselves were sold and eaten. The conclusion reached by the ICJ in the *Whaling in the Antarctic* case is certainly a positive one for those who prefer whale-watching to whale-stomach-watching. This may be a personal and emotional way to evaluate the judgment of a court of law and though law should be separated from emotions,⁵⁰ where whales are in sight, strong emotions are unavoidable.⁵¹

New Zealand Intervening) (Separate Opinion of Judge Bhandari) [2014] ICJ Rep 442 para 15).

⁴⁹ 'Notwithstanding the other provisions of paragraph 10, catch limits for the killing of for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other limits' (para 10, *e*, of the Schedule, as amended, of the Whaling Convention).

⁵⁰ 'Many of us are disturbed by the killing of these iconic and intelligent animals and by the manner in which they are killed. However, these perfectly justified emotional reactions should not make us overlook that it is only by reference to the law that the issues before this Court can be resolved. The judicial settlement of disputes between States cannot be made on emotional or purely ethical grounds' (*Whaling in the Antarctic* (Dissenting Opinion of Judge Yusuf) (n 32) para 2)

⁵¹ 'So is this great and wide sea, wherein are things creeping innumerable, both small and great beasts. There go the ships: there is that leviathan, whom Thou hast made to play therein' (*Bible*, Psalm 104).



Weighing the evidential value of expert opinion: The *Whaling Case*

Lucas Carlos Lima*

1. Introduction

The question of how the International Court of Justice (ICJ) uses experts in disputes involving complex scientific issues seems to be a *trend topic* in academic discussions on international litigation. The two commentaries offered by professors Mbengue and Scovazzi shed significant light on several questions raised after the *Whaling in the Antarctic* judgment rendered by the Court.¹ Both authors agree that the function of the experts in this case was fundamental. They also agree that some problems remain open.

From a theoretical viewpoint, the experts' function in judicial proceedings is generally understood as the translation of the scientific knowledge (or facts) to the legal word. They assist judges, as mentioned by Scovazzi, 'to determine the relevant facts and to qualify them in connection with the relevant legal provisions.'² But, as said by Mbengue, 'it remains for the Court to discharge exclusively judicial functions, such as interpretation of legal terms, legal categorization of factual issues, and assessment of the burden of proof.'³

Judges frequently make use of a number of general criteria for assessing the evidence presented by the parties. In particular, they identify

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¹ *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Judgment) [2014] ICJ Rep 226.

² T Scovazzi, 'Between law and science: Some considerations inspired by the *Whaling in the Antarctic* judgment' (2015) 14 QIL-Questions of International Law 15.

³ M Mbengue, 'Between law and science: A commentary on the *Whaling in the Antarctic* case' (2015) 14 QIL-Questions of International Law 8-9.

distinct elements that may increase and decrease the evidential weight of certain means of proof.⁴ This has also been the approach followed by the ICJ. Guided by the principle of the free assessment of evidence⁵, the ICJ emphasized that ‘within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence.’⁶

Taking that into account, one of the questions on which further reflections might be appropriate concerns the evidential value attributed by the ICJ to expert opinions. Given that the ramifications of the issue were not fully analysed by the authors, I would like to offer some reflections on the criteria, if any, used by the Court for evaluating the expert evidence presented by the parties in the *Whaling* case. The determination of the criteria used by the Court when assessing the evidential weight of expert opinions are relevant because they may provide guidance for the parties in future cases; they also serve to better grasp the role of the experts in the ICJ’s case law.

2. *The evidential weight of expert opinion in ICJ’s case law*

When assessing the evidence presented by the parties, the Court frequently finds it appropriate to identify some general criteria for determining the weight to be given to the different evidence. In *Nicaragua* the Court observed that it gives greater evidential weight to statements

⁴ On the issue, see JH Langbein, ‘Historical Foundations of the Law of Evidence’ (1996) 96 *Columbia L Rev* 1168-1202; A Keane, P McKeown, *The Modern Law of Evidence* (OUP 2012) 31-32; N Monaghan, *Law of Evidence* (CUP 2015) 55-62; A Riddell, B Plant, *Evidence Before the International Court of Justice* (BIICL 2009) 123-201; CF Amerasingue, *Evidence in International Litigation* (Martinus Nijhoff 2005) 185-210; N Brower, ‘The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence’ in RB Lillich (ed), *Fact-Finding Before International Tribunals* (Transnational Publishers 1991) 147-153; N O’Malley, *Rules of Evidence in International Arbitration: An annotated Guide* (Routledge 2012) 197-201.

⁵ See R Kolb, *The International Court of Justice* (Hart 2012) 930; Riddell, Plant (n 4) 187.

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep para 60.



made by persons who had direct access to the facts in dispute⁷ or to testimonies which presented ‘evidence which is contemporaneous with the period concerned.’⁸ Similarly, in the *Genocide* cases (*Bosnian and Croatian*) the Court seemed to give greater evidential weight to statements ‘made by State officials or by private persons *not interested in the outcome of the proceedings*’⁹ and it also stressed that ‘it will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them.’¹⁰

When determining the criteria used by the Court for weighing the evidence, a certain caution is in order. Thus, the Court’s evaluation on witnesses is not absolute and the ‘case by case’¹¹ approach seems to be the main rule.

With regard to the evaluation of expert opinions, the criteria seem to vary according to the different categories of experts that appear before the Court. Mbengue and Scovazzi reconstructed the mosaic of different procedures of appointment and examination of the four distinct categories of experts: *invisible experts*, independent experts in the sense of Article 50 of the Statute, expert counsel and, finally, the party-appointed experts in the sense of Articles 57 and 64 of the Court’s Rules. Depending on the type of experts, the evidential value of their opinion may vary.

In the *Corfu Chanel* case, for instance, when referring to the independent experts appointed under Article 50, the Court stated that ‘it cannot fail to give great weight to the opinion of the Experts who exam-

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 83 para 222.

⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 731.

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 5) para 197, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (n 6) 731.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 130 para 213, referring to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 41.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 5) para 196: ‘In determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made.’

ined the locality in a manner giving every guarantee of correct and impartial information.’¹²

As to expert counsels, in the *Pulp Mills* case the Court was rather critical towards their use by the parties. According to the Court, the expert counsels should be tested by cross-examination. One may therefore assume that subjecting experts to cross-examination would enhance the evidential weight of their opinions.¹³ Be that as it may, in the *Pulp Mills* case the Court seemed to give little evidential weight to this category of expert. The Court’s criticism seems to have been taken into account by the parties in the *Whaling* case, where expert counsels were not used.

Since the Court has never mentioned in its reasoning that it had made recourse to invisible experts, it is hard to say what could be their evidential weight. As observed by Mbenge and Scovazzi, this instrument is characterized by the lack of transparency and entails a sacrifice of the parties’ right to examination. These are elements that justify the criticism addressed against it. In principle, if in the Court’s view one of the shortcomings of the expert counsel is the absence of cross examination, it can be noted that the same applies to the evidence *invisibly* presented by the expert *phantôme*.

The last category is that of experts indicated by the parties in accordance to Articles 57 and 64 of the Court’s rules. In the Court’s practice they have been frequently qualified as witness-experts,¹⁴ since they

¹² *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 21.

¹³ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 72: ‘The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.’

¹⁴ In cases where a person gives their declaration about certain facts but also assesses these facts from their technical or scientific point of view this person is invited to make a declaration as a witnesses, in the sense of article 64 (a) of the Court’s Rules, and also as an expert, in the sense of article 64 (b) of the Court’s Rules. As defined by President Higgins, ‘the term [expert-witness] refers to a person who can testify both as to knowledge of facts, and also give an opinion on matters upon which he or she has expertise’ (R Higgins, *Speech by H.E. Judge Rosalyn Higgins to the Sixth Committee of the General Assembly*, 2 November 2007, UN DOC A/C.6/62/SR.2). About the issue, see C Tams, ‘Article 51’ in A Zimmermann, C Tomuschat, K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2012) 1263.



testify on questions of fact and also according to their technical knowledge. With respect to this category of experts the Court's case law did not offer much guidance on the question of their evidential weight. The question I intend to address is whether some criteria emerged from the judgment in the *Whaling* case.

3. *Evaluating the evidential weight of expert opinion in the Whaling case*

It can be said from the outset that, unlike in other cases, in its judgment in the *Whaling* case the Court did not expressly identified general criteria relating to the evidential weight of the expert opinions. There are no statements in the judgement openly identifying factors that increase or decrease the evidential weight of an expert opinion. However, the judgment raises a number of interesting issues in this respect. Moreover, some significant elements can be inferred from the analysis of the Court's general approach to the evidence presented by the experts.

A first issue which is worth examining concerns the selection of the individuals appointed as experts by the parties. The question is whether it would be appropriate for the parties to appoint individuals who were directly involved in the case having acted as experts of one of the parties in relation to the programme or activity which gave rise to the dispute.

In this respect it can be noted that Japan had refrained to appoint as experts the Japanese scientists who were involved in JARPA II. The Court did not fail to notice it. However, it is hard to infer from the judgment what could be the Court's preference on this point.

When examining the use of lethal methods in the JARPA II program the Court stressed that it 'did not hear directly from Japanese scientists involved in designing JARPA II.'¹⁵ A member of the Court asked Japan what analysis it had conducted on the feasibility of non-lethal methods prior to setting the sample sizes for each year of JARPA II. Japan did not offer other satisfying documents to clarify this issue and, eventually, the Court concluded that '[t]he absence of any evidence

¹⁵ *Whaling in the Antarctic* (n 1) para 138.

pointing to consideration of the feasibility of non-lethal methods was not explained.’

From these two passages, one is left with the impression that the Court tacitly criticized the absence of a *certain* type of expert, i.e. an expert that Japan could have indicated to sustain its position. In this respect, the ‘non-explanation’ of this absence appears to have weakened Japan’s argument.

As a counter-argument, one could say that the decision not to appoint Japanese experts who had participated in the development of the JARPA II program was justified by the need to avoid a ‘biased witness.’¹⁶ It could be observed that, if Japan had appointed experts who had participated in the JARPA II program, the Court would have given little evidential weight to the evidence presented by them since ‘a member of the government of a State ... tends to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause.’¹⁷

The last observation raises a more general issue which concerns the possibility of transposing some of the general criteria established by the Court with regard to the evidential weighing of witnesses to that of experts. While in principle this possibility cannot be excluded, the judgment did not say anything on this point. Interestingly, the Court appeared to take into consideration when the expert’s opinion collided with the position taken by the State that appointed him. Thus, the Court took into account the criticism of the expert appointed by Japan, Mr. Walløe, with reference to the transparency of the activities performed by the JARPA II program.¹⁸ The fact of giving relevance to expert opinions which contradict the State’s position finds correspondence in the criterion according to which weight must be given to declarations made by the State’s officials when these declarations are unfavourable to the State.¹⁹

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 5) para 213; *Military and Paramilitary Activities in and against Nicaragua* (n 6) para 64.

¹⁷ *Military and Paramilitary Activities in and against Nicaragua* (n 6) para 70.

¹⁸ *Whaling in the Antarctic* (n 1) para 159.

¹⁹ *Military and Paramilitary Activities in and against Nicaragua* (n 6) para 64: ‘The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence

With regard to the Court's general approach to the assessment of expert opinions, an aspect which emerges from the judgment is that the Court seemed to give particular importance to the existence of an agreement between the opinions expressed by the experts appointed by the parties. For instance, when assessing the transparency of the Japanese program, the Court observed that 'the evidence shows that the JARPA II Research Plan lacks transparency in the reasons for selecting particular sample sizes for individual research items. This is a matter on which the experts called by the two Parties agreed, as described above.'²⁰ It also emphasized that 'the process used to determine the sample size for minke whales lacks transparency, as the experts called by each of the Parties agreed.'²¹

To the same vein, the Court gave relevance to the fact that the opinion expressed by an expert appointed by a party had not been contested by the other party. Thus, when assessing whether the number of whales killed was reasonable according to the scientific purposes of the JARPA II program, the Court, referring to the opinion expressed by the expert appointed by Australia, noticed the fact that 'Japan did not refuse this expert opinion.'²²

It is certainly not surprising that the Court attached importance to the existence of an agreement between experts or to the fact that the opinion of one expert was not contested by a party. If the parties bear the burden of proof, it is fair to give importance to the agreement of the experts presented by them in regard to the facts and circumstances of the case. However, the overall impression is that the evidential weight given by the Court to expert opinions was directly related to the extent that they allowed the Court to identify the emergence of a *consensus* between the parties regarding a certain fact or scientific data. In this logic, the interest in having experts in the proceedings lies in the fact that they permit to reveal the existence of an agreement between the parties with regard to the scientific facts in dispute. Accordingly, the evidential weight of expert opinions appears to be closely connected to their contribution to the emergence of that agreement. In this respect, the 'search' for consensus appears, to some degree, to have a greater role

acknowledging facts or conduct unfavourable to the State represented by the person making them.'

²⁰ *Whaling in the Antarctic* (n 1) para 188.

²¹ *Whaling in the Antarctic* (n 1) para 225.

²² *Whaling in the Antarctic* (n 1) para 190.



than the ‘search’ for scientific truth. This appears to conform to the adversarial logic that governs the Court’s proceedings.

As noted by Scovazzi,²³ a problem arises when experts take different positions on controversial questions of technical and scientific nature. Interestingly, in the *Whaling* case, the Court, when confronted to strongly different opinions, refrained to take a position in favour of one or the other expert. The Court sometimes considered that ‘[t]his disagreement appears to be about a matter of scientific opinion’²⁴. With regard to the experts’ disagreement about the determination of the criteria for establishing the meaning of the expression ‘scientific research’, in the sense of Article VIII of the Whaling Convention, the Court invoked the distinction between questions of fact and questions of law: since the interpretation of the expression ‘scientific research’ is a question of law,²⁵ it was for the Court to solve this question, without decisively taking into consideration the indications offered by the experts. In the Court’s view, even if, ‘as a matter of scientific opinion, the experts called by the Parties agreed that lethal methods can have a place in scientific research, while not necessarily agreeing on the conditions for their use’, ‘[t]heir conclusions as scientists, however, must be distinguished from the interpretation of the Convention, which is the task of this Court.’²⁶

4. *Conclusion*

The appearance of party-appointed experts in the *Whaling in the Antarctic* case helped the Court to ascertain the scientific facts underlying the dispute. While the Court did not set general criteria for assessing the evidential weight of expert opinions, the Court’s judgment offers food for thought in respect to such issue. In future cases, more attention can be expected from the parties regarding the appointment and the examination of party-appointed experts.

²³ Scovazzi (n 2) 28.

²⁴ *Whaling in the Antarctic* (n 1) para 134.

²⁵ Mbengue (n 3) 5.

²⁶ *Whaling in the Antarctic* (n 1) para 82.



Hopefully, the judgment in cases now pending before the Court, such as the *Construction of a Road in Costa Rica along the San Juan River* and *Certain Activities carried out by Nicaragua in the Border Area* cases, might offer further guidance on it.

The Question:

On the relationship between IHL and IHRL ‘where it matters’ once more: Assessing the position of the European Court of Human Rights after *Hassan and Jaloud*

Introduced by Marco Pertile and Chiara Vitucci

The relationship between international humanitarian law (IHL) and international human rights law (IHRL) is one of the thorniest issues in the recent literature on those two specialised areas of public international law. It has elicited highly theoretical speculations, but there can be no doubts that it is also fraught with very practical consequences.

As is well known, the International Court of Justice has conceptualized the problem in a relatively formal way. The Court has clarified that IHRL does not cease to apply in times of armed conflict and has made somewhat vague reference to the concept of *lex specialis* to address the inevitable issues of coordination. It can therefore be assumed that in case of conflict between a rule of IHL and a rule of IHRL, IHL should prevail by reason of its more specific character. However, the main weakness in the position of the Court is that it does not offer guidance as to how the possible antinomies between the two bodies of rules should be identified and addressed in practice. This vagueness is perhaps understandable in the light of the inter-State or advisory nature of the jurisdiction of the International Court of Justice, but it is scarcely compatible with the mandate and jurisdiction of human rights courts, international monitoring systems, and domestic courts.

In their seminal article of 2008, Sassoli and Olson started from the assumption that the interaction between IHL and IHRL could not be examined in the abstract. They decided to focus on the two issues for which, in their judgement, the problem mattered most, namely detention and the protection of the right to life in armed conflict, and made the important point that: ‘on some issues human rights constitute the

lex specialis' (M Sassoli, LM Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 90 Intl Rev Red Cross 600). Indeed, the question of the different legal regimes (IHRL and IHL) potentially applicable to the right to life and personal liberty in armed conflicts is not new but has not so far received a definitive answer.

The right to life applies to every person under the jurisdiction of a State. While the right is absolute and non derogable, deprivation of life shall not be regarded as inflicted in contravention of the law when it results from the use of force that is no more than absolutely necessary. In addition, a procedural aspect of the right to life is violated when the authorities fail to conduct an effective and impartial investigation in cases of deprivation of life. By contrast, the protection offered by IHL depends on the status of protected person and on the type of armed conflict at stake. Not surprisingly, under IHL, the scope of the duty to investigate violations seems to be less wide.

With respect to detention, permissible grounds for detention under IHRL would appear scarcely to be compatible with the latitude of internment of protected persons under IHL, a tool to which belligerents are likely to have ample recourse during conflicts and situations of occupation. Moreover, the rules of IHL on internment are decidedly less developed when it comes to procedural safeguards and detention review.

Against this background there is a new development: one of the most important international human rights jurisdictions, the European Court on Human Rights (ECtHR), has abandoned its traditional silence on the relationship between IHL and IHRL. Until recently, the ECtHR, despite having heard several cases involving the application of human rights in situations of armed conflict, had never directly addressed the application of IHL, a body of rules which is formally extraneous to its guiding text, the European Convention of Human Rights (ECHR).

A turning point in the ECtHR's case law on armed conflicts is represented by the decision in *Hassan v United Kingdom*. On that occasion the Court dealt with a case of internment of a civilian during the international armed conflict in Iraq. The events took place in the phase in which the invading countries had not yet declared that they were occupying powers in Iraq. As to the interaction between the right to liberty and security of the person under Article 5 of the ECHR and the appli-



cable provisions of IHL on internment, the ECtHR first established, according to its previous case law, that the list of permissible grounds of detention contained in Article 5(1) provided no basis for internment in accordance with IHL. By reason of the co-existence of the safeguards provided by IHL and by the Convention, in cases of international armed conflicts, however, the Court considered that the grounds of permitted deprivation of liberty should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security. The same reasoning is then applied to the procedural safeguards of the right to personal liberty. With reference to the absence of a previous derogation in relation to Article 5 under Article 15 of the ECHR on the part of the United Kingdom, the Court took the view that such a derogation was not necessary in order to permit interpretation of the Convention in the light of IHL. On this, the Court made reference to the consistent absence of derogations in the practice of State parties (Article 31(3)(b) of the Vienna Convention on the Law of Treaties).

Along similar lines, the recent judgment delivered by the Grand Chamber in *Jaloud v The Netherlands* offers fresh food for thought on the law applicable to the right to life in situations of armed conflict and occupation.

The case concerned an Iraqi civilian who was killed at a checkpoint either by Dutch soldiers or by personnel of the Iraqi Civil Defence Corp (ICDC). At the time of the shooting, Netherlands troops had authority in the region as part of the Stabilization Force in Iraq in accordance with UN Security Council resolution 1483 (2003). The father of the victim complained under Article 2 of the Convention that the investigation into the shooting carried out by the Dutch authorities had been neither sufficiently independent nor effective.

With regard to the alleged violation of the procedural obligations ensuing from Article 2 of the ECHR the Court recalled its precedents according to which such obligations continue to apply also in the context of an armed conflict. The Court also formally acknowledged the need to take account of the particular difficulties faced by State authorities in a situation of armed conflict or occupation. However, despite this acknowledgment, the Court in practice did not seem to give any real effect to the difficulties of the situation in which the Dutch authori-



ties had been operating. In other words, the Court did not seem to consider that the rules of IHL applicable to the investigation were less stringent than those under the Convention.

In the light of the decisions of the ECtHR in *Hassan* and *Jaloud*, the debate on the interaction between IHL and IHRL needed to be further developed. QIL asked Ziv Bohrer and Silvia Borelli, two legal scholars who have considered these questions in their research, to advance some answers to the issues at stake. The two authors chose quite different perspectives. Bohrer calls attention to the problems related to reliance on IHRL as a way of regulating wartime scenarios. He argues that the difference between IHRL and IHL would be better understood if one considered that the first is a system based on rights, whereas the second should be viewed as a system based on obligations. He then uses the Israeli Supreme Court's experience to advance the idea that domestic courts are in a better position to review military actions using IHL instruments. In contrast, Borelli starts from the assumption that the supporters of IHL and IHRL prioritize different values and that inquiring which of the two system is more appropriate to regulate the conduct of States in situations of armed conflict is therefore sterile. She rather focuses her contribution on the question of how IHRL instruments such as the European Convention may apply (in practice) in the context of military operations abroad. In her opinion the recent stand taken by European Court in the *Hassan* case is far from satisfactory and creates problems of uncertainty.



Human Rights vs Humanitarian Law or rights vs obligations: Reflections following the rulings in *Hassan* and *Jaloud*

Ziv Bohrer*

1. Introduction

In two recent cases, *Hassan v United Kingdom*¹ and *Jaloud v Netherlands*,² the European Court of Human Rights (ECtHR) extended the wartime application of International Human Rights Law (IHRL). Although these cases have been celebrated for reducing the horrors of war, this paper shows otherwise.³ Critical examination of them suggests that applying IHRL to expand the wartime protection of civilians can be counterproductive.

Part 2 presents these recent rulings. Part 3 analyzes them in order to call attention to an unacknowledged problem with reliance on IHRL as a way of regulating wartime scenarios: doing so often results in lower civilian protection than when International Humanitarian Law (IHL) is relied upon. Part 4 uses Robert Cover's seminal work on rights-oriented vs obligations-oriented legal systems to explain why IHL (an obligations-oriented system) is better suited than IHRL to protect civilians during armed-conflicts. Part 5 responds to a counterclaim that may be raised against the present argument whereby practical necessity de-

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¹ *Hassan v United Kingdom* App no 29750/09 (ECtHR 16 September 2014).

² *Jaloud v Netherlands* App no 47708/08 (ECtHR 20 November 2014).

³ L Hill-Cawthorne, 'The Grand Chamber Judgment in *Hassan v UK*' EJIL:Talk! (2014) <www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/> ('*Hassan* reflects an extremely important decision'); C DeKoker, 'Extra-territorial Jurisdiction & Flexible Human Rights Obligations: The Case of *Jaloud v the Netherlands*' Strasbourg Observers (2014) <www.strasbourgobservers.com/2014/12/08/extra-territorial-jurisdiction-flexible-human-rights-obligations-the-case-of-jaloud-v-the-netherlands/> ('the Court ... is now slowly but surely moving towards a more expansive approach').



mands extending IHRL to armed-conflicts, since the ECtHR's jurisdiction is limited to IHRL. Israel's experience, among other things, is presented to respond to this counterclaim, demonstrating the potential existence of an IHL-oriented alternative to the ECtHR, in the form of review by domestic courts. In light of this alternative, the dispute over the wartime relations between IHL and IHRL is revealed to be less an expression of disagreements regarding the nature of human rights and more a symptom of the failure of domestic courts to uphold the rule of law in times of war.

2. *The Cases*

On April 23, 2003, British forces in Iraq, suspecting Tarek Hassan of being a combatant, arrested him at his home, in the Basra region, and detained him in a joint British-American camp. In September 2003, Hassan's body was found 700 kilometers from the camp, bearing signs of torture. According to British records, Hassan had been released on May 2, 2003, after they concluded that he was a non-combatant. What happened between May and September remains a mystery.⁴

The ECtHR considers it exceptional to require a State to protect the rights of individuals outside of its territory or a territory under its effective control (ie, under its belligerent occupation).⁵ Hassan's case was ruled to be such an exception, as the British, despite not having yet occupied the Basra region, were deemed to have had 'personal jurisdiction' over Hassan because of his detention (irrespective of his custody being shared with the Americans).⁶ The UK, however, was not found to have violated Hassan's right to life, because evidence indicated that he was killed after having been released.⁷ Regarding *Hassan's* personal liberty, the court applied the doctrine, originating with the International Court of Justice (ICJ), which states that although during hostilities IHRL generally applies alongside IHL, the test for what constitutes a violation of a human right 'falls to be determined by the applicable *lex specialis*,

⁴ *Hassan* (n 1) paras 10-29.

⁵ *Al-Skeini v United Kingdom* App no 55721/07 (ECtHR [GC], 7 July 2011) paras 130-142.

⁶ *Hassan* (n 1) paras 70-77.

⁷ *ibid* paras 62-63.



namely [IHL].⁸ Because Hassan's detention was ostensibly in accordance with IHL, the court ruled that his right to liberty had not been violated.⁹

Shortly after the Hassan ruling, the ECtHR ruled in Jaloud's case, regarding the following events:

'On 21 April 2004, at around 2.12 a.m., an unknown car approached a vehicle checkpoint (VCP) [located on a road in] south-eastern Iraq [and] fired at the personnel guarding the VCP, all of them members of the Iraqi Civil Defence Corps (ICDC). The guards returned fire. No one was hit; the car drove off and disappeared ... Called by the checkpoint commander ... a patrol of six Netherlands soldiers led by Lieutenant A. arrived on the scene at around 2.30 a.m. ... Some fifteen minutes later a Mercedes car approached the VCP at speed. It hit one of several barrels which had been set out in the middle of the road to form the checkpoint, but continued to advance. Shots were fired at the car: Lieutenant A. fired 28 rounds [and] shots may also have been fired by ... ICDC personnel ... At this point the driver stopped ... Mr Azhar Sabah Jaloud, [a] passenger [inside] the car [was] hit [and subsequently] died.'¹⁰

Dutch authorities investigated the incident and determined that there had been no misconduct on the part of the soldiers.¹¹ The British were the occupier of that region; the Dutch were only assisting them, even relinquishing 'operational command' (their soldiers received their day-to-day orders from the British). Furthermore, the Dutch forces had not been regularly operating the checkpoint, arriving only 15 minutes earlier to aid the Iraqi forces there. Nevertheless, the ECtHR ruled that sufficient Dutch jurisdiction existed to bind the Netherlands to the duties of IHRL. It concluded that a State does not automatically become divested of its jurisdiction merely by deferring operational control to another State and that this was particularly so in the case at hand (a) because the Dutch retained the power to determine their forces' overall

⁸ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, para 25.

⁹ *Hassan* (n 1) paras 96-109. In reaching its conclusion the court did not only rely on the *lex specialis* doctrine but also on art 31 of the Vienna Convention on the Law of Treaties 1969 (*ibid* paras 100-107).

¹⁰ *Jaloud* (n 2) paras 10-13.

¹¹ *ibid* paras 39-48.



policy and (b) because they assumed sole responsibility for the area.¹² These two elements, however, were insufficient to give rise to Dutch jurisdiction. The determining factor, it seems, was that the checkpoint was manned by personnel under Dutch command and supervision.¹³ In other words, it was ruled that the public authority exercised over the small ‘territory’ of the checkpoint was sufficient to deem those passing through to be under Dutch jurisdiction, thereby placing the Netherlands under a duty to protect their rights.¹⁴

The right to life places a State under a duty to carry out an effective investigation when its agents use deadly force. The ECtHR has determined in its case-law that this duty may arise even during armed conflicts, although its demands are more lax.¹⁵ The Netherlands was found to have violated the victim’s right to life by failing to investigate his death effectively, because (a) key documents were not made available to judicial authorities or to the applicant, (b) the precautions taken to prevent collusion among witnesses and suspects were insufficient, (c) the autopsy was inadequate, and (d) evidence had been misplaced.¹⁶

3. *Have the rulings increased civilians’ protections?*

The rulings in *Hassan* and *Jaloud* serve to broaden the wartime application of IHRL in two ways: *spatially*, to territories beyond those under the State’s control and *temporally*, to periods of intensive fighting (as this is the typical wartime scenario when belligerent occupation has not been attained).¹⁷ The question that arises is whether, aside from giv-

¹² See mainly *ibid* paras 143 and 149.

¹³ *ibid* para 152.

¹⁴ The ruling’s discussion of the jurisdictional issue (*ibid* paras 112-153) is not entirely clear, and therefore may be open to interpretations other than the one presented herein.

¹⁵ *Al-Skeini* (n 5) paras 163-167. Other organs have also adopted this position; see eg *Public Commission to Examine the Maritime Incident of 31 May 2010: Second Report* (Israel 2013) (Turkel Report) 103-106.

¹⁶ *Jaloud* (n 2) paras 226-28.

¹⁷ Needless to say, these rulings are but two recent links in a lengthy chain. For prior ‘links’ see eg *Al-Skeini* (n 5); *Al-Jedda v UK* App no 27021/08 (ECHR 7 July 2011). Also, for listings of the ECtHR’s previous related rulings see: ECtHR Press Unit, *Factsheet – Armed Conflicts* (November, 2014) <www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf>; ECtHR Press Unit, *Factsheet – Extra-Territorial*



ing the ECtHR jurisdiction, individuals have gained substantive protections as a result of the determinations that IHRL applies alongside IHL.

The answer is negative in both cases, as demonstrated below. Indeed, it has already been generally pointed out that ‘curiously, very few scholars or advocates have put forward ... concrete ... examples of the substantive, normative contribution of human rights law application.’¹⁸ There was no such contribution in *Hassan*; the ECtHR explicitly ruled there that States need abide only by IHL to fulfill their IHRL duties.¹⁹ Similarly, in *Jaloud*, there was no need to turn to IHRL for a legal basis for the State’s duty to effectively investigate suspected deaths of civilians. Ample basis already exists in IHL.²⁰ Although IHRL is clearly a source of inspiration when interpreting the term ‘effective investigation’, identical interpretations can be reached through IHL alone, which should be interpreted in a manner that balances humanity with military necessity. Even lacunae in IHL can be remedied without recourse to IHRL. The Martens Clause, an IHL norm, instructs that such lacunae be resolved in accordance with: ‘principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’²¹

IHL-based solutions are not flawless, but neither is resorting to IHRL, which was not originally designed to regulate wartime actions. Many opine that resorting to IHRL may result in rulings that are overly

Jurisdiction of States Parties (November, 2014) <www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf>.

¹⁸ N Modirzadeh, ‘The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed-Conflict’ (2010) 86 Intl L Studies 349, 390. Some might rush to respond that the idea of avoiding any reference to IHRL is paradoxical when applied to rulings by a court that only has jurisdiction when IHRL applies. However, as discussed below, finding a way to allow the ECtHR jurisdiction over extraterritorial wartime occurrences is an insufficient *procedural* motivation for making the *substantive jurisprudential* determination that IHRL applies to combat actions.

¹⁹ *Hassan* (n 1) paras 96-109.

²⁰ Turkel Report (n 15) 73-82.

²¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 36 Stat 2277 (Hague Convention (IV)) preamble.



demanding of armed-forces.²² A less acknowledged problem is that individuals' substantive protections often decrease.²³ This problem is evident in both *Hassan* and *Jaloud*.

IHRL demands that States file formal derogation declarations if they intend to derogate from protecting certain rights (such as personal liberty) in circumstances of emergency.²⁴ The European Convention explicitly lists 'war' as an emergency that may justify a declaration of derogation.²⁵ But the UK did not enter a derogation in relation to the detention of individuals during the Iraq War; nor did most other States, when engaging in armed-conflicts. In view of IHL's *lex specialis* status, this State practice led the ECtHR, in *Hassan*, to conclude that IHL absolves States from the requirement to issue a derogation declaration in such circumstances.²⁶

This ruling is flawed. States traditionally assumed that human rights treaties did not apply to their extra-territorial actions, and therefore felt exempt from filing derogation declarations. Nearly all wars fought by European States since the signing of the European Human Rights Convention were abroad, prompting the conclusion that the State practice of not issuing derogation declarations is not IHL-related but has to do with the States' interpretation of IHRL. Thus, once IHRL was ruled to be applicable extraterritorially in certain wartime situations, its requirement for a derogation declaration should have also been deemed applicable to these situations.²⁷ Moreover, the derogation procedure

²² Eg M Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed-Conflict' (2007) 40 Israel L Rev 473.

²³ But see Modirzadeh (n 18) (discussing different protection reductions than those discussed herein).

²⁴ Eg International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 31 UNTS 269 art 4; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 27.

²⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 312 UNTS 221 art 15.

²⁶ *Hassan* (n 1) paras 40-42, 96-111. Stated differently, the court recognized that the member-States implicitly agreed through their subsequent (IHL-related) practice to modify the Convention's derogation demand (see *ibid* para 110).

²⁷ *Mohammed v MOD* [2014] EWHC 1369 (QB) paras 153-157. See especially para 155: '[its] wording ... tends to suggest that Article 15 was not intended to apply to a



consists of two elements: (a) the State's decision regarding the extent to which it wishes to derogate from the protections accorded to certain rights (based on the emergency conditions and the limitations set by IHRL); and (b) the derogation declaration itself, which is independently significant, because it requires the State to acknowledge the emergency and the associated harm to human rights it is about to cause in its emergency response. IHL's *lex specialis* status affects the extent to which rights may be harmed (the first element). It need not affect the requirement of a declaration (the second element), as IHL is indifferent to war declarations of any form.²⁸ The flawed legal reasoning in *Hassan* suggests a possible alternative motive behind the decision to absolve States from the derogation declaration demand: a desire of the ECtHR to reassure States that it does not intend to overly scrutinize their actions, after considerably expending its jurisdiction.

The ruling in *Hassan* can easily be corrected in future rulings, but *Jaloud* attests to a deeper problem, inherent in determining that wartime State duties are rooted in IHRL, not in IHL. Consider the hypothetical scenario of the Dutch forces sent to help the soldiers operating the checkpoint, walking toward the checkpoint as a car speeds past them. Feeling threatened, they shoot at the car, killing a civilian passenger. Clearly, these Dutch soldiers did not exercise sufficient public authority over the road for Dutch 'jurisdiction' to exist. Therefore, if the duty to conduct an effective investigation (without misplacing evidence, preventing collusion between suspects, etc) is based on IHRL, the Dutch are under no such duty—even though there is no convincing reason to distinguish this case from *Jaloud*. By contrast, if we consider this duty to be based on IHL, it applies as much to this scenario as to *Jaloud*.

This absurd predicament is derived from the historical/jurisprudential connection between 'rights' and 'jurisdiction'. Recognition of universal inalienable rights does not mean, *ipso facto*,

war overseas which does not threaten the life of the nation. That is no doubt because those who drafted the Convention did not envisage that a State's jurisdiction under Article 1 would extend to acts done outside its territory. Now that the Convention has been interpreted, however, as having such extraterritorial effect, it seems to me that Article 15 must be interpreted in a way which reflects this.'

²⁸ UK Ministry of Defence, *Manual of the Law of Armed-Conflict* (OUP 2004) 28-29.

that agents of all States are under a duty to protect these rights.²⁹ As Vattel already pointed out: ‘though [each person’s human] right[s] [are] necessary and perfect in the general view ... we must not forget that [they are] but imperfect with respect to each particular country.’³⁰ Placing State agents under a duty to protect rights with regard to certain individuals was originally justified based on jurisprudence that closely relates to the State’s personal and territorial jurisdiction. As Cover noted:

‘The jurisprudence of rights ... has gained ascendance in the Western world together with the rise of the national state with its almost unique mastery of violence over extensive territories ... [I]t has been essential to counterbalance the development of the State with a myth which ... establishes the State as legitimate only in so far as it can be derived from the autonomous creatures who trade in their rights for security ...’³¹

Cover indicates two realms where imposing a duty on State agents to protect individuals’ rights is widely accepted. The first is the relation between citizens and their State, because according to the social contract philosophy, the State was created to ensure its citizens’ rights. But States have limited capabilities, and therefore cannot always protect their citizens’ rights wherever they are found. The territorial jurisdiction of the State is, therefore, typically regarded as a practical proxy for the State’s personal jurisdiction over its citizens.³² As a result of the reliance on this proxy, a State’s duties regarding the protection of its citizen’s rights abroad are limited in comparison with the hypothetical scope that would had been set purely on social compact philosophy. On the other hand, the State is considered duty-bound to protect the rights of foreigners found within its territory (although the aforementioned descrip-

²⁹ S Besson, ‘The Extraterritoriality of the European Convention on Human Rights’ (2012) 25 *Leiden J Intl L* 859.

³⁰ E de Vattel, *The Law of Nations* (Robinson 1797) 108.

³¹ R Cover, ‘Obligation: A Jewish Jurisprudence of the Social Order’ (1987) 5 *J L & Religion* 69.

³² See A Cassese, P Gaeta, L Baig, M Fan, C Gosnell, A Whiting (eds), *Cassese’s International Criminal Law* (3rd edn, OUP 2013) 274 (discussing the transition from personal to territorial jurisdiction as the default form of jurisdiction that accompanied the rise of modern States).



tion greatly oversimplifies historical and jurisprudential issues³³). The resulting territorial sovereignty principle, as already stated in the *Island of Palmas* case, ‘serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.’³⁴ In fact, even the European Human Rights Convention was drafted with this traditional perspective in mind. ‘[T]hose who drafted the Convention did not envisage that a State’s jurisdiction under Article 1 would extend to acts done outside its territory.’³⁵ They, accordingly, phrased the Convention’s preamble and Article 1 to state:

‘Considering [that] the Universal Declaration of Human Rights ... aims at *securing the universal and effective recognition and observance* of the Rights therein declared; ... Being resolved, as the governments of European countries ... to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration, Have agreed [that] The High Contracting Parties *shall secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention.’³⁶

This traditional perspective, thus, regards IHRL, and the international organs charged with enforcing it (including the ECtHR), as mechanisms aimed at restraining the State from shirking the human

³³ Certain legal protections to foreigners (not rooted in IHRL) have existed long before: (1) the rise of modern States; (2) the maturation of Social Contract jurisprudence (and its vast acceptance as the jurisprudential basis for sovereign power (at least in democracies)); or (3) the consolidation of the modern conceptualization of territoriality. Social Contract jurisprudence relies on the existence of a certain kind of a personal connection (a ‘contractual’ one) as the determining factor for recognizing a special relationship between individuals and a sovereign. But despite that fact, its maturation and the consolidation of the modern conceptualization of territoriality have both occurred roughly at the same time, and both played a pivotal role in the rise of modern States. See Cover (n 31) 69; J Mostov, *Soft Borders* (Palgrave Macmillan 2008) 80; A Cassese (ibid). The simultaneous occurrence of these three processes brought about a human rights-oriented, re-conceptualization of the relations between States and foreigners and of the differences between such relations and the relation between each State and its own citizens.

³⁴ *Island of Palmas* (1928) 2 RIAA 829, 839.

³⁵ Mohammed (n 27) para 155.

³⁶ European Convention (n 25) preamble, art 1 (emphasis added).

rights-related duties it owes to its citizens and to individuals within its territory.³⁷

It is relatively widely accepted that making the duty of States to protect human rights correspond with their territorial sovereignty easily leads to the conclusion that such a duty should also exist in the relations between a belligerent occupier and the residents of the occupied territory. The occupier, after all, is the ruler of the territory, albeit temporarily.³⁸

Are there additional situations in which States are under an obligation to protect individuals' rights? Justifying such obligations in other situations based on the social compact ethos is challenging. To address this difficulty, an array of universalist theories have recently been advanced, offering an alternative 'ethos' in an attempt to place a general duty on all States to protect (or at least not harm) anyone whose life they affect. The motivation behind such attempts is understandable: many State actions negatively affect the lives of non-citizens found abroad, and there is considerable injustice in not demanding that States be concerned with this.³⁹

Universalist theories, however, have not garnered full support. On the philosophical level, opponents have argued that such theories fail to grasp the 'true' nature of rights, which presupposes a certain relation between the right-bearers and those placed under a duty to protect them.⁴⁰ On the practical level, it has been argued that these theories impose unrealistic demands on States, especially during armed-conflicts.⁴¹

Many middle-ground approaches have also been offered.⁴² The *Has-san* and *Jaloud* rulings may be understood as such for they continue to adhere to a jurisdictional constraint while simultaneously attempting to

³⁷ Besson (n 29) 863-864.

³⁸ Turkel-Report (n 15) 67. But see Y Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 *Israel YB Human Rights* 113-116; Modirzadeh (n 18) 363-367.

³⁹ See M Saliternik, 'Reducing the Price of Peace: Human Rights Responsibilities of Third-Party Facilitators' (2015) 48 *Vanderbilt J Transnational L* 179-243 (discussing such approaches). See also E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *AJIL* 295.

⁴⁰ Modirzadeh (n 18) 371-374.

⁴¹ Dennis (n 22) 473.

⁴² Modirzadeh (n 18) 370-373 (discussing such approaches).



widely define the concept of ‘jurisdiction’.⁴³ Such middle-ground approaches, however, as is often the case with normative compromises, are ambiguous and lead to normative incoherence.⁴⁴ Admittedly, if forced to choose, I would prefer an ambiguous middle-ground approach over either of the two polar extremes of (a) fully or (b) never applying IHRL to wartime situations. But such a choice is generally unnecessary because there is yet another alternative: applying IHL while properly interpreting and developing it.

4. *The benefits of relying on IHL*

Robert Cover has shown that some legal systems are rooted in the notion of ‘human rights’, while others in the notion of ‘obligations’ and that:

‘There are certain kinds of problems which a jurisprudence of [obligations] manages to solve rather naturally. There are others which present conceptual difficulties of the first order. Similarly, a jurisprudence of rights naturally solves certain problems while stumbling over others... It is not... that particular problems cannot be solved, in one system or the other — only that the solution entails a sort of rhetorical or philosophical strain.’⁴⁵

Each system’s core notions, rights vs obligations, are related to a jurisprudential ‘story’ that helps reveal the problems that the system is likely to solve more effectively. The original ‘story behind the term

⁴³ Many other middle-ground approaches attempt to ‘cherry-pick’ international human rights, by applying only some rights in only some wartime situations. See eg M Sassoli, LM Olson, ‘The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 90 Intl Rev Red Cross 599.

⁴⁴ Besson (n 29) 858; Modirzadeh (n 15) 370-373. See also S Benhabib, ‘Another Universalism: On the Unity and Diversity of Human Rights’ (2007) 81(2) Proceedings & Addresses American Philosophical Association 9 (‘There is wide-ranging disagreement in contemporary thought about the philosophical justification as well as the content of human rights [which] inevitably lead to ... ‘cherry-picking’ among various lists of rights’).

⁴⁵ Cover (n 31) 70-71.



‘rights’ is the story of social contract.⁴⁶ By contrast, IHL is an obligations-oriented system, originating in the status-based socio-legal structure of the Middle-Ages, and, according to many, there are still strong moral and practical reasons for it to remain a status-based, obligations-oriented system.⁴⁷

Given its historical and jurisprudential ties to the social contract ethos, rights-oriented jurisprudence functions effectively in the context of actions performed within a State’s territory, but not quite as well when applied to extraterritorial actions affecting foreigners. By contrast, IHL, a status-based, obligations-oriented system, is less affected by territorial boundaries as one’s duties go wherever one goes.⁴⁸ This difference can be demonstrated in readiness of different courts to review extraterritorial air-bombings by States. The Israeli Supreme Court considers itself authorized to review Israeli extraterritorial air-bombings.⁴⁹ Its longstanding position is that ‘every Israeli soldier carries in his backpack [wherever he goes] the rules of ... the law of war’ and judicial scrutiny is needed to assure that that is indeed so.⁵⁰ By comparison, the ECtHR, whose jurisprudence is rights-based, concluded that it lacks authority to review such air-bombings, as insufficient public authority is

⁴⁶ *ibid* 66.

⁴⁷ Modirzadeh (n 18) 362. The reasons in support of IHL remaining a status-based, obligations-oriented system go beyond the fact that such conceptualization makes it easier to apply IHL extraterritorially. Many opine that the moral/legal precept that one should not harm others — to which self-defense is the most widely accepted moral and legal exception — should be conceived in terms of a moral/legal duty and not be relegated to being a mere manifestation of the right to life. See eg HLA Hart, ‘Are There Any Natural Rights?’ (1955) 65 *Philosophical Rev* 183-186. The core *jus in bello* duties of soldiers are widely regarded as being rooted in restrictions set by self-defense morality (subsequent to certain adaptations and qualifications). See I Porat, Z Bohrer, ‘Preferring One’s Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State’s Civilians?’ (2015) 47 *George Washington Intl L Rev* 99. In other words, these restrictions are widely regarded as being rooted in derivatives of the moral/legal *duty* not to harm others.

⁴⁸ Modirzadeh (n 18) 352-355.

⁴⁹ *B’tselem v Military Advocate General* HCJ 9594/03 (2011). Unlike the two cases below, this petition was rejected on its merits; namely, the court considered itself authorized to review the military action. Moreover, the court pressured the military to change its policy and dismissed the case only after being satisfied that the policy had been properly reformed.

⁵⁰ *Jamait-Askan v IDF* HCJ 393/82 (1983) 37(4) PD 785, 810.



exercised by the bombers for State jurisdiction to exist.⁵¹ The decision of the US District Court in *Al-Aulaqi* demonstrates that, if rights-based jurisprudence is applied, substantive judicial review is unlikely even when the enemy target is a citizen of the attacking State. The court declined to review a decision to include Al-Aulaqi (an American al-Qaeda member) in the US ‘targeted killing list’, irrespective of whether that decision constituted a denial of due process, based on an abuse of rights rationale. It ruled that: ‘no US citizen may stimulatingly avail himself of the US judicial system and evade US law enforcement authorities.’⁵²

This is not to say that rights-based jurisprudence cannot resolve problems arising from the extraterritorial actions of States. Only that, in Cover’s words, doing so entails ‘rhetorical [and] philosophical strain[s].’⁵³

Cover also showed that reliance on rights-oriented jurisprudence may prove problematic when ‘it is not clear to whom [the right] is address[ed]’ because it is likely to result in ‘a series of attempts [by State agents] to foist the responsibility off to someone else.’⁵⁴ Hence, in cases such as *Jaloud*, when agents of several States control a territory (Americans at the macro-level, British regionally, Dutch locally, and Dutch and Iraqis jointly on the spot), it is more advantageous to deem it to be the *duty* of a military commander to effectively investigate a suspicious death in which his forces were involved, than to grant the deceased (by way of his family) the right to have his death effectively investigated. Otherwise, each State’s agents may attempt to foist the responsibility to

⁵¹ *Bankovic v Belgium* App no 52207/99 (ECtHR, 12 December 2001). While supporters of universalist and (some) mid-way approaches strongly hope and believe that the day will soon come when the ECtHR will overturn the *Bankovic* ruling, I seriously doubt that that will ever happen. For to rule that a dropping of a bomb, in and of itself, gives rise to the coming into existence of State jurisdiction is to, de facto, nullify the demand for jurisdiction set in the European Convention. Indeed, despite considerable academic criticism, during the decade and a half that has passed since that ruling, the ECtHR has not overturned it. Rather, it merely applied a somewhat wider definition of ‘jurisdiction’ in (some) subsequent rulings (such as, in *Hassan* and *Jaloud*). See S Hartridge, ‘The European Court of Human Rights’ Engagement with International Humanitarian Law’ in D Jinks, JN Magoto, S Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Springer 2014) 257, 267-270.

⁵² *Al-Aulaqi v Obama* (DDC 2010) 727 F Supp 2d 1, 18.

⁵³ Cover (n 31) 71.

⁵⁴ *ibid* 71-72.

ensure this right onto someone else, which is likely to result in an inadequate investigation.⁵⁵

Cover further suggested that '[t]he myth of social contract is a myth of coequal autonomous, voluntary acts, [and so, it] posits [active] participation.'⁵⁶ Thus, personal problems can be expected to be solved properly in a rights-based system when the individuals are able to actively demand that their rights be protected, which is less likely in the case of disempowered individuals. Cover demonstrates this issue by discussing how each system guarantees that defendants are properly attired for their trial to ensure that the convict's garb or poor man's clothes they may ordinarily wear do not unconsciously affect the judge's/jury's decision. In a rights-based system, this problem is often poorly resolved because courts are likely to rule that if the defendant appears in convict's garb 'in the absence of timely objection by counsel the right [to be dressed properly would be] deemed waived.'⁵⁷ By contrast, in an obligations-based system, this problem is generally resolved, because the legal position is likely to be that judges are duty-bound by their responsibility to assure a fair trial to ensure that defendants are properly dressed.⁵⁸

This issue can also be demonstrated regarding the likelihood that each system will successfully ensure the safe return of released wartime detainees to their places of residence. It stands to reason that released detainees are more likely to return home safely if their families are notified of their expected return. The British military orders applicable in

⁵⁵ Wartime criminal investigations are extremely time-consuming and time is a rare commodity for commanders and soldiers during wartime actions. Even more significantly, such investigations are extremely disruptive: impeding the motivation among soldiers to fight, reducing the level of trust between 'brothers-in-arms', et cetera. This is not to say that investigations should not be conducted when suspicions of wrongdoings arise. It is only stated herein to clarify that even a commander who is not evil nor corrupt, might be tempted to distance himself and his soldiers as much as possible from involvement in the investigation if the opportunity arises. The possible presence of an uncoordinated plurality of responsible persons that is created under an IHRL conceptualization of the issue presents such an opportunity. Hence, in practice, often, a conceptualization of the issue as an obligation of the relevant military commander under IHL, and as a right of the relatives under IHRL, could not co-exist.

⁵⁶ Cover (n 31) 73.

⁵⁷ *ibid* 72. Cover further discusses attempts made in such systems to solve this problem. Yet as noted by Cover, such solutions entail rhetorical and philosophical strains.

⁵⁸ *ibid*.



Hassan further stipulated that safe return is more likely to occur if detainees are released close to their homes ‘in daylight hours’.⁵⁹ One might ponder whether a rights-oriented jurisprudence should serve as the basis for the regulation of this issue? That is, should family notification and daylight drop-off be defined as rights, and as such their implementation should rely on the individuals’ demands? If the answer is affirmative, *Hassan*, upon discovering that he was going to be released at night (according to British records he was dropped off one minute after midnight)⁶⁰, could have been expected to oppose his release and demand to be dropped off the next morning. Similarly, if family notification is considered a right, State agents are permitted to leave to the released detainees the responsibility of notifying their families, when dropping them off in a *warzone*. In other words, irrespective of what happened to *Hassan* after his release, had the detaining British forces been scrutinized on the basis of an obligations-oriented jurisprudence, they would have been more strongly reprimanded, proving again that developing IHL is often a more appropriate course of action than wartime application of IHRL.

5. *The Israeli experience and the candor of the position herein presented*

Despite the potential harm that may result from reliance on rights-oriented framing of wartime situations, one might argue that doing so is necessary. The ECtHR’s jurisdiction is limited to IHRL, and currently no tribunal that is authorized to adjudicate IHL has shown the same readiness as the ECtHR to review States’ military actions. Thus, if wartime issues are not framed in IHRL vocabulary, such actions will not be judicially scrutinized.⁶¹ But as the Israeli experience shows, the potential for an IHL-oriented judicial alternative to the ECtHR does exist.

In Israel, most petitions against the government go directly to the Supreme Court, acting as a High Court of Justice (HCJ). Until the 1990s, Israel, like the UK, had no constitutional bill of rights that allowed voiding laws. Judicial scrutiny of the executive branch relied, and

⁵⁹ *Hassan* (n 1) para 26.

⁶⁰ *ibid* para 28.

⁶¹ See Modirzadeh (n 18) 390.



still does to some degree, on unwritten administrative law that for historical reasons is strongly rooted in obligations-based jurisprudence.⁶² Following Israel's occupation of Gaza and the West Bank, the HCJ decided to allow Palestinians to petition against Israeli military commanders, despite not having explicit authority to review extraterritorial State actions. It ruled: (a) that the Israeli military must conduct itself in accordance with both customary IHL and Israeli administrative law because every Israeli soldier carries both kinds of norms 'in his backpack' wherever he goes and (b) that the jurisprudential basis for its authority to review such extraterritorial actions stems from the HCJ's role as the organ charged with scrutinizing the legality of governmental actions and its authority to grant relief deemed necessary in the interest of justice.⁶³ Notice that both elements of the court's decision rely on obligations-based rationales. Since the 1980s, based on the government's duty to abide by the rule of law (again, an obligation-based rationale), the HCJ almost entirely did away with the doctrines of 'justiciability' and 'standing'.⁶⁴ As a result, even petitions against extraterritorial Israeli military actions not conducted in the context of occupation are examined by the court.⁶⁵

Thus, the Israeli HCJ has become extremely proactive in reviewing conflict-related State actions. It has dealt with a variety of cases, ranging from macro-issues (the security barrier, interrogation techniques) to miniscule ones (tree cutting in a single orchard).⁶⁶ Occasionally, it even reviews military actions in real-time, summoning officers from the battlefield to give testimony.⁶⁷ The volume of cases is impressive: research from 2010 shows that during 1990-2005, the court examined 410 military-related cases, 207 of them during 2000-2005.⁶⁸ The research also

⁶² G Davidov, A Reichman, 'Prolonged Armed-Conflict and Diminished Deference to the Military: Lessons from Israel' (2010) 35 *L & Social Inquiry* 922-926.

⁶³ *Jamait-Askan* (n 18) 810.

⁶⁴ Davidov, Reichman (n 62) 926. Formally, the court did not abolish these doctrines. But it left itself almost unlimited discretion to decide when to apply them and, in practice, it rarely does so.

⁶⁵ Eg *Ahmed v Prime Minister* HCJ 9132/07 (2008) <http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf>.

⁶⁶ Davidov, Reichman (n 62) 919-922.

⁶⁷ Eg *Physicians for Human Rights v IDF* HCJ 4764/04 (2004) 58(5) 385; *Physicians for Human Rights v Prime Minister* HCJ 201/09 (2009) Israel LR 1.

⁶⁸ Davidov, Reichman (n 62) 939.



examined the full extent to which the court's scrutiny has led the military to change its decisions; this includes not only petitions that were accepted, but also some petitions that were formally rejected – namely, those whose acceptance became unnecessary because, prior to the court's ruling, the military, under pressure from the court, was forced to change its original decision.⁶⁹ The examination revealed that in about 25% of the cases, the military was forced to change its decisions at least partially, rising to 40% during the period of 2000-2005.⁷⁰

The 2000-2005 data is especially important, since during that period, Israel and the Palestinians lived through one of the bloodiest periods of their perpetual conflict, known as the 'Second Intifada'. Despite the intensive fighting, resulting in approximately 1,000 Israeli casualties (70% civilians),⁷¹ judicial scrutiny considerably *increased*, possibly because judges gained greater expertise in military matters owing to the high volume of cases. Such an increase is contrary to the typical tendency, 'in states of emergency, [of] national courts [to] assume a highly deferential attitude when called upon to review governmental actions and decisions.'⁷²

While the HCJ did occasionally rely on human rights in these rulings, these were usually common-law rights rooted in Israeli administrative law (namely, in notions regarding the duty of State agents to assure core human rights). It was generally reluctant to apply IHRL,⁷³ or Israe-

⁶⁹ *ibid* 928.

⁷⁰ *ibid* 939-943. One should keep in mind that such judicial pressure could not have been effective without the court's position as to the obligations of soldiers in relation to the laws of war and as regards its own authority to scrutinize the compliance by soldiers with those duties; nor without the occasional rendering by the court of rulings in favor of petitioners on the basis of that position. For an empirical study demonstrating the advantages of the course of action taken by the Israeli HCJ, see M Hofnung, K Weinshall-Margel, 'Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice' (2010) 7 J Empirical LS 664 (examining a sample of 200 cases of the HCJ's 2000-2008 terror-related rulings).

⁷¹ 'Israeli-Palestinian Fatalities Since 2000' (UN-OCHA, 2007) <www.ochaopt.org/documents/cas_aug07.pdf> (approximately 4000 Palestinians were killed). The number of Israeli casualties is in the text (while the number of Palestinian casualties is mentioned in the footnote) only in order, to stress the fact that the HCJ increased its scrutiny despite the serious emergency experienced by the Israeli society.

⁷² O Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 Yale L J 1034.

⁷³ *Mara'abe v Prime Minister* HCJ 7957/04 (2005) paras 26-27 <http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf>.

li Constitutional Rights.⁷⁴ Rather, its decisions relied mostly on IHL and Israeli administrative law, i.e., on obligations-based norms.

Of course, any jurist (myself included) may find some cases in which he/she opines that a different course of action should have been taken by the HCJ. But to dismiss the significance of the 'Israeli experience' due to the existence of such individual cases is to miss the forest for the trees; this is especially so in light of the vast amount of cases. Indeed, to the best of my knowledge, the HCJ scrutinizes military actions much more closely than domestic courts in any other State, to an extent that most non-Israelis, in my experience, simply fail to grasp (irrespective of their position regarding the Israeli-Palestinian conflict). Furthermore, the experience of many military legal advisers I know has generally been that high-ranking and mid-level military commanders rarely criticize the Court's activism. Commanders, it seems, have become accustomed to judicial scrutiny as part of the process.

Usually, the actual goal of those who currently oppose the wartime application of IHRL is (presumably) 'saving our armed-forces from defeat by judicial diktat.'⁷⁵ Hence, one might intuitively suspect that in this article once again the argument in favor of IHL is only a disguise for the underlying agenda of decreasing the juridical scrutiny of armed-forces' combat actions. However, this is mistaken. One should keep in mind that for many decades the positions were somewhat contradictory to what they are today. When it came to non-international armed conflicts, States often denied that the strife they were embroiled in was indeed an armed conflict, rather considering it as internal disorder; namely, a situation to which IHRL, but not IHL, applies. States attempted to avoid the application of IHL – which forced them reluctantly to accept the applicability of IHRL – in order to shirk their duties according to Common Article 3 of the Geneva Conventions. To clarify, similar duties also exist in IHRL. Yet while the stigma of violating the laws of war was already considered extremely grave at the time, the implications for States of being deemed a violator of IHRL was considerably weaker

⁷⁴ *Adalah v. MOD HCJ 8276/05* (2006) 2 Israel LR 368-372 <www.hamoked.org/files/2010/8299_eng.pdf>.

⁷⁵ R Ekins, J Morgan, T Tugendhat, *Clearing the Fog of Law: Saving Our Armed-Forces from defeat by judicial diktat* (Policy Exchange, 2015) <www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20aw.pdf>.



than today.⁷⁶ At the time, those wishing to expend civilians' wartime protections asserted that IHL, and not IHRL, was the relevant law to be applied. In fact, in 1975, the Vice-President of the ICRC, Jean Pictet explicitly admitted that, while he believed that '[t]here may be two ways promoting new law to that end: [1] extending... the Geneva Convention or [2] human rights legislation, [traditionally] the ICRC favored the former solution',⁷⁷ for 'the lack of a 'spearhead' for human rights—that is, an operational body—[was] keenly felt.'⁷⁸ Only, in the last two decades, subsequent to the ECtHR 'spearheading' the enforcement of international human rights, have the tables (somewhat) turned. In other words, preferring IHL over IHRL is not necessarily motivated by any intention to reduce judicial scrutiny.

Yet contrary to Pictet's position (and to that of most current opponents of the wartime application of IHRL), I do not believe that, in the context of combat actions, the choice between routinely resorting to IHRL and primarily relying on IHL should be guided by attempting to influence the extent of judicial scrutiny. As shown, the option of primarily relying on IHL should be preferred because that body of law is better suited to regulate such actions. Moreover, contrary to the belief of most current opponents of the wartime application of IHRL, relying primarily on IHL can in fact increase judicial scrutiny (and thus lead to an increase of the constraints placed on the armed-forced) in comparison to the current state of affairs whereby juridical scrutiny is mainly IHRL-oriented. The constraints placed on armed forces as a result of such scrutiny will simply be better tailored to the circumstances with which such forces are faced during combat actions.

6. Conclusion

Supporters of extensive wartime application of IHRL argue that such application is necessary because IHL alone fails to provide sufficient protection to individuals. The paper shows the inaccuracy of this

⁷⁶ J Pictet, *Humanitarian Law and the Protection of War Victims* (AW Sijthoff, 1975) 58.

⁷⁷ *ibid* 58-59

⁷⁸ *ibid* 60.

claim – demonstrating, through the recent cases of *Hassan* and *Jaloud*, that applying IHRL to expand civilians' wartime protection can actually be counterproductive.

It may be that but for a rights-oriented framing, which facilitates ECtHR jurisdiction, military actions would not be judicially scrutinized, which would in practice diminish civilian protection. If that is the case, what is needed is not to expand the wartime application of IHRL, but to create a tribunal that would proactively scrutinize the military actions of States on the basis of IHL. Domestic courts have the ability to conduct such IHL-based scrutiny and the Israeli HCJ, indeed, has risen to this challenge. Courts in other States have only occasionally shown readiness to conduct such scrutiny, and (to the best of my knowledge) none have reached the HCJ's level of proactivity. The ECtHR appears to feel the need to fill the void left by insufficient domestic judicial action. Due to the limits of its substantive jurisdiction, in order to fill that void, it is forced to develop doctrines that expand IHRL spatially and temporally. The dispute over the relation between IHL and IHRL therefore stems more from domestic courts' failure to rise to the challenges of contemporary warfare, than from any philosophical disagreement over the nature of human rights.



***Jaloud v Netherlands and Hassan v United Kingdom:*
Time for a principled approach in the application
of the ECHR to military action abroad**

*Silvia Borelli**

1. *Introduction*

The aim of the present piece is not to undertake an examination of which of international human rights law (IHRL) and international humanitarian law (IHL) is ‘better’ or more appropriate to regulate the conduct of States in situations of armed conflict. Advocates of IHRL argue that it provides heightened protection for individuals, and that, by its own terms, it applies to, and is perfectly equipped to deal with situations of exception, including armed conflicts.¹ On the other hand, supporters of IHL focus on the need not to place unnecessary fetters upon the freedom of States to pursue their military objectives in situations of armed conflict, and argue that IHL provides an adequate level of protection, whilst being more pragmatic, better suited to the specificities of armed conflict and more likely to be observed by the parties to the conflict.² Insofar as they prioritise different values, proponents of

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¹ See the extensive discussion in A Sari, ‘The Juridification of the British Armed Forces and the European Convention on Human Rights: ‘Because It’s Judgment that Defeats Us’ (March 2014) <<http://ssrn.com/abstract=2411070>>.

² These and other commonly invoked arguments in favour of the application of IHL as *lex specialis* displacing IHRL in times of armed conflict are set out (and rejected) in D Jinks, ‘International Human Rights Law in Time of Armed Conflict’ in A Clapham, P Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014). See also the discussion in H-P Gasser, ‘International Humanitarian Law and



the two opposing camps to a large extent talk past each other and the debate is therefore necessarily somewhat sterile.

Without taking a position as to which view is correct, this short comment advocates the need, above all else, for a principled, predictable and consistent approach to the question of *how* IHRL instruments, in particular the European Convention on Human Rights,³ apply in situations of armed conflict and occupation and, more generally, in the context of military operations abroad.

For a long time, the principal issue raised by military action abroad was the prior, wider question of whether the Convention even applied to extraterritorial conduct of the Contracting Parties. After years of ebbs and flows in the jurisprudence of the European Court of Human Rights (the Court), however, that obstacle has now to a large extent fallen away. The most recent jurisprudence of the Court on the topic makes clear that the Convention will indeed apply to the actions of a States' armed forces in situations of extraterritorial military action either where a State exercises effective control over a particular area, or where State agents in fact exercise control over an individual.⁴

As a consequence, after years of grappling with the question of *whether* the ECHR applies to extraterritorial military action, in recent cases the Court has finally had to face up to the question of *how* it should apply. That question implicates fundamental questions as to both the interpretation of the ECHR, and of its interplay and relationship with the relevant rules of IHL.

Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion' (2002) 45 *German YB Intl L* 149.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 312 UNTS 221 (ECHR or 'the Convention').

⁴ See in particular *Al-Skeini v United Kingdom* App no 55721/07 (ECtHR [GC] 7 July 2011); see also *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR [GC] 7 July 2011). The Court has further elaborated upon the principles relevant to the applicability of the ECHR to military action abroad both in *Hassan v United Kingdom* App no 29750/09 (ECtHR [GC] 16 September 2014) and *Jaloud v The Netherlands* App No 47708/08 (ECtHR [GC] 20 November 2014). For comments on the Court's approach to extraterritoriality in *Jaloud*, see A Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions?' (2014) *Military L and L of War Rev* 287



The present comment takes as points of reference the judgments of the European Court in *Hassan v United Kingdom*⁵ and *Jaloud v The Netherlands*.⁶ Those judgments, handed down by the Court's Grand Chamber in September and November 2014, respectively, are illustrative of the ambiguous – and arguably inconsistent – approach of the Court to the question of how rights under the ECHR should be applied in situations of international armed conflict and occupation, and in particular how the relevant provisions of the Convention interact (or fail to interact) with those of IHL.

The central thesis is that resort should not be had to the *lex specialis* principle,⁷ nor to strained applications of the principle of systemic interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.⁸ Rather, whenever State Parties act in the context of an armed conflict, the mechanism for derogation under Article 15 ECHR should play the central role in mediating the relationship between the Convention and any concurrently applicable rules of IHL. To the extent that obligations under the ECHR may be inconsistent with the applicable rules of IHL (in the sense of being more restrictive), it should be for States to derogate from their obligations under the ECHR if they wish to benefit from the greater latitude which the rules of IHL afford them.

As a counterpart, it is argued that where a State has failed to enter a derogation from its relevant ECHR obligations in relation to military action abroad, the Court should adopt a principled stance and assess the legality of its actions on the basis of the Convention alone, without seeking to qualify or interpret the State's obligations by reference to IHL standards, in particular where this involves distorting the ordinary meaning of the text of the ECHR.

⁵ *Hassan* (n 4).

⁶ *Jaloud* (n 4).

⁷ For criticism of reliance upon the principle *lex specialis derogat legi generali* as a means of coordination between IHL (in particular the ECHR) and concurrently applicable rules of IHL, see S Borelli 'The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship Between International Human Rights Law and the Laws of Armed Conflict' in L Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer International 2015) 265-293.

⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).



After this brief introduction, Section 2 reviews the ‘self-contained’ approach which has been traditionally adopted by the Court in both cases involving internal conflict and situations of international armed conflict until as recently as the decisions in *Jaloud*. Section 3 then considers the novel approach introduced by the Court in *Hassan*, according to which, as regards at least some provisions of the Convention, there is no need for derogation in respect of military action abroad, and the operation of certain ECHR norms is implicitly modified by virtue of the concurrent applicability of rules of IHL. Section 4 concludes arguing for the need for express derogation under Article 15 whenever State Parties to the ECHR wish to rely upon the more permissive rules of IHL.

2. *The traditional ‘self-contained’ approach of the European Court to the application of the ECHR in time of armed conflict*

Given that one of the central aims in any armed conflict is to kill, capture or otherwise incapacitate the opposing forces, the Convention rights which are most obviously and directly implicated are the right to life enshrined in Article 2 of the Convention and the right to liberty guaranteed under Article 5. Although the two provisions, on their face, are formulated with a view to a law and order paradigm,⁹ the traditional approach of the European Court has been to apply those provisions to situations involving the use of military force with little or no regard being paid to the characterisation of the situation as an ‘armed conflict’ within the meaning of IHL, or, most importantly, whether any relevant rules of IHL might impose standards different from those under the Convention. This has been the case both as regards cases involving situations arguably rising to the level of internal armed conflict, and to cases involving situations of international armed conflict or occupation.

The approach was initially adopted as regards alleged violations of the right to life occurring in situations which arguably or indisputably

⁹ See FJ Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body’ (2008) 90 *Intl Rev Red Cross* 564, 571. See also FJ Hampson, ‘Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?’ in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (Naval War College 2009) 496-497.



amounted to internal armed conflicts. This self-contained approach was particularly evident in the cases arising out of the action of the Turkish security forces against the PKK in South East Turkey in the 1990s,¹⁰ and, perhaps even more strikingly, the cases arising out of the armed conflict in Chechnya in 1999-2002.¹¹ Whilst noting the exceptional character of the situations at issue and, in the case of Chechnya, on occasion referring to the fact that a conflict was under way,¹² the Court has simply applied the Convention, including both the substantive and procedural aspects of the right to life, as if the issue were no different from that arising in relation to a normal law enforcement operation.¹³

This approach has had both its detractors and its supporters. For instance, Abresch has argued that, in treating armed conflicts as law enforcement operations, the Court's approach 'may prove both more protective of victims and more politically viable than that of humanitarian

¹⁰ Despite having delivered more than 280 judgments in relation to conflict between the PKK and the Turkish security forces in the 1990s (see <www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf>), the Court has never taken a position as to whether the situation in South East Turkey reached the threshold of a non-international armed conflict for the purpose of applicability of Common art 3 of the Geneva Conventions; whilst at times using a terminology which closely mirrors that of the relevant standards under IHL, it has always dealt with the cases having exclusive regard to the applicable provisions of the ECHR. See *Ergi v Turkey* App no 23818/94 (ECtHR 28 July 1998); the approach has remained unchanged throughout the years: see, eg, *Benzer and Others v Turkey* App no 23502/06 (ECtHR 12 November 2013).

¹¹ See, eg, *Isayeva v Russia* App no 57950/00 (ECtHR 24 February 2005); *Khashiyev and Akayeva v Russia* App no 57942/00 and 57945/00 (ECtHR 24 February 2005); *Isayeva, Yusupova, and Bazayeva v Russia* (App no 57947/00, 57948/00 and 57949/00 (ECtHR 24 February 2005). For commentary, see W Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *Eur J Intl L* 741; A Orakelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 *Eur J Intl L* 161; P Leach, 'The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights' (2008) 6 *Eur Human Rights L Rev* 732; S. Borelli, 'Domestic Investigation and Prosecution of Atrocities Committed during Military Operations: The Impact of Judgments of the European Court of Human Rights' (2013) 46 *Israel L Rev* 369.

¹² See, eg, *Isayeva* (n 11), where the Court noted that 'the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to regain control over the Republic and to suppress the illegal armed insurgency' (para. 180); see also *ibid* para 181, where the Court referred to 'the conflict in Chechnya' and to the existence of an 'illegal armed insurgency.'

¹³ For commentary see Abresch (n 11); Leach (n 11); see also Gasser (n 2).



law.¹⁴ In any case, whatever the merits of such an approach from an abstract perspective, in practice, the Court in general arrived at results which are broadly consistent with IHL, and the outcomes of its judgments has not been very different from the likely result had the Court had regard to the relevant rules of IHL as they apply in non-international armed conflict. That phenomenon is largely explained by the particularly serious nature of the violations at issue, which involved the killing or forced disappearance of civilians, and the fact that the relevant potentially applicable rules of IHL were those applicable to non-international armed conflicts, where there is greater convergence between IHRL and IHL.¹⁵

With the progressive and now unequivocal recognition of the applicability of the ECHR to military action abroad, the Court's traditional 'self-contained' approach has in recent years been extended and applied to situations of international armed conflict and occupation. This has been the case despite the far more marked divergences between what is permissible under IHL in such situations and the standards of IHRL.

For instance, in a number of cases relating to the occupation of Iraq in the period between 2003 and 2004, the Court simply applied the standards developed in its jurisprudence on the right to life in the context of peacetime law-enforcement operations.¹⁶ Representative of this trend is the 2014 decision of the Grand Chamber in *Jaloud v Netherlands*.¹⁷

In *Jaloud*, the applicant's son had been shot and killed in 2004 when a car in which he was travelling was fired upon whilst going through a

¹⁴ Abresch (n 11) 767. For a critical view see, eg, S Hartridge, 'The European Court of Human Rights' Engagement with International Humanitarian Law' in D Jinks, JM Maogoto, S Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: Domestic and International Aspects* (Asser Press / Springer 2014) 277-278, 286.

¹⁵ For discussion see, eg, D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel L Rev* 8.

¹⁶ See, notably, *Al-Skeini* (n 4) and *Al-Jedda* (n 4).

¹⁷ *Jaloud* (n 4). The case also raises interesting issues with regard to the extraterritorial applicability of the ECHR and questions of attribution, which however fall outside the scope of the present comment. For discussion see A Sari, '*Jaloud v. Netherlands*: New Directions in Extra-Territorial Military Operations' in *EJIL:Talk!* (24 November 2014) <www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/>.



checkpoint in south-eastern Iraq. The checkpoint had been manned by soldiers of the Iraqi Civil Defence Corps, but Dutch troops had also been present at the checkpoint and it was alleged that the fatal shots had been fired by a Dutch soldier. The application claimed that the investigation carried out by the Dutch authorities into the incident had not been sufficiently independent or effective and was therefore in breach of the Netherlands' procedural obligations under Article 2 ECHR.

The Court affirmed as a matter of principle the full applicability of the procedural obligation to investigate under Article 2 even in 'in difficult security conditions, including in a context of armed conflict',¹⁸ whilst, in line with the approach taken in prior cases, also acknowledging the need to take account of the particular difficulties faced by State authorities in a situation of armed conflict or occupation.¹⁹

Reading the relevant passages of the judgment in which those principles were applied, one may be justified in wondering to what extent the standards applied by the Court to military operations abroad are in reality different from those which it applies in peace time. In particular, in assessing the cardinal requirement of the effectiveness of the investigation carried out by the Dutch authorities, the Court appeared not to give any real effect to the difficulties of the situation in which those authorities had been operating.²⁰ Although the investigation suffered from

¹⁸ *Jaloud* (n 4) para 186 citing *Al-Skeini* (n 4) para 164. This approach can be traced back to the PKK cases (see, eg, *Ergi v Turkey* App no 23818/94 (ECtHR 28 July 1998) para 85) and was also adopted in the Chechen cases (see *Isayeva* (n 11) paras 180, 210).

¹⁹ *Jaloud* (n 4) para 186 citing *Al-Skeini* (n 4) para 164: 'where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and ... concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed.' Previously, in *Al-Skeini*, the Court in a passage not cited in *Jaloud*, had noted that in assessing the compliance with Article 2 of the investigations carried out, it had to take as its starting point 'the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war' and had observed that 'in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators' (*Al-Skeini* (n 4) para 168).

²⁰ *Jaloud* (n 4) paras 197-220, concerning, *inter alia*, the deficiencies in the questioning of the soldiers involved, the inadequacy of the autopsy and the lack of ballistic analysis (in particular due to the loss of bullet fragments).



a number of serious deficiencies, the general impression is that, despite paying lip-service to the need to take into account the difficulties faced in a situation of occupation, the Court in fact applied the Convention in a relatively stringent and 'undiluted' fashion.

What is of particular relevance for present purposes is that, despite its recognition that the relevant events had occurred in a situation of belligerent occupation,²¹ the Court showed no apparent interest in discussing the way in which the rules of IHL applicable in such a situation regulate the obligation of the occupying power to investigate deaths within occupied territory, still less in considering whether the existence of those parallel rules might justify a less stringent application of the procedural obligations relating to investigation under Article 2 ECHR.

This is perhaps unsurprising in light of the Court's previous case-law. But it bears noting that the applicable rules of IHL are far less stringent than those under the ECHR insofar as they explicitly require investigation of deprivations of life during armed conflict only in certain limited circumstances,²² and say very little about the characteristics

²¹ *ibid* para 56, citing *Al-Skeini* (n 4) paras 9-19.

²² See, eg, art 121 of the Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III), and art 131 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV), imposing obligations 'immediately' to carry out 'an official enquiry' into every suspicious death or of serious injury to a prisoner of war or civilian internee, respectively. For detailed discussion, see International Committee of the Red Cross (ICRC), *Guidelines for Investigating Deaths in Custody* (ICRC 2013) <www.icrc.org/eng/assets/files/publications/icrc-002-4126.pdf>. Note also the obligation of State Parties to the 1949 Geneva Conventions and Additional Protocol I to 'bring before their ... courts' individuals suspected of war crimes. See art 49(2) of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); and, in nearly identical terms, art 50(2) of the Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II), art 129(2) GC III, and art 146(2) (GC IV); see also art 85(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I). The obligation to prosecute those suspected of war crimes clearly implies the obligation to carry out an effective investigation into conduct which may amount to a war crime. According to the ICRC, such an obligation is also reflected in customary humanitarian law; see JM



which such an investigation must possess.²³ For instance, as a matter of IHL, the criterion of independence of the investigation in general would appear to be far less stringent, in particular insofar as Additional Protocol I expressly envisages the possibility of what Schmitt has called ‘a system of military self-policing’ as regards certain violations of IHL.²⁴

In addition to the right to life, detention is the other area where the applicable standards under the ECHR and IHL clearly differ. Article 5 ECHR sets out what the Court has consistently held to be an exhaustive list of the grounds on which individuals may lawfully be deprived of their liberty, and the long-standing jurisprudence of the Court is that ‘security detention’ or ‘preventive detentions’ are not contemplated, at least in peace-time.²⁵ As such, most instances of detention permissible under IHL during armed conflict and occupation, including the internment of civilians for imperative security reasons²⁶ and the internment of enemy combatants as POWs,²⁷ would therefore appear not to be compatible with Article 5(1) ECHR.²⁸

Prior to the 2014 decision in *Hassan*, in those few cases in which questions relating to detention during armed conflict arose, the Court applied its normal ‘peace-time’ case law under Article 5 without advert-ing to the fact that different, more permissive rules may have been applicable under IHL. Admittedly, in the most important case prior to *Hassan* in which the issue of security detention during occupation

Henckaerts, L Doswald-Beck, *Customary International Humanitarian Law* (ICRC 2005) Rule 158.

²³ For instance, art 121 GC III and art 131 GC IV do not specify what the ‘official enquiry’ into death or serious injury in custody must entail.

²⁴ See, eg, art 81 AP I, and see M Schmitt, ‘Investigating Violations of International Law in Armed Conflict’ (2011) 2 *Harvard National Security J* 31.

²⁵ The Court has consistently emphasised (including as regards cases of domestic preventive detention) that the grounds for detention set out in art 5(1) are an exhaustive list: see, eg, *Ireland v United Kingdom* App no 5310/71 (ECtHR 18 January 1978) para 194; *Saadi v United Kingdom* App no 13229/03 (ECtHR [GC] 21 January 2008) para. 43; *A and others v United Kingdom* App no 3455/05 (ECtHR [GC] 19 February 2009) paras 162-163. That case law had previously been applied to detention by the military abroad in a situation of international armed conflict, see previously *Al-Jedda* (n 4) paras 99-100.

²⁶ See arts 78 and 135 GC IV.

²⁷ See arts 21 ff GC III.

²⁸ For commentary, see J Hartmann, ‘Detention in International Military Operations: Problems and Process’ (2013) 52 *Military L and L of War Rev* 303.



arose, *Al-Jedda v. United Kingdom*, the principal question before the Court was whether the effect of the relevant Security Council resolutions, and Article 103 of the UN Charter, was that the United Kingdom's obligations under Article 5 ECHR were displaced.²⁹ Nevertheless, having rejected that argument, the Court went on to assess the legality of the applicant's detention by applying Article 5, concluding that there had been a violation on the basis that the detention of the applicant had not been justified within any of the grounds expressly set out in Article 5.³⁰ There was no discussion of the extent to which detention may have been justified under IHL.³¹

3. *Hassan v United Kingdom*: A new approach to the application of Convention rights in armed conflict and occupation?

If previously it had proved possible for the Court to avoid questions relating to the interplay of the Convention and IHL, those questions came to the fore in the decision of the Grand Chamber in *Hassan v United Kingdom*, handed down in September 2014.³²

Hassan concerned alleged violations of Convention rights arising out of the arrest, detention, and interrogation of an Iraqi civilian in the period immediately preceding the Coalition's declaration of the 'end of active hostilities' arising from the 2003 invasion of Iraq.³³ The applica-

²⁹ See *Al-Jedda* (n 4), paras 87 ff. The UK government argued that the UK was under an obligation to detain the applicant pursuant to UNSC Resolution 1546 and that that obligation prevailed over any other of the UK's obligations under the ECHR.

³⁰ *Al-Jedda* (n 4) para 110. Indeed, the UK Government had not contested that, if its obligations under the ECHR were not displaced or modified by the relevant Security Council resolutions, the detention of the applicant could not be justified on any of the grounds contained in art 5(1) (ibid para 100).

³¹ For criticism, see J Pejic, 'The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law', (2011) 93 Intl Rev Red Cross 837.

³² *Hassan* (n 4).

³³ The victim had been arrested by UK troops on 23 April 2003, a few days before the declaration by the Coalition that 'major hostilities' had ended (1 May 2003) and the commencement of the occupation by the Coalition itself. Following his arrest, he had been detained at the US-run military facility at Camp Bucca and interrogated by UK intelligence agents. Having been cleared for release, he was released on 2 May 2003 at an unspecified location in Basra province. His body was discovered several months later



tion complained of violations of, *inter alia*, Article 5 ECHR, on the ground that the detention had not been based on any of the grounds foreseen by Article 5(1), and that the procedural guarantees enshrined in Article 5(2) to (4) had been denied.

The conflict between the limited permissible grounds for detention under Article 5(1) ECHR, and the more permissive rules under IHL allowing security internment in an international armed conflict was put squarely in issue by the position of the UK government. In resisting the claim, it argued that the relevant rules of IHL should prevail over Article 5, and in particular that where the ECHR fell to be applied in an international armed conflict, account had to be taken of the relevant rules of IHL 'which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention.'³⁴ In the alternative, it argued that, even if the Convention was not as such modified or displaced, nevertheless, Article 5 was to be interpreted consistently with other rules of international law, and that, in particular, the list of permissible grounds for detention under Article 5(1) 'had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis*, namely international humanitarian law.'³⁵

Whilst acknowledging the possibility of derogating from Article 5 pursuant to Article 15 ECHR, the United Kingdom argued that it had not done so 'consistently with the practice of all other Contracting Parties which had been involved in such operations.' Further, in a somewhat question-begging manner, it asserted that 'there had been no need to do so, since the Convention could and did accommodate detention in such cases, having regard to the *lex specialis*, international humanitarian law.'³⁶

Hassan constitutes a radical departure from the traditional approach of the Court of applying the ECHR in isolation from the rules of IHL. In dealing with the issues of derogation, and the inter-relationship of Article 5 and the powers of detention foreseen under the rules of IHL applicable in an international armed conflict, the Court at the outset reaffirmed its prior case law that the list of permissible grounds of deten-

in a location some 700 km from Basra. In addition to the alleged violation of art 5, the application before the Court alleged violations of arts 2 and 3 ECHR.

³⁴ *Hassan* (n 4) para 88.

³⁵ *ibid* para 89.

³⁶ *ibid* para 90.



tion contained in Article 5(1) provided no basis for internment or preventive detention. It concluded that detention on the basis of the Third and Fourth Geneva Conventions could not be regarded as ‘congruent’ with any of the express grounds set out in Article 5(1)(a) to (f).³⁷

Nevertheless, the Court accepted the United Kingdom’s position that detention in an international armed conflict in accordance with the rules of IHL should not be understood as being incompatible with Article 5(1). It did so having recalled that the United Kingdom had not sought to derogate from Article 5 in respect of the operations of its forces in Iraq, and observed that the case was the first in which a Contracting State had requested the Court to ‘disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law.’³⁸

First, as regards derogation, it held that there existed a subsequent practice of the States’ parties to the ECHR amounting to an agreement for the purposes of Article 31(3)(b) VCLT, ‘not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts.’³⁹

Second, the Court held that it was required ‘to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice.’⁴⁰ In reaching that conclusion, it referred to the principle of ‘con-

³⁷ *ibid* para 97.

³⁸ *ibid* para 99. Somewhat pointedly, the Court (*ibid*) also recalled that in *Al-Jedda*, which had likewise concerned detention in an international armed conflict, the UK had not sought to argue that art 5 ECHR had been modified or displaced by reason of the powers of detention contained in GC III and GC IV. As noted by the Court, the issue had only previously arisen in *Cyprus v Turkey* App no 6780/74 and 6950/75 (Report of the Commission 10 July 1976) para 313, where the Commission had refused to examine allegations of breach of art 5 relating to detention of prisoners of war.

³⁹ *Hassan* (n 4) para 101. The Court further noted that that practice appeared to be paralleled by the practice of the parties to the ICCPR in similar situations, and that no derogations had been entered even after the Advisory Opinion by the ICJ in *Nuclear Weapons* had made clear that obligations under the ICCPR continued to apply in parallel to IHL in situations of international armed conflict (*ibid*). Cf the trenchant criticism of the reasoning of the majority in this regard; *Hassan* (n 4), Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, paras 12-15.

⁴⁰ *Hassan* (n 4) para 102.



sistent interpretation' enshrined in Article 31(3)(c) VCLT, and, having recalled its own case law as to the need to interpret the ECHR in light of other rules of international law,⁴¹ quoted, *inter alia*, the dictum of the ICJ in *The Wall* Advisory Opinion as to the inter-relationship of IHRL and IHL (although notably it omitted the ICJ's reference to *lex specialis*).⁴²

On that basis, it accepted that the absence of any derogation from Article 5 of the Convention by the United Kingdom did not prevent it taking IHL into account in interpreting that provision.⁴³ Thereafter, in a third step, it affirmed that 'even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law', and concluded that

'[b]y reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.'⁴⁴

In that regard, the Court emphasised that the scope of the exception it was creating was limited to international armed conflicts, on the basis that, absent a derogation, it could only be

'in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.'⁴⁵

⁴¹ *ibid* paras 100, 102.

⁴² *ibid* para 102.

⁴³ *ibid* para 103.

⁴⁴ *ibid* para. 104.

⁴⁵ *ibid*. Cf the decision of the High Court of England and Wales in *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014), concerning the incompatibility with art 5 ECHR of the detention of a suspected Taliban leader by UK forces in Afghanistan in a context of non-international armed conflict. The finding of incompatibility was based, *inter alia*, on the conclusion that IHL applicable to non-



It further emphasized that any such detention nevertheless had to be 'lawful' under IHL, and had to be in keeping with the fundamental purpose of Article 5(1) of protecting individuals from arbitrariness.⁴⁶

In light of its conclusion that Article 5 was to be interpreted taking account of the relevant rules of IHL relating to international armed conflict, the Court then proceeded to read down the procedural safeguards contained in Article 5(2) to (4).⁴⁷ In that regard, it held that paragraphs (2) and (4) (requiring the giving of information as to the reasons for detention, and the availability of judicial review of the legality of detention, respectively), were to be interpreted 'in a manner which takes into account the context and the applicable rules of international humanitarian law',⁴⁸ and accepted that the 'competent body' for periodic review of detention as foreseen by Articles 43 and 78 of GC IV need not necessarily be a 'court' as is normally required by Article 5(4).⁴⁹

As to the safeguard contained in Article 5(3) (i.e. that persons detained pursuant to Article 5(1)(c) must be brought promptly before a judge, and are entitled to trial within a reasonable time, or release pending trial), the Court held, somewhat disingenuously, that the provision was not applicable on the basis that, in the case of security detention or internment under IHL, individuals were not detained pursuant to Article 5(1)(c).⁵⁰

international armed conflict provides for no separate power to detain or intern (ibid paras 241-251).

⁴⁶ *Hassan* (n 4) para 105.

⁴⁷ For analysis of the divergence between IHRL and IHL standards with regard to procedural guarantees for individuals deprived of their liberty, see J Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87 *Intl Rev Red Cross* 375. Pejic notes that although internment and administrative detention are frequently resorted to in both international and non-international armed conflicts and other situations of violence, the protection under IHL of the rights of those affected 'is insufficiently elaborated' (at 376) and advocates the view that those IHL guarantees should be supplemented by the relevant IHRL standards (at 377-379).

⁴⁸ *Hassan* (n 4) para 106.

⁴⁹ *Ibid.* The Court in addition added that the competent body 'should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness', and that the first review should take place shortly after the start of detention, with subsequent reviews taking place at frequent intervals thereafter (*ibid.*).

⁵⁰ *ibid.*



Applying those principles to the facts of the case, the Court concluded that the detention of Mr Hassan had been consistent with the United Kingdom's powers under IHL, and therefore did not violate Article 5 of the Convention.⁵¹

4. *The need for a principled approach*

The Court's approach in *Hassan* is deeply problematic, and its wisdom open to question, on the one hand as concerns adherence to the express text of the Convention and the previous case law of the Court on derogations and the permissibility of security detention, and, on the other, as regards the practical problems and uncertainty which it is likely to create in the future for State Parties and for the Court itself.

First, the conclusion reached by the Court is inconsistent with the ordinary meaning of the terms of Article 5(1). The text of Article 5 is clear that the only grounds for lawful detention are those listed in Article 5(1)(a)-(f), as the Court itself has previously recognized (and as it itself recalled in *Hassan*). The Court's conclusion to the contrary in *Hassan* is no more and no less than an exercise in *contra legem* interpretation.⁵² By interpreting the obligation under Article 5 in light of relevant rules of IHL, the Court has introduced a major qualification to its previous long-standing position of principle that the grounds for detention enumerated in Article 5(1) are exhaustive.⁵³

Second, the approach in *Hassan* is also not in line with the long-standing jurisprudence of the Court on derogations. The Court has always been strict in requiring that a derogation should be in place before accepting any claim that rights could be limited in light of the existence of an emergency. Notably, such a strict approach was adopted even in

⁵¹ *ibid* para 109.

⁵² See, in the context of a non-international armed conflict, the conclusions of Mr Justice Leggatt in *Serdar Mohammed* (n 45), that 'Given the specificity of Article 5, there is little scope for *lex specialis* to operate as a principle of interpretation' (para 291).

⁵³ See the jurisprudence cited above (n 25). In *Al-Jedda* (n 4), the Court specifically emphasised, in a case concerning detention in international armed conflict, that no deprivation of liberty will be compatible with art 5(1) 'unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention' (para 99).



the context of situations which incontrovertibly amounted to internal armed conflict. For instance, in *Isayeva v. Russia*, the Court noted that since '[n]o martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention', the military operation at issue 'ha[d] to be judged against a normal legal background.'⁵⁴

Finally, and perhaps most importantly, acceptance by the Court of the fact that States may rely on the more permissive rules of IHL without the need to have entered a prior derogation is dangerous for the future integrity of the system of protections under the Convention.

In light of the decision in *Hassan*, it is to be anticipated that the next front for litigation will be in the context of Article 2, with States trying both to limit the negative protection of the right to life in situations of armed conflict in the light of what is permissible under IHL, and to argue that the obligation of investigation of killings in armed conflict should coincide with the more restrictive obligations imposed by IHL.

In that regard, it might be argued that the text of Article 2 and Article 15(2) pose a near insurmountable obstacle, insofar as the latter expressly provides that no derogation is permissible from Article 2 'except in respect of deaths resulting from lawful acts of war.' On its face, Article 15(2) anticipates that, in order to be able to justify a killing as a 'lawful act of war' under IHL, a State must first enter a derogation. However, similarly clear textual limits were present in *Hassan*, yet the Court was prepared both to disregard the need for a derogation, and to interpret the text of Article 5 in a manner which is inconsistent with its 'ordinary meaning.' Such willingness to disregard the clear text of the Convention creates a dangerous precedent which does not bode well for the future and will make it more difficult for the Court to maintain a coherent interpretation of the Convention in the future.

Quite apart from this, the Court's approach in *Hassan* will almost inevitably draw the Court into difficult questions of IHL. For instance, questions are likely to arise as to the appropriate characterisation of par-

⁵⁴ *Isayeva* (n 11) para 191. See also, eg, *Al-Jedda* (n 4) paras 99-100; *Georgia v Russia (II)* App no 38263/08 (decision 13 December 2011) para 73, noting that neither Georgia nor Russia had made a derogation in the context of their 2008 conflict.



ticular situations, which is a necessary issue for application of the relevant body of rules of IHL, as well as being essential if effect is to be given to the Court's caveat that it is only in international armed conflicts that preventive detention can be regarded as compatible with Article 5.⁵⁵ Whilst admittedly for many military operations abroad there may be little doubt as to whether a conflict is international or internal, it is not guaranteed that this will be so in all cases.

Quite apart from those threshold questions, acceptance that ECHR obligations can be automatically modified by virtue of any applicable rules of IHL may also potentially require the Court to deal with complex questions relating to, inter alia, the status of particular individuals, including members of irregular forces or civilians who 'directly participate in hostilities.' This will particularly be the case if actions alleging violation of Article 2 are brought by the relatives of insurgents killed in battle, which will inevitably raise questions as to the circumstances in which it is permissible to kill 'illegal combatants.' As a specialist human rights court, some doubts may legitimately be expressed as to the extent to which the European Court is well-equipped and has the necessary expertise to deal with such issues.⁵⁶

A far simpler solution was available to Court in *Hassan*, which would have maintained coherence with its previous case law, and not required the questionable interpretative gymnastics in which the Court was forced to engage. Rather than dismissing the requirement of derogation on the basis that there existed a subsequent practice of the States parties to that effect, and then creating a new *contra legem* exception to Article 5, the Court could simply have held that, if a State wishes to exercise its power to detain individuals in an international armed conflict on grounds which are not expressly envisaged by Article 5, then it is required to enter a prior derogation to Article 5. Such an approach would have had the significant advantage of remaining faithful to the text of

⁵⁵ *Hassan* (n 4) para 104.

⁵⁶ Admittedly, many of the same issues are likely to arise to the extent that a State were to make the limited derogation to art 2 foreseen by art 15(2), permitting killings resulting from 'lawful acts of war.' The advantage of requiring derogation is that such issues would arise within the framework expressly contemplated by the ECHR, rather than as implied, *ad hoc* qualifications to the relevant obligations.



the Convention, and would have posed no particular burden upon the States parties.⁵⁷

Similar considerations would apply insofar as issues may arise in the future as to compliance with the substantive or procedural obligations relating to the right to life under Article 2 in the context of military operations abroad. Requiring a State to enter a limited derogation to its obligations under Article 2, as foreseen by Article 15(2), is consistent with the express terms of the Convention, whilst also permitting States to take the measures necessary in combat situations, provided that they comply with IHL.

The great advantage of the application of IHRL to armed conflict, quite apart from the better prospects of enforcement and compliance, has always been seen as resulting from its uniform application and the minimum threshold protections it provides, which apply to all merely by virtue of the fact of being a human being. Depending on the circumstances, a State may be able to limit the application of certain obligations in exceptional circumstances, including armed conflict, notably by way of derogation. But the crucial counterpart of this, which acts as a safeguard against abuse, is that any derogation needs to be clearly formulated and communicated in advance.

By contrast, and just when finally there had started to be a degree of clarity as to the extraterritorial application of the Convention to military action abroad, the decision of the Grand Chamber in *Hassan* has intro-

⁵⁷ Despite the doubts advanced by some commentators (see, eg, Pejic (n 31), at 850), there is little doubt that art 15 is relevant (and susceptible of application) in situations where a Contracting State is involved in military operations abroad. Given the evolution of international law since the adoption of the Convention in 1950, and in particular the progressive abandonment in international law of the relevance of a formal state of war (on which, see C Greenwood, 'The Concept of War in Modern International Law' (1987) 36 ICLQ 28), it would be unreasonable to interpret the notion of 'war' in art 15(1) in an overly restrictive manner. Similarly, the right to derogate should not be unduly limited by insistence upon the requirement that any situation of armed conflict abroad should be one 'threatening the life of the nation.' Rather, art 15 should be understood as, at the least, permitting a State to derogate where it is involved in a situation of international armed conflict. For extensive discussion of question of the relevance of art 15 to extraterritorial military operations, see M Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in N Butha (ed), *Collected Courses of the Academy of European Law* (OUP 2015) 55-88. See also the observations of Mr Justice Leggatt in *Serdar Mohammed* (n 45) para 155.



duced elements of inconsistency and legal uncertainty into the Court's jurisprudence, as a result of the possibility of 'implied' qualification of the relevant obligations by reference to the relevant rules of IHL. Whilst providing much to comment on for academics, it is bad for States, the scope of whose obligations is now once more subject to a significant degree of uncertainty, and even worse for the individuals affected by the actions of their armed forces.



The Question:

Does the ‘living instrument’ doctrine always lead to ‘evolutive interpretation’? Some remarks after *Hassan v the United Kingdom*

Introduced by Francesca de Vittor and Cesare Pitea

In the *Hassan v the United Kingdom* judgment the European Court of Human Rights found that ‘a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention’ (para 101).

According to the Court, such a ‘creative interpretation’: a) is based on the interpretive technique codified in Article 31 (3) (b) VCLT; b) is consistent with his previous case-law; and c) constitutes an application of the doctrine characterizing the Convention as a ‘living instrument.’

In *Hassan* the consideration of subsequent practice did not lead to an ‘evolutive interpretation’, ie to a more expansive or generous understanding of the scope of fundamental rights enshrined in the Convention. Quite the contrary, it was invoked and applied *to limit or restrict those rights*. Indeed, it has been used to add into the supposedly closed list of Article 5(1) of the ECHR an additional ground for the detention of persons during armed conflicts abroad, without the need to comply with the conditions set forth in Article 15 ECHR allowing derogation from conventional obligations ‘[i]n time of war or other public emergency threatening the life of the nation’ (see, in this respect, the Partly Dissenting Opinion of Judge Spano joined by Judges Nicolaou, Bianku And Kalaydjieva).

While some precedents had admitted the possibility of using the ‘common consensus’ of Contracting Parties as a circumstance justifying a restrictive interpretation (eg *Scoppola v Italy (no 3)* [GC] and *Mangouras v Spain* [GC]), the *Hassan* case appears to be the first in which the line between interpretation and modification has been crossed.

This situation raises a number of questions: Is the claim of consistency of the interpretive result with the VCLT and with the Court's jurisprudence on evolutive interpretation convincing? Is the very concept of the Convention as a living instrument jeopardised, thus undermining the idea of the Convention as the most important instrument of European public order? Can the judgment be inscribed in a trend towards a growing deference to States sovereignty, at least in matters touching upon matters of foreign policy? Can this be considered as a counterpart of the jurisprudence concerning the extraterritorial application of the Convention in situations of armed conflicts?

QIL asked Luigi Crema (University of Milan) and Eirik Bjorge (University of Oxford) to address these questions against a common background, namely the ECtHR jurisprudence and the customary rules of treaty interpretation, as reflected in the VCLT. While their analyses converge in many respects, Luigi Crema explores whether, in the context of the expansion of substantive guarantees to situations of armed conflicts abroad, the controversial reading of Art 5 ECHR may really be labelled as 'regressive.' Eirik Bjorge focuses on other issues, including on whether practice can legitimately lead to the *de facto* incorporation of rules of humanitarian law within the conventional system and if actual practice, as considered by the Court, justified such result in the specific circumstances of the case.



Subsequent practice in *Hassan v United Kingdom*: When things seem to go wrong in the life of a living instrument

*Luigi Crema**

‘[L]a vita, che da un canto ha bisogno di muoversi sempre, ha pure dall’altro canto bisogno di consistere in qualche forma. Sono due necessità che, essendo opposte tra loro, non le consentono né un perpetuo movimento né un’eterna consistenza. Pensate che se la vita si movesse sempre non consisterebbe mai; e che, se consistesse per sempre, non si moverebbe più.’** (*L Pirandello, Se il film parlante abolirà il teatro*)

1. *Introduction*

The *Hassan v United Kingdom* case decided by the Grand Chamber of the European Court of Human Rights (the Court, ECtHR) on 16 September 2014¹ raised a procedural issue and several substantive questions. The Court of Strasbourg could have focused on a simplistic procedural problem – ie the UK’s lack of communication to the Council of Europe under Article 15 of the suspension of certain rights of the European Convention on Human Rights (the Convention, ECHR) in time of war – and could have sanctioned the violation of Article 5, but instead it decided to address several hot topics in contemporary interna-

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** ‘[L]ife, though on the one hand it needs perpetual movement, has nevertheless a need to consist in some form or other. These two needs which are opposed to one another do not allow life to have either perpetual movement or perpetual consistency. Consider that if life were to move forever, it would never be consistent, whilst if it were always consistent, it would never move.’

¹ *Hassan v United Kingdom* App no 29750/09 (ECtHR [GC] 16 September 2014).

tional law. These included the coordination of the ECHR with international humanitarian law (IHL),² and the role of subsequent practice in interpreting treaties (a topic currently under the consideration of the United Nations International Law Commission, ILC).³ The necessary premise, in line with the Court's previous decisions, is that the ECHR also applies in conflicts outside the territory of the Contracting Parties.

2. *The Case*

The case concerned the United Kingdom's alleged violation of Articles 2, 3 and 5 of the ECHR (right to life; prohibition of torture and inhuman treatment; right to liberty) during the 2003 invasion of Iraq, in relation to the capture and detention of an Iraqi citizen, Tarek Hassan, and his subsequent death a few months later. Hassan, a professional soccer player, brother of a high-ranking politician of the Ba'ath party, and general of the Al-Quds Army, was captured by UK forces on 22 April 2003, when he was found guarding a house belonging to his brother (who had fled) with a Kalashnikov rifle. Detained for a number of days and interviewed twice by the British authorities, he was released early in May, at the end of hostilities.⁴ His body was found later, on 1 September 2003, in a region of Iraq far from the detention camp.⁵

² *ibid* paras 102-107. Among many, on the specific issue of the coordination of the ECHR with IHL, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 229-265. The general topic was recently the subject of a broad study by the ILC on the *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, completed in 2006 in a well-known report finalized by Martti Koskenniemi (UNGA, 'Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (2006) Doc A/CN.4/L.682).

³ *Hassan* (n 1) paras 100-101. On this, see most recently ILC, 'Report of the International Law Commission on the work of its sixty-sixth session' (2014) UN doc A/69/10 (ILC Report 2014) paras 66-76: 'Subsequent agreements and subsequent practice in relation to interpretation of treaties.'

⁴ *Hassan* (n 1) paras 21-24, 28.

⁵ *ibid*, para 29.



The Court, after dealing quickly with the issue of its jurisdiction over facts that occurred outside the territory of a signatory Country,⁶ and swiftly dismissing the claims on the violations of Articles 2 and 3 by unanimous vote,⁷ focused on the alleged violation of Article 5 and the applicability of international humanitarian law for its interpretation. The applicant contested that Article 5 was fully applicable against the UK, its Government not having made the formal notification to the Secretary-General of the Council of Europe to limit the applicability of the ECHR in conformity with Article 15. Thus, the deprivation of Tarek Hassan's liberty by UK troops would have to be qualified as illegitimate,⁸ since it would not have been conducted as required by Article 5 and its exceptions – a list that, according to the consolidated interpretation given by the Court, is exclusive and cannot be interpreted broadly.⁹

In short, according to the applicant, given the absence of any declaration of the UK under Article 15 to suspend Article 5 in time of war, even if the conduct of the UK could be legitimate under International Humanitarian Law (IHL), it was contrary to ECHR Article 5.

The Court was, therefore, facing a puzzle: on the one hand, given its articulated interpretation¹⁰ of how the Convention applies in conflicts outside the territory of a Contracting Party, it could simply apply the Convention, with the double consequence of stigmatizing the conduct of a State that had correctly applied IHL, and of opening the door for thousands of similar applications from other Iraqi citizens arrested during the 2003 conflict in Iraq. Alternatively, it could interpret the Convention in a way that accommodated the UK's conduct, but this would mean *inter alia* a lack of consequences for the failure to provide notification that certain rights would be suspended during a conflict.

⁶ *ibid*, paras 74-80, referring to its consolidated case-law on the matter and in particular extensively quoting *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECtHR [GC] 7 July 2011).

⁷ They were declared inadmissible given the large span of time between the release of Hassan and his death, and the lack of a clear connection between the death of Hassan and the UK, *ibid* paras 59-64.

⁸ *Hassan* (n 1) paras 81-85.

⁹ M Gialuz, 'Articolo 5' in S Bartole, P De Sena, V Zagrebelsky (eds), *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali* (CEDAM 2012).

¹⁰ P De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Giappichelli 2002); Milanovic (n 2).

These paradoxical results could have been avoided if the Court had opted simply to contest the UK's lack of notification and sanctioned the violation of Article 5, but without awarding pecuniary damages, leaving the decision itself as satisfaction. Such a decision would have served as a strong warning of the need for Contracting Parties to meet the procedural requirements established by the Convention. At the same time, it would have prevented the stigmatization of the conduct of a State acting in compliance with IHL, and avoided opening a Pandora's box of thousands of new, similar applications. Instead, the Court decided to take a different route, interpreting the Convention in a creative way to accommodate its application in the context of conflicts outside a signatory territory.

3. *The central argument*

The argument of the Court deals at the same time with Article 5 and 15 of the Convention, and has two prongs. A first, short part is dedicated to the modifying effect of the subsequent practice of the parties. In the second, longer part, the Court uses an integrationist interpretive approach with IHL. The relevant excerpts of the whole reasoning read:

‘100. The starting point for the Court’s examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties ...

101. [I]n respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention ... the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention ... The practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts ... [N]o State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities ... Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in re-



lation to the International Covenant for the Protection of Civil and Political Rights. Similarly, although many States have interned persons pursuant to powers under the Third and Fourth Geneva Conventions in the context of international armed conflicts subsequent to ratifying the Covenant, no State has explicitly derogated under Article 4 of the Covenant in respect of such detention ... even subsequent to the advisory opinions and judgment referred to above, where the International Court of Justice made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in situations of international armed conflict ...

102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention ... the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part ...

103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.¹¹

Even if it held in favour of the UK, the Court did not to follow the reasoning which the UK Government had expressed during the public hearing. The Government's argument was to apply IHL as *lex specialis* instead of Article 5, or to interpret Article 5 or consider it modified so as to allow IHL as a legitimate ground to deprive somebody of liberty during an armed conflict. However, the Government did not refer in detail to the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention, VCLT) and only rather vaguely described how these changes occurred.¹²

It was the Court that, with a quite short explanation, chose to avoid any typical Strasbourg terminology or techniques, such as 'living instrument' or 'European consensus',¹³ and decided to ground the whole change in the Vienna Convention, and in particular Article 31(3) letters

¹¹ *ibid* paras 99-103.

¹² The hearing of 11 December 2013 can be viewed on the ECtHR website, <www.echr.coe.int/Pages/home.aspx?p=hearings&w=2975009_11122013&language=lang&c=&py=2014> (Webcasts of Hearings 2013).

¹³ *A, B & C v Ireland* App no 25579/05 (ECtHR [GC] 16 December 2010) para 254.



(b) (subsequent practice) and (c) (systemic interpretation).¹⁴ The Court decided to refer to the fact that the Contracting Parties do not make an explicit derogation to the Convention in order to apply IHL as a ground for limiting Article 5 during armed conflicts (as Article 15 as previously interpreted by the Strasbourg Court would have required),¹⁵ and then concluded by saying that the arrest of Tarek Hassan fulfilled the conditions set by Article 5(1), being *lawful* according to the law applicable in the circumstances (ie IHL) and not *arbitrary*.¹⁶

4. *Vienna-like subsequent practice or a different subsequent practice?*

The Introduction to this *Zoom-in* goes straight to some key questions arising from this judgment: whether the Court is actually basing its reasoning on the interpretive technique codified in Article 31(3)(b) VCLT, and whether the Court is consistent with its previous case law in using this interpretive dynamic.

4.1. *On Article 31(3)(b) and interpretation of treaties*

The well-known Article 31(3)(b) VCLT says that, in interpreting a treaty, '[t]here shall be taken into account, together with the context: ... (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.' According to the *literal* interpretation of this provision – the orthodox reading of this provision, as used in certain decisions of the ICJ¹⁷ and

¹⁴ *Hassan* (n 1) para 100. On the controversial use of the VCLT emerging from some recent decisions of the ECtHR see C Pitea, 'Interpreting the ECHR in the Light of 'Other' International Instruments: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?' in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds) *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springer 2013) 545.

¹⁵ *Lawless v Ireland* [1961] ECHR 2, 31; *A and Others v United Kingdom*, App no 3455/05 (ECtHR 19 February 2009) para 179.

¹⁶ *ibid* paras 105-111.

¹⁷ See among others *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, para 74. On this decision as the orthodox interpretation of Art 31(3)(b) see L Crema, 'Subsequent Agreements and Practice within the Vienna Convention' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 16-17, with reference to other similar decisions.



described by the ILC¹⁸ – to consider subsequent practice in interpreting a treaty, three conditions must be fulfilled: it should be a *i*) practice of the member States, *ii*) in the application of the treaty, *iii*) which establishes the agreement of the parties. Any other form of practice falls outside Article 31(3)(b) and qualifies as another generic, supplementary means of interpretation under Article 32 VCLT.

In *Hassan*, the Court does not carry out a detailed analysis under these criteria. The analysis of the practice is referred to in a generic way. It is not clear that the practice was in the application of the treaty, or that it established an agreement. The Court also makes a non-specific reference to the practice of members regarding another treaty, without stating whether it is referring to all the States, the ones involved in the trial, or another group.¹⁹ Under a literal interpretation of Article 31(3)(b) and according to the recent work of the ILC, this practice would come under Article 32 – supplementary means of interpretation – to be used only in exceptional cases, when the meaning of a treaty term is not clear.

In the case at stake it would be hard, if not impossible, to fulfill all the criteria of Article 31(3)(b), given that the ‘practice’ considered by the Court is made up of a purely negative conduct: the *lack* of a notification. Here the question is not whether silence or an omission can amount to subsequent practice – a question that has already been answered positively as depending on the circumstances of the case²⁰ – but rather how to determine that a lack of a declaration *is in the application of a treaty*. The issue would be different if a treaty required specific conduct (eg control of goods at a boundary according to a treaty regulating custom duties between certain countries) and established another

¹⁸ G Nolte, ‘First report on subsequent agreements and subsequent practice in relation to treaty interpretation’ (19 March 2013) UN doc A/CN.4/660 36-45 (with *Draft Conclusion 3*) (First report); the Draft Conclusion after the work of the Drafting Committee became Draft Conclusion 4 (see Drafting Committee, ‘Statement of the Chairman of the Drafting Committee Mr. Dire Tladi’ (31 May 2013) <http://legal.un.org/ilc/sessions/66/pdfs/english/dc_chairman_statement_disasters.pdf> 9-13); the new draft conclusion is reproduced in ILC, ‘Report of the International Law Commission on the work of its sixty-fifth session’ (6 May - 7 June and 8 July - 9 August 2013) UN doc A/68/10 31-41, *Conclusion 4*, with commentary). The Second report (ILC, ‘Second report on subsequent agreements and subsequent practice in relation to treaty interpretation (26 March 2014) UN doc A/CN.4/671) (Second report 2014), goes into more depth on each of those characteristics.

¹⁹ *Hassan* (1) para 101.

²⁰ Second report 2014 (18) 29-33 (although with some distinctions, cf 29, para 69).



requirement (eg issuing a certain certificate), and a party did not act in conformity with the second requirement. In this example, the circumstances lead us to understand that the omission of required conduct falls under the application of that specific treaty. But in the present case it is hard to see how a practice of not performing a formal requirement can be linked to the application of the ECHR.

This observation suggests that Article 31(3)(b) is highly specific, because where certain kinds of treaties are involved, like the ECHR, relevant (lack of) practice would be excluded because of the difficulty of determining whether that practice were in application of the treaty. For this reason, the Court's failure to address this criterion does not seem to be of great importance in this case, given that it is difficult to say whether a State's conduct (or omission) is performed in application of the ECHR. Moreover (and not surprisingly) the case law of the ECtHR has been consistent in not considering this element to be a decisive one.²¹

More significant is the fact that the Court took into consideration the practice of the Contracting Parties to the International Covenant on Civil and Political Rights (ICCPR) on a similar matter.²² This use of parties' practice, although different from the one contained in Article 31(3)(b), reveals that the Court was looking to establish the parties' intentions, considering *how they behaved in similar situations coming under other agreements*. This was fairly common in other international decisions,²³ but it highlights another way to consider subsequent practice beyond what Article 31(3)(b) contains. The *Hassan* decision falls into that stream of decisions that consider practice of the parties that does not fall within the strict requirements of Article 31(3)(b), and use it as an element to assess the intention of the parties towards certain obligations.²⁴

It can be noted, however, that the Strasbourg Court has not always been very careful with these requirements,²⁵ and it has elaborated its

²¹ *ibid* 8; A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights L Rev 57.

²² *Hassan* (n 1) para 101.

²³ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38, para 28.

²⁴ *Crema* (n 18) 22-25.

²⁵ For example, it has considered any legislation or acts of the State as interpretive of the rights in the Convention, even if those decisions and laws were not explicitly passed in the application of the treaty, cf Second report 2014 (n 19) 8: '[W]hen describing the domestic legal situation in the member States, the Court rarely asks



own interpretive arguments (based on the ‘European consensus’ or on the ‘living instrument doctrine’), which, although similar to subsequent practice, take different approaches.²⁶

The Partly Dissenting Opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, includes criticism of the interpretation of Article 31(3)(b) for these reasons, but also gives a peculiar interpretation of that provision. It notes:

‘The Court has ... been rather cautious in its application of the subsequent practice rule, as Article 31 § 3 (b) of the Vienna Convention must be understood to cover only subsequent practice common to all Parties, as well as requiring that the practice be concordant, common and consistent. Subsequent practice of States Parties which does not fulfil these criteria may only constitute a supplementary means of interpretation of a treaty.’²⁷

The dissenting opinion gives a reading of Article 31(3)(b) that is even stricter than in the decision. The dissenting judges characterize subsequent practice under Article 31(3)(b) in a rather restrictive way, saying that must *i*) be of *all* the parties, and *ii*) be *concordant, common and consistent*. On the importance of the practice of *all* parties, a term that was explicitly removed from the draft articles on the law of treaties to avoid confusion, the dissenting opinion is fairly originalist, referring (imprecisely) to the *ILC Yearbook* of 1966,²⁸ without mentioning the

whether this legal situation results from a legislative process during which the possible requirements of the Convention are discussed. The Court nevertheless presumes that the member States, when legislating or otherwise acting in a particular way, are conscious of their obligations under the Convention, and that they act in a way which reflect their bona fide understanding of their obligations’, internal fn omitted. See also Report of the International Law Commission on the work of its sixty-sixth session (3) 175.

²⁶ S Touzé, ‘Les techniques interprétatives des organes de protection des droits de l’homme’ (2011) 115 *Revue générale de droit international public* 517.

²⁷ Partly Dissenting Opinion of Judge Spano, Joined by Judges Nicolaou, Bianku and Kalaydjieva to the *Hassan* case (n 1) para 13.

²⁸ The ILC in 1966 said a different thing: ‘The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties.’ By omitting the word ‘all’ the Commission did not intend to change the rule. It considered that the phrase ‘the understanding of the parties’ necessarily means ‘the parties as a whole.’ It omitted the word ‘all’ merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffice that it should have accepted

contemporary works of the ILC. Precisely on the topic of that *Yearbook* the special rapporteur Georg Nolte noted:

‘The Commission thus assumed that not all parties must have engaged in a particular practice but that such practice could, if it is ‘accepted’ by those parties not engaged in the practice, establish a sufficient agreement regarding the interpretation of a treaty.’²⁹

The characterization that an interpretive practice must be *concordant, common and consistent* was not given by the ILC either in the sixties, nor in its recent works, nor in a consolidated interpretation of Article 31(3)(b): the only case that mentions that expression is a report of the Appellate Body of the WTO of 1996, *Japan: Alcoholic Beverages*.³⁰ That case takes the expression from scholarly sources,³¹ who probably picked it up from the dissenting opinion of the 1974 *Fisheries Jurisdiction* case, which dealt with customary international law.³² This description, which special rapporteur Georg Nolte defined in his report of

the practice.’ ILC, ‘Report of the International Law Commission on the work of its eighteenth session’ (4 May–19 July 1966) (1966-II) YB ILC 221–222

²⁹ Second Report 2014 (n 18) para 60. See in general *ibid* 42–70.

³⁰ *Japan: Alcoholic Beverages II—Report of the Appellate Body* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/ sect. E, 13: ‘subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.’

³¹ The WTO refers to the book of Ian Sinclair on the law of treaties (I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 137), which refers to the Hague Course of Mustafa Yassen, that in fact says: ‘La pratique ultérieure doit donc être concordante, commune et d’une certaine constance’, M K Yassen, ‘L’interprétation des traités d’après la Convention de Vienne sur le droit des traités’ (1976) 151 *Recueil des Cours Recueil des Cours de l’Académie de Droit International* 48; on this see also I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 235.

³² Separate Opinion of Judges Bengzon, Forster, Jiménez de Aréchaga, Nagendra Singh, and Ruda, to the *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* (Judgement) [1974] ICJ Reports 50, para 16: ‘Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus, contradiction in the practice of States or inconsistent conduct, particularly emanating from these very States which are said to be following or establishing the custom, would prevent the emergence of a rule of customary law.’



2013 as a ‘narrow definition of interpretive subsequent practice’,³³ does not have a real status in international law, and neither does it correspond to the position so far taken by the ECtHR in dealing with the interpretive role of party practice.

4.2. *On Article 31(3)(b) and the modification of treaties*

The Court, however, determined not only that the practice was interpretive, but that it had a modifying effect, opting to classify the practice as a modification, rather than a mere interpretation. The literal reading of Article 31(3)(b) shows a fourth (tautological?) requirement, that the practice of the parties (in the application of the treaty, which establishes their agreement) ‘regard[s] its *interpretation*.’ This seems obvious, since Article 31 is dedicated to the interpretation of treaties; however, once practice exists that establishes the agreement of the parties, it may also have a modifying effect.

Indeed, this is what the ECtHR determined in the *Hassan* decision, in line with the ECtHR’s previous decisions. The Court has some unusual case law on Article 31(3)(b). Most of its decisions dealing with this provision are about the modification of the Convention. The ECtHR envisaged the possibility that the subsequent practice of the parties, and Article 31(3)(b) in particular, could modify the Convention in the famous interlinked sequence of cases *Soering-Öcalan-Al Saadoon* between 1989 and 2010, that dealt with the abolition of death penalty in times of peace and then war.³⁴ In *Soering* the possibility to amend the Convention through subsequent practice was envisaged in theory, but not in the actual holding.³⁵ In *Öcalan*, modificative subsequent practice was considered together with the widespread ratification of Protocol 6 to declare the modification of the Convention (the abolition of the death

³³ First report (18) 37.

³⁴ On these cases see C. Contartese, ‘La prassi successiva come metodo per modificare un trattato nella giurisprudenza della Corte Europea dei Diritti dell’Uomo’ (2014) 97 *Rivista di diritto internazionale* 419.

³⁵ In *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1980) (subsequent practice of the European Countries abolished the death penalty in peacetime) the Court admitted this possibility at para 103, at least in theory; it explained, however, that the Convention could not be considered amended yet because the Parties, by negotiating Protocol 6 on the same issue, were showing the intention to amend the Convention in a different way.

penalty in peacetime). In relation to the death penalty in wartime, the Court used the same reasoning that was used in *Soering*, and mentioned it as possible grounds for amending the Convention, but did not ultimately uphold it.³⁶ In both cases, the Court said that practice could modify the Convention, but because a protocol on the same issue was open to signature by the parties, it recognized that the Contracting Parties had expressed a clear intention to modify the Convention through a protocol, and not through subsequent practice. In *Al Saadoon* this line of reasoning was abandoned, and – without mentioning the VCLT – the Court decided to take into account an overall trend (although not a unanimous one) demonstrated by many member States of the CoE to abolish the death penalty in wartime, *notwithstanding* the fact that there was a protocol open to signature by the parties to the CoE, to which some signature and ratifications were missing:

‘All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances.’³⁷

This line of reasoning is maintained in *Hassan*, diverging from what the special rapporteur at the ILC on the modification of treaties through practice recently sustained. He observed:

‘While there are indications in international jurisprudence that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts should make every effort to conceive an agreed sub-

³⁶ *Öcalan v Turkey* [dec] App no 46221/99 (ECtHR, 12 March 2003); *Öcalan v Turkey* App no 46221/99 (ECtHR [GC], 12 May 2005) para 163, quoting the Chamber judgment: ‘an established practice within the member States could give rise to an amendment of the Convention.’ The Court replicated the reasoning used in the *Soering* judgment (Protocol 13 showing a different method of amendment chosen by the Parties) this time in the context of the death penalty in wartime), and also affirmed that the signature by all the CoE States of Protocol 6, together with the practice of the parties, had abolished the death penalty in peacetime.

³⁷ *Al-Saadoon and Mufdhi v United Kingdom* App no 61498/08 (ECtHR, 2 March 2010) para 120.



sequent practice of the parties as an effort to interpret the treaty in a particular way.³⁸

The short statement of the ECtHR in *Hassan* ('The practice of the High Contracting Parties is not to derogate [under Article 15] from their obligations under Article 5')³⁹ seems far from the rigorous analysis that, a few months earlier, the special rapporteur and the ILC had said would be essential for identifying a practice having modifying effect.⁴⁰

In conclusion, the use of Article 31(3)(b) in the *Hassan* case appears significant for two reasons. First, by referring to the practice of the parties under other treaties dealing with similar matters, it implies an idea of interpretation focused on the intention of the parties. This reasoning is different from the one mentioned in Article 31(3)(b): a literal interpretation of the Article, as used by the ILC and ICJ, gives a more precise and structured description of the kind of subsequent practice that should be taken into account. Second, the Court takes the modifying effect of Article 31(3)(b) as a given; this reading is consistent with previous cases of the ECtHR, but is an interpretation specific to the Court, that is not found in general international law.

³⁸ Second report 2014 (n 18) 60 para 142. The special rapporteur Georg Nolte therefore proposed the Draft Conclusion 11, *Scope for interpretation by subsequent agreements and subsequent practice*, *ibid* 71: 'It is presumed that the parties to a treaty, by a subsequent agreement or a subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.' This draft conclusion, in the work of the Drafting Committee, became the third paragraph of Draft Conclusion 7, *Possible effects of subsequent agreements and practice in interpretation*, *cf.* ILC, 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties – Statement of the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia' (3 June 2014) UN doc A/CN.4/L.833.

³⁹ *Hassan* (n 1) para 101.

⁴⁰ Second report 2014 (n 18); ILC Report 2014 (3) 192. However, in the same report the ILC commenting on *Al-Saadoon* (37) observed, 'the European Court of Human Rights cases suggest that a treaty may permit the subsequent practice of the parties to have a modifying effect', *ibid* 191.



5. *Neutral interpretive techniques, or descriptions of expansionist decisions? Two possible ways to understand 'evolution'*

Hassan, therefore, has a good precedent for the modification of the Convention and the use of Article 31(3)(b) on this matter. However, if the Court's modifying technique has a precedent, the result in *Hassan* does not. The case is different because the practice of the State parties does not *expand* the rights of the beneficiaries, the individuals, as in *Al-Saadoon*. Rather, the practice here affected two provisions: it expanded the admitted grounds for deprivation of liberty (Article 5.1), and impacted a provision explicitly intended to hold States accountable before the CoE and other member States for limiting the scope of individual rights (Article 15).

This difference was clearly raised in the dissenting opinion.

'In assessing whether a State practice fulfils the criteria flowing from Article 31 § 3 (b), and thus plausibly modifies the text of the Convention ... there is, on the one hand, a fundamental difference between a State practice ... towards a more expansive or generous understanding of their scope than originally envisaged, and, on the other, a State practice that limits or restricts those rights, as in the present case, in direct contravention of an exhaustive and narrowly tailored limitation clause of the Convention protecting a fundamental right.'⁴¹

The dissenting judges make clear that, beyond any aseptic technicality, what is important in the interpretation of the Convention is the result reached with an interpretation, and not the technique that leads there. In this framework, the underlying question that precedes interpretive techniques is whether they expand or restrict the Convention. 'Subsequent practice', 'living instrument', and 'European Consensus' in themselves are neutral expressions, independent from any particular criterion: a practice, the life of a treaty, or a consensus can go in the direction of either restricting or expanding a right. For the dissenting judges, however, these are not neutral terms, but are only valid where they tend to expand rights under the Convention; where they are restrictive, we should instead consider them a breach of the Convention.

Evolution itself, a concept borrowed from biology that refers to the differentiation of species, is a term that in law can be found used in a

⁴¹ Partly Dissenting Opinion (n 27) para 13.



progressivist way (evolution as progress, as opposed to regression) both in legal scholarship and by the ECtHR,⁴² but also in a neutral way, as a dynamic that merely changes over time.⁴³ The ILC, too, has referred to it in its work in a neutral way.⁴⁴ A prominent representative of American legal pragmatism, Richard Posner, well describes this understanding of evolution very well. He places evolution as a typical feature of American legal pragmatism, referring it to the circumstances rather than to any end-state or goal:

‘Another implication of Darwinism [...] places the theory side of intellectual activity in perspective: our most cogent intellectual procedures are likely to be experimental rather than aprioristic ones. Evolution is an experimental process, a process of trial and error. Mutations create heritable variations, and natural selection in effect picks the most adaptive.’⁴⁵

Posner describes the selection of mutations that are ‘most adaptive’ (or ‘fittest’ to use the term used by Charles Darwin) under the circum-

⁴² *Soering* (n 36) para 103; *Hatton and Others v United Kingdom* App no 36022/97 (ECtHR [GC], 8 July 2003), *Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner*, para 2: ‘As the Court has often underlined: ‘The Convention is a living instrument, to be interpreted in the light of present-day conditions’ (see, among many other authorities, *Airey v Ireland* [1979] 2 E.H.R.R. 305, 14-16, para 26, and *Loizidou v Turkey* (preliminary objections) [1995] ECHR 10, 26-27, para 71). This evolutive’ interpretation by the Commission and the Court of various Convention requirements has generally been ‘progressive’, in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the ‘European public order.’ J Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 L and Practice of Intl Courts and Tribunals 443.

⁴³ M Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human rights’ in A Orakhelashvili, S Williams (eds), *40 Years of the Vienna Convention on Treaties* (British Institute of International and Comparative Law 2010) 55. On the many facets of evolutive interpretation see also the fine excellent paper by G Distefano, ‘L’interprétation évolutive de la norme internationale (2011) 115 *Revue générale de droit international public* 373.

⁴⁴ First report (n 18) 24-30, dynamic meaning opposed to a static one.

⁴⁵ RA Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 31.



stances.⁴⁶ This approach is different from the systematic and progressivist one of idealism (implicitly adopted by the dissenting judges), which envisions the development of the law over time as approaching an end of determinate content.⁴⁷ In Posner's perspective, evolution does not always lead to what can be called progress: the concept of progress relies on its reference to a substantive set of values or a political project. Not so the concept of evolution – or that of fittest, living instrument, consensus, or common practice.

The idealistic approach can be slippery for an international jurisdiction, which could be facing a situation involving values on which States are in disagreement.⁴⁸ Indeed, it is rare to read decisions in which the Strasbourg Court speaks explicitly about a principle of progressive or expansive interpretation and explains it with a neutral expression like 'consensus' or 'common practice.' More often we see these expressions utilized as a legal method to arrive at the content of rules in line with the States' current understanding of those rules (if any). But, as Pier Giuseppe Monateri has noted, interpretive techniques can amount to nothing more than a screen for other reasoning, and in interpreting law there is no room for candid choices: in contesting the *Hassan* decision the dissenting judges do not contest the methods themselves, but the direction toward which they lead.⁴⁹

⁴⁶ C Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (5th ed, John Murray 1869) 91-92.

⁴⁷ 'Historical development, therefore, is not the harmless and unopposed simple growth of organic life but hard, unwilling labor against itself. Furthermore, it is not mere formal self-development in general, but the production of an end of determined content.' Georg WF Hegel, *Reason in History, a general introduction to the Philosophy of History* (The Bobbs-Merrill Company 1953) para 61; P-M Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2012) 122, 131-2.

⁴⁸ Giorgio Gaja criticized the possible political use of such a technique, G Gaja, 'Does the European Court of Human Rights Use Its Stated Methods of Interpretation?' in *Divenire sociale e adeguamento del diritto: Studi in onore di Francesco Capotorti*, Vol 1 (Giuffrè 1999) 221-222.

⁴⁹ PG Monateri, 'Correct our watches by the Public Clock.' L'assenza di fondamento dell'interpretazione del diritto' in J Derrida, G Vattimo (eds), *Diritto Giustizia e interpretazione* (Laterza 1998) 204, implicitly replying to the last chapter of Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982) 178.



6. *Evolution or Breach of Treaty?*

Aside from the political connotations of these issues and of the (impossible to satisfy?) need to make interpretive processes more transparent, this debate raises a serious theoretical question: when does the consensus of the parties modify the Convention, and when is it actually a breach of the Convention, no matter how many of the Parties are in agreement in violating it (amounting to a general, or even unanimous breach)? To say that the Parties act in a way that differs from the Convention can may amount to its amendment; but it can may also say mean that they the Parties are simply violating the Convention, and the Court, in which case the Court using the law must reintroduce order where society (in this case a society of States) has strayed from it.

The terms of this dialectic have been set up very clearly by Eskridge and Scalia in the American discussion over the interpretation of the US Constitution – an instrument that is more than 150 years older than the European Convention on Human Rights.⁵⁰ The dynamic vision of law and society (a new society comes before an old law) places Eskridge's position as evolutionist; Scalia's 'Matter of Interpretation' describes a strong originalism according to which *if our fathers passed a written Constitution, it was to avoid a society making the mistakes of the past, and not allow it to change it. Quite probably, following Monateri's realist account of interpretation, they are just using interpretational theories to shore up their value judgments on the evolutionary direction of society: Eskridge liking it, and foreseeing a new law that surpasses the old one; Scalia disliking it, and hoping that law can prevent this change.*⁵¹ Nei-

⁵⁰ WN Eskridge, 'Dynamic Statutory Interpretation' (1986-1987) 135 University of Pennsylvania L Rev 1479; A Scalia, *A Matter of Interpretation* (Princeton University Press 1997).

⁵¹ This debate has become richer over time, see among many LB Solum, 'Semantic Originalism' (2008) Illinois Public Law and Legal Theory Research Papers Series No. 07-24; JM Balkin, *Living Originalism* (Belknap Press 2011). Any such debate about the European Convention on Human Rights is far less developed, as K Dzehtsiarou and C O'Mahony have observed in 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court' (2013) 44 Columbia Human Rights L Rev 329: 'The status of the ECtHR as a living instrument open to evolutive interpretation is now firmly established in the case law of the ECtHR, in contrast with the more controversial notion of the living constitution in the United States.' However, see L Hoffman, 'The Universality of Human Rights'



ther position can be absolute (indeed, Scalia elsewhere referred to originalism as ‘the lesser evil’, not as the optimal option).⁵² As Pirandello suggests: life can have neither perpetual movement nor perpetual consistency. On the one hand, law is an outgrowth of a society, which is a living reality, subject to mutation over time. But on the other, the law provides structure to a society, which can degenerate; in which case the law should step in to prevent it.

So what is the yardstick which should orient the interpreter in understanding whether society is changing in a way that should be accommodated or corrected? One might suggest the object and purpose of the treaty. If a consensus, a practice, an evolution is in accordance with the object and purpose of the treaty, it should be recognized; if not, it must be rejected. In most of the cases the object and purpose of a treaty can be of sufficient assistance in resolving this issue. But in certain cases this may be problematic, not only because there can be disagreement over the object and purpose of a treaty, but also because, even if there is agreement on the object and purpose, this does not always provide clarity in deciding a case. *Hassan* was not the first case to bring before the Court a restrictive interpretation of Article 5. In *Mangouras* the Court accepted an enormous amount of bail, which one would consider disproportionate according to settled criteria, because of the social concern on environmental issues that European States were demonstrating. The protection of the individual here was opposed by the right of other individuals to have a safe environment, and laws embodying it. The judges recognized ‘new realities’ that made a once-disproportionate bail amount acceptable under the new conditions. This interpretation weakening the protection for an individual was dictated by a collective, European need for attention paid to environmental crimes.⁵³

(2009) 125 L Q Rev 416; D Nicol, ‘Original Intent and the European Convention on Human Rights’ (2005) Public L 155.

⁵² A Scalia ‘Originalism: The Lesser Evil’ (1988-89) 57 U Cincinnati L Rev 849.

⁵³ *Mangouras v Spain* App no 12050/04 (ECtHR [GC], 28 September 2010) paras 86-87: ‘[T]he Court cannot overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences. This is demonstrated in particular by States’ powers and obligations regarding the prevention of maritime pollution and by the unanimous determination of States and European and international organisations to identify those responsible, ensure that they appear for trial and, if appropriate, impose sanctions on them... The Court considers that these new realities have to be taken into account in interpreting the requirements of Article 5 § 3 in this regard.’ E Borge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 78-79.



Here, between the right of individuals to have a healthy environment and the right to freedom, the object and purpose of the Convention would have been of little help. In this case, the Court, without any difficulty, accepted that new realities in environmental law could determine decreased protection for an individual.

Of course, one can say that the object and purpose of the European Convention is the protection of the single individual, and so whatever change does not add further protection to single individual cannot be accepted. This is indeed what the dissenting opinion said. But this interpretation leads to an application of an idealized Convention that ignores concrete, serious social challenges that might arise and risks becoming naive.

7. *Regression or Adjustment?*

Notwithstanding the fact that the dissenting judges strongly state that it does, the *Hassan* decision does not seem to fit the description of a regressive interpretation of the Convention. The Court decided to fix one of the issues arising from the application of the Convention in conflicts abroad, a situation not foreseen when the Convention was adopted, and to which Article 15 was not written to apply.⁵⁴ The Court's precedent, on the other hand, had elaborated the applicability of the

⁵⁴ See eg *Collected edition of the 'Travaux préparatoires'* Vol VI (Martinus Nijhoff 1979) 155 ff. Art 15 (suspension of rights) refers to the internal 'state of war' and to civil strife, not to conflicts abroad. In addition, the fact that the applicability of the Convention to the colonies was controversial at the time of the drafting of the ECHR, and that States were requested to make specific declarations on this matter, shows that States did not agree on the application of the ECHR outside the territory of a State, cf *ibid*, Vol IV (Martinus Nijhoff 1978) 76; *ibid* Vol VII (Martinus Nijhoff 1985) 20-22, 72-74. In the outdated parlance of civilizers, it was even emphasized: 'Under paragraph (d) the signatory States are permitted to give due regard to special conditions which may exist in certain overseas territories. It is felt that the state of civilization of certain overseas territories does not permit the application of fundamental rights under the same conditions as for European territories. The States concerned have, however, to perform the task of bringing civilization to their overseas territories, a task of which the aim is precisely that of making the human rights applicable to these territories', *ibid* Vol III (Martinus Nijhoff 1976) 266 (see critics and defences of this provision at 172-176, 182, 236 and *ibid* Vol VII (Martinus Nijhoff 1985) 60-62. See also Milanovic (n 2) 12-16.



Convention in conflicts abroad. The *Hassan* decision adjusts the Convention to be consistent with this evolution in its case law. Enlarging the perspective to consider not only this decision, but the whole journey taken by the Court in its history, *Hassan* is an adjustment of the Convention to suit the broadened scope already elaborated upon by the Court. By saying that the concept of lawful in Article 5(1) also covers a IHL during conflicts abroad, the Court did not lower the protection of the individual, but adjusted the applicability of the Convention to a new situation not envisaged by its drafters.

The theoretical questions that arise, however, which have been dealt with very critically in the recent past with regard to measures against terrorism, and less critically on measures in favour of the environment, remain, cannot be resolved once and for all, and belong to the ongoing struggle of jurists to understand whether a collective effort of several States in the same direction (maybe unanimously) is progress or, in some cases, a violation of the Convention, a degeneration of society.⁵⁵ Mechanical answers, leading in opposite directions, like stating that any European consensus leads to a good modification of the Convention, or (as suggested by the dissenting opinion) that only a common practice that enhances the rights of an individual can be accepted, can be good rhetorical arguments, but do not seem well-suited to the problem at stake. Rather, this discernment must be carried out starting from a proper evaluation of the rights at stake, the way their expansion or restriction impacts the dignity of the individuals, and the reasons that underlie a common practice of States.

⁵⁵ George Letsas, for example, speaks of a *moral reading* of the ECHR that can run against any European consensus: G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009) 40; G Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 14 *Eur J Intl L* 302-305.



**What is living and what is dead in
the European Convention on Human Rights?
A Comment on *Hassan v United Kingdom***

Eirik Bjorge^{*}

1. *Introductory remarks*

The nexus between the living instrument approach and the interpretative technique codified in Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) is a close one. As the Court observed in *A, B & C v Ireland*, the existence of a consensus has long played a role in the evolution of the Convention provisions, beginning with *Tyrer v the United Kingdom*, with the Convention being considered a ‘living instrument’ to be interpreted in the light of present-day conditions: ‘Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.’¹ As Nolte has observed, although the European Court does refer to Article 31(3)(b) with consistency, it regularly professes its adherence to this method of interpretation, as well as to the provisions on interpretation in the VCLT: ‘It can therefore be assumed that the Court is conscious of and adheres to the Vienna Convention’s rules even when it does not quote them explicitly.’²

Furthermore, the general approach of the European Court in this respect seems to be in line with Draft Conclusion 3 of the International Law Commission (ILC)³ on subsequent agreements and subsequent

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¹ *A, B & C v Ireland* App no 25579/05 (ECtHR [GC], 16 December 2010) para 234.

² G Nolte, ‘Second Report for the ILC Study Group on Treaties over Time’ (5 May-6 June, 7 July-8 August 2014) UN doc A/CN.4/671 para 1.7.

³ ILC, ‘Report of the International Law Commission on the work of its sixty-fifth session’ (6 May - 7 June and 8 July - 9 August 2013) UN Doc A/68/10 (2014) chp IV, ‘Subsequent agreements and subsequent practice in relation to interpretation of treaties.’

practice in relation to the interpretation of treaties, which stipulates that: 'Subsequent agreements or subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.' As the ILC here mentions, there is, in terms of the law of treaties, nothing special about treaty terms being interpreted as having evolved; the issue of evolutionary interpretation of treaties is one of the correct application of Articles 31–33 VCLT.⁴

The possibility, raised by Judge Ziemele in *Roblena v Czech Republic*, that a better way of conceptualizing the idea of 'consensus', in connection with the living instrument approach, is as a matter of 'particular' or 'regional' customary international law, will not be developed any further here, although it seems to this author to be a promising avenue for further research.⁵

But what is the line that divides what is and what is not capable of interpretation under the living instrument doctrine, or to put it another way, what is living and what is dead in the European Convention?

In *Hassan* the European Court found that 'a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention.'⁶

This interpretation was, according to the Court, based on the interpretative techniques codified in Article 31(3)(b) VCLT and 31(3)(c). These considerations did not lead to an evolutionary interpretation that heightened the level of protection afforded by the Convention; rather, they limited or restricted that level of protection.

This short contribution will argue that, as a matter of treaty interpretation under the rules set out in Articles 31–33 VCLT, ie the 'gold standard' of treaty interpretation which the European Court itself explicitly follows, was not necessarily wrong in principle, but was inappropriate by reason of the subsequent practice which was available

⁴ E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

⁵ *Roblena v Czech Republic* App no 59552/08 (ECtHR) [GC], 27 January 2015) (Concurring Opinion of Judge Ziemele) para 2.

⁶ *Hassan v the United Kingdom* App no 29750/09 (ECtHR [GC], Judgment 16 September 2014) para 101.



in the case. Before addressing that question squarely, however, it is necessary first to touch on three other points: first, that *Hassan* is not the first case in which the Grand Chamber has taken an approach which, by way of evolution, restricted Convention rights rather than expanding them; second, the issue of extraterritorial derogation; and, third, the issue of whether, in principle, a special regime of treaty interpretation ought to apply to provisions such as Article 1 ECHR.

2. *Restricting the Convention's protection through evolutionary interpretation? The possible precedent of Mangouras v Spain*

Hassan was not the first case in which the Court arguably has watered down the level of protection flowing from Article 5. Perhaps the most important example is *Mangouras v Spain*,⁷ where, it seems, the Grand Chamber (with a majority of 10 to 7) decided to lower the protection offered by Article 5 of the Convention to the individual claimant, who had caused great harm to the environment in the form of an oil spill. The Spanish courts had set a bail amount of three million Euros, a sum which was, according to the minority of the Grand Chamber, 'far beyond the means of the applicant, with the consequence that he continued to be detained on remand for a total of eighty-three days.'⁸ Whilst the case is different in many ways, one could see *Mangouras* as lowering the standards of protection in Article 5 of the Convention concerning the setting of bail for an applicant. Certainly, Judge Tulkens has characterized the judgment as an example of how evolutionary interpretation can 'in some cases, have as an effect the restriction of the scope of the rights protected by the Convention.'⁹

The Grand Chamber stated that in principle 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of

⁷ *Mangouras v Spain* App no 12050/04 (ECtHR [GC], 28 September 2010).

⁸ *ibid*, joint dissenting opinion of Judges Rozakis, Bratza, Bonello, Cabral Barretto, David Thór Björgvinsson, Nicolau, and Bianku.

⁹ F Tulkens, *What are the Limits to the Evolutive Interpretation of the Convention?* (Council of Europe 2011) 8.



democratic societies.¹⁰ But this did not lead the Grand Chamber to the conclusion that the applicant's rights under Article 5 had evolved towards a higher level of protection for individuals in the applicant's situation. Instead the Grand Chamber stated that it could not 'overlook the growing and legitimate concern both in Europe and internationally in relation to environmental offences.'¹¹ The subsequent practice in *Mangouras* was evidenced in particular by States' powers and obligations regarding the prevention of maritime pollution and the unanimous determination by European States to identify those responsible and imposing sanctions on them, sometimes using the criminal law as a means to enforce environmental law obligations. The Grand Chamber in *Mangouras* admittedly did not follow the exacting test as to what is subsequent practice drawn up by the International Court of Justice in the case concerning *Kasikili/Sedudu Island*. According to the ICJ a subsequent practice can be seen as being established only when the parties to a treaty, through their authorities, engage in common conduct, and when they acted wilfully and with awareness of the consequences of their actions.¹² Nonetheless it seems fair to analyse this case as an example of an international court shying away from giving an evolutionary interpretation to a treaty provision that would have gone with the grain of the object and purpose of the treaty, and instead found guidance in the subsequent agreements and practice of the States, which seemed in the event to go in the other direction. In *Mangouras*, in other words, the Grand Chamber gave precedence to subsequent practice over the object and purpose, thus avoiding a divergence between its own jurisprudence and the practice of States parties.

3. *Extraterritorial derogations?*

Second, can it be right for the European court to expand jurisdiction without a concurrent enlargement of the potential for

¹⁰ *Mangouras* (n 7) para 87.

¹¹ *ibid* para 86.

¹² *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045 para 74.



derogation? In other words, is it tenable simultaneously to hold a State accountable because it exercises jurisdiction abroad yet deny it the possibility to derogate extraterritorially? A recent High Court judgment in the United Kingdom has suggested that it must be possible to derogate extraterritorially,¹³ and so did the minority in *Hassan*. The obligation to afford human rights protection in the context of the external exercise of State power is not, however, likely to be amenable to derogation. Article 15 lays down as a condition for express derogation that the emergency in issue be one which is ‘threatening the life of the nation.’ The Court in *Lawless v Ireland* determined that the words ‘refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.’¹⁴ Lord Bingham, delivering the lead judgment in *Al-Jedda*, observed that: ‘[i]t is hard to think that these conditions could ever be met when a State had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw.’¹⁵ Lord Hope, delivering the lead judgment in *Smith v Ministry of Defence*, observed about the power to derogate that ‘[t]he circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas.’¹⁶ Campbell McLachlan summarizes the legal position in his recent book *Foreign Relations Law* stating: ‘[e]ngaging in an overseas military or peacekeeping operation, undertaken at the State’s election, is most unlikely’ to meet the requisite criteria.¹⁷ If the overseas operation is really elective, then it is difficult to imagine that that should meet the criteria of Article 15. In any case, if the Strasbourg Court were to go against the views of the House of Lords and of the Supreme Court and allow derogations in such circumstances, the acceptability of the derogation would depend heavily on the impugned facts. It is not possible to say, *ex ante*, that one can derogate out of all extraterritorial military activity undertaken by British troops; derogation is not an on–off switch for human rights obligations. The

¹³ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (Q.B.).

¹⁴ *Lawless v Ireland (no 3)* App no 332/57 [1961] ECHR 2 para 28.

¹⁵ *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 [2008] 1 AC 332 para 38.

¹⁶ *Smith and others v The Ministry of Defence* [2013] UKSC 41 para 60.

¹⁷ C McLachlan, *Foreign Relations Law* (CUP 2014) 334.



provision provides that the State may take measures derogating from its obligations under the Convention only ‘to the extent strictly required by the exigencies of the situation’; as is clear from *A v United Kingdom*, the Strasbourg Court has been fastidious in upholding the principle on which Article 15 is based,¹⁸ and the Court is likely to follow that same approach in respect of overseas military operations too. In any case, derogations in circumstances such as those prevailing in *Hassan* would, as pointed out by Sari and Quénivet, come with a series ‘of important limitations, including the fact that derogations are incapable of displacing the applicability of the Convention as a whole, that they are subject to scrutiny by the European Court and are without prejudice to other applicable rules of international law, including other applicable human rights norms, and that the rules of the ECHR overlap with those of the law of armed conflict in a number of respects.’ Derogations should not therefore be regarded as ‘a magical panacea.’¹⁹

4. *Are there special rules for the interpretation of issues of jurisdiction?*

A question that was addressed by both parties in *Hassan* but which did not come to a head directly in the judgment is the correctness or otherwise of that which the Court observed in *Bankovic* about evolutionary interpretation and Article 1 of the Convention. As the Court stated in that case, ‘[i]t is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court’s case-law.’ It continued to observe that it had ‘applied that approach not only to the Convention’s substantive provisions ... but more relevantly to its interpretation of former Articles 25 and 46 concerning the recognition by a Contracting State of the competence of the Convention organs.’ Given, however, that ‘the scope of Article 1 ... is determinative of the very scope of the Contracting Parties’ obligations and, as such, of the scope and reach of the entire Convention system of human rights’ protection as opposed to

¹⁸ *A v United Kingdom* App no 3455/05 (ECtHR [GC], Judgment 19 February 2009).

¹⁹ A Sari, N Quénivet, ‘Barking up the Wrong Tree: How Not to Save the British Armed Forces from Legal Defeat’ <www.lawfareblog.com/2015/04/barking-up-the-wrong-tree-how-not-to-save-the-british-armed-forces-from-legal-defeat/>.



the question ... of the competence of the Convention organs to examine a case', the Court in *Bankovic* declined to apply the living instrument doctrine to the jurisdictional use of Article 1. The Grand Chamber of the European Court in *Bankovic* held that the living instrument doctrine ('dynamic' or 'evolutionary interpretation') did not apply to Article 1, as that article pertains to jurisdiction.²⁰

As a matter of principle, there is no reason why special doctrines of interpretation should apply to issues of jurisdiction. As a matter of international law, Article 1, like any other provision of the European Convention, has to be interpreted in accordance with the rules set out in Articles 31–33 VCLT. No special rules of interpretation apply to jurisdictional provisions. As the Tribunal (Crawford; Schwebel; Stephen, President) in *Mondev* determined:

'there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31–33 of the Vienna Convention on the Law of Treaties.'²¹

The Tribunal added that:

'Neither the International Court nor other tribunals in the modern period apply any principle of restrictive interpretation to issues of jurisdiction.'²²

The main point in this matter, however, is a very simple one: whilst it is incorrect to say, as the Court did in *Bankovic*, that special rules of treaty interpretation should apply to Article 1, it is also wrong to think that the concept of jurisdiction that the Court now relies on has somehow evolved since the Convention's inception. Rather, we are talking here about a straight-forward application of a concept that,

²⁰ *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR [GC], Decision 12 December 2001) paras 64–65.

²¹ *Mondev v United States of America* (Award 11 October 2002) [2002] 6 ICSID Rep 192, 43.

²² *ibid.*



somewhat confused in *Bankovic*,²³ has always been there and is not so much evolving as finally being allowed to apply.

5. *Was the interpretative result in Hassan supported by the subsequent practice of States?*

Turning, then, to the main issue to which *Hassan* gives rise, namely how convincing is the claim of consistency of the interpretative result in *Hassan* with the VCLT?

First, it is worth pointing out that the result in *Hassan* was in no way a novel one; the Commission had already reached it in 1976 in *Cyprus v Turkey*, where the Commission had:

‘account of the fact that both Cyprus and Turkey are Parties to the (Third) Geneva Convention of 12 August 1949 ... Having regard to the above, the Commission has not found it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.’²⁴

Furthermore, it is worth recalling, as Judge Greenwood did, that the European Court of Human Rights has no more than ‘a restricted jurisdiction and cannot directly enforce rules drawn from outside the body of law which created [it].’²⁵ This coheres with the conventional basis of the European Court’s jurisdiction. Article 19 ECHR establishes the European Court, ‘[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.’ Its jurisdiction, according to Article 32(1), ‘shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto’, Article 32(2) adding that ‘[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide.’

Greenwood added, on the other hand: ‘that is no excuse for

²³ See McLachlan (n 17) 319–345; M Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011).

²⁴ *Cyprus v Turkey* App nos 6780/74 and 6950/75 (Report of the Commission, 10 July 1976) para 313.

²⁵ C Greenwood, ‘Rights at the frontier: protecting the individual in time of war’ in BAK Rider (ed), *Law at the Centre* (Kluwer 1999) 278.



adopting a philosophy, reminiscent of extreme versions of the dualist approach to international law and municipal law, in which the existence of the laws of war is ignored even when such tribunals are confronted with alleged human rights violations in time of war.²⁶ That must be correct.

Of course, such an approach has certain limits, limits which flow from the treaty to be interpreted. The *Kishenganga*²⁷ Tribunal in its interpretation of the Indian–Pakistani Indus Waters Treaty and Annexures, underscored that in interpreting the treaty, ‘principles of international environmental law must be taken into account.’²⁸ However, Paragraph 29 of Annexure G to the Indus Waters Treaty made clear that:

‘the law to be applied by the Court shall be this Treaty and, whenever, necessary for its interpretation or application, but only to the extent necessary for that purpose, the following in the order in which they are listed: (a) International conventions establishing rules which are expressly recognized by the Parties; (b) Customary international law’

Thus the Tribunal noted that ‘the place of customary international law in the interpretation and application of the Indus Waters Treaty remains subject to Paragraph 29’; ‘this Treaty expressly limits the extent to which the Court may have recourse to, and apply, sources of law beyond the Treaty itself.’²⁹ The Tribunal concluded that:

‘if customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be ‘interpretation or application’ of the Treaty but the substitution of customary law in place of the Treaty.’³⁰

The danger is that other international law is ‘applied not to circumscribe, but to negate rights expressly granted in the Treaty’ which the court in question is entitled to interpret and apply; then the

²⁶ *ibid* 278–279.

²⁷ *Kishenganga* (Final Award) 20 December 2013 <www.pca-cpa.org/showpage.asp?pag_id=1392>.

²⁸ *Kishenganga* (Partial Award) (2013) 154 ILR 173 para 452.

²⁹ *Kishenganga* (Final Award) (n 27) para 111.

³⁰ *ibid* para 112.



court is no longer engaging, to use the wording of Article 32(1) ECHR in the ‘interpretation or application of the Convention and the protocols thereto.’ But, to use the words of the *Kishenganga* Tribunal, ‘the substitution’ of international humanitarian law ‘*in place of*’ the ECHR. As was seen above, the ECHR does not include the kind of clause that the Indian–Pakistani Indus Waters Treaty and Annexures included; instead the relationship between the Convention and other international law is regulated through Articles 31–32 VCLT.

Thus, in *Hassan*, the Court set out the ‘criterion contained in Article 31 (3)(c) of the Vienna Convention’, in respect of which the ‘Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part.’³¹ The Court noted that it had already held that Article 2 should be interpreted ‘so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict.’³²

In addition to the criterion contained in Article 31(3)(c), came the fact that no contracting State has purported to derogate from its obligations under Article 5 in order to detain, during international armed conflicts, persons on the basis of Geneva Convention III and IV. Although, as the Court noted both in *Bankovic* and *Hassan*, there have been a number of military missions involving a contracting State acting extra-territorially since their ratification of the Convention, none of these States has ever made a derogation pursuant to Article 15 in respect of these activities.³³ The practice of not lodging derogations in respect of detention under Geneva Conventions III and IV during international armed conflicts, the Court pointed out in *Hassan*, is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Under this instrument no State has explicitly derogated under Article 4 in respect of such detention, even subsequent to the *Nuclear Weapons* and *Wall* Advisory

³¹ *Hassan* (n 6) para 102.

³² *ibid.*

³³ *Bankovic* (n 20) para 62; *Hassan* (n 6) para 101.



Opinions³⁴ and *DRC v Uganda* Judgment,³⁵ where the International Court made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

If it would have been wrong to rely only on extraneous rules of law such as the Geneva Convention, the interpretation that the Court made was supported too by the subsequent practice of the parties. That takes one dangerously close to the situation described by the *Kishenganga* Tribunal, ie one in which the court or tribunal engages not in the interpretation or application of the treaty of which it is the arbiter but instead in the 'substitution' of other rules of international law '*in place of the Treaty*.'³⁶

Perhaps that would have been the case if other rules of international law had been the only means of interpretation in favour of the interpretation that the Court made in *Hassan*. As seen above, however, that was not the case, as another means of interpretation favouring the result was, according to the Court, the subsequent practice on the part of all the States parties.

This approach was sound in principle. As the ILC has recently confirmed, a subsequent practice is 'an authentic means of interpretation' consisting 'of conduct in the application of a treaty, after its conclusions, which establishes the agreement of the parties regarding the interpretation of the treaty.'³⁷ The importance of such subsequent practice in the application of a treaty, as an element of interpretation, is obvious, as 'it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.'³⁸ On the other hand, as the ILC pointed out both in 1966 and in 2013, 'subsequent agreements and subsequent practice under Article 31(3)(a)–(b) are not the only

³⁴ *Legality of the Threat or Use of Nuclear Weapon* (Advisory Opinion) [1996] ICJ Rep 226 para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 106.

³⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 para 216.

³⁶ *Kishenganga* (Final Award) (n 27) para 112.

³⁷ ILC, 'Report of the International Law Commission on the work of its sixty-fifth session' (n 3), Draft Conclusion 4(2).

³⁸ ILC, 'Report of the International Law Commission on the work of its eighteenth session' (4 May-19 July 1966) (1966-II) YB ILC 221–222.



‘authentic means of interpretation.’ In particular the ordinary meaning of the text of the treaty is also such a means[;] ‘the text of the treaty must be presumed to be the authentic expression of the intentions of the parties’.³⁹ By describing subsequent practice as an: “authentic’ means of interpretation the Commission recognizes that the common will of the parties, from which any treaty results, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusions of the treaty. The Vienna Convention thereby accords the parties to a treaty a role which may be uncommon for the interpretation of legal instruments in some domestic legal systems.⁴⁰ Special Rapporteur Sir Humphrey Waldock in 1964 was prepared in certain circumstances to accord particular – even decisive – weight to subsequent practice which is consistent and which embraces all the parties:

‘Subsequent practice when it is consistent and embraces all the parties *would appear to be decisive of the meaning to be attached to the treaty*, at any rate when it indicates that the parties consider the interpretation to be binding upon them. In these cases, subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement.’⁴¹

The ILC in 2013 confirmed this approach to the extent that it observed that: ‘subsequent agreements and subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty must be conclusive regarding such interpretation when ‘the parties consider the interpretation to be binding upon them’.⁴²

That, according to the Court’s description of the practice of the States parties, was the case in *Hassan*. In the Court’s view, all the States parties seemed to consider the interpretation to be binding on upon them. The subsequent practice in question in *Hassan* was, the Court

³⁹ *ibid* 204–205; ILC, ‘Report of the International Law Commission on the work of its sixty-fifth session’ (n 3) 20.

⁴⁰ *ibid* 21.

⁴¹ H Waldock, ‘Third Report on the Law of Treaties’, (1964-II) YB ILC 60 (emphases added).

⁴² ILC, ‘Report of the International Law Commission on the work of its sixty-fifth session’ (n 3) 22.



held, consistent and embraced all the parties to the Convention, as ‘no contracting State has purported to derogate from its obligations under Article 5 in order to detain, during international armed conflicts, persons on the basis of Geneva Convention III and IV.’⁴³ Arguably, in such a case, to use Sir Humphrey Waldock’s words, ‘subsequent practice as an element of treaty interpretation and as an element in the formation of a tacit agreement overlap and the meaning derived from the practice becomes an authentic interpretation established by agreement.’ As a matter of treaty interpretation the approach the Court took in *Hassan* is possible in principle, but only if one accepts that the failure of the States members to derogate extraterritorially met the threshold in terms of subsequent practice – a point that can certainly be doubted. Could it not be that some States failed to derogate because they thought – *à tort ou à raison* – the Convention would not apply in *Hassan* type cases? Could others, equally, have felt that purporting to derogate could have amounted to agreement that the Convention ought to bind in this type of case? Did the States in this regard act wilfully and with awareness of the consequences of their actions? Another issue is that some States, Germany being one of them, refrained from detaining any individuals in Afghanistan,⁴⁴ as they in fact assumed that they were bound by human rights obligations in situations such as those at issue in *Hassan*.⁴⁵

⁴³ *Hassan* (n 6) para 101.

⁴⁴ Declaration in the Seventh Report by the Federal Government on its Human Rights Policy in the Context of Foreign Relations and in Other Policy Areas (BT-Drs. 15/5800) <www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule99_SectionA>. Ibid, under ‘Germany. Practice Relating to Rule 99. Deprivation of Liberty. Section A. General.’ it is stated that: ‘Since April 2007 German forces have detained no individuals in Afghanistan.’

⁴⁵ For example, ‘Germany accepts the recommendation and already submitted the following declaration to the United Nations Human Rights Committee in 2004: Pursuant to Article 2(1), Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction. Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.’ Germany’s replies in the Universal Periodic Review 2009: UNHRC, ‘Report of the Working Group on the Universal Periodic Review. Germany. Addendum – Views on conclusions and/or recommendations, voluntary commitments and replies presented by the States under review (20 May 2009) UN Doc A/HRC/11/15/Add.1 2–3.



Whilst, in principle, subsequent practice could legitimately lead to the kind of extreme interpretative results which were the outcome in *Hassan* – interpretation *contra legem* – it is far from clear that the requisite practice was actually obtained in *Hassan*.

There are other limits to such an approach too, such as the one set out in the judgment of the International Court of Justice in *Whaling in the Antarctic* case. There the International Court found that the functions which the International Convention for the Regulation of Whaling conferred on the International Whaling Commission (IWC) had ‘made the Convention an evolving instrument.’⁴⁶ The Court observed that ‘amendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objectives pursued by the Convention, but cannot alter its object and purpose.’⁴⁷ In line with this approach, the subsequent practice of the contracting States to the ECHR may put an emphasis on one or the other objectives pursued by the ECHR but cannot alter its object and purpose. Whilst it would seem that *Hassan* is within the wider bounds drawn up by the International Court, the interpretation it applied was nonetheless an unsatisfactory one.

⁴⁶ *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Judgment) [2014] ICJ Rep 226 para 45.

⁴⁷ *ibid* para 56.



The question:

Legal normativity through tacit agreements: Putting *Peru v Chile* into a broader perspective

Introduced by Beatrice Bonafé and Paolo Palchetti

The Vienna Convention on the Law of Treaties (VCLT) expressly recognizes the admissibility of international agreements which are not concluded in written form, although they are not within the scope of the Convention (Article 2). Tacit agreements, in which obligations and commitments are implied or inferred but not openly declared, are something of an exception in State practice. The International Court of Justice has always been very cautious in determining the existence of tacit agreements (eg *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 25 para 28, and *Delimitation of the Marine Boundary in the Gulf of Maine (Canada v United States of America)* (Judgment) [1984] ICJ Rep 309-312 paras 144-154). In the specific context of maritime delimitation, the Court clarified that the existence of a tacit agreement must be supported by ‘compelling’ evidence, because ‘the establishment of permanent maritime boundaries is a matter of grave importance’ (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 735 para 253).

Recently, the Court seems to have adopted a more flexible approach. In *Maritime Dispute*, the Court denied the existence of any written treaty expressly establishing the maritime boundary between Peru and Chile but recognized the existence of a tacit agreement in that respect. Notably, the Court dealt with two specific issues, that is, the existence and the content of that tacit agreement. According to the Court, the text in the 1954 Special Maritime Frontier Zone Agreement was sufficient to prove the existence of the tacit agreement (*Maritime*

Dispute (Peru v Chile) (Judgment) [2014] ICJ Rep 38 para 91). As to the determination of the precise content of that agreement, the Court gave relevance to other treaties concluded by the parties, as well as other pertinent practice between them, such as fishing activities, legislative practice, enforcement activities, and even the developments in the law of the sea (*ibid* paras 96-151).

The Court's approach entails several questions with respect to this delicate operation of determining the implied intention of the parties when one of them opposes such a possibility. Is the existence of a written agreement sufficient proof of the existence of a tacit agreement? What are the factual or normative elements that can lead to an affirmation that an agreement has been tacitly concluded? Are those elements different from the factors to be taken into account when ascertaining the precise content of the tacit agreement?

This Zoom-in is intended to tackle those issues by focusing on whether the Court should adopt a rigorous or a rather more flexible approach and in particular whether the criteria adopted by the Court for determining the content of the tacit agreement between Peru and Chile are appropriate.

Jean d'Aspremont and Giovanni Distefano offer two different perspectives on the relationship between written and non-written rules, the criteria according to which tacit agreements are to be established and more generally the role that tacit agreements play in contemporary international law.



The International Court of Justice and tacit conventionality

*Jean d'Aspremont**

1. *The 'written' and the 'non-written' in international law*

The 'written' is the traditional domain of lawyers, for written materials provides a tangible soil from which legal contents can be extracted and converted into binding evaluative standards (ie legal normativity) on the basis of which the behaviour of addressees is appraised. The 'written' is thus the primary receptacle of all binding evaluative standards at which lawyers direct their interpretive activities. This is not to say that 'the written' enjoys an exclusive monopoly on the production of legal normativity. Most legal systems somehow accommodate the creation of binding evaluative standards through non-written materials. International law, however, distinguishes itself from other legal systems by virtue of the generous room it reserves for legal normativity generated through non-written materials. Indeed, when it comes to the production of binding evaluative standards, the 'non-written' has always enjoyed a privileged position in international law. For instance, the doctrine of customary international law famously allows the behavioural generation of rules, that is the creation of legal normativity through the general, uniform and consistent conduct of States (and possibly other actors) and its congruence with the corresponding anthropomorphic opinions of those actors about their own obligations. The same holds for general principles which are also commonly recognised – albeit reluctantly resorted to by international courts – as permitting the generation of legal normativity through a comparative and synthesizing account of domestic practices. It is true that the designation of non-written materials as sources of legal normativity by virtue of customary law and general

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principles is not specific to international law. Yet, international law stands out, not only because customary law and – to a lesser extent – general principles enjoy a prominent role, but also because it allows the extraction of a great deal of legal materials from other non-written materials like oral promises as well as tacit agreements between States.

As is well-known, oral promises came to be accepted as a possible source of legal contents by the Permanent Court of International Justice in its decision in the famous *Eastern Greenland* case.¹ This position was subsequently endorsed by the International Court of Justice.² The recognition of the possibility to generate legal normativity through tacit agreements – understood here as bilateral or multilateral legal agreements not explicitly confirmed in a written document – dates back to the classical doctrine of the sources of international law.³ They were originally invoked to provide a conventional foundation to customary international law.⁴ It is only once customary international law grew alien to conventionality that tacit agreements came to be elevated into a source of binding evaluative standards on its own. They nowadays constitute a widely accepted mode of creation of legal normativity in contemporary international legal scholarship.⁵ In this respect, it is well-

¹ PCIJ, *The Eastern Greenland Case*, Series A/B, No 53, 71.

² See ICJ, *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 267 para 43.

³ See GF De Martens, *Droit des gens* (Aillaud 1831) 541. See also the mention of Grotius by P Gautier, *Essai sur la définition des traités entre Etats* (Bruylant 1993) 85.

⁴ On the conventional foundations of customary law, see H Triepel, *Völkerrecht und Landesrecht* (Scientia Verlag 1899); K Strupp, *Elements du droit international public* (Rousseau 1927); T Lawrence, *The Principles of International Law* 95 (7th edn, Macmillan 1915); J Westlake, *International Law* (CUP 1904) 14; D Anzilotti, *Scritti di diritto internazionale pubblico*, vol 1 (Cedam 1957) 95 ff.; GI Tunkin, *Theory of International Law* (Harvard UP 1974) 24; C Chaumont, 'Cours général de droit international public' (1970) 129 *Recueil des Cours de l'Académie de Droit International* 333, 440. For an attempt to modernize the consensual conception of customary international law, see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 70-107; A D'Amato, 'Treaties As a Source of General Rules of International Law' (1962) 3 *Harvard Intl L J* 1-43. For some classic criticisms of such a convention-based approach to customary law, see H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British YB Intl L* 65, 83; J Brierly, *The Law of Nations* (5th edn, Clarendon Press 1955) 52; J Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 664.

⁵ A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 9; P Gautier, *Essai sur la définition des traités entre Etats* (Bruylant 1993) 85-88. See also P Gautier, 'Article 2' in P Klein, O Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Com-*



known that the Vienna Convention on the Law of Treaties acknowledges the possibility to create binding evaluative standards through tacit agreements.⁶

Because the resort to oral promises is rather limited in practice,⁷ it seems more germane, to zero in in the following sections on the possibility of extracting binding standards from tacit agreements. Although their practical importance should not be exaggerated,⁸ tacit agreements have more commonly been relied on by international actors as a possible soil from which legal contents can be unearthed than oral promises. Moreover, tacit agreements have recently been the object of new judicial developments that offer new glimpses on how international lawyers value the ‘written’ and the ‘non-written.’ Following these introductory remarks (1), and after sketching out the strict evidentiary regime to which the identification of tacit agreements has traditionally been subjected (2), the following paragraphs shed light on recent judicial developments pertaining to tacit conventionality (3). A few critical remarks on such judicial treatment of tacit conventionality are subsequently formulated (4). This paper ends with a few observations on the value of the ‘written’ and the ‘non-written’ in international legal argumentation (5).

2. *The traditional suspicion towards tacit conventionality and the need for a stringent evidentiary regime*

Despite the abovementioned generosity of international law towards the ‘non-written’, it should not come as a surprise that such source of legal normativity has always been frowned upon and approached by in-

mentaire article par article (Bruylant 2006) 55-56. See also Y Bouthillier, J-F Bonin, ‘Article 3’ in P Klein, O Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (Bruylant 2006) 103-105.

⁶ See arts 2 and 3 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁷ See however UNSG, ‘Bulletin on the Observance by United Nations Forces of International Humanitarian Law’ (6 August 1999) UN Doc ST/SGB/1999/13. On the idea that this Bulletin constitutes a unilateral act, see J d’Aspremont, J de Hemptinne, *Droit International Humanitaire* (Pedone 2012) ch 7.

⁸ See Aust (n 5) 9. F Capotorti, ‘Cours général de droit international public’ (1994-IV) 248-249, 343.



international lawyers with some veiled suspicion.⁹ Such wariness has commonly been informed by the impossibility to ascertain oral agreements by virtue of an explicit (written) manifestation of the *animus contrahendi* (legal intent) and the correlative necessity to ‘discover’ it elsewhere.¹⁰ Indeed, in the absence of any written container, the identification of such agreements as legal instruments and the determination of their contents inevitably constitute interpretive exercises bound to be carried out on a very instable soil. This is why, international lawyers have always been fearful that their interpretive activities in connection to tacit conventionality and, more specifically, their extraction of normativity from tacit agreement could look overly speculative, if not arbitrary.¹¹

⁹ As far back as 1889, in the case of the Island of Lamu, Arbitrator Baron Lambermont indicated that oral agreements were deemed odd as not reflecting international usages. See ‘Arbitral sentence of Baron Lambermont in the Island of Lamu dispute’ (1890) 22 *Revue de droit international et de législation comparée* 349-360. The Harvard Research, for instance, voiced strong misgivings towards oral agreements. See the 1935 codification of the law of treaty by the Harvard Law School, ‘Draft Convention on the Law of Treaties’ (1935) 29 *AJIL* supp 691 (‘Without the instrument, there is no evidence of an agreement, there is nothing to be interpreted or applied; in short there is no treaty apart from the instrument which records its stipulations’). This was already bemoaned by C Rousseau, *Principes généraux du droit international public*, vol 1 (Pedone 1944) 143. During the debates at the International Law Commission, several members voiced the support for the idea that there cannot be a binding agreement without an instrument. See ILC, ‘Summary Records of the Second Session’ (5 June – 29 July 1950) *YB ILC* 1950, vol 1, UN Doc A/CN.4/SER.A/1950, 64 ff. See also the remarks by P Reuter, *Introduction au Droit des Traités* (3rd edn, Presses Universitaires de France 1995) 27.

¹⁰ Aust (n 5) 9; Gautier (n 5) 85-88.

¹¹ It should be noted that similar misgivings have been witnessed with respect to *oral promises*, prompting scholars to seek some formal indicators elsewhere, like in the ‘publicity’ of the promise. See ICJ, *Nuclear Tests Case* (n 2) para 43: ‘An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.’ See also V Rodríguez Cedeño, ‘Second report on Unilateral Acts of States’ (14 April and 10 May 1999) UN Doc A/CN.4/500, para 55. On this question, see C Goodman, ‘Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law’ (2006) 25 *Australian YB Intl L* 58-59. It should be noted that the International Law Commission eventually decided not to elevate publicity in a promise-ascertainment criterion. See the recommendation n 1 of the ILC, ‘Report of the International Law Commission on the work of its fifty-fifth Session’ (5 May – 6 June and 7 July – 8 August 2003) UN Doc A/58/10 para 306. On that point, see E Suy, *Les actes juridiques unilatéraux en droit international public* (LGDJ 1962) 28 ff; Harvard Law School, Draft Convention on the

These suspicions – and fear – explain the omission of oral agreements from the enterprises of codification of the law of treaties. For instance, the 1928 Havana Convention on Treaties,¹² the codification undertaken by the Harvard Research in International Law in the 1930s¹³ and that undertaken by the International Law Commission¹⁴ in the 1960s have all excluded oral agreements from the ambit of the rules laid down therein.¹⁵ It is noteworthy, however, that such wariness never led international lawyers to completely rule out the possibility of generating legal normativity through tacit conventionality. Only a handful of international lawyers have categorically refused the possibility of tacit agreements.¹⁶ Even the commentary to the abovementioned Harvard Draft, while manifesting a clear scepticism as to the practice of oral agreements, did not deny the legal value of tacit conventionality.¹⁷ For its part, the International Law Commission made clear that, despite the exclusion of tacit agreements from the scope of its codification of the

Law of Treaties (n 9); See also J d'Aspremont, 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux' (2005) 109 *Revue Générale de Droit International Public* 163-189.

¹² Cited in Harvard Draft (n 9).

¹³ The comments of the Harvard Draft reads as follows: 'most writers on international law lay it down as an essential condition that the stipulations of a treaty must be recorded in writing, and with rare exceptions this has been the practice.' See the Harvard Draft (n 9) 689.

¹⁴ On the reasons why the ILC decided not to include oral agreements in the scope of application of its articles, see ILC, 'Report of the International Law Commission covering the work of its eleventh session' (20 April – 26 June 1959) UN Doc A/4169 (F) (A/14/9) ch II, 94-96 paras 8-20; ILC, 'Report of the International Law Commission on the work of its fifteenth session' (24 April – 29 June 1962) UN Doc A/5209 (F) (A/17/9) ch II, 178 paras 11-23.

¹⁵ Art 2(1) VCLT: 'For the purposes of the present Convention: (a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'

¹⁶ AD McNair, *The Law of Treaties* (Clarendon Press 1961) 2.

¹⁷ The commentary reads as follows: 'while a treaty, as the term is used in this Convention, must be in the form of an instrument, it is not intended to deny that oral agreements between States may not be as binding upon the parties as those recorded in writing, it is meant only that, for the reasons explained in the comment on Article 5, it is not deemed advisable to include such agreements in the category of treaties as the term is used in the Convention.' See the Harvard Draft (n 9) 689.



law of treaties, it 'ha[d] no intentions of denying the legal force of oral agreements being in conformity with international law.'¹⁸

The general acceptance of the possibility to generate legal normativity through tacit conventionality did however not do away with the abovementioned suspicions. While accepting the possibility of generating obligations through tacit agreements, international lawyers consciously made the 'discovery' of tacit conventionality more painstaking. It is not really that they subjected the ascertainment of such agreements to a stricter regime of law-identification. In fact, the ascertainment criterion of tacit agreements remains the same as the one used for the identification of treaties: the intent of the parties to anchor the meeting of their individual wills in the language of legal obligations provided by international law (ie the *animus contrahendi*). Yet, what was made more stringent by international lawyers in the case of tacit conventionality is the evidence of such *animus contrahendi*, the absence of written materials justifying a higher evidentiary threshold.¹⁹ This higher and stricter evidentiary regime of the *animus contrahendi* necessary for the ascertainment of tacit agreements was confirmed by the International Court of Justice in the context of maritime delimitations in its 2007 judgment in the case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*) where the Court, in a famous short-cut formula, contended that '[e]vidence of a tacit agreement must be compelling.'²⁰

It is true that the Court, while setting a high evidentiary regime of tacit conventionality in the case *Nicaragua v Honduras*, simultaneously remained rather cryptic as to the exact scope thereof, leaving room for a variety of interpretations. For instance, its 'compelling evidence' threshold for tacit conventional could be read as being restricted to

¹⁸ ILC, 'Report of the International Law Commission on the work of its fourteenth session' (24 April – 29 June 1962) YB ILC 1962, vol 2, UN Doc A/CN.4/SER.A/1962 V.I.23; 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (26 March – 24 May 1968 and 9 April – 22 May 1969) UN Doc A/CONF.39/11/Add.2 10.

¹⁹ See more recently, H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 2 (OUP 2013) 1223–1225; Q Xiaocheng, 'Oral International Agreement and China's Relevant Practice' (2005) 4 Chinese J Intl L 471–472.

²⁰ ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 735 para 253.



questions of ‘establishment of a permanent maritime boundary’, the latter being for the Court ‘a matter of grave importance.’²¹ Yet, such an interpretation is not self-evident and an interpretation allowing a much wider scope of application could be vindicated. None of the opinion appended to the judgment provides any inkling whatsoever. What is more, it can be contended that it is probably no accident that the Court remained so elliptical as to the scope of its ‘compelling evidence’ threshold, thereby preserving its room of manoeuvre for future cases and allowing itself to adjust, if need be, the threshold of evidence for tacit agreements on other matters. In any case, the 2014 judgment of the Court in the case concerning the maritime dispute between Peru and Chile – which is discussed below – did not dispel this equivocation. Against this backdrop, it seems of no avail to speculate about what the Court could possibly have had in mind in *Nicaragua v Honduras* regarding the scope of its high evidentiary threshold for tacit conventionality.

It is more important to stress that, irrespective of whether the high evidentiary regime of tacit conventionality set in *Nicaragua v Honduras* applies is restricted to questions of establishment of maritime boundary, one can hardly dispute that the Court’s imposition of a higher evidentiary threshold regarding the *animus contrabendi* in tacit conventionality was informed by the fact that, in want of a written instrument, reconstructing the intent of the parties to anchor their oral agreements into the international legal order is made dependent on less tangible indicators. Such a position epitomises the fact that, for international lawyers, it is only by requiring stronger evidences of the *animus contrabendi* that the finding of tacit agreements can prevent – or at least rein in – criticisms of arbitrariness, especially in adjudicatory processes. The possibility of adjusting this higher evidentiary regime for agreements on other matters does not put into question the rationale thereof, that is the need for stronger evidences when the *animus contrabendi* is impalpable.

It should be noted that the high evidentiary threshold imposed on the discovery of tacit conventionality – as the abovementioned requirement of ‘compelling’ evidence set by the Court – often calls for an incidental return to written manifestations of the *animus contrabendi*. Said differently, the stricter evidentiary regime imposed on the ascertainment of tacit agreements very regularly allows ‘the written’ to return to evi-

²¹ *ibid* para 253.



dence the ‘non-written.’ The *animus contrahendi* in tacit conventionality will often be demonstrated by the resort to written materials like exchanges of notes between the parties.²² Yet, it matters to realize that, in the traditional regime of tacit conventionality, such supporting written materials ought not to be legal materials properly so-called – that is they do not need to present any formal membership to the international legal order – to perform their evidentiary functions in relation to tacit conventionality. This is however where recent judicial practice has brought new insights to which the attention must now turn.

3. *Sophisticating the evidence of tacit conventionality: from ‘compelling’ evidence to legal ‘cementing’ of tacit agreements*

It is submitted here that the scope of application of the higher evidentiary threshold reserved to the ascertainment of tacit agreement did not remain in limbo but was further elucidated in a recent judgment of the International Court of Justice. While not indicating whether the high evidentiary regime set in *Nicaragua v Honduras* is meant to be restricted to maritime boundary matters, the Court clarified the scope of the strict evidentiary regime of tacit conventionality by excluding its application in cases where tacit conventionality is ascertained on the basis of a written instrument. It will be argued in the following paragraphs that, in doing so, the Court boosted the role of the ‘written’ when the latter presents some formal membership to the international legal order.

The decision that ought to draw our attention in this respect is the Court’s judgment of 27 January 2014 in the case concerning the maritime dispute between Peru and Chile.²³ The case did not boil down to one of these tradition (territorial or maritime) boundary disputes that

²² See eg *Territorial and Maritime Dispute Between Nicaragua and Honduras* (n 20) paras 252, 257.

²³ See *Case Concerning Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3. For a summary of the decision, see US Burney, ‘International Court of Justice Defines Maritime Boundary Between Peru and Chile’ (February 2014) ASIL Insights, vol 18, issue 3, <www.asil.org/insights/>. For a scholarly commentary, see MT Infante Caffi, ‘Peru v. Chile: The International Court of Justice Decides on the Status of the Maritime Boundary’ (2014) 13 Chinese J Intl L 741-762.

pits arguments based on *effectivés* against arguments based on titles.²⁴ It primarily revolved around a debate on the existence against the non-existence of a prior agreement on the maritime boundary between the two countries.²⁵ It is in this context, that the judgment came to offer new insights on the regime of tacit conventionality in international law. In fact, the positions of the parties requested the Court to appraise whether the respective maritime zones entitlements of Peru and Chile had been fully delimited by agreement – a position rejected by Peru. The Court found that the 1952 Santiago Declaration was of a legal nature²⁶ but, as far as its content is concerned, failed short to establish a maritime boundary between Chile and Peru. This is why the Court went on to gauge whether other instruments could enshrine such an agreement on a maritime boundary between the two countries.²⁷ In this respect, it reviewed the nature and contents of four specific agreements, namely the Complementary Convention to the 1952 Santiago Declaration, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries, the Agreement relating to a Special Maritime Frontier Zone as well as 1968-1969 arrangements pertaining to the construction of lighthouses.²⁸ The Court came to the conclusion that both the 1954 Special Maritime Frontier Zone Agreement²⁹ and – in a subsequent section of the judgment – the 1968-1969 arrangements pertaining to the construction of lighthouses³⁰ were legal

²⁴ On this point, see Infante Caffi (n 23) 755. See in general on effectivité vs titles, M Kohen, 'La relation titres/effectivités dans la jurisprudence récente de la Cour Internationale de Justice' in D Alland, V Chetail, O de Frouville, JE Viñuales (eds), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff 2014) 599-614.

²⁵ It must be acknowledged that the question of a pre-existing agreement establishing a land or maritime boundary is a recurrent one in the contentious business of the court. See cases such as *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303; *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38. For some critical remarks, see S Jiuyong, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9 *Chinese J Intl L* 277.

²⁶ *Maritime Dispute* (n 23) para 48.

²⁷ *ibid* para 70.

²⁸ *ibid* paras 31-99.

²⁹ *ibid* paras 90-92.

³⁰ *ibid* paras 96-99.



agreements that acknowledged the existence of a prior tacit agreement between Peru and Chile on their maritime boundary, thereby confirming the existence of such a maritime boundary between the two countries.³¹ As far as the 1954 Special Maritime Frontier Zone Agreement is concerned, the Court even ventured into some unusual linguistic grandiloquence by claiming that the legal binding 1954 Agreement ‘cements the tacit agreement.’³²

It is this possibility of ‘cementing’ tacit agreement through written legally binding agreements that brings about an important nuance to the stringent evidentiary regime of tacit conventionality that was recalled above. Such a judicial treatment of tacit conventionality warrants a few analytical observations. This is the object of the following section.

4. *The ancillary evidentiary virtues of legally binding written materials*

It is fair to say that, on the whole, the legal reasoning of the Court in the above-mentioned judgement denoted some unique – or regularly lacking³³ – argumentative rigor. Indeed, this judgement certainly stands out among international judicial decisions for its careful distinction between the criteria required to establish the existence of legal agreements and those used to determine the content of such agreements. In *Peru v Chile*, after observing it had been agreed that the 1952 Santiago Declaration is an international treaty, the Court highlighted that the question was no longer a question of law-identification but one of content-determination and that the Court’s subsequent task was to ‘ascertain whether it established a maritime boundary between the Parties.’³⁴ The Court thus proved very diligent in separating the ascertainment of the treaty and the determination of its content, thereby recalling that criteria to carry out the former are not necessarily the same as those relied

³¹ *ibid* paras 80-99.

³² *ibid* para 91.

³³ For an example of conflation between law-ascertainment and content-determination techniques, see *Whaling in the Antarctic (Australia v Japan, New Zealand Intervening)* (Judgment) [2014] ICJ Rep 226. See the remarks of J d’Aspremont, ‘The International Court of Justice, the Whales and the Blurring of the Lines between Sources and Interpretation’, 27(4) EJIL 1027-1041.

³⁴ *Maritime Dispute* (n 23) para 48.

on to achieve the latter. This is how the Court, after having answered the question of the legal nature of the 1952 Declaration, came to resort to the traditional content-determination techniques provided by the doctrine of interpretation as it is found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.³⁵ Deploying these traditional techniques of content-determination, the Court went on to find that the 1952 Declaration did not establish an agreement on a maritime boundary between the two countries.³⁶ This finding is what brought the Court to subsequently review the nature and content of the Complementary Convention to the 1952 Santiago Declaration, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries, the 1954 Agreement relating to a Special Maritime Frontier Zone as well as 1968-1969 arrangements pertaining to the construction of lighthouses with a view to verifying whether they did enshrine an agreement between the parties on their maritime boundary.³⁷

The Court's argumentative meticulousness and its careful distinction between law-identification and content-determination perpetuated itself in its review of these various instruments. Such rigour is what allows the observer to distil more clearly the Court's treatment of the evidentiary regime of tacit conventionality and grasp how the legal nature of written materials impacts their evidentiary virtues. It is especially when determining the content of the above-mentioned 1954 Agreement that the Court came to elucidate its high evidentiary test for the *animus contrahendi* of tacit conventionality. It must be noted that the Court barely discussed the legal nature of the 1954 Agreement which was not really contested by the parties. It limited itself to say that the Agreement became binding upon the parties once Chile ratified it, albeit belatedly.³⁸ Having presumed the 1954 Agreement as an instrument of a legal nature without much difficulty, the Court engaged in a content-determining exercise with a view to verify the possibly existence of a distinct agreement on the maritime boundary. This is when it went on to recall the requirement to provide 'compelling' evidence for tacit conventionality³⁹ as was set in *Nicaragua v Honduras* and found that the

³⁵ *ibid* 57.

³⁶ *ibid* para 70.

³⁷ *ibid* paras 31-99.

³⁸ *ibid* para 87.

³⁹ *ibid* para 91.



1954 Agreement evidenced the existence of an agreement on the maritime boundary between Peru and Chile. The foregoing means that the examination of the content of the 1954 Agreement is what allowed the Court to ascertain a tacit agreement on maritime boundary to which the 2007 high evidentiary regime was, as matter of principle, applicable. In doing so, the Court let the distinction between law-ascertainment and content-determination collapse temporarily. To the regret of most observers, however, the Court proved very laconic as to its modes of evidencing the *animus contrahendi* of the tacit agreement on the basis of the 1954 Agreement. Its judgment is indeed very terse as to how the tacit agreement is actually inferred from the 1954 Special Maritime Frontier Zone Agreement. The Court confined itself to finding an express acknowledgment of an earlier tacit agreement, claiming that it had before it ‘an agreement which makes clear that the maritime boundary along a parallel already existed between the Parties.’⁴⁰ The rare indications given by the Court as to its modes of evidencing of the tacit agreement hinted at the ‘terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1 read with the preambular paragraph’⁴¹ and the 1968-1969 arrangements pertaining to the construction of lighthouses.⁴²

It is noteworthy that the laconism of the Court regarding its finding of evidences of an *animus contrahendi* regarding a tacit agreement on maritime boundary strikingly contrasts with the pains the Court took to determine the very content of such a tacit agreement in the subsequent part of the judgement.⁴³ It is certainly not the place to elaborate on the modes of determination of the content of the tacit agreement which the Court discussed extensively. Nor is it relevant to dwell on the difference between the techniques of ascertainment of agreement – which the Court does not spell out in its judgment – and the techniques of content-determination – which the Court generously deploys in its judgment. For the sake of the argument made here, it matters more to highlight that the Court meticulously distinguish between the establishment of an *animus contrahendi* for the sake of the ascertainment of a tacit

⁴⁰ *ibid* para 91.

⁴¹ *ibid* para 90.

⁴² *ibid* paras 96-99.

⁴³ *ibid* paras 103-151.

agreement and the determination of the content of this agreement, thereby confirming that the techniques to ascertain a tacit agreement differ from that meant to determine its content.

This contrast did not go unnoticed. It is no surprise that the concision of the judgment on the ascertainment of the *animus contrahendi* supporting the tacit agreement spawned some unease among judges, some of which felt that the Court's refuge in the 'cementing' effect of the text of the 1954 Agreement did not meet the 'compelling' evidentiary threshold set by the Court in its earlier case-law.⁴⁴ That criticism seems warranted. Yet, it is argued here that, more than the departure from the traditional requirement of compelling evidence itself, it is the justification for such qualification that requires some attention. In fact, it is actually difficult not to read the laconism of the Court on the high evidentiary value of the 1954 Agreement in terms of tacit conventionality in the light of the legal nature of the latter. In other words, and even if the perception of a causal relation between the legal nature of the 1954 Agreement and the ease with which it is used to evidence a tacit agreement is bound to be somewhat speculative, it is hard for the observer not to relate the alleged 'clarity' of the acknowledgement of an earlier tacit agreement on the maritime boundary to the finding that the 1954 Agreement has the nature of a treaty. It is as if the legal character of the written material which the Court could rely on – ie the 1954 Agreement – allows it to get away with a unsubstantiated claim that the text of the agreement was sufficiently clear to evidence the existence of an earlier tacit agreement on the maritime boundary. Even looking into the practice surrounding the adoption of this written materials no longer seems necessary.⁴⁵

The fact that the 'written' helps extract legal normativity from the 'non-written' is not idiosyncratic. As was already indicated above, written materials have always provided evidentiary support for the 'non-

⁴⁴ See *ibid* (Separate opinion of Judge Owada) < <http://www.icj-cij.org/files/case-related/137/137-20140127-JUD-01-03-EN.pdf> > paras 12-21; (Dissenting opinion of Judge Sebutinde) < <http://www.icj-cij.org/files/case-related/137/137-20140127-JUD-01-08-EN.pdf> > paras 4-10. *Contra*: *ibid* (Joint dissenting opinion of Judges Xue, Gaja, Bhandari and Judge ad hoc Orrego Vicuna) < <http://www.icj-cij.org/files/case-related/137/137-20140127-JUD-01-05-EN.pdf> > para 22.

⁴⁵ This triggered the disagreement of Judge Sebutinde. See *ibid* (Dissenting opinion of Judge Sebutinde) para 8.



written.’ What is remarkable in the judgement of the Court in *Peru v Chile* is that the evidentiary virtues of the ‘written’ seem to fluctuate according to its legal nature. Whilst the non-written character of an agreement had traditionally justified ‘compelling’ evidentiary support of the *animus contrahendi* on the basis of which such a tacit agreement can be ascertained (at least with respect to maritime boundary matters), the Court, in *Peru v Chile*, indicated that the requirement of a ‘compelling’ evidence of *animus contrahendi* can be waived if the written materials drawn on to evidence tacit conventionality are of a legal nature. In that sense, the Court, even if it did not indicate whether the ‘compelling evidence’ test was limited to maritime boundary matters, clarified its scope of application by introducing an important qualification to the test and excluding its application where the *animus contrahendi* is extracted from an instrument of a legal nature.

It should be made clear that, as a matter of principle, such a waiver does not necessarily boil down to a lowering the whole evidentiary regime of tacit conventionality *in concreto*. Indeed, establishing the legal nature of the written materials on the basis of which tacit conventionality is evidenced nonetheless remains subject to strict ascertainment standards, namely the establishment of an intent by the parties to anchor such supporting written materials in the international legal order. To benefit from a waiver of the ‘compelling’ evidence requirement and from a less stringent evidentiary regime, one must still prove the *animus contrahendi* pertaining to the written materials from which the tacit agreement can be extracted without compelling evidence. In *Peru v Chile*, the Court did not discuss the legal nature of the 1954 Agreement as the Parties, despite the delayed ratification of Chile, had not contested its treaty nature. Yet, ascertaining the written instrument from which tacit conventionality is inferred as a legal instrument may not always be so easy – or approached with so much ease and self-confidence by the law-applying authority. In that sense, irrespective of the waiver of the ‘compelling evidence test’ for evidences of tacit conventionality drawn from legal instruments, evidencing tacit conventionality inextricably remains rather arduous. In the end, this is not surprising, as a different conclusion would be at odds with the common suspicion with which international lawyers approach tacit conventionality.

5. *Concluding remarks: the uninterrupted reign of the 'written'*

In the light of the case law-examined in the previous sections, the International Court of Justice ought to be commended for its rigorous distinction between law-ascertainment and content-determination processes. Such rigorous sequencing allows one to distil the Court's subtle approach to tacit conventionality. Indeed, its reasoning in the case *Peru v Chile* demonstrates the continuous care with which international lawyers take the generation of normativity through unwritten channels. It also shows that, as far as tacit conventionality is concerned, content-determination may come to precede law-ascertainment when law-ascertainment is carried out on the basis of a written instrument, that is when tacit conventionality is inferred from a written instrument whose content must preliminarily be determined.

The lessons drawn from the recent judicial practice that has been examined in the previous section are however not restricted to the generation of normativity through unwritten channel. Insights can be extrapolated beyond the narrow framework of the debate on tacit conventionality in international law. In fact, the discussion above buttresses the idea that the evidentiary weight which international lawyers are ready to attribute to the materials they draw on in their legal reasoning vary according to two fundamental parameters: the written or unwritten character of such materials on the one hand and their legal or non-legal nature on the other hand. In this respect, it seems that, for international lawyers, a material which is both written and legal will present the highest evidentiary value. Conversely, a material that is both unwritten and non-legal – like unrecorded practice – will present almost no evidentiary value and will itself be in need of support by other – legal or non-legal – written materials. In that sense, recent judicial practice in respect of tacit conventionality confirms – rather than contradicts – the privileged position of the 'written' in international legal argumentation and indicates that, when combined, the 'legal' and the 'written' provide the most solid soil on which legal argumentation can be constructed. For all the other materials that do not present such twofold nobility, there will always be room for a wide variety of different evidentiary values and thus argumentative disagreement.



L'accord tacite ou l'univers parallèle du droit des traités

*Giovanni Distefano**

1. *Prologue*

La figure de l'accord tacite nous plonge dans l'univers parallèle du droit des traités, dominé par le non-dit, par la volonté inexprimée par des mots mais non moins tangible et effective. Une dimension qui, à l'instar de l'antimatière dans l'univers, remplit dans les relations internationales les (parfois) larges interstices laissés béants par la volonté exprimée des États, aussi bien oralement que par écrit. L'accord tacite déploie ses effets non seulement dans son domaine naturel – et contigu – du droit des traités (écrits) mais également dans celui fort agité des conflits territoriaux (terrestres et maritimes). Ceci ne doit pas nous étonner outre-mesure puisque la variété des formes d'engagements internationaux est assurément une des spécificités qui font toute la beauté de notre science. Le juriste se trouve ainsi confronté à une palette bigarrée de manifestations de volonté des États que l'on ne peut parfois que très difficilement étendre sur le lit de Procuste de l'internationaliste.¹

2. *Notion: la polyphonie de la volonté des États*

La doctrine ainsi que la jurisprudence internationale ont longuement débattu sur la question des formes qu'un accord international doit assumer pour qu'il puisse déployer les effets juridiques qui sont les siens dans l'ordre international. La Commission du Droit International (CDI), lors de ses travaux sur la codification du droit des traités, aboutissant à la future Convention de Vienne sur le droit des traités de 1969

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¹ P Reuter, *Introduction au droit des traités* (2e éd., PUF 1985) 20 para 28.



(CVDT), dut précisément prendre position à cet égard. Elle réserva la dénomination de traité aux seuls ‘accords internationaux en forme écrite’,² tout en admettant cependant que les ‘accords verbaux ou tacites’ possédaient une valeur juridique et étaient ‘régis par des règles constituant le droit des traités’,³ mais manifestement pas les mêmes que celles reflétées dans la CVDT. Partant, même des traités non écrits, comme les accords tacites, sont censés créer des droits et obligations à l’encontre des sujets de droit international,⁴ car, nonobstant les ‘vertus probatoires de l’écrit’,⁵ ‘aucune loi ne prescrit une forme spéciale pour les conventions entre Etats indépendants.’⁶ En effet, ce qui compte, au-delà⁷ (et en dépit) des formes par lesquelles s’exprime la volonté des Etats, c’est que les Etats aient voulu s’engager en droit (international) en créant des droits et des obligations. Le fondement du caractère obligatoire des accords tacites réside à l’instar de tout autre engagement, quelque soit sa forme,⁸ sur la *bona fides*,⁹ la confiance dans les relations internationales entre Etats.

² CDI, ‘Annuaire de la Commission du Droit International’ (1966) NU Doc A/CN.4/Ser. A/1966/Add. 1 (Commentaire à l’art 2) 205. Voir aussi Convention sur le Droit des Traités (signé à La Havane le 20 février 1928) art 2: ‘the written form is an essential condition of treaties’; ou encore Harvard Research in International Law, ‘Draft Convention on Law of Treaties’ (1935) 29 AJIL supp 690, art 5. De même, dans la doctrine: S Romano, *Corso di diritto internazionale* (3a edn, CEDAM 1933) 256; PA Sereni, *Diritto internazionale* (Giuffrè 1963), vol 3, 1383.

³ Annuaire CDI (n 2) 207.

⁴ ‘Un accordo fra Stati, in lato senso, può costituirsi con efficacia giuridicamente obbligatoria qualunque sia il modo di manifestazione della loro volontà’, D Anzilotti, *Corso di diritto internazionale* (4a edn, CEDAM 1964) 311. De même: M Decleva, *Gli accordi taciti internazionali* (CEDAM 1957) 5-21.

⁵ Ph Gautier, ‘Article 2 – Convention de 1969’ in O Corten and P Klein (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire Article par Article* (Bruylant 2006) 53. De même: B Crandall, *Treaties. Their Making and Enforcement* (2nd edn, Washington 1916) 5 para 6; WE Hall, *International Law* (8th edn, Clarendon Press 1924) 383 para 109.

⁶ *Affaire de l’Ile de Lamu (Allemagne/Grande-Bretagne)*, sentence rendue en avril 1889, *Pasicrisie internationale* (Stämpfli 1902) 337; *Essais nucléaires (Australie c France)* (arrêt) [1974] CIJ Rec 267-268 para 45. Presque *verbatim*: *Affaire du Temple de Préah Vibéar (Cambodge c Thaïlande)* (arrêt- exceptions préliminaires) [1961] CIJ Rec 31.

⁷ Hall (n 5).

⁸ *Essais nucléaires* (n 6) 268 para 46.

⁹ *Statut juridique du Groenland Oriental* (Pièces de la procédure écrite) [1932] CPJI, Série C 63, 856.



Vattel avait correctement appréhendé¹⁰ la question des modalités de l'expression du consentement des Etats comme source de droits et obligations conventionnels en les termes suivants:

'On peut engager la foi tacitement, aussi bien qu'expressément: il suffit qu'elle soit donnée, pour devenir obligatoire; la manière n'y peut mettre aucune différence, la foi *tacite* est fondée sur un consentement tacite; et le consentement tacite est celui qui se déduit, par une juste conséquence, des démarches de quelqu'un.'¹¹

En conséquence, la volonté des Etats, visant à produire des effets de droit par leur rencontre, doit s'extérioriser de manière à ce qu'elle puisse être appréhendée et prouvée. La parole – qu'elle soit consignée dans un texte écrit ou exprimée oralement – n'est que l'un des moyens de cette extériorisation qui peut dès lors prendre d'autres formes tout aussi contraignantes et efficaces à cet effet; paroles, signes et comportements concluants des Etats constituent donc autant de véhicules de transmission de la volonté des Etats reconnus comme tels par le droit des gens. Dans son sillage, De Martens, établit un tryptique de la volonté normatrice en droit international:

'La base de ces obligations positives est donc la volonté des peuples. Cette volonté peut être: 1° *expressément* déclarée par des paroles ou par des signes substitués aux paroles [donc traités écrits ou oraux]; 2° *tacitement*, par des actes qui, sans être substitués aux paroles [exprimées, on le répète, par écrit ou oralement], suffisent pour faire preuve d'un consentement obligatoire; 3° ou *présumée*, par l'uniformité des actes qui ont eu lieu jusqu'ici dans des cas semblables. De là une triple source de droit des gens positif: les *conventions expresses*, les *conventions tacites*, l'*observation* ou l'*usage*.'¹²

¹⁰ Déjà auparavant (Grotius, *Le droit de la guerre et de la paix* (Amsterdam 1625), livre III, ch XXIV, 832 para 1) avait nettement affirmé que 'le consentement, de quelque manière qu'il soit indiqué et accepté, a la vertu de transférer un droit. Or, il y a d'autres signes de consentement que les paroles et l'écriture ... Quelques-uns sont naturellement renfermés dans l'acte [c'est-à-dire les comportements concluants].'

¹¹ E de Vattel, *Le droit des gens ou Principes de la loi naturelle* (Londres 1758), livre II, ch XV, 443 para 234.

¹² GF De Martens, *Précis du droit des gens moderne de l'Europe*, vol 1 (2e éd., Guillaumin & Cie 1864) 154 para 46. Le juriste russe y ajouta ainsi la coutume, conçue, dans la mouvance grotienne et vattélienne comme un accord tacite. De même: F von Liszt, *Le*

Le *negotium*, à savoir le ‘accord of will’,¹³ l’emporte sur toute autre considération de forme,¹⁴ puisque c’est lui qui cristallise la rencontre de volontés à l’origine des droits et obligations conventionnels. C’est seulement donc dans le cas de figure spécifique d’un traité écrit que l’*instrumentum*, à savoir le texte écrit¹⁵ dans lequel il y est ‘consigné’ (Article 2(1)(a) CVDT), devient quintessentiel au *negotium* dans la mesure où il est le moyen de transmission de la volonté des Etats.¹⁶ Dans le cas de l’accord tacite, des pièces écrites voire des témoignages oraux peuvent prouver (*evidence*) le *negotium* qui découle des comportements concluants des Etats; dans le cas des traités écrits le *negotium* s’incarne dans l’*instrumentum*; dans le cas du traité oral, le *negotium* est exprimé verbalement et peut être enregistré dans un *instrumentum* voire rapporté dans un texte (d’habitude non signé), mais qui n’est pas, contrairement au traité écrit, consubstantiel à celui-ci.

Or, tout acte juridique conventionnel, écrit ou oral, explicite ou tacite, réel ou présumé, doit posséder, même dans un système juridique aussi peu formaliste¹⁷ que celui international, une certaine *forme* aussi rudimentaire soit-elle susceptible de véhiculer l’‘accord des volontés’.¹⁸ Or, à ce sujet, la

droit international. Exposé systématique (Pedone 1913) 176 para 20.II.2; G Balladore Pallieri, *Diritto internazionale pubblico* (8a edn, Giuffrè 1962) 285; P Fauchille, *Traité de droit international public* vol 1 (8e éd., Rousseau 1922) par 818(1); J De Louter, *Droit international public positif*, vol 1 (Londres 1920) 474.

¹³ H Kelsen, *Principles of International Law* (Rinehart & Company 1952) 317.

¹⁴ Von Liszt (n 12) 177 para 20.II.4. De même: L Oppenheim, *International Law, A Treatise*, vol 2 (2nd edn, Longman 1912) 550 para 507; CD Bluntschli, *Le droit international codifié* (Guillaumin 1870) art 419; Fauchille (n 12).

¹⁵ Comme il a été adroitement observé: le texte d’un traité écrit est donc un ‘instrument constatant un accord’ conclu entre Etats (ou autres sujets de DIP), Gautier (n 5) 54.

¹⁶ La CIJ se penche sur les liens intimes et uniques entre texte d’un traité écrit (*instrumentum*) et la volonté concordante des Parties (*negotium*) dans l’*Affaire de la Délimitation Maritime et des Questions Territoriales entre Qatar et Bahreïn (Qatar c Bahreïn)* (arrêt - compétence et recevabilité) [1994] CIJ Rec 121 para 25: ‘[Le procès – verbal d’une négociation] ne se borne pas à relater des discussions et à résumer des points d’accord et de désaccord. Il énumère les engagements auxquels les Parties ont consenti. Il crée ainsi pour les Parties des droits et des obligations en droit international. Il constitue un accord international’ (italiques ajoutées).’

¹⁷ Anzilotti (n 4) 310; Sereni (n 2) 1384.

¹⁸ *Affaire de l’Ile de Lamu* (n 6) 337.



'pratique internationale ... est partagée entre deux nécessités contradictoires: celle de faire respecter la bonne foi et la sécurité juridique et ainsi de rester fidèle au caractère général du droit international, qui est d'être aussi peu formaliste que possible, et celle d'entourer les engagements conventionnels d'un minimum de certitude, sinon de solennité.'¹⁹

A cet effet, il a été donc justement observé que 'tout traité a une 'forme' c'est-à-dire se traduit par des signes sensibles qui permettent de l'appréhender.'²⁰ Comme nous le verrons plus loin, ces 'signes'²¹ peuvent être à tour de rôle: des paroles (pour les traités écrits et les accords oraux), des symboles (comme des drapeaux²² ou encore 'en faisant battre la chamade'²³) ou encore des faits et comportements concluants (pour les accords tacites précisément).²⁴ Dans ce dernier cas de figure, partant, un accord tacite²⁵ peut bel bien résulter de comportements concluants des Etats,²⁶ comme la Cour internationale de justice (CIJ) l'a clairement établi, bien avant l'affaire de la délimitation entre le Pérou et le Chili, dans la fameuse affaire du *Temple de Préah Vibéar*: 'Les deux parties ont par leur conduite reconnu la ligne et, par là même, elles sont effectivement convenues de la considérer comme étant la frontière.'²⁷

Or, à l'instar de la preuve de l'*opinio iuris* dans l'établissement de la règle coutumière internationale, ces comportements peuvent se concrétiser

¹⁹ Reuter (n 1) 34 para 67.

²⁰ P Reuter, 'Traité et transactions. Réflexions sur l'identification de certains engagements conventionnels' in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, vol 1 (Giuffrè 1987) 402.

²¹ Kelsen (n 13) 317. De même: Bluntschli (n 14) art 422; G Grafton Wilson, *Handbook of International Law* (3rd edn, St Paul 1939) 204.

²² Comme par exemple: 'the exhibition of white flags by both of two hostile armies establishes a truce' lors d'un conflit armé (Hall (n 7) 384). De même: L Oppenheim (n 14), 551 para 507.

²³ De Martens (n 12) 190 para 65.

²⁴ P Fiore, *Il diritto internazionale codificato* (4a edn, UTET 1909) 319 art 728; Deleva (n 4) 22-74.

²⁵ 'Tacit declaration of will', *Customs House (State Succession) Case*, German Reichsgericht (12 May 1922) 1 ILR, case n. 41 69.

²⁶ R Monaco, C Curti Gialdino, *Manuale di diritto internazionale pubblico* (3a edn, UTET 2009) 136.

²⁷ *Affaire du Temple de Préah Vibéar (Cambodge c Thaïlande)* (arrêt) [1962] CIJ Rec 33.

tiser non seulement dans la sphère des relations internationales²⁸ mais également dans l'ordre interne des Etats concernés.²⁹ Ces actes internes, adoptés par l'Etat pour donner suite à l'accord tacite (international), peuvent donc être configurés comme des faits concluants prouvant dès lors son existence. C'est ainsi que peut être lue l'affirmation de la Cour Permanente de Justice Internationale:

'L'accord de volontés, ainsi traduit par le manifeste [de la Royale Chambre des Comptes de Sardaigne] du 9 septembre 1829, confère à la délimitation de la zone de Saint-Gingolph un caractère conventionnel que doit respecter la France, comme ayant succédé à la Sardaigne dans la souveraineté sur ledit territoire.'³⁰

3. *Les faux-amis et les notions voisines de l'accord tacite*³¹

3.1. *Les traités oraux ou par signes*

Le droit international admet la catégorie des traités oraux, c'est-à-dire d'accords dont le texte est exprimé et agréé de vive voix par des plénipotentiaires étatiques; la CVDT elle-même les mentionne pour les exclure de son champ d'application. La doctrine³² est unanime à

²⁸ Fiore (n 24) 373, art 914.

²⁹ R Phillimore, *Commentaries upon International Law*, vol I (Part I) (3rd edn, Butterworths 1879) ch II, 54 para 55.

³⁰ *Affaire des Zones Franches de la Haute Savoie et du Pays de Gex (France v Suisse)* (arrêt) [1932] CPJI Série A/B 145.

³¹ 'Chacune de ces constructions intellectuelles est plus ou moins bien adaptée aux circonstances d'une affaire déterminée; les agents et les conseils le perçoivent bien et les tribunaux internationaux encore davantage. C'est sans doute ce qui peut expliquer que dans certains cas on se place davantage sur le plan des sources, invoquant soit une coutume locale, soit un accord tacite, soit même la valeur d'un acte unilatéral, dans d'autres sur celui de la prescription ou de la consolidation du titre, dans d'autres encore sur celui de l'*estoppel* ou de l'*acquiescement*', Reuter (n 1) 48 para 66.

³² De Martens (n 12) vol 1, 189 para 65; AF Frangulis, *Théorie et pratique des traités internationaux* (Paris 1934) 34; Reuter (n 1) 25 para 42; Monaco, Curti Gialdino (n 26) 136 (selon lesquels les principes généraux codifiés par la CVDT pourraient s'appliquer par analogie aux accords oraux); R Jennings, A Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992) 1201 paras 582, 1207, 585; A Mc Nair, *The Law of Treaties* (Clarendon Press 1961) 7-8;



l'unisson d'une pratique étatique et jurisprudentielle³³ – surtout ancienne³⁴ – convergente.³⁵ Les accords verbaux, néanmoins, ne doivent guère être confondus avec les accords tacites dans la mesure où dans les premiers la volonté est exprimée verbalement alors que dans les seconds elle exprimée de manière tacite, c'est-à-dire implicitement déduite des comportements effectifs ou 'matériels'³⁶ des Etats.³⁷

Toutefois, que l'accord soit donc oral ou tacite, l'effectivité de l'expression du consentement à être lié par le traité (Article 11 CVDT) doit être prouvée. En effet, comme il a été judicieusement observé:

'Mere suppositions and conjectures raise, at the utmost, a *probability*, but can constitute no *certain* fact between nations. The *consensus fictus* of Civil Law is unknown to International Jurisprudence.'³⁸

Car la présomption d'un consentement intervient précisément là où il n'y a pas la preuve qu'il ait été réellement exprimé;³⁹ la preuve de l'engagement conventionnel constitue dès lors une question fondamentale, voire existentielle,⁴⁰ 'un Etat ne [pouvant], dans ses rapports conventionnels, être lié sans son consentement.'⁴¹ Les deux catégories

³³ *Affaire de l'Ile de Lamu* (n 6) 337-338.

³⁴ La doctrine fait remonter la trace la plus ancienne d'un traité oral à l'accord d'alliance militaire conclu à Pilau le 10 juin 1697 entre Pierre le Grand (Russie) et Frédéric III (grand électeur de Brandebourg): F de Martens, *Recueil des Traités et Conventions conclus par la Russie avec les Puissances Etrangères* (St Pétersbourg 1885) tome V, n 181, 39-52.

³⁵ Un tribunal états-unien est même parvenu à configurer un accord oral dans une 'téléphone call' entre les garde-côtes de ce pays et le gouvernement hondurien, suffisant donc pour établir un 'informal agreement', *U.S. v Gonzalez* [1986] 80 AJIL 653.

³⁶ PM Dupuy, *Droit international public* (5e edn, Dalloz 2000) 246 para 238.

³⁷ *Contra*: F Mosconi, *La formazione dei trattati* (Giuffrè 1986) 24, 32-36.

³⁸ R Phillimore, *Commentaries upon International Law*, vol. 2 (3rd edn, Butterworths 1879) 78 para 50.

³⁹ Dans un autre domaine du DIP, celui de la responsabilité de l'Etat pour fait internationalement illicite, on observe que le consentement 'doit être effectivement exprimé par l'Etat et ne peut être simplement présumé au motif que l'Etat aurait donné son consentement si on le lui avait demandé', CDI, 'Annuaire de la Commission de Droit International' (2001) A/CN.4/SER.A/2001/Add.1 (Part 2) (commentaire à l'art 20) 77.

⁴⁰ M Giuliano, T Scovazzi, T Treves, *Diritto internazionale*, vol 1 (2 edn, Giuffrè 1983) 359.

⁴¹ *Réserves à la Convention pour la prévention et la répression du crime de génocide* (avis consultatif) [1951] CIJ Rec 21.

d'accords internationaux partagent en effet la même difficulté – la preuve – et de ce fait mettent mal à l'aise une partie de la doctrine davantage soucieuse de la forme que du fond.

En règle générale, la preuve d'un accord oral peut être recherchée dans les minutes ou encore dans un procès-verbal,⁴² voire même dans des témoignages.⁴³ Dans tous ces cas, ces textes⁴⁴ – voire des enregistrements du texte exprimé oralement par le représentant de l'Etat – ne constituent que la preuve documentaire d'un accord oral, à la différence des traités écrits où le texte est consubstantiel à la source des droits et obligations conventionnels. En revanche, pour les accords tacites, une multitude hétéroclite de preuves peuvent être alléguées à cette fin pourvu qu'elles révèlent son effective existence, un peu à l'instar de la preuve de la règle coutumière,⁴⁵ où la question de son existence est inextricablement liée à celle de son contenu. En effet, la constatation d'un accord tacite se rapproche sensiblement de l'opération intellectuelle visant l'établissement d'une règle coutumière, car prouver un accord tacite revient toujours à en déterminer par la même occasion le contenu.⁴⁶ Pour les accords oraux, au contraire, le contenu de l'accord (*negotium*) est exprimé – quoique verbalement – et seul la preuve de son existence doit être apportée. Il en va de même pour les traités conclus par des

⁴² Il ne faut pas du tout confondre ce cas de figure avec l'exemple de procès-verbal dont la CIJ avait affirmé le caractère de traité (écrit) dans l'affaire *Qatar c Bahreïn* (n 16). Ici le *negotium* s'incarne dans le texte écrit qui en est dès lors *l'instrumentum*, alors que toute preuve écrite d'un accord oral n'est qu'un parmi les différents éléments probatoires. Dans le premier cas, donc, le texte du traité s'exprime et est 'consigné' (art 2(1)(a) CVDT) dans un texte écrit qui cristallise ainsi sa conclusion, cependant que dans le second le texte n'incarne pas le consentement des Parties, mais se borne à en fournir l'existence. Il est donc aisé de souscrire à l'affirmation (Gautier (n 5) 56) selon laquelle la 'frontière est mince entre un accord écrit et un accord verbal' dont la preuve serait écrite. Voir aussi (n 15).

⁴³ 'The fact of the agreement might be established by witnesses if any are available', JW Garner, 'The International binding force of unilateral oral declarations' (1933) 27 *AJIL* 497.

⁴⁴ Les Parties s'empressement en effet à rédiger ultérieurement un écrit qui en reproduit la substance (aide-mémoire, mémorandum, etc.) qui n'est généralement pas signé.

⁴⁵ G Sperduti, 'Prescrizione, consuetudine e acquiescenza in diritto internazionale' (1961) 44 *RDI* 3-15.

⁴⁶ Cette difficulté ultérieure a apparue avec toute son acuité dans l'affaire Pérou/Chili (*infra* 3.2) précisément là où il était question de déterminer l'étendue spatiale de l'accord tacite visant la délimitation des espaces maritimes entre ces deux Etats: *Dif-férend Maritime (Pérou c Chili)* (arrêt) [2014] CIJ Rec 3.



signes, car dans ce dernier cas le consentement est exprimé – à l'instar des traités verbaux – 'tout aussi *expressément* qu'on pourrait le faire de vive voix.'⁴⁷ Les deux catégories de traités (oraux et par signes) se distinguent ainsi des accords tacites dans la mesure où dans ce dernier cas, le consentement se manifeste par des comportements effectifs et réellement concrétisés par les États. Enfin, si on voulait rapprocher les accords tacites d'une part et les accords par 'signes' d'autre part on pourrait avancer que le *silence*, à la charnière entre les deux, s'exprime par la gestualité *lato sensu*.

3.2. Promesse unilatérale

La doctrine a, dans le sillage notamment des affaires *Lamu*⁴⁸ et *Groenland oriental*,⁴⁹ flirté parfois avec la notion de la promesse unilatérale (orale ou écrite) pour la rapprocher des accords tacites. Or, s'il est vrai que le 'caractère obligatoire d'un engagement international', qu'il soit donc unilatéral ou conventionnel, repose sur la 'bonne foi',⁵⁰ il n'en est pas moins vrai qu'au moins une différence fondamentale entre les deux catégories d'engagements s'érige irrémédiablement entre elles.⁵¹ La CIJ saisit l'occasion en 1974 pour conceptualiser nettement l'acte unilatéral, tâche amorcée en 1933 par sa devancière dans l'affaire du Groenland oriental:

'aucune contrepartie n'est nécessaire pour que la déclaration prenne effet, *non plus qu'une acceptation ultérieure ni même une réplique ou une réaction d'autres États, car cela serait incompatible avec la nature strictement unilatérale de l'acte juridique par lequel l'État s'est prononcé.*'⁵²

⁴⁷ De Vattel (n 11) 444. Contrairement à Grotius (n 10) Livre III, ch XXIV, 832 para 1.

⁴⁸ *Affaire de l'Île de Lamu* (n 6) 337 ('pour transformer cette intention en une promesse unilatérale valant convention, l'accord des volontés...').

⁴⁹ Réplique de M De Visscher (Danemark) dans l'affaire *Statut juridique du Groenland Oriental* (Séances Publiques et Plaidoiries) [1932] CPJI, Série C 66, 3455.

⁵⁰ *Essais nucléaires* (n 6) 268 para 46.

⁵¹ S Carbone, *Promessa e affidamento nel diritto internazionale* (Giuffrè 1967) 73-80. De même: Fiore (n 24) 373, arts 914-915; A McNair, *The Law of Treaties: British Practice and Opinions* (Columbia UP 1938) 47; Balladore Pallieri (n 12) 285.

⁵² La Cour semble configurer la déclaration du MAE norvégien, M Ihlen, comme une promesse unilatérale, *Statut juridique du Groenland Oriental* (arrêt) [1933] CPJI,

La promesse faite par un Etat a donc créé des attentes légitimes auprès des autres Etats de sorte que son auteur est ‘désormais tenu en droit de suivre une ligne conforme à sa déclaration’,⁵³ la bonne foi exigeant précisément ceci de lui.

En conséquence, à moins de vouloir encadrer à tout prix la promesse unilatérale dans un accord constitué par deux actes unilatéraux diachroniques – comme le prétendit le juge Anzilotti dans l’affaire du Groenland oriental – ou encore d’y voir un acte juridique complexe comme semble l’envisager Reuter,⁵⁴ il importe de maintenir distinctes ces deux figures juridiques d’expression du consentement en soulignant le caractère authentiquement unilatéral de la promesse.

3.3. *Comportements non volitifs des Etats:*⁵⁵ *l’acquiescement*

L’acquiescement⁵⁶ doit figurer d’entrée de jeu dans toute liste destinée à énumérer les faux amis de l’accord tacite. Si par acquiescement on

‘entend le silence qui a été observé à propos d’une revendication juridique par un autre sujet de droit et qui a pour effet que, selon le principe de la bonne foi, cette attitude passive ne peut être interprétée que comme constituant une reconnaissance tacite’,⁵⁷

Série A/B 71. *Contra*: l’opinion dissidente du juge Anzilotti qui y voit un accord en ‘forme verbale’ (ibid 91). Il convient de souligner cependant que le Danemark avait judicieusement oscillé entre les deux catégories d’engagement lorsque il avait évoqué un accord de volontés ‘manifesté par la promesse expresse l’une des Parties jointe à l’acceptation de l’autre’ (Réplique de M De Visscher (Danemark) dans l’affaire *Statut juridique du Groenland Oriental* [1932] CPJI, Série C 67, 3454).

⁵³ *Essais nucléaires* (n 6) 267 para 43 (italiques ajoutées).

⁵⁴ Reuter (n 1) 100-101 para 174.

⁵⁵ A cet égard, voir l’article précurseur de: Ph Cahier, ‘Le comportement des Etats comme source de droits et d’obligations’ in *Recueil de droit international en hommage à Paul Guggenheim* (Georg 1968), 237-265.

⁵⁶ L’acquiescement, qui présuppose la connaissance, est partant le ‘silence circonstancié’ (‘qualifiziertes Stillschweigen’), à savoir le silence du sujet qui connaît à la fois la réalité factuelle et le régime juridique s’y rapportant mais qui ne réagit pas alors que ‘loqui debuisse ac potuisset’ (*Affaire du Temple de Préah Vibéar* (n 27)). Il s’agit donc d’un silence ‘étourdissant’ par le message qu’il transmet aux autres sujets, en raison des circonstances particulières – appelant une réponse – dans lesquelles il se manifeste (*Georgia v South Carolina* [1990] 91 ILR 449).

⁵⁷ *Canton du Valais c Canton du Tessin* [1981] 37 Annuaire Suisse de Droit International 233.



alors l'accord tacite lui ressemble beaucoup presque à s'y méprendre. Toutefois, même si les conséquences pratiques d'une telle distinction sont minimales, voire peut-être inexistantes,⁵⁸ il n'empêche que les deux concepts⁵⁹ trahissent deux visions diamétralement différentes en ce qui concerne la création de droits et d'obligations: l'acquiescement est une inaction face à une revendication d'un autre sujet de droit, alors que l'accord tacite est une 'rencontre de volontés' établie par des comportements concluants. Dans un cas, l'acquiescement, c'est *l'attitude*, configurée comme un acte non volitif, donc un fait juridique plutôt qu'un acte juridique, alors que le second, l'accord tacite, appartient de plein droit à la catégorie des actes juridiques conventionnels. Certes, si l'on construit le silence comme une manifestation tacite de volonté, alors on peut le considérer comme un élément constitutif (passif) d'un accord tacite. Mais on peut tout aussi bien – en réfutant la construction volontariste – considérer l'acquiescement comme un élément de la pratique des Etats prouvant l'*opinio iuris*.⁶⁰ Si tel est le cas, ceci peut avoir en aval des conséquences au niveau probatoire car il semblerait, du moins dans le sillage de l'affaire du *Droit de passage sur territoire indien*, que la preuve d'une coutume bilatérale soit moins ardue que celle devant étayer un accord tacite.⁶¹

Enfin, il convient d'observer *in limine litis* que la science juridique en droit international fait appel,⁶² afin d'appréhender les comporte-

⁵⁸ 'This identity of effects eliminates the practical consequences of the doctrinal divergence between the partisans of the theory according to which acquiescence is equivalent to tacit consent', *Case Concerning the Interpretation of the Air Transport Services Agreements between the United States of America and France* [1963] 16 RIAA 63. En effet, quelle que soit la construction conceptuelle retenue, aussi bien l'accord tacite que l'acquiescement peuvent 'modifier un titre conventionnel' préexistant (*Frontière Terrestre et Maritime entre le Cameroun et le Nigéria* (Cameroun c Nigéria; *Guinée Équatoriale Intervenante*) (arrêt) [2002] CIJ Rec 353 para 68; de même, auparavant: *Différend Frontalier, Terrestre, Insulaire et Maritime* (El Salvador c Honduras; *Nicaragua intervenant*) (arrêt) [1992] CIJ Rec 408-409 para 80. Voir aussi *infra* (n 67), (n 85).

⁵⁹ Reuter (n 1) 34 para 66.

⁶⁰ Voir entre autres: Sperduti (n 45).

⁶¹ Voir à cet égard: F Francioni, 'La consuetudine locale nel diritto internazionale' (1971) 54 RDI 396-422.

⁶² Dans l'affaire du Golfe du Maine, la Chambre de la CIJ passe en effet en revue la plupart de ces différents outils permettant au juriste de cerner les comportements des Etats et d'en faire découler des effets juridiques: *Délimitation de la Frontière Maritime dans la Région du Golfe du Maine* (Canada c Etats-Unis d'Amérique) (arrêt) [1984] CIJ Rec 309-312 paras 144-154.

ments des Etats, à d'autres catégories normatives, tels l'*estoppel*, le *modus vivendi*,⁶³ etc. qui ont été de temps à autre rapprochées, voire amalgamées avec l'accord tacite. Toutefois, eu égard aux finalités limitées de la présente investigation, nous ne les examinerons pas ici.⁶⁴

4. Domaines d'applications (naturels) privilégiés de l'accord tacite

4.1. Droit des traités

Tout naturellement la forme tacite d'expression de la volonté trouve son terrain de prédilection en droit des traités (écrits) où il se manifeste de plusieurs façons différentes: modification ou extinction, ratification,⁶⁵ renouvellement,⁶⁶ perte du droit (Article 45(b) CVDT),⁶⁷ accep-

⁶³ Sans nullement prétendre à analyser cette figure juridique, il convient cependant préciser que cette notion – de par sa nature même – ne peut aucunement expliquer la création, la modification ou l'extinction de droits entre sujets de droit international public: 'as the name indicates a *modus vivendi* is in its nature a temporary or working arrangement made in order to bridge over some difficulty pending a permanent settlement', JB Moore, cited in CC Hyde, *International Law* vol 2 (2nd edn, Boston 1947) 1146.

⁶⁴ Au sujet du rôle que ces notions jouent dans le contentieux territorial, voir G Distefano, *L'ordre international entre légalité et effectivité* (Pédone 2002) 201-209, 236-244.

⁶⁵ La question épineuse de la ratification tacite a été abordée par la CIJ qui observa que lorsque le traité en question prévoit 'l'accomplissement de certaines formalités ... on ne saurait présumer à la légère qu'un Etat n'ayant pas accompli ces formalités, alors qu'il était à tout moment en mesure et en droit de le faire, n'en est pas moins tenu d'une autre façon', à savoir par son comportement consistant par exemple à revendiquer un droit contenu dans le traité ou en accédant à une prétention formulée par un Etat partie basée dans le traité (*Plateau Continental de la Mer du Nord (République Fédérale d'Allemagne c Danemark)* (arrêt) [1969] CIJ Rec 26 para 28). La doctrine – surtout ancienne – penchait probablement pour davantage de souplesse. Voir entre autres: 'Tacit ratification takes place when a State begins the execution of a treaty without expressly ratifying it', Oppenheim (n 14) 557 para 515. Jadis et dans la même veine, Gentili avait observé: 'You will say that a treaty is ratified in fact, as in the case of private agreements' lorsque par exemple 'the fruit of the benefit of the treaty is enjoyed', *De iure Belli Libri Tres* (1612), translated from Latin (London 1933) Livre III, ch XIV, 365 para 598. Dans une affaire plus ancienne, un tribunal arbitral avait envisagé la possibilité d'une ratification tacite: *Sentence and Award of the Arbitrator in the Matter of the Chili and Peru alliance* (7 April 1875) in *Pacificis internationalis* (Stämpfli 1902) 158-160.

⁶⁶ Decleva (n 4) 81-82.

⁶⁷ Comme il a été observé par la Commission dans son commentaire: 'il n'est pas



tation de la revendication d'un autre Etat partie dans le cadre de la procédure relative à la mise en œuvre de la Partie V (Article 65(2) CVDT), acceptation d'une réserve (Article 20(5) CVDT), traités créant des droits pour les Etats tiers (Article 36(1) CVDT),⁶⁸ traités établissant des situations objectives,⁶⁹ abrogation tacite d'un traité du fait de son incompatibilité avec un traité postérieur (Article 59 (1)(b) CVDT),⁷⁰ etc. Dans tous ces cas, des comportements concluants des Etats se rapportent à un acte juridique conventionnel précédent pour créer, modifier et éteindre des droits et des obligations conformément au droit des traités (écrits). En d'autres termes, le consentement tacite ne survient pas pour engendrer des droits et des obligations en parfait isolement, mais en revanche il se greffe sur un traité écrit en dialoguant avec lui. Les effets juridiques de l'accord tacite sont donc envisagés et régis par le droit des traités.

Eu égard à la finalité circonscrite de la présente contribution, nous nous bornerons à examiner la question de la pratique subséquente conduisant à un accord tacite modificatif ou extinctif d'un traité (écrit);⁷¹ par cette formule on entend la pratique applicative par les Parties d'un traité (écrit) qui peut dès lors avoir des effets interprétatifs (Article 31(2)(b) CVDT) ainsi que modificatifs voire extinctifs.⁷² Alors que la

permis à l'Etat en question d'adopter, sur le plan juridique, une attitude incompatible avec celle que son comportement antérieur doit avoir porté les autres parties à lui prêter à l'égard de la validité du traité ou de son maintien en vigueur ou en application' (Annuaire CDI (n 2) 261). La CDI préféra explicitement ne pas recourir au concept de l'*estoppel*.

⁶⁸ Reuter (n 1) 95 para 164.

⁶⁹ *Réparations des dommages subis au service des Nations Unies* (avis consultatif [1949] CIJ Rec 185. Certains auteurs n'hésitent pas à fonder le caractère obligatoire de ces traités à l'égard des tiers sur leur adhésion tacite (Commentaire de la CDI au futur art 38 CVDT (Annuaire CDI (n 2) 251-252); Reuter (n 1) 104 para 176.

⁷⁰ 'Mais il est généralement admis que, à côté de l'abrogation expresse, il y a aussi une abrogation tacite, résultant du fait que les dispositions nouvelles sont incompatibles avec les dispositions antérieures, ou que toute la matière qui formait l'objet de ces dernières se trouve désormais réglée par les nouvelles dispositions', opinion dissidente du juge Anzilotti jointe à l'arrêt de la CPJI dans l'affaire de la *Compagnie d'électricité de Sofia et de Bulgarie* (arrêt) [1939] CPJI, Série A/B, n 92. De même: *Russian-German Commercial Treaty Case* [1925-1926] 3 ILR 355.

⁷¹ Jennings, Watts (n 32) 1254 para 624, selon lesquels aussi bien les accords oraux que ceux tacites sont susceptibles de modifier les traités écrits.

⁷² PA Sereni, *Diritto internazionale* (Giuffrè 1963), vol I, 123 (qui distingue correctement ce phénomène de la 'désuétude'). Il faut également distinguer l'abrogation tacite

première catégorie d'effets juridiques n'est aujourd'hui nullement contestée,⁷³ les deux derniers types de conséquences juridiques d'un accord tacite sur un traité écrit agitent la doctrine en dépit d'une jurisprudence malgré tout relativement constante et uniforme. Il ne s'agit pas ici de rentrer dans les débats autour de cette question et encore moins de plonger dans ce que cet auteur a appelé la *Via Dolorosa* de l'Article 38 du Projet d'articles de la CDI ayant servi de base à la CVDT de 1969.⁷⁴ Nous nous bornerons plutôt à indiquer quelques éléments conceptuels de ce mode de modification⁷⁵ des traités internationaux à la lumière notamment de la pratique jurisprudentielle internationale. Or, la susmentionnée (défunte) disposition ('Modification des traités par une pratique ultérieure') était formulée en ces termes: 'un traité peut être modifié par la pratique ultérieurement suivie par les parties dans l'application du traité lorsque celle-ci établit leur accord pour modifier les dispositions du traité.'⁷⁶ Cette proposition d'article, qui ne fut finalement pas retenue par la Conférence diplomatique à Vienne, envisageait,⁷⁷ comme les travaux préparatoires au sein de la CDI le démontrent clairement, la pratique subséquente comme 'preuve' d'un accord tacite portant modification d'un traité écrit. En d'autres termes, le comportement des Etats, *dans l'application du traité*, a comme effet de prouver leur 'dissentiment mutuel' (*mutuus dissensus*), c'est-à-dire l'opposé du 'consentement mutuel' à l'origine du traité. La plausibilité juridique de l'existence d'une telle procédure de modification des traités

d'un traité par voie de pratique subséquente de l'abrogation tacite (ou implicite, voire impliquée) résultant de la conclusion par les Etats d'un traité *postérieur* incompatible avec un traité *antérieur* (*Compagnie d'électricité de Sofia et de Bulgarie* (n 70); *Russian-German Commercial Treaty Case* (n 70)).

⁷³ Conclusion 7 du Texte des projets de conclusion sur les accords et la pratique ultérieurs dans le contexte de l'interprétation des traités adoptés provisoirement par la CDI, 'Rapport de la Commission du droit international. Soixante-sixième session' (2014) UN Doc A/69/10, 184-193.

⁷⁴ G Distefano, 'La pratique subséquente des Etats parties à un traité' (1994) 40 *Annuaire Français de Droit International* 41-71.

⁷⁵ L'extinction semblerait aussi possible: Distefano (n 74) 67-70.

⁷⁶ *Annuaire CDI* (n 2) 257.

⁷⁷ Toutefois, comme l'indique le préambule de la CVDT: 'les règles du droit international coutumier continueront à régir les questions non réglées dans la présente Convention'; de ce fait, il n'est pas du tout impossible de considérer l'accord tacite – découlant de la pratique applicative d'un traité – comme une modalité de modification (et extinction) des traités écrits.



s'expliquerait par le souci d'adapter, par le truchement d'un processus très souple, la réalité normative aux changements de l'environnement factuel. Dans le but d'éviter la sénilité précoce des accords internationaux, la logique juridique reconnaît à la pratique subséquente des Etats une valeur normatrice dans la mesure où elle accouche d'un accord tacite modificatif d'un traité écrit. Le dissentiment mutuel est déduit par l'interprète (par exemple, le juge) de l'analyse de la pratique subséquente, certains *facta* ou *acta concludenti* lui permettant d'établir si effectivement le traité a été modifié. Au regard de la jurisprudence internationale, la cause célèbre est représentée par l'affaire concernant l'interprétation de l'accord des services aériens. Le Tribunal arbitral, présidé par Roberto Ago, fit valoir que la pratique subséquente – réalisée en l'espèce par des organes étatiques qui n'étaient pas investis du *treaty-making power* – est

'a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim'⁷⁸

et déclara avoir relevé dans les comportements des Etats des faits aptes à créer un 'informal agreement.'⁷⁹ La pratique jurisprudentielle et étatique nous élargit une riche moisson de précédents. Il nous suffit ici d'en mentionner quelques-uns, en commençant par les exemples les plus significatifs non seulement parce qu'ils ont trait à la Charte des Nations Unies (Charte), mais aussi parce que dans tous ces cas, le traité en question prévoit bel et bien une procédure formelle pour son amendement. Tout d'abord l'Article 12 de la Charte, disposition centrale dans l'aménagement des compétences respectives entre Conseil de sécurité et Assemblée générale en matière de maintien de la paix et de la sécurité internationales. La résolution 377 (V) (3 novembre 1950) de l'Assemblée générale, dite 'Uniting for Peace' (Union pour le maintien de la paix), et la pratique subséquente des organes concernés et des

⁷⁸ *Case Concerning the Interpretation of the Air Transport Services Agreements* (n 58).

⁷⁹ *ibid* 69. Voir aussi, jadis, et dans le même sens: *Affaire Concernant le paiement de Divers Emprunts Serbes émis en France Affaire Relative au paiement, en or, des emprunts fédéraux brésiliens émis en France* (arrêt) [1929] CPJI, Série A 20/21, 38.

Etats membres ont tacitement modifié l'articulation des compétences entre l'Assemblée générale et le Conseil de sécurité. La CIJ l'a bien constaté dans l'affaire du *Mur en Palestine*.⁸⁰ Deuxièmement, il est notoire que le texte de l'Article 27(3) de la Charte, relatif à la procédure de vote au sein du Conseil de sécurité, ne correspond plus à la véritable norme puisque l'abstention d'un membre permanent lors de l'adoption d'une résolution est calculé *dans les faits* comme une voix positive ('concurring vote') et ce contre toute possible acrobatie herméneutique de cette disposition permettant de réconcilier la lettre de l'article avec son contenu réel. Dans ce cas aussi, fort heureusement, la CIJ, en constatant la modification tacite,⁸¹ a contribué à dissiper tout doute. Troisièmement, il en va de même pour l'Article 42 de la Charte qui prévoit que le Conseil de sécurité, dans l'exercice de sa compétence principale relative au maintien de la paix et de la sécurité internationales 'peut *entreprendre, au moyen de forces aérienne, navales ou terrestres, toute action qu'il juge nécessaire ...*' Or, dans le dessein de mieux adhérer à la nouvelle réalité normative de cette disposition, le bout de phrase en italiques devrait être remplacé par le fragment suivant: 'autoriser tout Etat membre à utiliser tous les moyens nécessaires ...' Cette nouvelle pratique du Conseil de sécurité, qui n'a rencontré de résistances ni de la part des Etats membres ni de la part des autres organes de l'Organisation des Nations Unies (ONU), s'est mise en place dès 1990 par la résolution 678 (29 Novembre 1990). Il est aujourd'hui incontesté et incontestable que la délégation par le Conseil de sécurité de la mise en œuvre forcée de ses résolutions en matière de maintien de la paix et de la sécurité internationales est conforme à la Charte. Faut-il y voir autre chose qu'un accord tacite révélé par la pratique subséquente modificative des Etats – constituée à la fois par l'action des Etats membres du Conseil et l'approbation (quelle que soit sa forme) par les autres Etats membres de l'ONU? La doctrine, quant à elle, ne semble pas être

⁸⁰ *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* (avis consultatif) [2004] CIJ Rec 148-151 paras 24-32.

⁸¹ *Conséquences Juridiques pour les Etats de la Présence Continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la Résolution 276 (1970) du Conseil de Sécurité* (avis consultatif) [1971] CIJ Recueil 22 para 22.



insensible aux charmes du 'tacit mutual consent' modifiant un traité et découlant de sa pratique applicative.⁸²

Il convient enfin de relever que ce n'est pas le temps qui éteint, modifie ou abroge mais c'est 'the presumption of a tacit agreement of the parties – or, alternatively, of an assent to or acceptance by each party of the non-application of the treaty by the other.'⁸³

4.2. *Droit des conflits territoriaux (terrestres et maritimes)*

Un ensemble de comportements fait de renonciations tacites, d'actions et réactions, de revendications et de silences *ne se rapportant pas à un traité écrit préexistant* peut tout aussi bien engendrer un accord tacite porteurs de droits ou titres territoriaux.⁸⁴ Dans ce cas de figure, donc, un accord tacite peut 'découle[r] du comportement des Parties'⁸⁵ et fonder un titre territorial.

Or, le 'stringent test'⁸⁶ permettant d'établir un accord tacite de ce genre a été indiqué par la Cour dans les termes suivants:

'les éléments de preuve attestant l'existence d'un accord tacite doivent être convaincants. L'établissement d'une frontière maritime est une question de grande importance, et un accord ne doit pas être présumé facilement.'⁸⁷

⁸² Oppenheim (n 14) 571 para 537; Monaco, Curti Gialdino (n 26) 177. Voir en général (n 99) 63 de notre article cité ci-dessus (n 74) ainsi que l'opinion dissidente du juge Ajibola jointe à l'arrêt de la CIJ dans l'affaire *Frontière Terrestre et Maritime entre le Cameroun et le Nigéria* (n 58) 556-561.

⁸³ G Fitzmaurice 'Second Report on the Law of Treaties' (1957) YB ILC 48.

⁸⁴ 'Dans la pratique jurisprudentielle internationale, le comportement des États est grandement pris en compte. Le silence d'un État, son consentement, son acquiescement, sa renonciation, sa protestation, l'estoppel qui peut frapper ses actes, constituent des éléments importants dans la création ou l'extinction d'un titre sur un territoire', opinion dissidente collective des juges Bedjaoui, Koroma et Ranjeva jointe à l'arrêt de la CIJ dans l'affaire de la *Délimitation Maritime et des Questions Territoriales entre Qatar et Bahreïn (Qatar c Bahreïn)* (fond, arrêt) [2001] CIJ Rec 168 para 69.

⁸⁵ *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie c Singapour)* (arrêt) [2008] CIJ Rec 50 para 120. Dans le paragraphe suivant, cependant, la Cour fait aussitôt recours à la notion d'acquiescement.

⁸⁶ Opinion individuelle du juge Owada jointe l'arrêt de la Cour dans l'affaire du *Différend Maritime (Pérou c Chili)* (n 46) para 12.

⁸⁷ *Différend Territorial et Maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c Honduras)* (arrêt) [2007] CIJ Rec 735 para 253. Ce qui permet à la

La CIJ réfuta dans cette affaire entre le Nicaragua et le Honduras, l'existence d'une frontière maritime établie par accord tacite; toutefois, dans une affaire plus récente, elle déclara que 'il existe entre les Parties une frontière maritime unique agréé' reposant 'sur un accord tacite intervenu entre elles.'⁸⁸ La Cour ne sait pas 'quand ni par quels moyens cette frontière a été agréée', mais elle constate, d'une part, que l'accord tacite s'est coagulé (le verbe 'cristalliser' étant employé par la Cour plutôt pour indiquer le processus coutumier)⁸⁹ entre 1947 et 1954 et, d'autre part, qu'il découle d'un agrégat d'actes conventionnels et fait juridiques (comportements d'Etats) disparates qui tous convergent vers sa réalisation.⁹⁰ De surcroît, la conclusion de la Cour est corroborée par la logique juridique, en vertu de laquelle des traités postérieurs entre les Parties n'auraient pas pu être conclus en l'absence de cet accord tacite; ils présupposent donc nécessairement celui-ci.⁹¹ L'indétermination temporelle doit-elle alors vraiment nous perturber? N'est-ce pas connaturel à la figure de l'accord tacite révélé par des comportements concluants? D'ailleurs, est-ce que cette même Cour avait-elle été plus précise – et pouvait-elle par ailleurs l'être – dans l'affaire du *Temple de Préah-Vihéar*?⁹²

Quant à l'étendue territoriale (limite externe) de cette délimitation, quelques critiques ont été adressées à la CIJ, mais son raisonnement est cohérent par rapport à la nature même de l'accord tacite qui se fonde sur des effectivités et non sur une prétendue conception que les Parties pouvaient avoir des régimes des espaces maritimes de l'époque. La limite externe doit partant être définie à la lumière des intentions et finalités poursuivies par les Parties tout au long des leurs comportements divers.⁹³ Certes, la Cour avoue quelques 'incertitudes' au regard de la

CIJ d'exclure tout naturellement une 'ligne à vocation spécifique, limitée' ou encore 'provisoire', telle que celle découlant d'un *modus vivendi*. Voir Hyde (n 63).

⁸⁸ *Différend Maritime (Pérou c Chili)* (n 46) paras 91, 177.

⁸⁹ *Plateau Continental de la Mer du Nord* (n 65) 38 para 61.

⁹⁰ *Différend Maritime (Pérou c Chili)* (n 46) paras 69, 91.

⁹¹ *ibid* para 53, 100. De même: déclaration du juge Guillaume para 8. *Contra*: opinion individuelle du juge Owada (paras 12-21), opinion dissidente du juge Sebutinde (paras 4-10).

⁹² *Affaire du Temple de Préah Vihéar* (n 27).

⁹³ La surveillance par le Chili des espaces maritimes contestés (*ibid* paras 126-129), l'absence de 'protestation de la part du Pérou' (para 147), le 'mémorandum de Bakula' (paras 136-142).



limite des 80 milles nautiques finalement arrêtée, mais elle estime, et la preuve du contraire peut difficilement être faite, qu'elle est supportée par 'des éléments de preuve qui lui ont été présentés.'⁹⁴ Concernant les éléments de preuve sur lesquels se base la Cour, il convient de relever que la Cour, en 2007, ne nous prodigue ni de critères précis ni, encore moins, de formule ou d'algorithme juridique susceptible d'établir l'existence d'un accord tacite.⁹⁵ Le silence de la Cour à cet égard ne nous doit pas trop surprendre dans la mesure où le caractère 'scientifique' du droit international ne dépend pas du recours aux méthodes quantitatives des sciences exactes (*more geometrico*). Le droit, incarnant plutôt l'esprit de finesse ne s'embarrasse pas de ces 'brouilles.' En revanche, la Cour souligne la nécessité de prouver, de manière convaincante, que les Etats aient exprimé leur volonté à *se lier en droit* et qu'une rencontre de leurs consentements en ce sens ait eu lieu. Comme déjà relevé plus haut, ces comportements concluants (puisqu'ils concluent à l'émergence d'un accord) peuvent être recherchés aussi bien dans leur sphère d'activité interne qu'externe, ils peuvent assumer n'importe quelle forme et émaner de n'importe quel organe. Ces critères, si on peut les appeler ainsi, paraissent dès lors applicables dans tout domaine du droit international et ne sont guère exclusifs au droit international des espaces; ils appartiennent de ce fait à la boîte à outils de l'internationaliste généraliste.⁹⁶

De surcroît, l'accord tacite a, non seulement délimité la frontière commune entre les Etats concernés (compétence exclusive conjointe), mais il a au même temps défini sa limite extérieure délimitant ainsi des espaces *res omnium*, représentant ainsi une sorte de revendication commune des deux Etats vis-à-vis de la Communauté internationale ('proclamation conjointe de souveraineté'⁹⁷). La question de l'évolution du droit international a été en effet abordée par la Cour lorsqu'elle a pris acte du fait que

'les Parties ont tous deux reconnu que la revendication qu'elles avaient formulée dans la déclaration de Santiago de 1952 n'était pas conforme

⁹⁴ *ibid* para 151. *Contra*: Déclaration du juge Donoghue.

⁹⁵ Les opinions dissidentes et individuelles jointes aux arrêts de 2007 et de 2014 ne nous éclairent pas davantage.

⁹⁶ Distefano (n 64) 184-192.

⁹⁷ *ibid* para 55.

au droit international et ne pouvait pas être opposée aux Etats tiers, du moins pas à l'époque.⁹⁸

Ceci produit au moins deux conséquences enchevêtrées l'une dans l'autre. *Primo*, comme déjà relevé, la conception par les deux parties du droit international de la mer ainsi que son évolution ne sont pas pertinentes aux fins de l'établissement de l'accord tacite et de son contenu. Une rencontre – tacite – de volontés peut ne pas être conforme au cadre juridique général mais ceci ne porte pas atteinte à son existence. *Secundo*, à la différence de l'affaire des Pêcheries de 1951, cette revendication commune ne rencontra ni d'abstention prolongée ni suscita la 'tolérance générale des Etats étrangers' ou de la 'communauté internationale'.⁹⁹ Dès lors, cette revendication conjointe, par actes et faits concluants, si elle fait droit entre les Parties, elle ne pouvait pas être, du moins à l'époque de sa formulation, valablement opposée aux Etats tiers, comme ce fut, en revanche le cas, pour le système de délimitation de la Norvège dans l'affaire susmentionnée.

La pratique jurisprudentielle internationale n'est pas avare en accords tacites. L'affaire du *Temple de Préah-Vihéar*,¹⁰⁰ tout d'abord, où la CIJ considéra l'acquiescement-silence de la Thaïlande vis-à-vis d'une carte géographique annexé au traité de délimitation qu'elle venait de ratifier avec la France (puissance coloniale du Cambodge), comme l'acceptation de sa modification. De fait la Cour déclara que la 'conduite ultérieure de la Thaïlande a confirmé et corroboré son acceptation initiale ... *Les deux parties ont par leur conduite reconnu la ligne*'.¹⁰¹ Dans le même registre il a été affirmé qu'une frontière établie par le

⁹⁸ *ibid* para 116.

⁹⁹ *Affaire des Pêcheries (Royaume-Uni c Norvège)* (arrêt) [1951] CIJ Rec 139.

¹⁰⁰ Cette affaire (en vertu de sa *ratio decidendi*) aurait pu également figurer dans la section précédente dans la mesure où les comportements des Etats se situaient par rapport à un traité de délimitation et partant ils pouvaient être aisément configurés comme une pratique subséquente portant modification de celui-ci. De même: 'Le Sénégal considère que la pratique subséquente à l'Accord de 1960 [franco-portugais] de délimitation maritime et l'acquiescement de chaque Etat à la législation de l'autre ... auraient donc donné naissance à un accord tacite ou à une coutume bilatérale', *Affaire de la Détermination de la Frontière Maritime (Guinée-Bissau c Sénégal)* (sentence arbitrale rendue le 31 juillet 1989) 20 RSA 151 para 83.

¹⁰¹ *Affaire du Temple de Préah-Vihéar* (n 27) 33 (italiques ajoutées).



principe de l'*uti possidetis* peut-être modifié par 'consentement tacite'¹⁰² ou encore qu'un 'accord exprès ou tacite entre les Parties', découlant des concessions pétrolières, pouvait fonder un titre territorial autonome.¹⁰³ Les frontières terrestres ne sont évidemment pas en reste comme le témoigne l'affaire de Taba lors de laquelle le Tribunal arbitral releva correctement un accord tacite: 'the parties to the Agreement of 1906, *had by their conduct, agreed to the boundary as it was demarcated by masonry pillars ...*'¹⁰⁴

5. Epilogue

Il est intéressant de noter en guise de remarque conclusive comme la doctrine ancienne, plus que la contemporaine (peut-être excessivement formaliste et craintive de la kaléidoscopique pratique des Etats en matière de formation des engagements conventionnels), se soit davantage interrogée sur les linéaments de l'accord tacite. Ce qui pourrait peut-être expliquer le malaise que certains juristes éprouvent aujourd'hui à l'égard des formes tacites d'expression du consentement des Etats. Faudrait-il en conclure que la jurisprudence moins récente était davantage imprégnée *d'esprit de finesse* ou, sinon, que les Etats risqueraient de se froisser aujourd'hui plus qu'hier de la constatation d'un accord tacite délimitant leurs espaces de souveraineté?

Quoi qu'il en soit, nous avons essayé de montrer brièvement de quelle façon l'adjectif tacite nous fait entrer de plain-pied dans un monde parallèle à celui (formel) du traité écrit, mais avec lequel il entre-

¹⁰² 'Si la situation résultant de l'*uti possidetis* peut être modifiée par une décision d'un juge et par un traité, la question se pose alors de savoir si elle peut être modifiée d'autres manières, par exemple un acquiescement ou une reconnaissance [...] Le comportement du Honduras vis-à-vis des effectivités antérieures révèle une admission, une reconnaissance, un acquiescement *ou une autre forme de consentement tacite à l'égard de la situation*', *Différend Frontalier, Terrestre, Insulaire et Maritime* (n 58) paras 67, 364 (italiques ajoutées).

¹⁰³ *Différend Frontalier, Terrestre, Insulaire et Maritime* (n 58) 448 para 304.

¹⁰⁴ *Case concerning the location of boundary markers in Taba between Egypt and Israel (Egypt v Israel)* (decision) (1988) 27 ILM 1488 para 233 (italiques ajoutées). De même: *Affaire de l'Ile de Lamu* (n 6) 338; mais surtout: *Décision Concernant la Délimitation de la Frontière entre l'Erythrée et l'Ethiopie* (sentence arbitrale rendue le 13 avril 2002) 25 RSA 110-112 paras 3.6-3.13.

tient des liens intenses et nécessaires. Nous avons de surcroît observé que s'il s'agit bel et bien de deux univers, ces derniers n'entretiennent pas moins force relations entre eux, à l'instar des 'passerelles' entre univers dans l'espace cosmique. En effet, tantôt le consentement tacite se greffe sur et présuppose le traité écrit (3.1) tantôt il existe et déploie ses effets (et ses vertus) de manière totalement indépendante avec un régime juridique qui est le sien (3.2). Dès lors, nous aurions tout intérêt à nous inspirer des intuitions géniales de Musil ('L'Homme sans qualités') et de Borges ('Le jardin aux sentiers qui bifurquent') pour appréhender ce 'multivers' qu'est le consentement en droit international public.



The question:

UN immunity and the Haiti Cholera Case

Introduced by Emanuele Cimiotta and Maria Irene Papa

In October 2013, Haiti cholera victims filed a class action complaint against the United Nations (UN) in the Southern District Court of New York, claiming UN responsibility for ‘the negligent, reckless, and tortious conduct’ that had caused the outbreak of the epidemic, and seeking compensation (*Georges et al v United Nations et al*). Evidence provided by various scientific investigations, including a study carried out by a UN panel of independent experts, shows that the disease was brought to Haiti after the 2010 earthquake by a battalion of Nepalese peacekeepers, acting within the United Nations Stabilization Mission in Haiti (MINUSTAH). The epidemic caused approximately 8.000 deaths.

The class action followed the UN’s explicit refusal to provide redress to cholera victims and to provide for an appropriate mode of settlement for the private law disputes, as required by Article VIII, Section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations (the General Convention), as well as by the Status of Forces Agreement between Haiti and the UN. According to the UN, the dispute at hand involves ‘a review of political and policy matters.’ It does not have a private law character. Therefore, those rules do not apply.

The Haiti Cholera Case has to be assessed in the context of the broader ongoing debate about the UN’s accountability. The jurisdictional immunity of international organisations in domestic courts is increasingly being brought into question. There is a growing plea to update it, with a view to reducing its scope and balancing it with the individual right of access to justice. Such demands have gained some success over time: recent judicial practice has shown a trend to restrict that immunity.

Nevertheless, the UN has remained unaffected by this trend, notwithstanding the enlargement of its activities in the field of international peace and security. Domestic courts continue to uphold its immunity, as in the *Mothers of Srebrenica* case where the European Court of Human Rights found that the Dutch courts' grant of immunity to the UN did not violate Article 6 of the European Convention on Human Rights.

A similar approach was adopted in the Opinion on United Nations Immunity, rendered on 9 January 2015 by District Court Judge Oetken in *Georges et al v United Nations et al*, which dismissed the case for lack of subject-matter jurisdiction. According to Judge Oetken, the UN enjoys absolute immunity from suit, unless it expressly waives it. He refused to consider this privilege contingent on the fulfilment of the duty to provide a mechanism to solve third-party claims. The applicants appealed this ruling and two other similar class actions are still pending in US courts. Consequently, the issues raised by this case are far from being definitively settled.

The problem concerning the extent of UN immunities goes far beyond the case at hand, even if the fate of the Haiti cholera victims is indicative of the aberrations to which absolute immunity can lead. It is hard to accept that the UN could decline its responsibility, by asserting blanket immunity for peacekeeping operations which manifestly fail to meet diligence standards and run against their objectives. This is all the more so given the UN's continued failure to establish alternative mechanisms for adjudicating victims' claims resulting from such operations.

Three main legal questions hence arise. First, what is the relationship between the UN's absolute immunity, prescribed by Article II, Section 2 of the General Convention, and the UN's obligation to provide for alternative modalities to settle individual third-party claims under Article VIII, Section 29 of the same Convention? Second, are disputes stemming from UN forces' activities 'of a private law character'? Finally, can the availability of alternative dispute settlement mechanisms, as a necessary condition to the immunity grant, be constructed on other legal grounds that Judge Oetken did not take into account (such as, relevant UN legal instruments or international human rights law)? In particular, how can the UN's absolute immunity be reconciled with the UN's role in promoting and ensuring respect for human rights, including the individual right of access to justice?



Rosa Freedman and Nicolas Lemay-Hebert, on the one hand, and Riccardo Pavoni, on the other hand, address these issues from different point of views and following different approaches. However, they both put the Haiti Cholera Case into a wider context and assess recent judicial developments concerning the immunity of international organisations. As a result, they rely on the ‘alternative remedy’ test to find a more balanced solution to the conflict between UN immunity and the individual right of access to a court.



Towards an alternative interpretation of UN immunity: A human rights-based approach to the Haiti Cholera Case*

*Rosa Freedman** and Nicolas Lemay-Hebert****

1. *Introduction*

The Haiti Cholera Case has rightfully received significant attention from practitioners, scholars, the media, and the wider public. The facts lend themselves to a thorough examination of issues arising from United Nations (UN) immunity, not only in relation to the case but more broadly in relation to UN peacekeeping operations. At the outset of the case scholars provided useful and well-needed explanations of the legal issues, exposing the gaps that the UN has exploited in order to avoid its responsibilities to the cholera victims. Two central issues are the distinction between public and private acts for the purposes of dispute settlement, and also the discussion about whether UN immunity under Section 2 of the Convention on the Privileges and Immunities of the United Nations (CPIUN) is dependent upon the Organisation upholding its Section 29 obligations to provide alternative dispute resolution mechanisms. Academic writings on those matters have been crucial for practitioners, academics, and indeed the media, drawing upon cases and scholarship from various jurisdictions that had addressed similar or related questions in order to provide explanations of the law.

A central role of the academy and of scholars is to bring together a range of sources to analyse and interpret questions of international law.

* Parts of this paper and the ideas contained herein first appeared in R Freedman, 'UN Immunity or Impunity?: A Human Rights Based Challenge' (2014) 25 *Eur J Intl L* 239; and R Freedman, N Lemay-Hébert, 'Jistis ak reparasyon pou tout viktim kolera MINUSTAH: The United Nations and the Right to Health in Haiti' (2015) 28 *Leiden J Intl L* 507.

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Indeed, many of the early materials published about the Haiti Cholera Case have been cited in documents presented to the New York District Court, have been relied upon by journalists, and are even distilled into accessible language and made available on many websites. As such, description about the various stages of the case and discussions about the relevant sources are well-understood within and beyond the academy. It serves little purpose, therefore, simply to repeat the points made by other scholars and practitioners over recent years. Instead, it is the responsibility of academics to set out alternative approaches that may provide fresh and nuanced interpretations of the relevant laws in order to assist those who seek to find a solution to the cholera claims.

One main reason why practitioners and judges turn to and cite the writing of academics is that scholarship ought to be, and often is, at the cutting edge of its field. The approaches outlined in early scholarship on the Haiti Cholera Case necessarily addressed the traditional and typically conservative approaches to the issue of UN immunity. It is clear that the New York District Court at first instance was unwilling to go beyond those traditional interpretations. Therefore, restating and highlighting those matters does little to encourage a shift in paradigms, both in terms of the cholera claims and more broadly regarding the problems caused by outdated notions of absolute immunity operating within the contemporary and globalised world. As such, our paper will set out an alternative and viable approach to the Haiti Cholera Case, and to the issue of UN absolute immunity by offering an interpretation based on international human rights law.

Our thesis is that UN immunity ought not only to be dealt with by reference to the CPIUN but that it needs to be interpreted within the broader context of international human rights law. It is widely-accepted that an individual's fundamental right to access a court and a remedy is enshrined not only in international human rights law treaties but also has achieved the status of customary international law.¹ Adopting a human rights-based approach, UN immunity ought not to be upheld where it precludes any individual realising his or her right to access and a court and a remedy. The human rights based-approach would therefore restrict immunity in circumstances where the UN fails to set up al-

¹ See R Freedman 'UN Immunity or Impunity?: A Human Rights Based Challenge' (2014) 25 *Eur J Intl L* 239 s 4.

ternative dispute resolution mechanisms, as has occurred in the Haiti Cholera Case. This is not the first case to address such issues, but in many ways the Haiti Cholera Case provides the perfect set of facts for a national court finally to recognise that the UN cannot avoid its human rights obligations by hiding behind the cloak of immunity. This short paper will explore how and why the Haiti Cholera Case provides the perfect facts for a human rights-based challenge to UN immunity.

2. *The facts*

The facts of the Haiti Cholera Case are well-known. The cholera epidemic started in the Artibonite region in October 2010. Prior to that, there had been no recorded cases of cholera in Haiti for over a century.² The population was therefore immunologically naive and highly susceptible to infection.³ Between October and December 2010, approximately 150,000 people contracted cholera and 3,500 had died; by the end of 2014, more than 8,813 people had died and over 725,608 individuals had been infected, making it one of the most deadly cholera outbreaks in recent history.

A Nepalese battalion arrived in Haiti in October 2010 and was deployed to the Mirebalais camp during October 2010.⁴ It is important to note that Nepal suffered cholera outbreaks only weeks before the troops' deployment.⁵ French epidemiologist Renaud Piarroux, who wrote an initial report on the cholera outbreak,⁶ stated that all of the scientific evidence demonstrates that the cholera is attributable to the Nepalese contingent travelling from a country experiencing a cholera

² DA Walton, LC Ivers, 'Responding to Cholera in Post-Earthquake Haiti' (2011) 364 *New England J of Medicine* 3, 4.

³ Center for Disease Control and Prevention, 'Cholera Outbreak: Haiti, October 2010' (2010) 59 *Morbidity and Mortality Weekly Rep* 1411.

⁴ J Katz, *The Big Truck That Went By: How the World Came to Save Haiti and Left Behind a Disaster* (Palgrave Macmillan 2013) 230.

⁵ L Maharjan, 'Cholera Outbreaks Looms Over Capital' *The Himalayan Times* (23 September 2010).

⁶ T Daniel, 'Source of Haiti Cholera Bug Goes Under Microscope' *Associated Press* (17 July 2012).



epidemic, and that faecal contamination of the Meille River⁷ draining into the Artibonite River initiated the epidemic.⁸ The Artibonite River is one of the nation's largest and most important rivers providing water to 1.5 million people.⁹ The link with the South Asian strain has been confirmed by numerous field investigations¹⁰ including the UN's Independent Panel of Experts on the Cholera Outbreak in Haiti.¹¹ Despite recent scientific debates, it is now increasingly accepted that the cholera outbreak is directly attributable to Nepalese peacekeeping troops, even by the UN itself.¹²

There is still confusion about whether or not the soldiers were tested prior to their deployment.¹³ What is clear is that the cholera screening protocols were inadequate to prevent the Haitian epidemic.¹⁴ The problem was not just the lack of appropriate testing: The *Medical Support Manual for United Nations Peacekeeping Operations* does not list cholera and diarrhoea as conditions precluding peacekeeping service,

⁷ M Stobbe, E Lederer, 'UN Worries Its Troops Caused Cholera in Haiti' *Associated Press* (19 November 2010); Katz (n 4) 228.

⁸ R Piarroux et al, 'Understanding the Cholera Epidemic, Haiti' (2011) 17 *Emerging Infectious Diseases* 1161.

⁹ F Tasker, F Robles, 'Source of Cholera Outbreak May Never Be Known' *Miami Herald* (20 November 2010); Katz (n 4) 229.

¹⁰ See, for example: RR Frerichs et al, 'Nepalese origin of cholera epidemic in Haiti' (2012) 18 *Clinical Microbiology and Infection* 158; RS Hendriksen et al, 'Population Genetics of *Vibrio cholera* from Nepal in 2010: Evidence of the Origin of the Haitian Outbreak' (2011) 2(4) *MBio* <<http://mbio.asm.org/content/2/4/e00157-11.abstract>>; C Chin et al, 'The Origin of the Haitian Cholera Outbreak Strain' (2010) 364 *New England J Medicine* 33.

¹¹ The panel found that 'the strains isolated in Haiti and Nepal during 2009 were a perfect match.' A Cravioto et al, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti* (2011) 27.

¹² 'Clinton: UN Soldier Brought Cholera to Haiti' *Al Jazeera* (8 March 2012).

¹³ 'Haiti cholera outbreak: Nepal troops not tested' *BBC News* (8 December 2010). UN Spokesperson, Vincenzo Pugliese, told an Associated Press journalist that none tested positive because they had never been tested: Katz (n 4) 233, as compared with United Nations Department for Public Information, Press Conference by the Under-Secretary-General for Peacekeeping Operations (2010) <www.un.org/News/briefings/docs/2010/101215_Guest.doc.htm>; see also: CNN Wire Staff, 'UN investigates allegations of cholera source in Haiti' *CNN* (28 October 2010).

¹⁴ PS Keim et al, 'Reply to "South Asia Instead of Nepal May Be the Origin of the Haitian Cholera Outbreak Strain"' (2011) 2(6) *MBio* <<http://mbio.asm.org/content/2/6/e00245-11.full#ref-5>>.



and examination only has to take place within three months of deployment, leaving plenty of time for soldiers to contract the disease.¹⁵

After the outbreak the international aid machinery led by the UN failed to take the steps necessary to contain and eradicate cholera in Haiti. Firstly, the UN's World Health Organisation (WHO) and other actors battled against mass vaccination in Haiti, citing cost, logistical challenges and limited vaccine supplies.¹⁶ Secondly, the UN failed to invest in a large-scale improvement of Haiti's water and sanitation systems before and immediately after the cholera outbreak, despite the peacekeeping mission's mandate to capacity-build and improve national infrastructure. In January 2011, 37.6 % of peacekeeping camps lacked water and 28.5 % did not have a single toilet.¹⁷ One Médecins Sans Frontières official stated that 'the inadequate cholera response in Haiti makes for a damning indictment of an international aid system',¹⁸ especially the cluster system set up by the UN's Office of the Coordinator of Humanitarian Affairs.

3. *The claims*

The attribution of responsibility to the UN for the outbreak and spread of cholera in Haiti is clearly documented. Victims of that outbreak, however, have been denied their fundamental right to access a court and a remedy owing to the UN failing to set up mechanisms to hear such claims. The case brought before the New York District Court focuses on the UN failure not only to protect Haitians from the introduction of cholera and to prevent the spread and continued existence of the disease, but also to provide a remedy to individuals affected by the outbreak. Claims and a pending appeal filed in a New York District

¹⁵ Katz (n 4) 233. The UN's expert panel mentioned a 10-day free period for Nepalese soldiers to visit their families after medical examination was completed. Cravioto *et al* (n 11) 12.

¹⁶ P Santa-Olalla *et al*, 'Implementation of an Alert and Response System in Haiti During the Early Stage of the Response to the Cholera Epidemic' (2013) 89 *American J of Tropical Medicine and Hygiene* 688.

¹⁷ M Schuller, *Killing with Kindness: Haiti, International Aid, and NGOs* (Rutgers UP 2012) 173.

¹⁸ U Karunakara, 'Haiti: Where Aid Failed' *The Guardian* (28 December 2010).



Court on behalf of 5,000 individuals affected by cholera in Haiti¹⁹ allege negligence, gross negligence and/or recklessness by the UN and the UN Stabilization Mission in Haiti. The lawsuit states that UN actions and failures to act are

‘the direct and proximate cause of the cholera related deaths and serious illnesses in Haiti to date, and of those certain to come. The UN did not adequately screen and treat personnel coming to Haiti from cholera stricken regions. It did not adequately maintain its sanitation facilities or safely manage waste disposal. It did not properly conduct water quality testing or maintain testing equipment. It did not take immediate corrective action in response to the cholera outbreak.’²⁰

The UN response to the requests for compensation for the victims and to the lawsuit has been to insist on absolute immunity from the jurisdiction of national courts.²¹ It has altogether failed to address the substance of the claims – that it was responsible for the cholera and therefore liable to the victims. Instead, the UN insists that the claims are ‘not receivable’²² because it asserts that the claims involve review of political and policy matters.²³

The attempt to bring the UN to court was rejected at first instance, and an appeal is currently pending. Judge Oetken in the New York District Court upheld UN absolute immunity. However, the main issue in terms of UN immunity and international human rights law, and an issue that Judge Oetken altogether failed to address, is whether UN immunity can be upheld if in so doing an individual’s fundamental right to access a court and a remedy is violated. It is this issue – rather than Judge Oetken’s judgment and the pending appeal – that we shall explore in this paper.

¹⁹ See, generally, Freedman (n 1).

²⁰ ‘Petition for Relief’ (3 November 2011) para 57 <www.ijdh.org/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf>.

²¹ Eg Letter from Ban Ki-moon, UN Secretary-General, to Maxine Waters, US Representative for California’s 43rd congressional district (July 5, 2013) <www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>.

²² UN Department of Public Information (New York), ‘Haiti Cholera Victims’ Compensation Claims “Not Receivable” under Immunities and Privileges Convention, United Nations Tells Their Representatives’ (21 February 2013) UN Doc SG/SM/14828.

²³ *ibid.*



4. *Absolute immunity and alternative dispute resolution*

The absolute immunity that the UN is relying upon is set out in Section 2 of CPIUN, which establishes that:

‘The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.’²⁴

Section 2 is generally interpreted as granting the UN absolute immunity from jurisdiction of national courts²⁵ – an approach based on the UN Charter and the CPIUN pre-dating the move to restrictive immunity.²⁶ That approach can be seen, for example, in the early case of *Manderlier v Organisation des Nations Unies et l’Etat Belge*²⁷ (1966) and in cases ranging from employment disputes²⁸ to damages arising from peacekeeping operations.²⁹ Traditional justification for absolute immunity is that national courts (a) would have very different interpretations to one another; and (b) may be open to prejudice or frivolous actions within some countries.³⁰

The same Convention sets out that the UN must provide mechanisms to resolve claims arising out of disputes of a private law character. Section 29 of the CPIUN mandates that:

²⁴ UN General Assembly Resolution 22(1), ‘Convention on the Privileges and Immunities of the United Nations’ (13 February 1946) s 2.

²⁵ A Reinisch, *International Organizations Before National Courts* (CUP 2000) 332.

²⁶ G Rios, E Flaherty, ‘Legal Accountability of International Organization: Challenges and Reforms’ (2010) 16 *ILSA J Intl Comp L* 433, 437.

²⁷ *Manderlier v Organisation des Nations Unies et l’Etat Belge (Ministre des Affaires Etrangères)*, Brussels Civil Tribunal, 11 May 1966, (1966) *Journal des Tribunaux* 721; (1972) 45 *ILR* 446.

²⁸ For example, *Radicopoulos v United Nations Relief and Works Agency*, Egyptian Court, 1957, *Annual Report of the Director of UNWRA*, 13 UN GAOR (supp no 14) UN Doc A/391 (1958) 41; *Boimah v United Nations General Assembly*, US District Court EDNY, 24 July 1987, 664 F Suppl 69 (EDNY 1987).

²⁹ For example, *Abdi Hosh Askir v Boutros Boutros-Ghali*, US District Court, Southern District, New York, 29 July 1996, 933 F Suppl 368 (SDNY 1996).

³⁰ P Sands, P Klein, *Bowett’s Law of International Institutions* (5th edn, Sweet & Maxwell 2001) s 15-45, 491.



‘The United Nations shall make provisions for appropriate modes of settlement of:

(a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.’

It is important to understand the Section 29 obligations in terms of peacekeeping operations. It is clear that UN peacekeepers require immunity in order to fulfil their functions and because countries might otherwise be reluctant to commit their troops as peacekeepers.³¹ The functioning of judicial systems in conflict or fragile States might lead to peacekeepers’ own rights, such as to a fair trial, being violated should such immunity not exist. As a result there needs to be an appropriate means of dispute resolution provided for instances where peacekeepers’ actions are criminal offences or give rise to private law claims.

Provision of appropriate dispute settlement is set out in the UN’s ‘Model Status of Forces Agreement for Peace-Keeping Operations.’³² The Model SOFA sets out that where the peacekeeping operation or its members have immunity from jurisdiction of local courts in respect of a private law claim, the Model SOFA provides for alternative dispute settlement mechanisms³³ – namely, claims commissions.³⁴ Yet, to date the UN has failed to establish any mechanisms to hear cholera victims’ claims in line with its Section 29 obligations either through the methods set out in Article 51 of the Model SOFA or any other alternative modes of dispute resolution available to it such as *ad hoc* negotiation, conciliation, mediation or arbitration, and lump-sum settlements.³⁵ Indeed, the attempt to bring the UN before the New York District Court is a direct

³¹ Cf Clark, ‘Peacekeeping Forces, Jurisdiction and Immunity: A Tribute to George Barton’ (2012) 43 *Victoria U Wellington L R* 77.

³² *Model status of forces agreement for peace-keeping operations* UN Doc A/45/594 (1990) art 51.

³³ *ibid* arts 51–54.

³⁴ Despite art 51 of the Model SOFA, no standing claims commissions have ever been established, although third-party claims have been settled instead by local claims review boards made up of UN officials and established for each peacekeeping mission.

³⁵ See, for example, *Manderlier v Organisation des Nations Unies et l’Etat Belge* (n 27). Salmon insists that the UN used the lump-sum payment because it wanted to avoid the public procedure and public scrutiny that would come with having claims from that peacekeeping operation brought before the claims commission (cf ‘Les Accords Spaak-U Thandt du 20 fevrier 1965’ (1965) 11 *Annuaire Français de Droit International* 469–497).

result of the UN refusing to establish any alternative mechanisms for resolving the cholera victims' disputes.

One issue, and the main one focused upon in the Judge Oetken's judgment, is whether Section 29 is a counterbalance to Section 2 or whether the two operate independently of one another. If the two were interdependent then it would be clear that the UN failure to establish mechanisms in line with Section 29 CPIUN undermines its ability to rely on the immunity set out under Section 2 of that Convention. However, case law and treaty interpretation points towards the conclusion that UN immunity is not conditional on alternative dispute mechanisms being established.³⁶ Our thesis does not interrogate that oft-discussed argument, but rather looks at a separate and more holistic issue: the ability of the UN to rely on absolute immunity where in so doing an individual's fundamental rights are violated. This second issue receives less attention than the one focused upon by Judge Oetken.

The question is whether Section 2 CPIUN, in absentia of the UN implementing its obligations under Section 29, can be given effect where it violates fundamental an individual's right to access a court and a remedy. It is this issue that we shall focus upon because the human rights-based approach is one that is increasingly applied to other international organisations and the Haiti Cholera Case provides the perfect facts for demonstrating that the UN ought also to be constrained from using its immunity to violate individuals' fundamental rights.

5. *The human rights-based challenge*

Judge Oetken, following jurisprudence from US and European courts, determined only to address the interpretation of the CPIUN. The legal reasoning contained within the judgement, and that follows on from cases such as *Brzak*³⁷ and *Sadikoglu*,³⁸ focuses on whether immunity was intended to be contingent upon the provision of alternative dispute resolution mechanisms. That narrow approach, however, fails

³⁶ Cf Freedman (n 1).

³⁷ *Brzak v United Nations*, 597 F3d 107, 111–112 (2d Cir 2010).

³⁸ *Sadikoglu v United Nations Dev Programme*, no 11 Civ 0294 (PKC), 2011 WL 4953994.



to take into account the violation of the fundamental right to access a court and a remedy that occurs where the UN uses the cloak of immunity whilst refusing to provide alternative dispute resolution mechanisms. When the CPIUN is situated within the broader context of UN human rights obligations, it is clear that the immunity under Section 2 may only be legally valid if there are mechanisms available to ensure that claimants have access to an alternative process to decide and remedy private law claims as otherwise Section 2 would violate individuals' fundamental rights to access a court and a remedy.

This is an argument that was presented on behalf of the Plaintiffs in the Haiti Cholera Case, and that has been argued in European cases as well as in academic scholarship, but is one that Judge Oetken failed to mention let alone address in his judgement. It is this issue that forms the heart of our argument: UN immunity in absentia of an alternative dispute resolution mechanism may violate the fundamental right to access a court and a remedy,³⁹ and therefore must be overridden in respect of those private law claims where the UN fails to fulfil its Section 29 obligations.

There is increasing recognition that where alternative dispute resolution mechanisms are not available a claimant's fundamental rights may be violated. Individuals hold fundamental rights to access a court and to seek a remedy.⁴⁰ Appropriate modes of settling disputes⁴¹ enable claimants to access a court or a remedy through alternative mechanisms. According to Reinisch, those mechanisms are 'increasingly also seen as a legal requirement stemming from treaty obligations incumbent upon international organizations, as well as a result of human rights obligations involving access to justice.'⁴²

³⁹ Rios, Flaherty (n 26) 445–446.

⁴⁰ Those rights are found within the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Customary Human Rights Law.

⁴¹ See, for example, *Groupement d'Enterprises Fougerolle v CERN* (1992), Switzerland Federal Tribunal. The court looked at alternative methods for resolving disputes owing to the distinction between *jure gestionis* and *jure imperii* not applying to international organisations (211–212) and noted that such mechanisms provide the counterpart to international organisations' immunity (212).

⁴² A Reinisch, 'The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals' (2008) 7 *Chinese J Intl L* 285, 286.



Dannenbaum insists that the UN also is legally bound by international human rights law.⁴³ The UN legal personality means that it is bound by customary international law and this includes certain human rights.⁴⁴ UN Charter provisions, including Articles 1(3), 55 and 56, also require the UN to respect human rights.⁴⁵ UN member States arguably have a positive duty to enforce the Charter's human rights obligations 'over and above any other international law granting immunity.'⁴⁶ The position that the UN has immunity even where that would violate human rights has been deemed 'counterintuitive.'⁴⁷ As a result, a human rights-based approach to UN immunity has been developing over the past four decades.⁴⁸

The Brussels Appeals Court in *Manderlier v Organisation des Nations Unies et l'Etat Belge*⁴⁹ (1969) paves the way for a potential human rights-based challenge to UN immunity. The Appeals Court criticised 'the present state of international institutions [being that] there is no court to which the appellant can submit his dispute with the United Nations' as being a situation that 'does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights.'⁵⁰ The case highlights the tension between absolute immunity and human rights.

Urban v United Nations (1985) emphasised that a 'court must take great care not to unduly impair [a litigant's] constitutional right of access to courts.' Although the US Court of Appeals of the District of Columbia Circuit focused on a constitutional right, this might as easily have been an international human right. Whilst the tension was not fully explored owing to the facts, it does highlight that there is a lending

⁴³ See, generally, T Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability' (2010) 51 *Harvard Intl L J* 323-327.

⁴⁴ *ibid* 323.

⁴⁵ *ibid*.

⁴⁶ See, generally, Rios, Flaherty (n 26).

⁴⁷ JJ Paust, 'The UN Is Bound by Human Rights; Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity' (2010) 51 *Harvard Intl L J* 9.

⁴⁸ See Freedman (n 1).

⁴⁹ In *Manderlier v Belgium State and United Nations* (Brussels Appeal Court) [1969] 69 *ILR* 139; (1969) *UN Juridical YB* 236-237, the Appeal Court held that failure under Section 29 had no bearing on the absolute immunity under Section 2. Therefore the plea of 'no jurisdiction' was upheld.

⁵⁰ *ibid*.



towards rights of access to a court. Given the developments in international human rights law, this tension might now resolve in human rights taking precedence.⁵¹

The plaintiffs in *Mothers of Srebrenica v State of the Netherlands and the United Nations* (2008) claimed that the right to access a court provides an exception to the immunity principle.⁵² While that argument was not accepted by the Hague District Court,⁵³ the Court of Appeal in *Mothers of Srebrenica v State of the Netherlands and United Nations* (2010)⁵⁴ ruled that the UN could be joined to the case, thus setting aside its immunity under Section 2 of the CPIUN. The basis for setting aside the immunity was the right of an individual to access a court. The Court of Appeal held that the UN Charter and the CPIUN could not be used by States to avoid their ECHR obligations and it insisted that it was not precluded from *testing* the UN's immunity against these provisions. After testing the UN's immunity, and on the findings within that case, the Court of Appeal concluded that there would be no violation of the ECHR or ICCPR if a Dutch court upheld UN immunity within that particular case. While this case does not provide an example of when UN immunity may violate an individual's right to access a court, based on its specific facts, it does demonstrate that courts have the jurisdiction to determine whether such a violation has occurred within the context of a specific case.

These cases demonstrate that the door is now ajar for a human rights-based challenge to the UN's immunity.⁵⁵ Although in each case the courts found that alternative modes of settlement were available to the claimants, the seeds have been sown for a human rights-based challenge to succeed if such mechanisms are not in place.

⁵¹ *Urban v United Nations* [1985] US Court of Appeals DC Cir, 768 F 2d 1497, 248 US App DC 64 (DC Cir 1985) – the court considered the litigant to be 'frivolous' and seeking to 'flood' the court with 'meritless, fanciful claims.'

⁵² *Mothers of Srebrenica et al v State of the Netherlands and the UN* [2008] District Court in The Hague, 295247/HA ZA 07–2973.

⁵³ See, generally, G den Dekker, 'Immunity of the United Nations before the Dutch courts' (2008) 3 *The Hague Justice Journal* <www.haguejusticeportal.net/index.php?id=11748>.

⁵⁴ *Mothers of Srebrenica v Netherlands & United Nations* [2010] Case No 200.20.151/01, Judgment (Appeal Ct Hague).

⁵⁵ Freedman (n 1).



6. *A case for change*

The UN cannot be viewed in a vacuum. A human rights-based challenge to immunity must be understood in the context of developments regarding other international organisations. Reinisch insists that international organisations ‘may be under a duty to provide’ access to courts or to a remedy for potential claimants, without which ‘they may encounter difficulties in insisting on their immunity from suit in national courts’,⁵⁶ and his view is reflected in judicial statements and decisions.

The European Court of Human Rights has made clear that it regards the European Space Agency (ESA) as bound by international human rights law. In *Beer and Regan v Germany* (1999)⁵⁷ the Court considered that while immunities of international organisations might pursue a legitimate aim that would result in access to a court being restrained, this should not be absolute. Although the Court did not state that alternative dispute resolution mechanisms are a ‘strict prerequisite’ for immunity,⁵⁸ it did stress that ‘reasonable alternative means’ available to claimants⁵⁹ are ‘a material factor’⁶⁰ when assessing the proportionality of the restriction to the right of access to a court.⁶¹ The need for alternative mechanisms was developed further in *Siegler v Western European Union* (2003),⁶² where the Brussels Labor Court of Appeal held that immunity is conditional on the existence of alternative dispute settlement mechanisms, and that it must meet certain standards of due process.

Other international tribunals have adopted similar positions to the ECtHR. The ILOAT in *Chadsey v Universal Postal Union* (1968) emphasised ‘the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals proce-

⁵⁶ Reinisch (n 42) 291.

⁵⁷ *Beer and Regan v Germany* App no 28934/95 (2001) 33 EHRR 54, para 58; *Waite and Kennedy v Germany* App no 26083/94 (2000) 30 EHRR 261, para 73.

⁵⁸ Reinisch (n 42) 292.

⁵⁹ *Waite and Kennedy* (n 57) para 73.

⁶⁰ *ibid* para 68.

⁶¹ Reinisch (n 42) 292.

⁶² *Siegler v Western European Union* [2004] Brussels Labor Court of Appeal, *Journal des Tribunaux* 2004, 617, ILDC 53 (BE 2003).



dure.⁶³ In a later case, the same tribunal extended that principle to ‘the safeguard of an impartial ruling by an international tribunal.’⁶⁴ UNAT has relied upon the *Chadsey* ruling,⁶⁵ both explicitly⁶⁶ and implicitly by broadly interpreting its jurisdiction.⁶⁷

Courts seemingly approach international organisations as obligated to provide a reasonable legal remedy if there is no alternative and effective dispute settlement mechanism. Praust insists that this approach ‘must be approved’ because ‘it is justified by the human rights principle of access to courts.’⁶⁸ The Haiti Cholera Case provides the perfect facts for such an approach to be applied to the UN.

The outcome of a rights-based approach to UN would not be to remove immunity but to make it contingent on individuals being able to access a court and a remedy through the provision of alternative dispute resolution mechanisms. Indeed, that is simply a case of the UN adhering to its own framework for redressing injury outside of national courts. Implementing a rights-based approach to immunity would not result in cases being brought against the UN unless it fails to adhere to its obligations to provide appropriate mechanisms for victims to make claims. What a rights-based approach would do is to ensure that the UN foregrounds its human rights obligations and ensures that it does not violate the rights of individuals that it is supposed to protect.

⁶³ *Chadsey v Universal Postal Union* [1969] ILO Administrative Tribunal, Judgement No 122.

⁶⁴ *Rubio v Universal Postal Union* [1997] ILO Administrative Tribunal, Judgement No 1644, para 12.

⁶⁵ For a discussion of these cases, see Reinisch (n 42) 292–293.

⁶⁶ *Teixera v Secretary-General of the United Nations* [1977] UN Administrative Tribunal, Judgement No 230.

⁶⁷ *Irani v Secretary-General of the United Nations* [1971] UN Administrative Tribunal, Judgement No 150; *Zafari v UNWRA* [1990] UN Administrative Tribunal, Judgement No 461; *Salaymeh v UNWRA* [1990] UN Administrative Tribunal, Judgement No 469.

⁶⁸ J Wouters, P Schmitt, ‘Challenging Acts of Other United Nations’ Organs, Subsidiary Organs and Officials’, *Leuven Centre for Global Governance Studies*, Working Paper No 49 (April 2010) 26.

Choleric notes on the Haiti Cholera Case

*Riccardo Pavoni**

1. *Introductory remarks*

The titles in the growing literature¹ relating to the Haiti Cholera Case are often, albeit tacitly, inspired by García Márquez's celebrated novel 'Love in the Time of Cholera.'² This choice seems to arise from the traditional concern of writers with the identification of a catchy title for their works. We should go beyond that concern and enquire into the manifold ways to establish a connection between the devastating cholera epidemic in Haiti and García Márquez's masterpiece. The most apt way is to take advantage of the pun deliberately used by the Colombian author: *el cólera* as the deadly disease and *la cólera* as rage.

Indeed, one may feel choleric about the posture consistently taken by the United Nations (UN) since evidence began to emerge in late 2010 linking the cholera outbreak in Haiti to negligent organic waste management and disposal at a base being used by the UN Stabilization Mission in Haiti (MINUSTAH), which was hosting troops from Nepal, a country endemically affected by the disease. That posture has been translated into stone-wall tactics, an absence of transparency and inexplicable silences, refusals to acknowledge responsibility for the deaths and infections despite overwhelming evidence, and most important for our purposes, indefensible legal argumentation purportedly ruling out any duty to provide redress to the victims on the part of the UN.

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¹ F Mégret, 'La responsabilité des Nations Unies au temps du choléra' (2013) 47 *Revue Belge de Droit International* 161; J Alvarez, 'The United Nations in the Time of Cholera' *AJIL Unbound* (4 April 2014). See also Al Jazeera's documentary 'Haiti in a Time of Cholera' <www.youtube.com/watch?v=iz-kDh5Y2VE>.

² G García Márquez, *El amor en los tiempos del cólera* (Oveja Negra, 1985).



As shown below, it is noteworthy that the UN's defence does not rely on arguments that exclude the existence of primary obligations on the Organisation in the area of international human rights law or that suggest difficulties in establishing that the acts leading up to the Haiti cholera tragedy should be attributed to the UN. Therefore, such well-known problems, which are conversely highlighted by scholars in the context of the Haiti Cholera Case,³ may conveniently be left out from the scope of this contribution. The real bone of contention in the case at hand seems rather to involve the extent of the UN's third-party liability for acts of a private law nature, as well as the repercussions, if any, of the non-fulfilment of that liability on the jurisdictional immunity of the Organisation in domestic courts.

Before addressing these legal issues, a caveat is that, as in García Márquez's novel, the present contribution evokes a choleric mood driven by extreme passion, not by irresistible furious anger *per se*. It is default intellectual and civic passion for the workings and destiny of the principal universal international organisation (IO), one which is certainly 'worth cherishing ... at least if and when [it] serve[s] the global good.'⁴ Yet, the 'Haiti cholera betrayal' fuels choleric feeling and the perception of an exponentially increasing 'disconnect between how UN officials have historically seen themselves – as a kind of secular God for the international community – and the more pedestrian way that organization is now seen by outsiders, namely as just another governance institution whose legitimacy rests on its accountability.'⁵

³ See eg, J Klabbers, 'The Transformation of International Organizations Law' (2015) 26 *Eur J Intl L* 9, at 67–68, 70–76, 82.

⁴ *ibid* 82 ('Organizations may well-nigh be untouchable right here and right now, but at least they carry the promise of the "salvation of mankind" – they promise a better future, a better tomorrow').

⁵ Alvarez (n 1). Against the background of the Haiti Cholera Case, a vital link between accountability, legitimacy and effectiveness of IOs is forcefully advocated by K Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25 *Eur J Intl L* 991.

2. *An unprecedented frontal challenge from within*

Most strikingly, the Haiti Cholera Case reveals that the multifaceted UN system may also produce antibodies to protect the Organisation against itself. On 25 September 2014, four UN Human Rights Council (HRC) mandate holders addressed a joint letter of allegation to the UN Secretary-General (SG) communicating submissions they had received, according to which the UN must bear responsibility for the cholera outbreak in Haiti and the resulting violations of human rights, such as the rights to health and to safe drinking water.⁶

The submissions were especially concerned with the UN's refusal to acknowledge its tortious liability towards the victims and the associated duty to afford such victims remedies and compensation as envisaged by Section 29 of the General Convention on the Privileges and Immunities of the UN (GC) and the related provisions in the MINUSTAH Status of Forces Agreement (SOFA).⁷ They were also concerned with the terseness with which the UN had liquidated the affair until then, namely by means of letters from the UN Office of Legal Affairs (OLA) labelled as 'strictly confidential' and declaring some 5,000 individual claims for compensation as non-receivable under Section 29 of the GC, because 'consideration of these claims would necessarily include a review of political and policy matters.'⁸ Despite their somewhat baffling language, the letters were assuming that, whereas Section 29(a) mandates the UN to set up 'appropriate modes of settlement of ... disputes of a private law character' to which the Organisation is a party, the Haitian claims had to be regarded as triggering a public law dispute.

In their letter of allegation, the UN experts made clear that they took the complaints of the submitting entities very seriously and en-

⁶ Case No HTI 3/2014, Joint Letter of Allegation from the Special Rapporteur on Adequate Housing, the Independent Expert on Haiti, the Special Rapporteur on Health, and the Special Rapporteur on Water and Sanitation (25 September 2014). This letter and the subsequent replies from the UN are accessible via hyperlinks contained in Human Rights Council, Communications Report of Special Procedures, UN Doc A/HRC/28/85 (19 February 2015) 84.

⁷ Agreement between the United Nations and the Government of Haiti concerning the Status of Forces of the United Nations Operation in Haiti (9 July 2004) 2271 UNTS 235 paras 54–55.

⁸ Letter dated 5 July 2013 from Patricia O'Brien, Under Secretary-General for Legal Affairs, addressed to Brian Concannon, Institute for Justice and Democracy in Haiti.



gaged, in particular, with the OLA's abrupt rejection of the petitions. They highlighted the absence in Section 29 and the pertinent SOFA provisions of any policy or political exceptions, and that, in any case, 'addressing the lack of sanitation and wastewater management would not imply the review of political or policy matters but concerns the practicalities of setting up facilities at a peacekeeping base.'⁹ Tragicomically, they concluded that '[o]therwise, this would imply that the inadequate management of faeces and wastewater produced by peacekeepers reflects the policy of the United Nations.'¹⁰ The experts asked several questions of the SG, including – most significantly – whether the facts summarised in their letter were accurate, whether the UN had put in place compensation processes to the benefit of the victims of cholera, and whether enquiries had been undertaken about the OLA's contention that the cholera-related claims were not receivable.

The initiative of the four UN experts has prompted the most comprehensive document to date setting out the official position of the Organisation on the Haiti Cholera Case. In November 2014, Mr Pedro Medrano, the UN Senior Coordinator for the Cholera Response in Haiti, addressed a 33-page reply to the UN experts.¹¹ But only five pages of the document deal with the core legal issues arising from the Haitian claims in some depth.¹² The rest is devoted to a detailed account of the history of the UN's presence in Haiti, to the findings of the UN-appointed Independent Panel of Experts on the Cholera Outbreak in Haiti and the related follow-up by the UN, to the various efforts undertaken by the UN in the aftermath of the outbreak, and to the UN's general policies and practice concerning accountability for human rights violations caused by its peacekeeping forces. The single remarkable aspect of this part of the reply is the UN's persistent refusal to acknowledge its responsibility for the epidemic. The reply recalls that the Panel of Experts concluded in 2011 that the outbreak was caused by a 'confluence of circumstances and ... was not the fault of, or due to

⁹ Case No HTI 3/2014, Joint Letter of Allegation (n 6) 4.

¹⁰ *ibid.*

¹¹ Case No HTI 3/2014, Reply from Pedro Merano, Assistant Secretary-General and Senior Coordinator for Cholera Response, addressed to the Special Rapporteur on Adequate Housing, the Independent Expert on Haiti, the Special Rapporteur on Health, and the Special Rapporteur on Water and Sanitation (25 November 2014).

¹² *ibid.* 25–30.

the deliberate action by, a group or individual.¹³ What the reply fails to mention is that, in the Panel's view, such confluence of circumstances, including the deficiencies of Haiti's health care system and water-supply infrastructure, was responsible for *facilitating* the outbreak and explosive spread of the disease, *not for the penetration* itself of the cholera strain to Haiti; in this respect, the Panel's remarks were consistent with the scenario of the importation of cholera in Haiti via the Nepalese contingent of MINUSTAH.¹⁴ The reply also fails to mention that, indeed, subsequent findings by the Panel in 2013 indicated that 'personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti.'¹⁵

3. *Private versus public law disputes*

The UN reply is entirely unsatisfactory with respect to the reasons behind the summary dismissal of the Haiti cholera-related individual claims. It is tautological and begs questions. It states that the UN concluded that those claims 'raised broad issues of policy that arose out of the functions of the United Nations as an international organization',¹⁶ and that '[a]s such, they could not form the basis of a claim of a private law character'¹⁷ which would trigger the obligation under Section 29 of the GC and associated provisions in the MINUSTAH SOFA to establish appropriate means of settlement.

According to the reply, disputes of a private law character should be understood as 'disputes of the type that arise between two private parties',¹⁸ namely, those involving 'claims arising from circumstances in

¹³ *ibid* para 10. See 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (3 May 2011) 29.

¹⁴ 'Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti' (n 13) 27 (giving account of scientific analyses that had confirmed that 'the strains isolated in Haiti and Nepal during 2009 were a perfect match'). If that was the source of cholera's introduction into Haiti, the shortcomings in the wastewater management system at the relevant MINUSTAH camp, as detected by the Panel of Experts, should also be included among the *key* circumstances that facilitated the outbreak, *ibid* 21–23.

¹⁵ Case No HTI 3/2014, Joint Letter of Allegation (n 6) 2.

¹⁶ Case No HTI 3/2014, Reply (n 11) para 97.

¹⁷ *ibid*.

¹⁸ *ibid* para 87.



which the United Nations is acting like a private person',¹⁹ such as contractual, property or traffic accidents disputes. By contrast, 'claims that would arise between an individual and a public authority'²⁰ should be regarded as underlying public law disputes that may be settled only at the international level through the traditional political, diplomatic and judicial remedies available to international law subjects of a public nature (States and IOs).²¹ In and of itself, the invocation of the UN's liability in tort by alleged individual victims would not generate a private law dispute, as this determination would rest on a series of additional factors, including the 'nature of the duty'²² incumbent on the UN and the 'nature of the conduct or activity at issue.'²³

The reply attempts to justify the purported 'political/policy issue' carve-out to the UN's duty to establish appropriate modes of settlement, which is at the basis of the rejection of the Haitian claims, by citing the 1995 SG Report on the implementation of Section 29 of the GC.²⁴ It recalls that the SG ruled out any duty on the UN to create mechanisms for the settlement of private claims 'based on political or policy-related grievances against the United Nations.'²⁵ The SG maintained that such claims usually involved 'actions or decisions taken by the Security Council or the General Assembly in respect of certain matters';²⁶ they frequently consisted of 'rambling statements'²⁷ challenging the policies of the UN and demanding compensation for damage arising therefrom. According to the 2014 reply, the foregoing are indeed claims 'attacking the political or policymaking functions'²⁸ of the UN and its adoption (*vel non*) of certain policies or practices. As such, they would not give rise to private law disputes.²⁹

¹⁹ *ibid* para 89.

²⁰ *ibid* para 88.

²¹ *ibid*.

²² *ibid* para 90.

²³ *ibid*.

²⁴ *ibid* para 89.

²⁵ 'Report of the Secretary-General, Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations' UN Doc A/C.5/49/65 (24 April 1995) para 23.

²⁶ *ibid*.

²⁷ *ibid*.

²⁸ Case No HTI 3/2014, Reply (n 11) para 89.

²⁹ *ibid*.

The reference to the 1995 SG Report is unfortunate and misleading, at least for two reasons. First, the Haitian cholera-related claims cannot be subsumed within the ‘frivolous’ claims that the SG had in mind, namely claims which directly seek to harass and question the decision-making processes of the political bodies of the UN, say for example, a claim that the UN’s deliberations and operations with respect to the Occupied Palestinian Territory or Iraq have facilitated systematic loss of private property or widespread suffering and starvation. Instead, far from being ‘rambling statements’, the Haitian petitions are merely seeking redress for death and personal injuries arising from the outbreak of cholera in the country allegedly as a result of gross negligence or reckless conduct on the part of the UN. That these petitions may entail an indirect challenge to the sanitary, environmental and waste management policies pursued by the UN when exercising its powers based on Chapters VI or VII of the UN Charter does not modify their essential nature as claims of compensation for damage caused by wrongs that any private party may well commit. Asserting the opposite lends weight to the scholarly perception that the ‘political/policy issue’ carve-out may translate into an arbitrary and open-ended argument in fact shielding the UN from any form of accountability towards aggrieved individuals.³⁰ Secondly, the 1995 Report was one of a series of documents whereby the SG, in the context of the boom in UN peacekeeping and peace enforcement actions during the 1990s, neatly upheld the principle of the UN’s third-party liability for death and personal injuries arising from both the ‘ordinary’ and combat-related operations of UN forces.³¹ It is difficult to see why claims relating to injuries suffered as a result of humanitarian law violations through military activities of UN forces may be eligible for individual redress, whereas the Haitian cholera-associated petitions should carry the ‘stigma’ of public law claims ruling out any duty to compensate the victims.³²

The UN reply quotes three precedents evidencing the consistent practice of the Organisation in rejecting claims of a public law nature allegedly similar to those brought by the Haitian cholera victims. Two

³⁰ Mégret (n 1) 170.

³¹ See especially, ‘Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations’ UN Doc A/51/389 (20 September 1996) paras 7-8, 16.

³² Cf Mégret (n 1) 168.



of these precedents are largely irrelevant. They refer to the claims submitted by (or on behalf of) victims (or their relatives) of the mid-1990s Rwandan and Srebrenica genocides on account of the purported failure of UN peacekeeping forces to prevent those crimes.³³ Although there may be doubts about whether those claims are accurately classifiable as underlying public law disputes,³⁴ the position of the UN is more understandable here. Such claims do entail a certain degree of encroachment on the way the UN has carried out its Chapters VI and VII mandates. They directly bring into question the independent exercise of the core functions of the UN and its discretion in respect of key operational and military decisions.³⁵ The difference with the Haitian claims is glaring. Entertaining the latter claims would not imply any review of the UN's performance of its Charter-based mandate and decisions vis-à-vis Haiti, ie, of the acts whereby its truly public authority has been exercised in that country. Such mandate and decisions merely stand in the background of quintessentially collateral 'private' wrongs.

The third precedent is more pertinent.³⁶ It relates to the little-known (or softly spoken) story of the relocation by the UN Interim Administration in Kosovo (UNMIK) of certain displaced communities (mostly of Roma ethnic origin) to camps in North Mitrovica which were heavily contaminated by toxic substances, particularly lead. It is a story replete with alleged unjustifiable delays and incomprehensible inertia by the UN authorities in evacuating the camps in the face of dozens of deaths and sick individuals.³⁷ The compensation claims filed in 2011 by the representatives of the communities were dismissed by the UN on

³³ Case No HTI 3/2014, Reply (n 11) paras 91–92.

³⁴ With respect to the Srebrenica situation, the European Court of Human Rights has refrained from taking a position on this point: *Stichting Mothers of Srebrenica and Others v the Netherlands*, App no 65542/12 (Decision, 11 June 2013) para 165 ('Regardless of whether Article VIII, paragraph 29 of the [General] Convention ... can be construed so as to require a dispute settlement body to be set up in the present case ...'). By contrast, in the context of the same litigation, the Dutch Supreme Court had apparently no doubt that the obligation under Section 29 had not been honoured by the UN: Supreme Court of the Netherlands, *Mothers of Srebrenica Association v the State of the Netherlands and the United Nations*, LJN BW1999 (Judgment of 13 April 2012) para 3.3.3 ('Contrary to the provisions of article VIII, § 29 ... the UN has not made provision for any modes of settlement of disputes ...').

³⁵ See eg, Mégret (n 1) 171–174.

³⁶ Case No HTI 3/2014, Reply (n 11) para 93.

³⁷ P Polansky, *UN-led Blood* (Kosovo Roma Refugee Foundation, 2005).



the ground that they ‘involved alleged widespread health and environmental risks arising in the context of the precarious security situation in Kosovo’,³⁸ as such, they did not constitute claims of a private law character, but rather amounted, in essence, to ‘a review of the performance of UNMIK’s mandate as the interim administration in Kosovo.’³⁹ The 2014 UN reply seeks to shed some light onto this puzzling argumentation by adding that, indeed, ‘UNMIK retained the discretion to determine the modalities for implementation of its interim administration mandate, including the establishment of [internally displaced person] camps.’⁴⁰ First of all, one should stigmatise the attempt by the UN to rephrase the content of the claims at issue. The dire environmental, sanitary and security conditions prevailing in (that part of) Kosovo only represented the setting against which the relevant decisions were made and the asserted wrongs were perpetrated by UNMIK. They did not exempt the UN from its responsibility to identify safer sites to relocate the children and adults of the communities than the lead-contaminated areas, and, *a fortiori*, to secure the prompt evacuation of such areas once scientifically-backed evidence confirmed that deaths and injuries were occasioned by that situation. The emphasis on those dire conditions looks more like an awkward move which aims to place the blame on the Kosovar authorities. Secondly, the case in question may be distinguished from the Haiti Cholera Case on the ground that the compensation claims directly arose from decisions made by UNMIK in the fulfilment of its mandate as a transitional governmental authority, rather than from misconduct incidental to the pursuit of the core mission of MINUSTAH. In this context, it would have been more appropriate for the UN to invoke the defence of ‘operational necessity’,⁴¹ say, that the relocation to safer areas was unfeasible or outweighed by other competing concerns, instead of insisting on the public law nature of the claims. At any rate, that defence is patently unavailable vis-à-vis the Haiti chol-

³⁸ Letter dated 25 July 2011 from Patricia O’Brien, Under Secretary-General for Legal Affairs, in the matter of a Claim for Compensation on behalf of Roma, Ashkali and Egyptian Residents of Internally Displaced Person (‘IDP’) Camps in Mitrovica, Kosovo <www.sivola.net/download/UN%20Rejection.pdf>.

³⁹ *ibid.*

⁴⁰ Case No HTI 3/2014, Reply (n 11) para 93.

⁴¹ See ‘Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations’ (n 31) paras 13–15.



era-related petitions. All considered, however, the differences between the two cases are not straightforward. It is difficult to share the view that when the UN is acting as an interim territorial administration ‘there is a much stronger case’⁴² for regarding its actions ‘as addressing political or policy matters of a governmental nature that do not give rise to claims of a private law character.’⁴³ On the contrary, it is submitted that the scope and extent of the accountability of the UN towards individual victims, especially when they belong to the most vulnerable sectors of the population (such as the Roma communities), should be magnified when the Organisation acts in its capacity as a State-like public body. In similar situations, where the UN is frequently the sole authority exercising effective governmental power,⁴⁴ there must be a limit to the notion that its decision-making discretion is not subject to (indirect) review. The UN retains its freedom to establish camps for refugees or displaced persons wherever it sees fit, as well as to refuse to close down massively polluted or unsafe camps, but it should then shoulder its responsibility for deaths and personal injuries arising therefrom.

Either way, the case of the lead-contaminated camps in Mitrovica is unhelpful to the UN’s defence in the Haiti Cholera Case. This is crystal clear if one takes the view that the former is fundamentally different from the latter. Alternatively, if the two are comparable, as the UN reply assumes, this would simply mean that the summary rejection of the Mitrovica claims is also legally untenable.

4. *The immunity issue*

4.1. *A precarious ruling from a US district court*

The letter of allegation from the HRC mandate holders did not ask clarifications or contain significant remarks on the jurisdictional immunity enjoyed by the UN in domestic courts, except for a statement

⁴² B Rashkow, ‘Remedies for Harm Caused by UN Peacekeepers’ *AJIL Unbound* (2 April 2014).

⁴³ *ibid.*

⁴⁴ Of course, as in the Kosovo situation, the UN is increasingly accompanied by fellow IOs in the exercise of fundamental functions of State-building, administration of justice, law enforcement, promotion of the rule of law, and so on.

according to which the UN's duty to provide for modes of settlement of private law disputes under Section 29(a) of the GC can be regarded as a 'counterbalance'⁴⁵ to the UN's immunity from legal process stipulated by Section 2. Nonetheless, the UN reply briefly addressed this issue.⁴⁶ After recalling that the UN had been sued before the United States (US) courts in a number of pending cases instituted by the Haitian cholera victims (or their relatives), it affirmed that 'the fulfilment of the Organization's obligation under Section 29(a) is not, and has never been understood, [*sic*] to be a *prerequisite* or *condition* for the enjoyment of its immunity from legal process.'⁴⁷ Indeed, the reply reiterated the UN's consistently-held view that its immunity 'is neither qualified nor limited in any way under the terms of the General Convention.'⁴⁸

The foregoing observations seem to imply the UN's acquiescence on the point that compliance with the duty to afford a remedy under Section 29 is at least a counterbalance to its immunity, if not a precondition *stricto sensu*. But this perspective is likely to offer little solace to alleged victims of UN's wrongful acts, because, as the Haiti Cholera Case shows, that counterbalance may be brought into play only if and when the UN unilaterally determines that the relevant claims are of a private law nature, hence receivable. Such unilateralism is also evident in the comment that the duty at stake has never been understood as a prerequisite for the granting of immunity to the UN. This position is a reflection of the views and practice *of the Organisation itself*.⁴⁹

The UN's insistence on its absolute immunity even in contexts where doing so appears futile betrays a certain degree of anxiety. Rightly so. The Haiti Cholera Case is the prototype of a situation carrying the risk that domestic courts step in and try to make sense themselves of the counterbalance in Section 29 by denying the UN immunity from suit. The case is exceptional in that no modes of settlement whatsoever, in-

⁴⁵ Case No HTI 3/2014, Joint Letter of Allegation (n 6) 3.

⁴⁶ Similarly, without any apparent reason, the 2011 UN's letter of dismissal of the claims relating to the lead-contaminated Roma camps in Mitrovica (n 38) concluded with the following statement: 'Nothing in this communication shall be deemed a waiver, express or implied, of the privileges and immunities of the United Nations, including its subsidiary organs, which are hereby expressly reserved.'

⁴⁷ Case No HTI 3/2014, Reply (n 11), para 100, emphasis added.

⁴⁸ *ibid.*

⁴⁹ See below sub-s 4.3 for the practice of domestic courts evidencing a different approach and n 50 for a sample of literature to the contrary effect.



cluding the UN's internal processes such as local claims review boards, is open to the victims of cholera. There would be no need here for domestic courts to engage in controversial assessments of the adequacy and effectiveness of an existing remedy. The thesis which makes the enjoyment of the immunity of *all* IOs conditional on the availability of alternative means of redress for the victims is therefore at its strongest.⁵⁰

Nevertheless, the disregard for the counterbalance in Section 29 by the UN was deemed immaterial for the purposes of the UN's immunity in the first judicial decision handed down within the ongoing Haiti cholera-related litigation before the US courts. In *Georges v United Nations*,⁵¹ a US District Court recently held that it lacked jurisdiction to entertain the case, as confirmed by consistent US precedents according to which the UN is entitled to absolute immunity from suit under Section 2 of the GC, save an *express* waiver by the UN itself. Relying on the Court of Appeal's *Brzak* decision,⁵² Judge Oetken stated that to consider the immunity of the UN as conditional on the setting up of alternative means of settlement 'would read the *strict express* waiver requirement out of the [GC]';⁵³ moreover, the text and drafting history of the GC, as well as the 'reasonable' views outlined by the US Executive in its Statement of Interest in support of the UN, further demonstrated the fallacy of the 'alternative remedy' argument.⁵⁴ Although *Brzak* involved a challenge to the adequacy of the UN's pertinent internal dispute resolution mechanisms, the sweeping statements by Judge Oetken make

⁵⁰ See eg, A Reinisch, UA Weber, 'In the Shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004) 1 Intl Organizations LR 59; R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in E de Wet, J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 71, 103–111.

⁵¹ US District Court for the Southern District of New York, *Delama Georges et al v United Nations et al*, 13-CV-7146 (JPO), Opinion and Order of 9 January 2015 (per Oetken J). This decision has been appealed against and as a result the case is now pending before the US Court of Appeals for the Second Circuit.

⁵² *Brzak v United Nations*, 597 F3d 197 (2nd Cir 2010).

⁵³ *Georges v United Nations* (n 51) 5, emphasis added. This holding seems to preempt any argument to the effect that non-fulfilment of the obligation in Section 29 may amount to an *implied* waiver of immunity.

⁵⁴ *ibid* 5–7.

clear that, in his view, immunity must likewise be afforded to the UN in situations characterised by a complete absence of individual remedies.⁵⁵

The main criticism concerning the US District Court's *Georges* decision is simply that it cannot be considered as representative of the current state of the law at the global level. There is nothing in this decision that suggests that an identical solution would necessarily prevail in other domestic settings. It is at best a close reflection of US precedents and US court attitudes towards the interpretation of treaties. Thus, Judge Oetken interpreted the GC, on the one hand, in the light of its text and drafting history, and on the other, by substantially deferring to the US Executive. A court more open to the wider framework could well highlight the relevance of other hermeneutic criteria warranting the opposite conclusion and modernising the pertinent provisions of the GC, in particular (i) effective interpretation (ie, affording immunity under Section 2 in these circumstances would unduly set at naught the duty to establish means of settlement for private law disputes under Section 29); and (ii) systemic and evolutionary interpretation (ie, Sections 2 and 29 would be construed in the light of the whole body of contemporary international law, including the way specular provisions in other IO immunity agreements have been read and applied, as well as developments in international human rights law subsequent to the GC). In Judge Oetken's narrow findings, there is no room for these outreach efforts, even less so for acknowledging the possibility of a norm conflict between the rule of unconditional UN immunity and the human right of access to justice.

4.2. *The inconclusiveness of the Strasbourg Court's case law*

The case law of the European Court of Human Rights (ECtHR) on the relationship between the right of access to justice under Article 6 of the European Convention on Human Rights (ECHR) and the immunity of IOs is particularly noteworthy, yet controversial and unsettled. The leading precedents are still the 1999 twin judgments in *Waite and Ken-*

⁵⁵ It must be noted, on the other hand, that the District Court did not say anything about the meaning and scope of Section 29 and seemed rather to proceed on the assumption that the provision was engaged in the case at hand, ie, that the latter involved a private law dispute.



nedy and *Beer and Regan*,⁵⁶ where the Court famously stated that a ‘material factor’⁵⁷ in reviewing the proportionality of grants of immunity to IOs vis-à-vis Article 6 was ‘whether the applicants had available to them *reasonable alternative means* to protect *effectively* their rights under the Convention.’⁵⁸ However, in 2013, faced with a challenge to the immunity of the UN arising in the context of the Srebrenica litigation before the Dutch courts, the ECtHR abandoned the ‘alternative remedy’ test as a critical yardstick for evaluating the ECHR legality of IO immunity.⁵⁹ The Court explicitly revisited the test and held that the *Waite and Kennedy* ruling did not imply that ‘in the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court.’⁶⁰ On the facts of the case, the patent absence of alternative means of redress for the victims of Srebrenica was irrelevant and the application was dismissed as manifestly ill-founded. Although the foregoing holding was referred to IOs as a whole and – as far as the UN is concerned – did not make any distinction based on the specific UN activities at stake, an overall reading of the 2013 decision suggests that it is narrowly confined to cases involving the UN in the exercise of its powers in the field of international peace and security. Indeed, the ECtHR insisted that the Srebrenica case was ‘fundamentally different’⁶¹ from all the earlier IO-related cases brought to its attention, because it concerned allegedly wrongful acts by a UN peacekeeping force created pursuant to Chapter VII of the UN Charter. Hence, according to the Court, ‘since operations established by ... Security Council Resolutions under Chapter VII of the ... Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations.’⁶²

⁵⁶ *Waite and Kennedy v Germany* App no 26083/94 (Judgment, 18 February 1999); *Beer and Regan v Germany* App no 28934/95 (Judgment, 18 February 1999).

⁵⁷ *Waite and Kennedy* (n 56) para 68.

⁵⁸ *ibid*, emphasis added.

⁵⁹ *Stichting Mothers of Srebrenica* (n 34).

⁶⁰ *ibid* para 164.

⁶¹ *ibid* para 165.

⁶² *ibid* para 154.

This holding must be taken as yet another piece of the unfinished puzzle of the relationship between UN law and the ECHR. For one thing, the Strasbourg Court has actually adjudicated cases involving either indirectly⁶³ or directly⁶⁴ the exercise of Security Council powers under Chapter VII, most prominently in the area of targeted sanctions. It has never shown, at least in a clear-cut manner, any particular deference to the UN Charter and has never stated that, by definition, it lacks jurisdiction to review such cases. On the contrary, a few months after the *Stichting Mothers of Srebrenica* decision, in *Al-Dulimi*, the ECtHR applied the equivalent protection test, as developed in the context of the general question of ECHR Parties' responsibility for transfers of powers to IOs, to the UN and found that the test was not fulfilled by the remedies available at the UN level to the individuals blacklisted pursuant to Security Council resolutions.⁶⁵ True, the targeted sanctions cases do not concern immunity issues, but formalism aside, it is undeniable that the *Stichting Mothers of Srebrenica* and *Al-Dulimi* decisions are in contention with one another.

Moreover, it is difficult to identify any plausible reason why the UN should be spared an alternative remedy test in the form of an impartial adjudicatory mechanism as dictated by human rights law, especially in situations similar to the genocide in Srebrenica or the cholera in Haiti. Logically, if the test is retained vis-à-vis much more functionally limited IOs, such as the European Space Agency⁶⁶ or NATO,⁶⁷ it would appear *a fortiori* applicable to an IO, such as the UN, with exponentially increasing powers and associated occasions where its accountability for harm to private parties is likely to arise. From a legal point of view, the 'stone guest' in this framework is obviously the primacy clause in Article 103 of the UN Charter. Aside from the fact that the ECtHR has so far

⁶³ *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Şirketi v Ireland*, App no 45036/98 (Judgment, 30 June 2005).

⁶⁴ *Al-Jedda v United Kingdom* App no 27021/08 (Judgment, 7 July 2011); *Nada v Switzerland*, App no 10593/08 (Judgment, 12 September 2012).

⁶⁵ *Al-Dulimi and Montana Management Inc v Switzerland*, App no 5809/08 (Judgment, 26 November 2013) paras 116–121, 134. The case is now pending before the Grand Chamber of the ECtHR, whose much-awaited decision is expected around the end of 2015.

⁶⁶ *Waite and Kennedy* (n 56); *Beer and Regan*, *ibid.*

⁶⁷ *AL v Italy*, App no 41387/98 (Decision, 11 May 2000); *Chapman v Belgium*, App no 39619/06 (Decision, 5 March 2013).



refrained from taking a definite position on the impact of that provision on ECHR obligations,⁶⁸ what matters here is to outline how Article 103 might come into play vis-à-vis the immunity of the UN. First, the problem does not normally involve the primacy of obligations stemming from Security Council Chapter VII resolutions. A domestic court qualifying UN immunity from compensation claims arising in the context of Chapter VII missions on the basis of existing alternative remedies would not renege on its duty to comply with Security Council resolutions, but rather, arguably, on its duty to afford the Organisation ‘such privileges and immunities as are necessary for the fulfilment of its purposes’ under Article 105(1) of the Charter. Secondly, however, it would be too simplistic to assert that the absolute immunity rule stipulated by Section 2 of the GC is entitled to precedence vis-à-vis all other treaties *par ricochet*, ie, as a reflection of the primacy enjoyed by Article 105(1) of the Charter via Article 103. This opinion would regard Section 2 as confined to spelling out the true meaning of Article 105(1). Functional immunity would in fact translate into absolute immunity, because in principle the UN and IOs as a whole can only act within the scope of their functions, save the possibility of *ultra vires* decisions, which, far from warranting denials of immunity, would be invalid and engage the international responsibility of IOs. Such a trite argument⁶⁹ may be considered as a remnant of strict functionalist thinking, one which is increasingly out of tune with the contemporary evolution of international law and the ongoing transformation of the role of IOs as perceived by scholars and the public at large. In short, the relationship between Article 105(1) of the Charter and Section 2 of the GC is one of the key legal aspects at hand which could usefully be addressed by a fresh pronouncement of an international adjudicatory body. Meanwhile, it is submitted that a domestic court may well take the view that a given act by the UN, say, the mismanagement of waste disposal at peacekeeping bases causing harm to individuals, does not in fact satisfy the functional necessity test inherent in Article 105(1). This is one of the chief reasons why Article 103 cannot be seen as a tie-breaker in our context. The

⁶⁸ See for instance the misleading statements in *Stichting Mothers of Srebrenica* (n 34) para 145.

⁶⁹ The argument is routinely recalled especially in the practice of IOs. For sceptical accounts, see eg, Reinisch, Weber (n 50) 63–64; Klabbers (n 3) 68–74.

problem of the effect of the Charter obligations' primacy on customary and treaty law on human rights may be irrelevant, after all.

The *Stichting Mothers of Srebrenica* decision casts doubt on whether a hypothetical application filed with the ECtHR by Haitian cholera victims against an ECHR party upholding UN immunity would succeed. Indeed, despite the marked differences between the Srebrenica litigation and the Haiti Cholera Case,⁷⁰ the decision is a powerful reminder of the Strasbourg Court's reluctance when it comes to reviewing immunity cases which implicate UN operations based on Chapter VII.

In actual fact, another recent decision of the ECtHR concerning the immunity of the UN in a labour dispute gives the impression that the restrained attitude in question applies to all cases which implicate the UN in any manner whatsoever, that is to say not just in relation to its Chapter VII powers, thereby providing an *a fortiori* argument corroborating the foregoing observation on the Court's judicial policy vis-à-vis UN immunity issues. In *Perez*,⁷¹ the ECtHR rejected an application filed against Germany by a former staff member of the UN Development Programme (UNDP) – a subsidiary organ of the UN covered as such by the latter's immunities – on account of the deficiencies of the UN administration of justice system, including the UN Administrative Tribunal, that was applicable when⁷² she challenged the allegedly unfair termination of her employment contract with the UN. The rather unusual⁷³ circumstance that the applicant, while insisting on Germany's responsibility, had not brought suit before any German courts paved the way for the Court's dismissal of the case on the ground that domestic remedies had not been exhausted.⁷⁴ There is reason to doubt the soundness of this finding, as the relevant remedies could be regarded as plainly ineffective, given the monolithic case law of the German courts affording immunity to IOs such as the European Space Agency or the European Patent Organisation, despite glaring shortcomings in their

⁷⁰ See text at nn 33–35.

⁷¹ *Perez v Germany*, App no 15521/08 (Decision, 6 January 2015).

⁷² A few years thereafter, the UN Administrative Tribunal was replaced with a two-tier system consisting of the UN Dispute Tribunal and the UN Appeals Tribunal: see UNGA Res 63/253 (24 December 2008).

⁷³ But see *AL v Italy* (n 67); *Gasparini v Italy and Belgium*, App no 10750/03 (Decision, 12 May 2009).

⁷⁴ *Perez* (n 71) paras 90, 96.



internal means of dispute settlement. The perception is that in this case the ECtHR found a convenient way to get rid of an application questioning the immunity of the UN, thus circumventing the issue of the compatibility of the former UN administration of justice system with meaningful due process standards. The Court had before it a 2006 report by an independent panel of experts which had depicted that system as, *inter alia*, ‘outmoded, dysfunctional ... [,] ineffective and ... lack[ing] independence.’⁷⁵ It acknowledged that such flaws may well ‘raise an issue’⁷⁶ under Article 6 of the ECHR.

4.3. *The distinct role of domestic courts*

The decisions of the ECtHR do not purport to evidence the practice of (European) States parties to the GC and other IO immunity agreements. Moreover, the role of the Court in immunity cases is clearly distinguishable from that of (European) domestic courts. It is hard to imagine how its jurisdiction may ever be triggered in situations involving *denials* of IO immunity by those courts. Nonetheless, ECtHR decisions may have a decisive impact also on the latter situations. An ECtHR ruling that the recognition of IO immunity does not violate the right of access to justice offers domestic courts a formidable incentive to follow suit. But this is ultimately just an incentive which may simply be ignored by such courts, which primarily are mandated to administer the human rights guarantees in their constitutions. As interpreted and applied, these guarantees may well induce certain courts to lift the immunity of IOs, including the UN, regardless of the findings of the ECtHR. This latent danger should be kept in mind by the UN authorities when considering the way forward in the Haiti Cholera Case.

A precedent in point is the 1992 *Stavrinou* decision⁷⁷ by the Supreme Court of Cyprus which accorded immunity to the UN and its peacekeeping force in Cyprus (UNFICYP) in a damages action filed by one of its local employees for injuries suffered while performing his duties. The Court’s conclusion was driven by the existence of an

⁷⁵ *ibid* para 31.

⁷⁶ *ibid* para 65.

⁷⁷ *Stavrinou v United Nations*, (1992) CLR 992, ILDC 929 (CY 1992), Decision of 17 July 1992.

UNFICYP internal settlement system open to the claimant, which made the grant of immunity compatible with the right of access to justice in the Cyprus Constitution. But in recent times, the most significant example is provided by Judgment No 238/2014 of the Italian Constitutional Court.⁷⁸ In a situation denoted by (what was perceived as) an absolute lack of meaningful remedies for the victims of Nazi crimes, this Court found that the duty to comply with the International Court of Justice (ICJ) *Jurisdictional Immunities* Judgment⁷⁹ was unconstitutional for its breach of the Italian Constitution's general clause on the safeguarding of fundamental rights and the specific clause on the right to effective judicial protection. The Court also ruled that, insofar as it applied to unredressed grave violations of human rights, the customary State immunity rule was never incorporated into the Italian legal system. There can be little doubt that this decision would be squarely – or better, *a fortiori* –⁸⁰ transposable to the facts underlying the Haiti Cholera Case. It is noteworthy that the inclusion of the key provision of Article 94 of the UN Charter (as implemented by Italy) among the legal rules covered by the declaration of unconstitutionality did not have any significant impact on the Court's argumentation.

Judgment No 238 may well be regarded as just another prominent example of Italian exceptionalism in the area of international immunities. It may also be forcefully criticised for its radical dualism and for undermining crucial tenets upon which modern international law and relations have been forged. It nonetheless remains a potent demonstration of a domestic backlash against any internationally-cleared attempt at condoning unredressed breaches of human rights, and of the significance of the 'alternative remedy' test in immunity cases at large. However one chooses to side, it is pertinent to recall the widely shared view⁸¹ according to which the primary useful function played by the critical

⁷⁸ *Simoncioni v Germany*, Judgment No 238 of 22 October 2014.

⁷⁹ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, (Judgment, 3 February 2012) [2012] ICJ Rep 99. As far as material, the ICJ found that Italy had breached Germany's right to immunity by allowing compensation claims to be brought against it for violations of international humanitarian law during World War II, *ibid* para 139(1).

⁸⁰ If only because of the treaty-based nature of IO immunity as compared to the customary status of the State immunity rule.

⁸¹ See eg, A Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013) 10 Intl Organizations LR 572, 578, 581, 587.



engagement of domestic courts with the law of international immunities is that of urging the targeted foreign States or IOs to come back to the negotiating table and to cooperate in good faith in devising methods of affording a remedy to aggrieved individuals.

In any event, Italy's exceptionalism does not encompass the 'alternative remedy' test as applied in the field of IO immunity. There is no need here to trace back the multitude of domestic court decisions that, though almost exclusively in the area of labour disputes with IOs, have accepted that the fulfilment of the test constituted a prerequisite for the enjoyment of such immunity.⁸² Three observations would be sufficient. First, a considerable number of these decisions have not simply re-trenched behind the respective national constitutions. They have instead justified the test at hand on the basis of international law arguments, such as effective treaty interpretation⁸³ and compliance with the ECHR.⁸⁴ Secondly, various decisions have applied the test in the context of treaty provisions which are by all means identical to Sections 2 and 29 of the GC, including – most significantly – in cases brought against the specialised agencies of the UN,⁸⁵ the 'framework' immunities of which are governed by a convention⁸⁶ closely modelled, for all relevant purposes, on the GC. These disputes involving the specialised agencies show that no plausible reason warrants a different approach to the immunity of the UN, unless one were of the view that the UN is a

⁸² See eg, C Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends' (2010) 7 Intl Organizations LR 121; Pavoni (n 50) 98–108.

⁸³ Italian Court of Cassation, *Drago v International Plant Genetic Resources Institute*, ILDC 827 (IT 2007), Judgment No 3718 of 19 February 2007.

⁸⁴ See eg, Belgian Court of Cassation, *Western European Union v Siedler*, No S.04.0129.F; *General Secretariat of the ACP Group v Lutchmaya*, No C.03.0328.F; *General Secretariat of the ACP Group v BD*, No C.07.0407.F, Judgments of 21 December 2009.

⁸⁵ See eg, Italian Court of Cassation, *Food and Agriculture Organization v Colagrossi*, Judgment No 5942 of 18 May 1992; Supreme Court of Justice of Argentina, *Dubalde v World Health Organization*, D.73.XXXIV, Judgment of 31 August 1999. This Argentine case law is the most compelling example showing that the 'alternative remedy' test cannot be viewed as an all European phenomenon, a point which is frequently missed by commentators, see eg, Mégret (n 1) 184.

⁸⁶ Convention on the Privileges and Immunities of the Specialized Agencies, adopted 21 November 1947 UNGA Res 179(II). Sections 4 and 31 of this Convention are identical to Sections 2 and 29 of the GC.

sort of super IO entitled to a privileged treatment vis-à-vis its family members. Thirdly, domestic court case law is not, however, uniform, even at the European level. In addition to US courts, significant decisions discarding the ‘alternative remedy’ test have been delivered by United Kingdom⁸⁷ and Canadian courts.⁸⁸ This oscillating national jurisprudence suggests, here too, that an ad hoc ruling by an international judicial body on the relationship between IO immunity clauses and the right of access to justice would represent a key contribution towards the stabilisation and predictability of the law.

5. *Conclusion: Towards a lump sum settlement?*

It may well be that the whole question of the nature of the thousands of claims made against the UN by the victims of cholera in Haiti boils down to pragmatic considerations advising against the viability of compensation on an individual basis. It is safe to assume that the UN regards mass claims of these proportions as politically and financially unsustainable. Thus, were the UN ever to acknowledge its responsibility for the cholera epidemic, the most likely scenario is that of a lump sum settlement agreement between the Organisation and the Haitian Government. This scenario finds a well-known precedent in the 1960s agreements concluded by the SG with Belgium⁸⁹ and various other countries in the context of claims of compensation for personal injuries and damage to property suffered by nationals of the States in question as a result of wrongful acts by the United Nations Operation in the Congo (ONUC). But, as pointed out below, the replication of this model in the Haiti Cholera Case poses unique questions of credibility and legitimacy.

The UN’s attempt to characterise the case as one solely involving its relationship with the Haitian Government is by all means evident. After ruling out a private law dispute triggering the duty under Section 29 of

⁸⁷ UK High Court of Justice, *Entico v UNESCO*, Judgment of 18 March 2008 (per Tomlinson J).

⁸⁸ Supreme Court of Canada, *Amaratunga v Northwest Atlantic Fisheries Organization*, Judgment of 29 November 2013 (per LeBel J) paras 59–63.

⁸⁹ Exchange of Letters Between the United Nations and Belgium Constituting an Agreement Relating to the Settlement of Claims Filed Against the United Nations in the Congo by Belgian Nationals (20 February 1965) 535 UNTS 197.



the GC, the 2014 UN reply to the allegation letter of the HRC mandate holders observed that, however, this was without prejudice to the means of settlement that Haiti might wish to pursue in accordance with the relevant provisions of the GC itself and the MINUSTAH SOFA.⁹⁰ There is something decidedly irritating in this statement. Not so much because the suitability of diplomatic protection as an avenue for achieving a reasonable and workable settlement in the interest of *all* concerned parties should be refuted altogether. The problem with the statement is that it ducks several key legal and factual elements which, for the time being, make the prospect of a dispute between Haiti and the UN unrealistic and a negotiated solution between them very controversial.

For one thing, the glaring asymmetry between States and IOs insofar as access to international dispute settlement bodies is epitomised by the Haiti Cholera Case. It is true that Section 30 of the GC confers compulsory jurisdiction on the ICJ for all differences relating to the interpretation or application of the Convention. But such clause evidently refers to State-to-State disputes, ie, the sole disputes that can be adjudicated by the ICJ pursuant to its contentious jurisdiction.⁹¹ Indeed, Section 30 specifies that when the differences in question arise between the UN and a State party, they shall be referred to the advisory jurisdiction of the ICJ ‘in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court.’ Although it is at times misunderstood,⁹² this provision clearly implies the exclusive power of the UN organs and agencies to request advisory opinions of the ICJ.⁹³ If one were to advocate a broader involvement of the ICJ in the issues discussed in this contribution,⁹⁴ the principle of equality of the parties before judicial bodies would require an amendment of Article 96 of the UN Charter, in the first instance. Further, there is reason to believe that a more genuinely third-party adjudicatory forum

⁹⁰ Case No HTI 3/2014, Reply (n 11) para 94.

⁹¹ Art 34 of the ICJ Statute.

⁹² Mégret (n 1) 187–188.

⁹³ Indeed, the only ICJ precedent directly in point is the *Cumaraswamy* Advisory Opinion, which was requested by the UN Economic and Social Council: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion, 29 April 1999) [1999] ICJ Rep 62. It is important to recall that Section 30 constitutes one of the most significant treaty clauses envisaging ‘binding’ advisory opinions by the ICJ (‘The opinion given by the Court shall be accepted as decisive by the parties’).

⁹⁴ Reinisch (n 81) 585–587.

would be preferable in our case to the double-hatted ICJ, ie, a court which is both one of the principal organs of the UN and a judicial body.⁹⁵ One such option could be seen in the three-member ad hoc arbitral tribunal envisaged by the MINUSTAH SOFA for the settlement of disputes between MINUSTAH and Haiti regarding the interpretation and application of the SOFA.⁹⁶ But even here, the UN may simply refuse to accept arbitration by withholding the appointment of a member of the tribunal. After all, the UN is likely to take the view that the Haiti Cholera Case chiefly relates to a ‘question of principle’⁹⁷ concerning the GC, for which the SOFA requires that the aforementioned ICJ advisory proceedings under Section 30 of the GC be utilised.⁹⁸ In short, the UN cannot be brought before any international adjudicatory body by Haiti against its will, ie, in the absence of its explicit ad hoc consent.

Finally, as to the deep legitimacy concerns raised by the dealings of the UN with the Haitian Government, it is trite to recall the imbalance between the two parties in potential negotiations addressing issues of compensation for the cholera-related deaths and injuries, as the heavy financial dependence of the country on aid from the UN and associated organisations makes its extremely weak bargaining position crystal clear. It is less trite, though, to highlight the ongoing and substantial suspension of the rule of law in Haiti, recently reported by the *New York Times* as a country run by a President ‘without the checks and balances of a parliament’,⁹⁹ who is increasingly attacked for being surrounded by an ‘inter-connected web of nefarious characters’¹⁰⁰ and *de facto* creating ‘an environment of corruption, abuse of power and impunity.’¹⁰¹

⁹⁵ As candidly recalled by the ICJ itself: see *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development* (Advisory Opinion, 1 February 2012) [2012] ICJ Rep 10, para 33.

⁹⁶ Para 57 of the MINUSTAH SOFA. This tribunal could be asked to clarify the meaning of the provisions in the SOFA which are a reflection of Section 29(a) of the GC, ie, paras 54–55.

⁹⁷ Para 58 of the MINUSTAH SOFA.

⁹⁸ *ibid.*

⁹⁹ F Robles, ‘Haitian Leader’s Power Grows as Scandals Swirl’ *The New York Times* (16 March 2015).

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*



The question:

What is the legal relationship between the International Criminal Court and non-State entities? Beyond the case of Palestine

Introduced by Emanuele Cimiotta and Micaela Frulli

In April 2012 the International Criminal Court (ICC) Prosecutor declined to review the admissibility of the Palestinian National Authority's declaration recognising the Court's jurisdiction, which was lodged in 2009 under Article 12(3) of the Rome Statute. This provision allows States not party to the Statute to accept the ICC jurisdiction with respect to crimes committed on their territory or by their nationals. The Prosecutor declined the authority to rule on such admissibility, since he was not empowered to define the term 'State' for the purposes of Article 12(3). This competence instead rested with the UN Secretary General (UNSG) and the UN General Assembly (UNGA). Potentially the Assembly of States Parties (ASP) could also in due course decide to address the matter. In concluding, the Prosecutor announced that he could consider future allegations of crimes perpetrated in Palestine, should the competent organs of the UN resolve the legal issue relevant to an assessment on the basis of Article 12, or should the UN Security Council (UNSC) make a referral according to Article 13(b).

Subsequently, on 29 November 2012, by Resolution 67/19, the UNGA granted Palestine the status of 'non-member observer State', thereby fulfilling the condition outlined by the ICC Prosecutor in April 2012. This Resolution was followed by a renewed Palestinian declaration of acceptance of the ICC's jurisdiction over alleged crimes committed in the occupied Palestinian territory since 13 June 2014 (1 January 2015), and by Palestine's accession to the Rome Statute (2 January 2015).

In a press statement dated 2 September 2014, the ICC Prosecutor returned to the issue as to whether the ICC could exercise its jurisdic-



tion over war crimes occurred in the Gaza Strip, with a view to addressing media allegations of politically driven inactivity. In doing so the Prosecutor partially contradicted its 2012 position that it lacked authority to examine the admissibility of the 2009 Palestinian declaration and labelled this declaration as 'invalid', since it was 'lodged without the necessary standing.'

According to the Prosecutor, the issue of statehood relates to both legal frameworks governing the preconditions to the exercise of the jurisdiction prescribed by Article 12: the participation to the Rome Statute and the acceptance of the ICC's jurisdiction on an *ad hoc* basis.

This view was reiterated in a further press statement issued on 16 January 2016, upon receipt of the second Palestinian declaration under Article 12(3), when the Prosecutor decided to open a preliminary examination of the situation in Palestine, given that 'a State that may accede to the Rome Statute may also lodge a declaration validly under Article 12(3).' As a result – she found – 'the UNGA Resolution 67/19 is determinative of Palestine's ability to accede to the Statute pursuant to Article 125, and equally, its ability to lodge an Article 12(3) declaration.'

Is this reasoning legally grounded, notwithstanding that those legal frameworks have different requirements, different contents, and different consequences? Does an *ad hoc* declaration under Article 12(3) lead for its author to the 'entry into the Rome Statute system'? Under what circumstances? To what extent?

The documents regulating the activity of the ICC are silent on the legal relationship between the Court and non-State entities, or political entities whose statehood is unclear or controversial. Thus, the problems raised by the participation to the Statute, the acceptance of the Court's jurisdiction, and the cooperation with the Court by such entities do not find any express regulation. Does the controversial statehood of a political entity have the same bearing both in the case that it seeks to accede to the Rome Statute, under Article 125, and in the case that it seeks to accept the Court's jurisdiction through an *ad hoc* declaration to that effect, under Article 12(3)?

Lastly, can the UNSC, acting under Article 13(b) of the ICC Statute and Chapter VII of the UN Charter, enable the ICC to exercise jurisdiction over crimes allegedly committed by Palestinians in the Gaza Strip during the 2009 Operation Cast Lead or the 2014 Operation Protective Edge, notwithstanding that Palestine is not a UN member State? To put



it into a wider context, can the UNSC extend the ICC's judicial reach to acts performed on the territory or by nationals of non-State entities, or of entities whose statehood is unclear or controversial, with no UN membership (such as, for instance, Abkhazia, Kosovo, South Ossetia, Transnistria, Turkish Republic of Northern Cyprus, Western Sahara; or the recently self-proclaimed Donetsk People's Republic and Lugansk People's Republic)? What about areas beyond State's jurisdiction, situations of military occupation, or territories under UN administration? Does the circumstance that the entity at stake is fighting for its self-determination play any role in addressing these legal issues?

Harmen van der Wilt and Nicola Napolitano focus on these and other closely related questions raised by the relationship between the ICC and non-State entities, reaching radically different conclusions. One considers non-State entities as virtually excluded from the ICC system. According to the other meanwhile, the ICC Statute grants some room for action upon them. However, both authors encountered the same problem: except for the Palestinian case, namely that to date, there is no relevant judicial practice. As a result, one needs to turn to international law and to logical arguments.

The Rome Statute: Only States are invited to tune in

*Harmen van der Wilt**

1. Introduction

On 21 January 2009, the Minister of Justice of the Government of Palestine lodged a declaration in conformity with Article 12(3) of the Rome Statute recognising the jurisdiction of the International Criminal Court (ICC) in respect of ‘acts committed on the territory of Palestine since 1 July 2002.’¹ The event triggered a lively debate on the questions whether non-State entities could submit a declaration pursuant to Article 12(3) and whether any positive acknowledgement of the declaration could boost the Palestinian quest for recognition as a State.² For the advocates of the Palestinian cause the position taken by the Prosecutor was rather disappointing. He argued that, in case of controversy whether an applicant would qualify as a ‘State’ for the purpose of Article 12, the General Assembly would be the most appropriate institution to make a legal determination. The Rome Statute did not authorise the Of-

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¹ Palestinian National Authority, Declaration recognizing the Jurisdiction of the International Criminal Court <www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

² Compare Y Ronen, ‘ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities’ (2010) 8 J Intl Criminal Justice 3; Y Shany, ‘In Defence of Functional Interpretation of Article 12(3) of the Rome Statute’ (2010) 8 J Intl Criminal Justice 329; A Pellet, ‘The Palestinian Declaration and the Jurisdiction of the ICC’ (2010) 8 J Intl Criminal Justice 981. For a thorough analysis in German, see A Dürr, N von Maltitz, ‘Die Staatlichkeit Palästinas und ihre Bedeutung für die Gerichtsbarkeit des Internationalen Strafgerichtshofs’ (2014) 125 Zeitschrift für die gesamte Strafrechtswissenschaft 907. See also on the general issue of the scope of Article 12(3): S Freeland, ‘How Open Should the Door Be? – Declarations by Non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court’ (2006) 75 Nordic J Intl L 211, and C Stahn, ‘Why Some Doors May be Closed Already: Second Thoughts on a “Case-by-Case” Treatment of Article 12(3) Declarations’ (2006) 75 Nordic J Intl L 243.



fice of the Prosecutor to adopt a method to define the term ‘State’ under Article 12(3) if the applicant did not entirely meet the conditions of statehood.³ Meanwhile, the issue has been superseded by the General Assembly’s de facto recognition of Palestine as a sovereign State on 29 November 2012. On 2 January 2015 Palestine acceded to the Rome Statute and immediately lodged a new declaration ex Article 12(3) Rome Statute. The Prosecutor has followed suit by starting a ‘preliminary examination’ into the situation in Palestine on 16 January 2015.⁴

The Prosecutor’s initial decline of Palestine’s declaration was reached on rather formalistic grounds and precisely for that reason the general question whether non-States entities would be eligible to lodge a declaration remains intriguing. In this short contribution I will argue that the acceptance of non-State entities is difficult to reconcile with the system of international criminal law enforcement as envisaged in the Rome Statute. That conclusion is reached on the basis of a teleological interpretation of the concept of ‘State’, in the light of the objectives of the Rome Statute. In view of the principle of complementarity, the International Criminal Court is meant as default option, an instance of last resort, whenever States are unwilling or unable to genuinely investigate or prosecute a case. It is highly questionable whether quasi-States would ever be capable to undertake these commitments. In a similar vein, it is doubtful whether non-State entities would be able to cooperate with the Court, an obligation that is expressly stipulated in Article 12(3) Rome Statute. These issues have been touched upon in legal literature, but have received insufficient attention. In the next section I will develop the main argument, as concisely exposed above. In section 3 I will discuss whether a referral by the Security Council can compensate for the creation of a ‘legal black hole’ that may result from my rigid position. And section 4 will end with some final reflections.

³ ICC Office of the Prosecutor, *Situation in Palestine* (3 April 2012) para 6 <www/icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-AFA9-836106D2694A.284387?SituationinPalestine030412ENG.pdf>.

⁴ Press Release 16 January 2015, ICC-OTP-20150116-PR1083.



2. *Why non-State entities should remain outside the framework of the Rome Statute*

The Rome Statute is a convention – *id est* a consensual instrument – that provides for a delegation of criminal jurisdiction by States. Both these aspects may shed a light on the question whether non-State entities would qualify for lodging a declaration under Article 12(3). The capacity to enter into relations with (other) States is one of the distinguishing features of statehood.⁵ It does not imply, however, that non-State entities cannot conclude international agreements. Entities that have the capacity to bind themselves by entering into obligations have legal personality under international law and are entitled to sign international treaties.⁶ A non-State actor like Taiwan, for instance, has bilateral investment treaties with 6 countries.⁷ Moreover, an entity that lodges a declaration under Article 12(3) does not become a fully-fledged party to the Rome Statute in the sense of Article 125. It only accepts the exercise of jurisdiction of the ICC with respect to a crime (or a pattern of several crimes, amounting to a ‘case’ or a ‘situation’). This presupposes, however, that this entity has jurisdiction itself, which takes us to the second prong.

The Court’s jurisdiction is predicated on acceptance of the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft (a); or the State of which the person accused of the crime is a national (b).⁸ The system reflects the predominance of the territoriality principle and the active nationality principle in international (criminal) law. These States possess criminal jurisdiction and the Court derives its jurisdiction from them. Interestingly, Article 12 of the Rome Statute also alludes to two other criteria of statehood: population and territory. These qualifications, incorporated in Article 1 of the Montevideo Convention, connote the idea that a State can only claim

⁵ See the 1933 Montevideo Convention on Rights and Duties of States, 165 LNTS 19, art 1, sub (d).

⁶ MN Shaw, *International Law* (6th edn, CUP 2008) 195–197.

⁷ Example presented by Shany (n 2) 334.

⁸ Art 12(2) of the Rome Statute. This system of State consent can be circumvented by a Resolution of the Security Council. See art 13, sub (b) of the Rome Statute and s 3 of this article.



this 'status' if it can wield effective control over a (more or less) permanent population and a defined territory. Such control is effectuated by a Government which is the final requirement for statehood in the Montevideo Convention. Malcolm Shaw contends that, while a political society requires some form of Government or central control in order to function properly, this is not a precondition for recognition as an independent country.⁹ And indeed there are some precedents where the international community bestowed recognition of statehood while effective control had not yet been accomplished, or not over the entire territory (Congo in 1960, Guinea-Bissau 1973, Bosnia-Herzegovina 1992).¹⁰ Shaw refers to the 'mixed' determination of statehood, by factual and legal indicia, in which recognition of the right to self-determination can compensate for tiny flaws in the factual situation. However, the limits of such compensation are rather tight. As Crawford argues, 'the notion of statehood based exclusively on entitlement without realization of the factual criteria has not been accepted in international practice.'¹¹ Moreover, the degree of effective control, required by the Rome statute, is arguably more exacting than in other international instruments. Article 12(3) is analogous to a conferral of jurisdiction by ratification or accession, which implies that the State or entity lodging a declaration must have criminal jurisdiction itself and delegates its powers to the Court.¹² Such criminal jurisdiction, as Ronen correctly observes, is not merely a procedural requirement, but a substantive one.¹³ The system of international criminal law enforcement as envisaged by the Rome Statute is predicated on the principle of complementarity which assumes that national jurisdictions have primacy in the realm of investigation and prosecution of international crimes. The International Criminal Court is only allowed to intervene whenever domestic jurisdictions are unable or unwilling to genuinely carry out investigations or prosecutions.¹⁴ This

⁹ Shaw (n 6) 200.

¹⁰ For a more elaborate analysis, see Ronen (n 2) 12.

¹¹ J Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 447–448.

¹² Schabas leaves the question whether art 12(3) is analogous to a conferral of jurisdiction by ratification or accession slightly in abeyance, but he suggests an affirmative answer, WA Schabas, *The International Criminal Court. A Commentary on the Rome Statute* (OUP 2010) 290.

¹³ Ronen (n 2) 18.

¹⁴ Compare the Preamble, art 1 and art 17 of the Rome Statute.



precedence of national jurisdictions is not a noncommittal affair which States can freely dispose of by outsourcing their jurisdiction to the Court. Paragraph 4 of the ICC Preamble ‘affirms’ that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. And paragraph 6 ‘recalls’ – more precisely and to the point – that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The choice of terms – ‘recalling’ – suggests that the Preamble refers to a pre-existing duty under international law, but there can be no doubt that the Preamble – as an integral part of the treaty text – informs the operative provisions and stipulates a clear legal obligation on the part of States parties.¹⁵ The appeal on States is comprehensive and unspecific. It seems to be addressed to all States parties, without making any distinction on the basis of a hierarchy of principles of jurisdiction.¹⁶ It is, however, generally acknowledged that a primary responsibility attaches to the territorial State.¹⁷ That position has been corroborated in case law of courts of arbitration, criminal courts and human rights courts.¹⁸ It bears emphasis

¹⁵ On the legal force of the Preamble, see the seminal analysis by J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Academic Dissertation University of Amsterdam (2007) 264–283.

¹⁶ TN Slade, RS Clark, ‘Preamble and Final Clauses’ in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer 1999) 427, speak of ‘delicious ambiguity.’

¹⁷ Compare for instance D Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *European J Intl L* 491: ‘... there are convincing reasons to suggest that under current or emerging customary international law, there is a duty to bring to justice perpetrators of genocide, crimes against humanity and war crimes, *at least with respect to crimes committed on the state’s territory or by its nationals*’ (emphasis added). Kleffner (n 15) 309: ‘The obligation to investigate and prosecute is *primarily* directed at the *territorial State*’ (emphasis in original).

¹⁸ Compare the *Islands of Palmas Case (Spain v The Netherlands)* (1928) 2 *RIAA* 829, 838: ‘Territoriality continues to be the point of departure in settling most questions that concern international relations.’ The Israel Supreme Court in the Eichmann-case recognised the right of all States under customary international law to prosecute perpetrators of genocide, but made a distinction between the *facility* vested in every State and the *obligation* of the State *loci delicti*, Israel Supreme Court, Eichmann-case (1962) 36 *Intl L Rev* 304. For settled case law of the European Court of Human Rights, stipulating an obligation for States parties to effectively investigate (serious) violations



that the obligation to investigate and prosecute international crimes pertains to all States – not only States parties to the Rome Statute – because this duty is sustained by customary and conventional international law. As declarations pursuant to Article 12(3) can only be lodged by the territorial State (or the State whose nationals are allegedly involved in the crime),¹⁹ any entity that wields insufficient control to exercise criminal jurisdiction – whether it is a State or not – would fail to comply with its obligation.

Now one might argue that the very act of lodging a declaration demonstrates the material inability of an entity to engage in criminal law enforcement. Precisely for that reason, it seeks the support of the ICC. The situation is reminiscent of the practice of self-referrals by States parties. Such inability would not disqualify a quasi-State to submit a declaration.²⁰ Indeed, Uganda lodged a ‘Declaration on Temporal Jurisdiction’, in order to bridge the temporal gap between the entry into force of the Rome Statute and the (later) ratification and simultaneously (auto) referred the situation to the Court.²¹ All the same, I do not find the argument entirely convincing. For one thing, the practice of self-referrals has been severely criticised as a departure from the intentions of the founding fathers of the Rome Statute.²² Kleffner has openly questioned the compatibility of self-referrals with the legal architecture of the Rome Statute, explaining that such referrals are not easy to reconcile with the State’s positive obligations in the framework of investiga-

of human rights within their jurisdiction, see for example, ECtHR, *McCann and others v United Kingdom* (1995) Series A 324, para 161.

¹⁹ Schabas (n 12) 290, correctly observes that the declaration would also render the Court jurisdiction over nationals of the accepting State when they commit crimes on foreign territory. However, until now ad hoc declarations have only been submitted by the territorial State.

²⁰ In this vein: Shany (n 2) 339.

²¹ The two other States that lodged a declaration under art 12(3) could not refer the situation in their country to the Court, because that privilege is reserved for States parties.

²² Compare W Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2009) 6 J Intl Criminal Justice 751; M Arsanjani, MW Reisman, ‘Law-in-Action of the International Criminal Court’ (2005) 99 AJIL 385, and A Müller, I Stegmüller, ‘Self-referrals on Trial: From Panacea to Patient’ (2010) 8 J Intl Criminal Justice 1267.



tion and prosecution of international crimes.²³ In other words: the practice of self-referrals may not be the most felicitous argument to sustain the plea for a relaxation of the requirements under Article 12(3) of the Rome Statute. On the other hand, other scholars have recently expressed more sympathy for the plight of weak States that are confronted with powerful contenders and urgently need the assistance of the international community to rein in violent non-State actors.²⁴ One wonders where to draw the line between States that once obtained the imprimatur of the international community, but have fallen below the mark and quasi-States that seek admittance to this privileged circle. It probably boils down to formal recognition.

One must admit that the complex criterion of ‘effective control’ blurs the boundaries between (failed or weak) States and non-State entities that aspire to that status. And it is this twilight zone that has prompted scholars like Shany and Pellet to favour a functional interpretation of the question whether entities qualify as a ‘State’ for the purpose of Article 12(3), in light of the objectives of the Court. The main thrust of the Court is to end impunity and that aim would be seriously jeopardised if the Court were to decline declarations of quasi-States. After all, it would restrict the scope of its jurisdiction and might be conducive of establishing zones that are beyond its reach.²⁵ For these rea-

²³ JK Kleffner, ‘Auto-referrals and the Complementary Nature of the ICC’ in C Stahn, G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 41–53.

²⁴ See P Akhavan, ‘Self-referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?’ (2010) 21 *Criminal L Forum* 103–120; D Robinson, ‘The Controversy over Territorial Referrals and Reflections on ICL Discourse’ (2011) 9 *J Intl Criminal Justice* 355–384, and H van der Wilt, ‘Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors’ in C Stahn, M El Zeidy (eds), *The Law and Practice of the International Criminal Court* (OUP 2015).

²⁵ In the context of the Palestine situation: ‘At the same time, preventing the PNA from delegating criminal jurisdiction would compromise the Court’s “ending impunity” mission, and prevent it from exercising jurisdiction over a situation where serious crimes have occurred. Moreover, restricting the contents of Article 12(3) to state-referrals only might create a number of “legal black holes” – land territories over which no state exercises sovereignty’ (Shany (n 2) 337). In a similar vein Pellet (n 2) 995: ‘... by making it (*id est* the Palestinian declaration) ineffective, the Court would give its blessing to the constitution of a zone of impunity in the territories occupied by Israel, which is contrary to the intentions of the authors of the Rome Statute, and to its very purpose and object, since, in this case *no* state could grant the Court jurisdiction within these territories.’



sons, both authors advocate a lenient interpretation of Article 12(3), leaving room for the admission of non-State entities.

These are sensible and serious considerations that should not be lightly dismissed. I only wish to add that, while the quest to end impunity is no doubt laudable, it should be practically feasible as well. For its functioning, the Court is largely dependent on the assistance of States in general and the State *loci delicti* in particular. While the latter may be occasionally, or even structurally, impeded to conduct a trial in respect of international crimes, there is always the (alternative) obligation to cooperate.²⁶ According to Part 9 of the Rome Statute, the duty to cooperate encompasses the surrender of suspects, the taking of evidence, the execution of searches and seizures, the hearing and – if necessary – protection of witnesses, etc. In short, it requires an institutional and legal framework that is hardly less demanding than the one that would be necessary to conduct a full criminal trial.²⁷ It is hardly imaginable that a non-State entity that does not exercise ‘effective control’ would be capable of rendering the level of assistance required. For the assessment of the question whether an entity would be qualified to lodge a declaration ex Article 12(3), I would therefore argue that it should meet all the criteria, mentioned in the Montevideo Convention. If there is no reasonable expectation that the entity will cooperate, without any delay or exception in accordance with Part 9, the Court should reject the declaration. It should be emphasised that this applies both to States and non-States. That does not mean, however, that the Court is completely bereft from possibilities to perform its mandate. There is always the possibility that the Security Council intervenes.

²⁶ In this context, I find Pellet’s observation (n 2) 996, that ‘the implementation of the Rome Statute is not Palestine’s responsibility, it is the Court’s’ slightly misleading. It is a shared responsibility that directly follows from the second sentence of art 12(3).

²⁷ In this context it is both interesting and surprising that art 17(3) of the Rome Statute identifies a number of indicia for ‘inability’ – like the incapacity to obtain the accused or the necessary evidence and testimony – that are equally relevant for effective cooperation!

3. *The Security Council steps in*

Article 13, sub b) of the Rome Statute determines that the Security Council, acting under Chapter VII of the UN Charter, can refer a situation in which one or more core crimes appear to have been committed to the ICC Prosecutor. Such referrals circumvent the system of State consent and are reminiscent of the legal establishment of the ad hoc tribunals.²⁸ Moreover, they have potentially a universal scope and can therefore compensate for the 'legal black holes' that emerge from the rejection of declarations by non-State entities.²⁹ Nonetheless, Shany is rather sceptical on the potential of Security Council referrals to redress the jurisdictional gaps.³⁰ For one thing, so he argues, intervention on the basis of Chapter VII of the Charter depends on the finding of a threat or breach of international peace and security and many situations might not reach that threshold. While the concern is pertinent, the Security Council has been inclined to resort to Resolutions under Chapter VII more quickly, in view of the contagious nature of violence in conflict-ridden areas.³¹ Secondly, Shany fears that the Security Council will sparingly make use of its referral powers. Although this observation initially seemed to be refuted by the Council's referrals of the situations in Darfur (2005) and Libya (2011), the efforts to activate the ICC jurisdiction by means of a Resolution in Syria have indeed been paralyzed by a veto of China and Russia on 22 May 2014.³² Shany's concerns are realistic. A

²⁸ Compare GP Fletcher, JD Ohlin, 'The ICC: Two Courts in One' (2006) 4 *J Intl Criminal Justice* 428.

²⁹ Obviously, in the referrals themselves territorial and personal limitations of ICC jurisdiction are incorporated. Resolutions 1593 (31 March 2005) UN Doc S/RES/1593 (2005) and 1970 (26 February 2011) UN Doc S/RES/1970 (2011) restrict the ICC jurisdiction to the territory of Darfur and the Libyan Arab Jamahiriya respectively. Moreover, both these resolutions exclude nationals from other non-State parties from ICC jurisdiction and declare that they shall be subject to the exclusive jurisdiction of their home State, unless that State has expressly waived such exclusive jurisdiction.

³⁰ Shany (n 2) 337.

³¹ See for instance the several Resolutions, UN Doc S/RES/2085 (2012), S/RES/2100 (2013) and S/RES/2164 (2014), that have been adopted in relation to Mali.

³² United Nations; Meetings Coverage and Press Releases (22 May 2014) 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft resolution' <www.un.org/press/en/2014/sc11407.doc.htm>.



greater problem, however, is that even a Resolution of the Security Council cannot invigorate criminal law enforcement. Armed conflicts severely hamper criminal investigations, as is correctly observed by Luke Moffett, in the context of a wry opinion on the Russian/Chinese veto on Syria: ‘Of particular importance are the difficulties in obtaining evidence, given the conflict, control of territory by different groups, lack of access to crime scenes, destruction of evidence and intimidation of witnesses and victims – all likely to inhibit the ability of a prosecutor to prepare cases which have a reasonable prospect of a conviction.’ And somewhat later on he adds that ‘these problems reflect the need for co-operation by a State and a willingness to ensure the success of the ICC’s investigations and prosecutions.’³³ These are the same considerations we encountered in the previous paragraph which prompted me to militate against the admission of declarations by non-State entities. Contrary to what some authors contend, the real obstacle is not lack of jurisdiction, but deficient enforcement powers and that cannot be repaired by the Security Council. Unless the Great Powers are prepared to establish a (permanent) UN force with a special mandate to search for and arrest war criminals, but that is quite an unrealistic prospect, in view of the current political relations.

4. *Some final reflections*

The formal approach of the question what entities are authorised to lodge a declaration under Article 12(3) Rome Statute – an approach that has been followed by the Prosecutor and has been conducive of exclusion of non-State entities – has been defended with the argument that the ICC should not be embroiled in highly sensitive political issues.³⁴ Other scholars have favoured a functional interpretation of the issue, in light of the objectives of the ICC, that enables them to take a more lenient position and allow non-State entities to submit a declaration. Although I intuitively sympathise with the functional interpreta-

³³ L. Moffett, ‘Syria and the International Criminal Court: justice denied’ (*Open Democracy*, 22 May 2014) <www.opendemocracy.net/opensecurity/luke-moffett/syria-and-international-criminal-court-justice-denied>.

³⁴ Compare Ronen (n 2) 24–26.



tion, I reach a conclusion that is diametrically opposed to the one harboured by Shany and Pellet. The system of international criminal law enforcement, established in the Rome Statute, makes heavy demands on the entity's capacity to wield effective control over territory and population. In other words, entities that aspire to lodge a declaration ex Article 12(3) must fully meet both the 'soft' (territory, population) and the exacting ('effective control') requirements of the Montevideo Convention. Otherwise they will not be able to comply with their obligations, ensuing from the submission of the declaration. As recognition of statehood by the international community is a declaratory, rather than a constitutive act, non-State entities are virtually excluded from the system of ad hoc declarations. At the end of the day, my application of the method of 'functional interpretation' yields the same result as the formal approach of the Prosecutor to outsource the decision on statehood to the General Assembly. On further consideration, I must concede that I find this position sensible, both from a legal and a political perspective.³⁵

My preference for a substantive assessment of statehood for the purpose of identifying entities that are eligible to delegate their jurisdiction to the ICC, may at first blush run astray when applied to failed States that (no longer) meet the factual indicia, as spelled out in the Montevideo Convention.³⁶ After all, any acceptance of such a declaration by the Court would run afoul of the principle that States entities should be able to cooperate with the Court and would entail discrimination of the non-State entity. However, no State can force the Prosecutor to start an investigation or the ICC to exercise jurisdiction. The Prosecutor can invoke her discretionary power to decline an investigation 'in the interests of justice.'³⁷ The prospect that no cooperation of the territorial State is likely to be forthcoming would in my view warrant such a refusal.³⁸

³⁵ For a similar sympathetic assessment of the Prosecutor's position: Dürr, von Malitz (n 2) 927–929.

³⁶ The consequence of my approach is that non-State entities would not be entitled to sign and ratify the Statute, as envisioned in art 125 of the Rome Statute. I would indeed be inclined to draw that conclusion.

³⁷ Art 53(1), sub (c) of the Rome Statute.

³⁸ For a similar proposition, see Shany (n 2) 338.



The stern position that I have defended in this brief essay derives from a commitment to take international criminal law seriously. Jurisdiction of an international criminal court is the first condition, but the law must be enforced and, just like in domestic systems, criminal law requires a strong institutional framework that is both effective and just. Until we have an international UN force with a mandate to search and arrest war criminals – and it could be seriously questioned whether such an international police force is desirable – we are dependent on cooperation by States. It is far from perfect, but we have to deal with it. Negligence of the enforcement aspect is bound to result in deep disappointment.



Non-State entity's 'ability to lodge' a declaration pursuant to Article 12(3) of the ICC Statute

Nicola Napolitano*

1. *Palestine's ad hoc declaration accepting the jurisdiction of the International Criminal Court: The road so far*

On 21 January 2009, the Palestinian National Authority (PNA) lodged a declaration under Article 12(3) of the ICC Statute,¹ recognising the jurisdiction of the International Criminal Court (ICC) for 'the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.'² The day after, the ICC Registrar acknowledged receipt of the

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¹ See on the lodging mechanism, the scope and the qualification of declarations under Article 12(3) of the Rome Statute, C Stahn, 'Why Some Doors May be Closed Already: Second Thoughts on a "Case-by-Case" Treatment of Article 12(3) Declarations' (2006) 75 *Nordic J Intl L* 243–248; S Freeland, 'How Open Should the Door Be? – Declarations by Non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court' (2006) 75 *Nordic J Intl L* 211–241.

² Palestinian National Authority, Declaration recognizing the Jurisdiction of the International Criminal Court <www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>. See, on the capacity of Palestine to lodge the *ad hoc* Declaration and accept the exercise of jurisdiction by the ICC under art 12(3) of the Rome Statute: Y Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities' (2010) 8 *J Intl Criminal Justice* 3–27; Y Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute' (2010) 8 *J Intl Criminal Justice* 329–343; A Pellet, 'The Palestinian Declaration and the Jurisdiction of the ICC' (2010) 8 *J Intl Criminal Justice* 981–999; MN Shaw, 'The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law' (2011) 9 *J Intl Criminal Justice* 301–324; M Forteau, 'La Palestine comme "Etat" au regard du Statut de la Cour pénale internationale' (2012) 45 *Revue Belge de Droit International* 41–64; E Cimiotta, 'Corte penale internazionale e accettazione della giurisdizione da parte della Palestina: incompetenza o subalternità al Consiglio di sicurezza?' (2012) 6



PNA 'correspondence *which refers itself to*' Article 12(3) of the Rome Statute, informing the PNA that 'a declaration under Article 12 paragraph 3 has the effect of the acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation and the application of the provisions of Part 9 and any rules thereunder, concerning States parties, pursuant to Rule 44 of the Rules of Procedure and Evidence.'³

In a statement of 13 February 2009, the ICC Prosecutor maintained that it would have carefully examined all relevant issues related to the jurisdiction of the Court, 'including whether the declaration by the [PNA] accepting the exercise of jurisdiction by the ICC *meets statutory requirement*; whether the alleged crimes fall within the category of crimes defined in the Statute, and whether there are national proceedings in relation to those crimes.'⁴ According to the Prosecutor, in fact, even in the case of a referral by the UN Security Council, 'issues of jurisdiction had to be independently assessed in order to determine whether or not to open an investigation.' This determination has to be made by the Prosecutor applying 'the same standard to all situation[s]' that he/she is preliminary examining, in order to verify whether the criteria under the Rome Statute for opening a formal investigation are met. In particular the Prosecutor firstly examines the preconditions to the exercise of jurisdiction (Article 12 of the ICC Statute), and, if they are established, the other condition set out in Articles 13 and 53(1) of the ICC Statute.⁵

Diritti umani e diritto internazionale 685–693; A Zimmermann, 'Palestine and the International Criminal Court Quo Vadis? – Reach and Limits of Declarations Under Article 12(3)' (2013) 11 J Intl Criminal Justice 303–329; J Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias' (2013) 11 J Intl Criminal Justice 563–570.

³ ICC Registrar's Communication of 23 January 2009, 2009/404/SA/LASS <www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf> (emphasis added).

⁴ Office of the Prosecutor, Visit of the Palestinian National Authority Minister of Foreign Affairs, Mr Riad al-Malki, and Minister of Justice, Mr Ali Khashan, to the Prosecutor of the ICC (13 February 2009) <www.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA-454D-A594-446F30289EF2/280869/PNAMFA130209.pdf> (emphasis added).

⁵ The same statement was confirmed in the Letter by the Office of the Prosecutor to the UN High Commissioner on Human Rights, dated 12 January 2010, OTP/INCOM/PSE/OHCHR-1/JCCD-ag <www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHC1.pdf>.



Accordingly, in its Report on the 'Updated Situation in Palestine' of 3 April 2012,⁶ the Prosecutor proceeded to assess those preliminary criteria, and the basis of the jurisdiction as the primary precondition to the exercise of jurisdiction of the Court. The crucial issue to be dealt with by the Prosecutor was whether the entity that filed the declaration was a 'State' provided that, in accordance with Article 12(1), only a 'State', which is not party to the Rome Statute, can accept the exercise of the Court's jurisdiction by an *ad hoc* declaration. In actual fact, the Prosecutor did not try either to establish this condition, or to determine the meaning of 'State' under the Rome Statute.

In accordance with Article 125 of the Statute, in fact, the instrument of accession of any State seeking to become a party to the Statute must be deposited with the UN Secretary-General, who can rely on the 'directives' of the General Assembly in disputed cases. Therefore, in the Prosecutor's view, it is for the former, under the guidance of the latter in controversial cases, to decide whether an acceding State or the entity lodging an *ad hoc* declaration is a 'State', and, as a consequence, to interpret and apply the relevant rules of the Rome Statute.⁷ Residually, the Prosecutor held that the same competence can be exercised by the Assembly of States Parties (ASP) under Article 112(2)(g) of the Statute, which provides that it performs 'any other function consistent with this Statute or the Rules of Procedure and Evidence.'

This paper aims at analysing the non-State entity's (entity) 'ability to lodge' an *ad hoc* declaration. Considering that the term 'State' in Articles 12(1)(3) and 125 of the Rome Statute are not 'equivalent' in meaning, the paper also intends to discuss which institution is entitled to determine the legal *status* of an acceding entity, and to interpret the term 'State' within the meaning of Article 12(3) of the Statute, particularly when the entity's statehood is controversial (sections 3 and 5).

Although the Statute does not expressly confer authority to the Prosecutor, nor establishes a specific procedure to determine whether the entity lodging an Article 12(3) declaration is or can be regarded as a 'State', the paper holds that such specific competence can be exercised

⁶ ICC Prosecutor's 2012 Report, paras 5–7 <www/icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-AFA9-836106D2694A.284387?SituationinPalestine030412ENG.pdf>.

⁷ See, against the approach taken by the Prosecutor to follow the practice of the UN, rather than to make a determination on its own, Zimmermann (n 2) 305ff.



by the Prosecutor while assessing the 'primary' preconditions to the exercise of ICC jurisdiction (ie, before starting to evaluate the available information in order to decide whether to initiate an investigation – Articles 15(1) and 53(1)). During this assessment, the determination of the meaning of the term 'State' under Article 12 of the Rome Statute is a question of interpretation and application, such as the interpretation of any other relevant provision of the Statute that the Prosecutor needs to apply in order to verify the other preliminary criteria. Moreover, even though the Statute does not provide the Prosecutor with authority for 'adopt[ing] a method to define the term "State" under Article 12(3)',⁸ a 'method' is not settled by Article 12(1) or Article 125. Nor can it be maintained that the competence rests, in the first instance, with the UN Secretary-General (under the guidance of UN General Assembly) in all the cases when a declaration under Article 12(3) is lodged by a UN non-member State. On the contrary, it is for the Prosecutor to verify if the entity lodging an Article 12(3) declaration can be qualified as, or regarded as equivalent to a 'State' for the purpose of accepting the exercise of jurisdiction by the Court, taking into account, on the one hand, the relevant rules of the Statute and international law, and, on the other hand, the practice of the ASP – if any – and, potentially, other international organisations, when the *status* of the accepting entity is controversial or unclear. Should any dispute regarding the judicial functions of the Court or the interpretation and the application of the Statute arise in connection with the qualification as a 'State' of an entity or a UN non-member State made by the Prosecutor, the dispute can be settled by a decision of the Court under Article 119(1) of the Statute⁹ or, in the

⁸ ICC Prosecutor's 2012 Report (n 6) para 6.

⁹ RS Clark, 'Article 119 – Settlement of Disputes' in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2 edn, Hart Publishing 2008) 1729: 'My understanding, from participating in the drafting process, is that, at the least, *anything that could be said to have some relationship, however tenuous, to prosecution* of an individual or a group of individuals on the basis of a concrete complaint of a breach of the Statute, would be *included in the notion of judicial functions*. In the absence of any definitive lists in the preparatory work of the issues to which this language might refer, I have gone through the Rome Statute and made some tentative suggestions On the *judicial functions* side of the line are probably: ... whether *the preconditions to the exercise of jurisdiction* have been met' (emphasis added).

case that it concerns two or more States parties, can be referred to and solved by the ASP in accordance with Article 119(2).

Moreover, the paper seeks to identify which entity can be considered to possess the 'ability to lodge' and, as a consequence, can confer jurisdiction to the Court with respect to crimes committed in its territory or by its nationals (section 4). Lastly, some final remarks address the UN Security Council's competence to provide jurisdiction to the Court, under Article 13(b), with respect to crimes committed on the territory of an entity which is not a UN member State, whether or not it has been granted the *status* of UN observer or UN non-member observer State (section 6).

2. *Everything, especially minds, can change even if nothing has changed*

On 29 November 2012, the UN General Assembly, by its Resolution 67/19¹⁰ decided to accord to Palestine 'non-member observer State' *status* in the United Nations, considering also that (1) the World Bank, the United Nations and the International Monetary Fund had positively assessed Palestine's readiness for statehood, (2) full membership is enjoyed by Palestine, *inter alia*, in the United Nations Educational, Scientific and Cultural Organisation (UNESCO), (3) at that time, 132 UN members States had accorded recognition to the State of Palestine, and (4) the Security Council Committee on the Admission of New Members, in its 2011 Report,¹¹ suggested – as an intermediate step – to grant Palestine the *status* of 'observer State', because it was unable to make a unanimous recommendation to the Security Council concerning the application of Palestine for admission to membership in the United Nations.¹²

¹⁰ UN Doc A/RES/67/19 (4 December 2012).

¹¹ Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, UN Doc S/2011/705 (11 November 2011).

¹² Application of Palestine for admission to membership in the United Nations – Note by the Secretary-General, UN Doc A/66/371-S/2011/592 (23 September 2011).



Having been finally qualified as a 'State' by UN institutions, on 2 January 2015, Palestine¹³ deposited with the UN Secretary-General, in his capacity as depositary, the instruments of accession to the Rome Statute (as well as a number of other international treaties).¹⁴ On 6 January 2015, the Secretary-General gave notification that the Rome Statute would enter into force for the 'State of Palestine' on 1 April 2015, in accordance with Article 126(2),¹⁵ and the Agreement on the Privileges and Immunities of the International Criminal Court (APIC) would enter into force for the aforementioned State on 1 February 2015, in accordance with Article 35(2).¹⁶

Moreover, on 31 December 2014, the Government of Palestine, acting under Article 12(3) of the Rome Statute, lodged a new declaration¹⁷ recognising 'the jurisdiction of the Court for the purpose of identifying, prosecuting and judging authors and accomplices of crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014.'¹⁸ The day after, the ICC Registrar not only confirmed receipt of the 'declaration' – on the previous occasion the Registrar made only reference to a 'correspondence which refers itself to' Article 12(3) of the ICC Statute¹⁹ – but also 'accepted' the declaration and transmit-

¹³ UN General Assembly, by its resolution 43/177, UN Doc A/RES/43/177 (15 December 1988), acknowledged the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988 and decided that the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organisation' in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organisation within the United Nations system.'

¹⁴ Press Release 7 January 2015, 'The State of Palestine accedes to the Rome Statute' ICC-ASP-20150107-PR1082 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1082_2.asp>.

¹⁵ UN-SG Depositary notification of Accession to the Rome Statute by the State of Palestine <<https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>>.

¹⁶ UN-SG Depositary notification of Accession to the APIC by the State of Palestine <<https://treaties.un.org/doc/Publication/CN/2015/CN.12.2015-Eng.pdf>>.

¹⁷ <www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf>.

¹⁸ Press Release 5 January 2015, 'Palestine declares acceptance of ICC jurisdiction since 13 June 2014', ICC-CPI-20150105-PR1080 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1080.aspx>.

¹⁹ ICC Registrar's 2009 Communication (n 3).



ted it to the Prosecutor for further consideration.²⁰ On 16 January 2015, the Prosecutor opened a preliminary examination of the situation in Palestine.²¹

What has really changed since the 2009 *ad hoc* declaration, apart from the different determinations of the Prosecutor in 2012 and in 2015, respectively? Two things have changed: the *status* of Palestine in the United Nations and the Palestinian authorities that lodged the *ad hoc* declaration has also changed. In 2009, the declaration was submitted by the PNA – the interim Government of the Palestinian territories created under the 1993 Oslo Accords –, whereas, in 2014, it was submitted by the State of Palestine, but *de facto* by the Palestine Liberation Organisation (PLO), which is the entity that: (a) adopted the Declaration of Independence of the State of Palestine in 1988²² that was subsequently acknowledged by the General Assembly in the same year;²³ (b) was recognised by the Government of the State of Israel on 9 September 1993; (c) is recognised as the sole legitimate representative of the Palestinian people at the international level; (d) filed the ‘Application of the State of Palestine for admission to membership in the United Nations’ in 2011.²⁴ Nevertheless, even if the PNA and the PLO are considered to be two separate and autonomous legal entities,²⁵ from a substantive point of view, it can be easily argued that both declarations were lodged by the same entity, namely the Government of Palestine. In fact, the declarations were submitted on behalf of the ‘Government (of the State) of Palestine.’ Moreover, the PLO never challenged or sought to unrecognise the 2009 PNA declaration; and the PNA has been *de facto* absorbed and replaced by the State of Palestine since 2003. Lastly, the Prosecutor did not actually address the point in 2012 and 2015, but

²⁰ ICC Registrar’s Communication of 7 January 2015, 2015/IOR/3496/HvH <www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>.

²¹ Press Release: 16 January 2015, ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine’, ICC-OTP-20150116-PR1083 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx>.

²² UN Doc A/43/827-S/20278 (18 November 1988).

²³ UN Doc A/RES/43/177 (n 13).

²⁴ UN Doc A/66/371-S/2011/592 (n 12).

²⁵ Shany (n 2) 333ff.



considered that both declarations concerned Palestine and its *status* in the United Nations.

It is interesting to note, instead, what consequences are produced by the UN General Assembly decision granting Palestine the *status* of 'non-member observer State': changing the signifier, changes the signified, even if the substance of things remains unchanged.

Firstly, at the end of 2012 Palestine became a 'State' only pursuant to the decision of the General Assembly, as 'suggested' by the Security Council Committee on the Admission of New Members²⁶ the year before. However, while the General Assembly acknowledged the proclamation of the State of Palestine since 1988, and was aware that Palestine had been accorded recognition by a significant number of UN member States and that it was admitted to UNESCO as a full member in 2011, the Security Council Committee was unable to decide whether to establish if Palestine were a 'State' for the purposes of acceding to the United Nations.

Secondly, in early 2015, in the Registrar's view, the Palestinian 'correspondence which refers itself to' Article 12(3) of the ICC Statute became an 'official' declaration, which deserved to be 'accepted', but the day after the UN Secretary-General gave notification of the accession of Palestine to the ICC Statute. On the previous occasion, the Registrar was completely silent on this point. In fact, after the acceptance of the 2014 declaration, on 16 January 2015, the Prosecutor opened a preliminary examination into the situation in Palestine, in order to determine whether there was a reasonable basis to initiate an investigation pursuant to Article 53(1) of the Rome Statute, namely whether (a) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under Article 17 of the Rome Statute; (c) there are substantial reasons to believe that an investigation would not serve the interests of justice.

Lastly, according to the Prosecutor, the 'invalid' and 'invalidly lodged' 2009 declaration²⁷ became the 'valid' 2014 declaration²⁸ because

²⁶ UN Doc S/2011/705 (n 11) para 20.

²⁷ Report on Preliminary Examinations Activities (2013) of the Office of the Prosecutor, paras 236 and 238 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20%20Report%20%20Preliminary%20Examination%20Activities

it was filed by a ‘State’ – Palestine – that had acquired the necessary standing as UN observer State in 2012, thus being entitled to accede to the Rome Statute.²⁹ Moreover, according to a 2015 Press Release of the Office of the Prosecutor (OPT), the ‘acceptance of the ICC’s jurisdiction differs from an act of accession to the Rome Statute.’³⁰ As a consequence, the Palestinian 2014 declaration could be dealt with by the Registrar even before the UN institutions had finished reviewing the documents transmitted by Palestine relating to its accession to the Rome Statute. This means that the accession to the Rome Statute and the *ad hoc* acceptance of the Court jurisdiction are under two different legal regimes.

3. *Are the terms ‘State’ under Articles 12(1) and Article 12(3) and 125 of the Rome Statute ‘equivalent’ in meaning? Who is entitled to determine the legal status of an acceding non-State entity and to interpret the term ‘State’ within the meaning of Article 12(3) of the Rome Statute?*

In 2009, the Prosecutor stated that, on the one hand, the admission to the UN as a member State ‘has no direct link with the declaration lodged by Palestine’, but, on the other hand, this process ‘informs the current legal *status* of Palestine for the interpretation and application of Article 12.’ However, in 2015 the Prosecutor held that, since Palestine was granted UN observer State *status* by the General Assembly, ‘it must be considered a “State” for the purposes of accession to the Rome Statute (in accordance with the “all States” formula).’ Therefore, ‘the term “State” employed in Article 12(3) of the Rome Statute should be interpreted in the same manner as the term “State” used in Article 12(1).

%202013.PDF>, and Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine’ of 2 February 2014 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx>.

²⁸ Press Release 16 January 2015, ICC-OTP-20150116-PR1083 (n 21).

²⁹ See on temporal (retroactive) effects of the 2009 *ad hoc* Declaration after the General Assembly decision on Palestine’s status within the UN in 2012, see Zimmermann (n 2) 306ff.

³⁰ Press Release 5 January 2015, ICC-CPI-20150105-PR1080 (n 18).



Thus, a State that may accede to the Rome Statute may also lodge a declaration validly under Article 12(3).³¹ In other words, pending the admission to the UN, any entity, whose statehood is controversial or unclear, cannot be qualified as a 'State' for the purpose of accepting the exercise of jurisdiction by the ICC, and its *status* cannot be assessed by the Prosecutor in accordance with the relevant provisions of the Statute and of general international law. Furthermore, according to the Prosecutor, the *ad hoc* declaration of an entity, which is designated as UN observer, but which has not been granted the *status* of UN non-member observer State, is 'invalid' and 'not validly lodged.' Hence, there is 'no basis on which to pursue the preliminary examination further.'³¹

Therefore, the interpretation and application of Article 12 of the Statute *de facto* does depend on the UN legal *status* of the entity, which lodges a declaration under Article 12(3) or deposits an instrument of accession in accordance with Article 125. No matter if the entity is a UN member State: the Prosecutor also assumes that a UN member is a 'State' within the meaning of Article 12(1) and (3) (and of Article 125) of the Statute.³² Accordingly, in the case that a declaration is lodged by a 'UN non-member State' or by an entity, which has not yet been granted the *status* of 'UN non-member observer State', but which has already submitted its instrument of accession to the UN Charter, the determination of the term 'State' within the meaning of Article 12(3) of the Statute depends on the recommendation of the Security Council and the decision of the General Assembly under Article 4(2) of the UN Charter. If an instrument of accession to the Statute is deposited by a 'UN non-member State' or an entity, which has not yet been granted the *status* of 'UN non-member observer State', the meaning of the term 'State' within Article 12(1) of the Statute depends on the determinations of the UN Secretary-General, under the guidance of UN General Assembly in disputed cases,³³ and, in due course, of the ASP. Nevertheless, in the case

³¹ ICC Prosecutor's 2013 Report (n 27) para 236.

³² Press Release 16 January 2015, ICC-OTP-20150116-PR1083 (n 21): 'The Prosecutor ... concluded in April 2012 that Palestine's status at the United Nations (UN) as an "observer entity" was determinative, since entry into the Rome Statute system is through the UN Secretary-General (UNSG), who acts as treaty depositary.'

³³ *ibid*: 'The Palestinian Authority's "observer entity", as opposed to "non-member State" status at the UN ... meant that it could not sign or ratify the Statute. As Palestine could not join the Rome Statute ... [the Prosecutor] concluded that it could also not

that an *ad hoc* declaration is lodged by an entity or a State – whether or not its statehood is disputed at international level – that has never submitted an instrument of accession to the UN Charter and/or to the ICC Statute, what is the institution entitled to determine the legal *status* of the accepting entity or State for the purpose of enabling the exercise of jurisdiction by the Court?³⁴ What is the institution that the Prosecutor can rely upon in order to interpret and apply Article 12(3) of the Statute?

The entry into force of the Rome Statute for a ‘State’, within the meaning of Articles 125, 126 and 12(1), implies not only the acceptance of ‘the jurisdiction of the Court with respect to the crimes’ within the jurisdiction of the Court (Article 5), but also the acceptance of all other mutual rights and obligations governed by the Statute.³⁵ Nevertheless, a ‘State’ or an entity, which lodges an *ad hoc* declaration under Article 12(3), accepts ‘the exercise of the Court jurisdiction with respect to’ the crime(s) mentioned in the declaration and assumes the obligation to cooperate with the Court pursuant to Part 9 of the Statute. In fact, the Prosecutor’s determination on the ability of an entity to lodge does not affect the definition of the term ‘State’ under Article 12(1) and 125 of the Statute, which can be at variance with that established for the only purpose of enabling the exercise of jurisdiction by the Court under Article 12(3).³⁶ As this determination is being directed to define what constitutes a ‘State’ for the purpose of acceding to the Rome Statute, it rests, in the first instance, with the UN Secretary-General who, while performing depositary functions, is guided by: (a) the provisions of the Rome Statute; (b) the practice of the General Assembly; (c) international law, including customary international law,³⁷ and, in the second instance, with the ASP.

According to the ‘Practice of the Secretary-General as Depositary of Multilateral Treaties’, the Secretary-General ‘must’ ascertain whether a

lodge an article 12(3) declaration bringing itself within the ambit of the treaty either, as it had sought to do’ (emphasis added).

³⁴ Shany (n 2) 338.

³⁵ Cimiotta (n 2) 687.

³⁶ Shany (n 2) 336ff.

³⁷ *Treaty Handbook*, prepared by the UN Treaty Section of the Office of Legal Affairs (rev edn, 2012) <<https://treaties.un.org/doc/source/publications/THB/English.pdf>>.



'State' may become a party to a treaty deposited with him.³⁸ When a treaty is open to 'all States', the Secretary-General considers that it is outside his competence to determine, on his own initiative, whether or not the entity that deposit an instrument of accession, whose *status* is unclear or controversial, is a 'State.' In this case, the Secretary-General deems it necessary to receive from the General Assembly explicit directives on the entity coming within the 'all States' formula.³⁹ With reference to 'entities other than independent States', the Secretary-General considers that such entities, 'which are not fully responsible for their own international relations', are therefore 'not fully sovereign independent States and accordingly do not fall within the purview of the 'all State' clause and cannot participate in treaties open to 'States.'⁴⁰ Finally, as far as liberation movements are concerned, the Secretary-General maintains that he cannot fulfil his depositary functions in 'the absence of recognition accorded by the members of the international community, that is to say action taken by a political organ of the United Nations or one of the specialized agencies', because he has 'no authority to grant recognition to a Government.'⁴¹

The legal regime and the practice that governs the UN membership and the depositary functions of the Secretary-General are different from the rules that govern the determination of the *status* of an accepting State pursuant to Article 12(3) of the Rome Statute. Therefore, the possibility for a 'State' or an entity, which is not a party to the Statute, to accept the jurisdiction of the Court cannot be denied by a discretionary determination of the Prosecutor based on the assumption that (a) the acceptance of the Court jurisdiction and the accession to the Statute are under the same legal regime, and/or (b) when an *ad hoc* declaration is lodged by an entity, whose *status* is disputed at international or UN level, it is necessary to wait for the assessment of UN institutions on the

³⁸ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the UN Treaty Section of the Office of Legal Affairs, ST/LEG/7/Rev.1, (2009) para 73.

³⁹ *ibid* para 81.

⁴⁰ *ibid* para 97.

⁴¹ *ibid* para 100.

UN membership or *status* in order to determine whether or not to accept the declaration.⁴²

Moreover, considering the differences between: (a) the rights, the obligations and the effects for the acceding State by the entry into force of the Statute and on the accepting State/entity by an *ad hoc* declaration; (b) the criteria to be established in order to accede to the Statute or to accept the exercise of the Court's jurisdiction of the Court; and (c) the institutions – the UN Secretary-General and the ICC Prosecutor, respectively – entitled to verify whether the acceding or the accepting criteria and requirements are met, it is hard to maintain that the term 'State' within Articles 12 and 125 has to be determined in the same sense. The term 'State' may have a plurality of meanings depending on the different socio-political, cultural and also legal context in which it is used. As a consequence, this term can be considered 'polysemic' in its connotations when it is interpreted not only in accordance with its 'ordinary meaning' but also taking into account its 'context' and the 'object and purpose' of an international treaty, such as the *Rome Statute*.⁴³

The legal determination necessary to establish whether an entity can be qualified as a 'State', or – even better – regarded as equivalent to a 'State' for the purpose of accepting the exercise of jurisdiction by the Court under Article 12(1) differs from the determination needed to establish whether the instrument of accession to the Statute deposited with the Secretary-General by a 'State' can be accepted and the Statute can enter into force for that 'State.'

When an *ad hoc* declaration is lodged, the competence to determine whether the entity can be qualified as a 'State' within the meaning of Article 12(3) rests with the Court and has to be exercised, in the first instance, by the Prosecutor while establishing the precondition to the exercise of the jurisdiction,⁴⁴ and, in the second instance, by the Cham-

⁴² Press Release 16 January 2015, ICC-OTP-20150116-PR1083 (n 21): 'The UNGA Resolution 67/19 is therefore determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.'

⁴³ Shany (n 2) 988ff.

⁴⁴ Zimmermann (n 2) 306: 'under Article 34(c) of the Statute, the OTP is considered to form part of the Court, implying that decisions by the OTP may be covered by Article 119(1).'



bers under Article 119(1),⁴⁵ or by the ASP under Article 119(2), when judicial functions and/or the interpretation or application of the Statute are respectively disputed. The same can be maintained even when the statehood of the entity that filed the *ad hoc* declaration is controversial. Otherwise, an *ad hoc* declaration lodged by a UN non-member State, a UN non-observer State, or any other entity, which have never applied for the UN membership, and whether or not they had been granted the *status* of UN 'observer', could not be dealt with by the Secretary-General nor by the Prosecutor.

4. *Have non-State entities the 'ability to lodge' an ad hoc declaration and thereby enable the exercise the Court's jurisdiction with respect to the crime committed in its territory or by its nationals?*

In order to interpret the term 'State' under Article 12(3) of the Rome Statute in accordance with the ordinary meaning to be given to this term, even without taking into account the other relevant rules of interpretation provided by the 1969 Vienna Convention on the Law of Treaties, it should be considered that the Statute does not help to establish the meaning of the term 'State', and that, in international law, there is no exact and commonly accepted definition of this term either.⁴⁶ Some criteria can be found – for instance – in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933, which settles the requirements that the State 'as a person of international law should possess ... : a. permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with other States.' Nevertheless, those criteria are not exhaustive and are not sufficient to determine whether or not an entity can be qualified as 'a person of In-

⁴⁵ Shany (n 2) 338. See also Pellet (n 2) 984, note 7: 'a Court's determination of the effects of the Palestinian declaration is an exercise of the *Kompetenz-Kompetenz* principle', and 988: 'It is for the ICC to define its jurisdiction and the limits imposed on its exercise of jurisdiction, based on its interpretation of the provisions of the Statute, in accordance with the *Kompetenz-Kompetenz* principle.'

⁴⁶ Pellet (n 2) 988: 'In this instance, the context and the object and purpose of the Statute and of its Article 12 are of particular importance due to the "variable geometry" of the very concept of the state, which makes it difficult to keep to a single unambiguous meaning, and, therefore to an "ordinary meaning".'

ternational Law.’ Other requirements may be relevant and may be considered when, as in the case of international multilateral treaties open to ‘all States’ or ‘any State’, the Secretary-General must ascertain whether a ‘State’ may become a party to a treaty deposited with him (ie, to determine which entities are ‘States’). Therefore, in controversial situations, when the ‘any State’ or ‘all States’ formula is adopted, the Secretary-General follows ‘the practice of the [General] Assembly in implementing such a clause and, whenever advisable, [requests] the opinion of the [General] Assembly before receiving a signature or an instrument of ratification or accession.’⁴⁷

In its 2013 Report on Preliminary Examination Activities, the Prosecutor explained, indeed, that the criteria to be established are whether or not the accepting State or entity has the ‘the ability to ... lodge’ an *ad hoc* declaration, and affirmed that her ‘consideration of jurisdiction does not involve any determination on [the accepting entity] statehood *per se*.’⁴⁸ Therefore, as any question related to the statehood *per se* can be left aside,⁴⁹ and a functional approach to statehood can be embraced,⁵⁰ the Prosecutor’s determination on accepting entity’s ‘ability to lodge’ an *ad hoc* declaration should be aimed at establishing on a case-by-case basis⁵¹ whether or not that entity: (a) has an effective *de iure* or *de facto* control over the territory where the conduct in question occurred and the population, to which the person accused of the crime belongs (Article 12); (b) it exercises the political and public powers and authority normally exercised by a sovereign State (eg, in Palestine, apart from the situation of East Jerusalem, no State claims sovereignty on the Palestinian territories); (c) has, *inter alia*, criminal jurisdiction with re-

⁴⁷ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (n 38) para 82.

⁴⁸ ICC Prosecutor’s 2013 Report (n 27) para 238.

⁴⁹ Pellet (n 2) 983ff and 998. *Contra* Ronen (n 2) 26–27: ‘[I]t would be premature for the ICC Prosecutor or Court to recognize the Palestinian declaration as that of a state, even for the limited purpose of Article 12(3). Interpreting Article 12(3) more widely to include entities effectively governing non-sovereign territory also seems unwarranted, as such interpretation flies in the face of the ICC Statute’s wording and the intention of its drafters. Any involvement in issues of recognition risks exposing the Prosecutor and the Court to accusations of politicization and subjectivity.’

⁵⁰ Shany (n 2) 334ff; Pellet (n 2) 983ff.

⁵¹ Shany (n 2) 338.



spect to the crimes referred to in Article 5 of the Statute.⁵² The domestic criminal jurisdiction of the accepting entity can be assessed not only in the case its jurisdiction is substantially exclusive and independent, but also when its jurisdiction is limited, as, for instance, with Palestine criminal jurisdiction over Israeli nationals⁵³ or settlements situated within Palestine's territories.⁵⁴ According to the so called 'delegation-based approach',⁵⁵ the Prosecutor could interpret the relevant provision of the Statute and legally determine that the accepting entity: (a) can be qualified as or can be considered equivalent to a 'State' within the meaning of Article 12(3) of the Statute; (b) has the 'ability to lodge' an *ad hoc* declaration for the purpose of enabling the exercise of jurisdiction by the Court; (c) can confer jurisdiction to the Court with respect to the crimes referred to in Article 5 of the Statute when they are committed on its territory or by its nationals, within the limits of the criminal jurisdiction that it can exercise at the domestic level. This legal determina-

⁵² *ibid* 330: '[A]lthough the PNA should in principle have been allowed to refer the Gaza situation to the ICC, its actual ability to delegate jurisdiction is limited by the Oslo Accords concluded between Israel and the Palestine Liberation Organization (PLO). These agreements deprive the PNA of jurisdiction over crimes committed by Israeli nationals in the Palestinian territories and seriously limit the PNA's ability to conduct foreign relations.'

⁵³ *ibid* 339ff; Pellet (n 2) 994.

⁵⁴ See, on the exercise of ICC jurisdiction over Israeli settlements, E Kontorovich, 'Israel/Palestine – The ICC's Uncharted "Territory"' (2013) 11 *J Intl Criminal Justice* 979–999, and, on the scope *ratione loci* of the (re-confirmed/new) Palestinian declaration under Article 12(3) of the Rome Statute after the General Assembly decision on Palestine's *status* in the UN, Zimmermann (n 2) 328–329: '[T]he geographical scope of any Palestinian acceptance of the jurisdiction of the ICC with regard to crimes committed in Palestine is therefore not limited by the fact that Palestinian authorities are not able to exercise full and effective control over the whole of the West Bank, and, in particular, the Israeli Settlements ... Article XVII of the Israeli-Palestinian Interim Agreement, which precludes Palestinian authorities from exercising criminal jurisdiction over Israelis does not preclude the ICC from exercising its jurisdiction on the basis of a Palestinian acceptance of jurisdiction under Article 12(3) ICC Statute *vis-à-vis* Israeli nationals even when the alleged crimes were committed in the C-Areas of the West Bank.' *Contra* see, on the 'limitations on Palestine's capacity to delegate territorial jurisdiction with respect to the territory in which the settlements are situated' and the fact that 'for the ICC to assert jurisdiction over the territory of the settlements would be both unadvisable as a matter of policy and impermissible as a matter of law', Y Ronen, 'Israel, Palestine and the ICC – Territory Uncharted but Not Unknown' (2014) 12 *J Intl Criminal Justice* 7–25.

⁵⁵ *ibid* 331ff.

tion does not imply either the recognition and the assessment of the statehood of the accepting entity, or its capacity to accede to the Rome Statute as a 'State.'

On the contrary, the capacity of the accepting entity to 'cooperate with the Court without any delay or exception in accordance with Part 9' of the Statute cannot be considered as a 'primary' precondition to be assessed in order to establish the ability to lodge an *ad hoc* declaration. Firstly, the obligation to cooperate with the Court arises only after the *ad hoc* declaration has been accepted, and it supposes the 'ability to lodge' of the accepting entity, and therefore – apart from its capacity to have rights – its ability to enter into relations with other subjects and assume obligations under international law, including international treaties, from which the duty to fulfil these obligations in good faith and to co-operate with other subjects arises. Secondly, the obligation to cooperate with the Court is an obligation of means, and not an obligation of results. Therefore, the capacity to fulfil the duty to cooperate with the Court cannot be evaluated *in abstracto*, but with reference to a concrete and specific action when the entity is asked by the Court to cooperate. Lastly, the capacity to cooperate with the Court does not impinge upon the statehood of the Parties to the Rome Statute, and, accordingly, the ability of a State to accede to the Statute or to lodge an *ad hoc* declaration. So, there is no reason for which the capacity to cooperate with the Court under Part 9 of the Statute should impinge upon the ability of an acceding entity to lodge an *ad hoc* declaration.

5. *Is the Prosecutor being left alone in determining the non-State entity's 'ability to lodge' an ad hoc declaration?*

The legal determination of the accepting entity's ability to lodge an *ad hoc* declaration needs to be made by the Prosecutor – on his/her own initiative – while assessing the primary precondition to the exercise of jurisdiction.⁵⁶ In some cases, the highly political and disputed character of the situation should be taken into consideration by the Prosecutor. Moreover, according to his 2012 Report, the assessment of the accepting entity's ability to lodge an Article 12(3) declaration is made by the

⁵⁶ See *supra* n 37.



Prosecutor '[i]n accordance with Article 15 of the Rome Statute',⁵⁷ namely after the commencement of the preliminary examination in order to determine whether there is a reasonable basis to believe that 'a crime within the jurisdiction of the Court has been or is being committed' and to proceed with an investigation (Articles 15(1) and 53(1) of the Statute). Consequently, if the Prosecutor does not wish to determine – on his/her own initiative – whether the accepting entity, whose *status* is unclear or controversial, has the 'ability to lodge' an *ad hoc* declaration, he/she may seek a ruling from the Pre-Trial Chamber regarding a question of jurisdiction in accordance with Article 19(3) and (6) of the Statute. The Pre-Trial Chamber's decision may be appealed to the Appeals Chamber in accordance with Article 82 of the Statute.⁵⁸

Nevertheless, considering the legal reasoning followed in the Prosecutor's Reports and statements, it seems that the determination on Palestine's 'ability to lodge' and thereby on its statehood was made before the commencement of the official preliminary examination aimed at analysing 'the seriousness of the information received' on crimes within the jurisdiction of the Court (Article 15(2)) and to establish whether 'there is a reasonable basis to proceed with an investigation' (Articles 15(1) and 53(1)).⁵⁹ This assumption seems to find confirmation in the 2015 OPT Press Release, according to which the Prosecutor's decision to open a preliminary examination into the situation in Palestine, in accordance with Regulation 25(1)(c) of the OPT Regulations, 'follows the Government of Palestine's *accession* to the Rome Statute' in 2015 and its 2015 '*valid*' declaration, lodged under Article 12(3) of the Rome Statute.⁶⁰ According to the aforementioned Regulation, the Prosecutor's '*preliminary examination and evaluation* of a situation ... *may be initiated*' on the basis of Article 12(3) declaration, whose 'validity' (ie, *inter alia*, the ability to lodge of the accepting 'State') has already been assessed in a previous phase. In this case, if the Prosecutor does not wish to determine – on his/her own initiative – whether the accepting entity, whose *status* is unclear or controversial, has the 'ability to lodge' an *ad hoc* declaration under Article 12(3), he/she may seek a ruling from the

⁵⁷ ICC Prosecutor's 2012 Report (n 6) para 2.

⁵⁸ Cimiotta (n 2) 689ff.

⁵⁹ *ibid* 698.

⁶⁰ Press Release 16 January 2015, ICC-OTP-20150116-PR1083 (n 21).



Chambers regarding a question of jurisdiction in accordance with Article 19(3), read in conjunction with Article 119(1) of the Statute, or can ask the ASP for some guidance on the interpretation and application of Article 12(3) of the Statute, in accordance with art. 112(2)(g) read in conjunction with Article 119(2) of the Statute.

The Court, moreover, may review the legal determination of the Prosecutor in any subsequent occasion when it is: (a) ruling on the decision adopted by the Prosecutor to open an investigation under Article 53 of the Statute; (b) authorising the commencement of the investigation (Article 15(4)); (c) ascertaining its jurisdiction in the case brought before it or, on its own motion, determining the admissibility of a case in accordance with Article 17 (Article 19(1)); (d) ruling on challenges to its jurisdiction and on questions of the admissibility of a case (Article 19(2)-(3)). In the latter case, the Prosecutor's legal determination can be reviewed by the Court while ruling on challenges to its jurisdiction made by: a) the State – whether or not it is party to the Statute – that, denying the 'ability to lodge' and thereby the statehood of the accepting entity, pretends to have jurisdiction with respect to the crime(s) and/or the territory where the conduct occurred (Article 19(2)(b) and (c)); b) or by an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58 (Article 19(2)(a)).

6. *Some final remarks on what role the UN Security Council can play with reference to crimes committed on the territories of non-State entities*

As argued above, in the case of an *ad hoc* declaration, the only legal determination that the Prosecutor cannot make is to consider 'invalid' or 'invalidly lodged' that declaration on the sole basis of an unproven statement of equivalence between the undetermined terms 'State' within the meaning of Articles 12(1)-(3) and 125 of the Rome Statute, in the wake of the United Nations institutions recognition of the accepting entity statehood (member State or, as an intermediate step, non-member observer State), as it happened in the Palestinian case.

In its 2012 Report, moreover, the Prosecutor stated that he 'could in the future consider allegations of crimes committed in Palestine, ... should the Security Council, in accordance with Article 13(b), make a



referral providing jurisdiction.⁶¹ The Prosecutor seems to assume that, pending the definition of the *status* of Palestine – or any other entity whose statehood is controversial or unclear – before the UN institution, the jurisdiction of the Court could be extended to Palestine by the Security Council acting under Chapter VII of the Charter of the United Nations in accordance with Article 13(b) of the Statute. However, the empowerment of the Security Council to refer a situation to the Prosecutor under Article 13(b) of the Statute appears to be quite limited because it depends, firstly, on a preliminary finding that international peace and security have been threatened or breached or an act of aggression has occurred, and, secondly, on the international *status* of the entity.

When dealing with the latter point, the basic assumption is to consider the case of an entity that is not a UN member State, and consequently that is not bound by the Security Council's decision under Chapter VII of the UN Charter,⁶² while it is irrelevant to take into account whether or not the entity has been granted the *status* of 'observer' or 'observer State' in the United Nations. Accordingly, on the one hand, if the entity exercises political and public powers and authority, including in criminal matters, and has an effective and independent control over a territory and a population (eg, Palestine until 2015; Kosovo – presuming that it is a 'State' – after the modification and the reconfiguration of UNMIK's mandate in 2008), it can be held that the Security Council cannot refer the situation to the Court and to extend its judicial reach under Article 13(b) of the Rome Statute. On the other hand, if the entity can be considered incapable of either exercising any of the public authority and powers that normally are exercised by a State, and having an effective and independent control over a territory and a population, it can be argued that the Security Council can refer to the Prosecutor the situation in which crimes under the jurisdiction of the Court appears to have been committed in the following cases. Firstly, when the State, on the territory of which the entity is acting or fighting for its self-determination, or the State, which *de facto* governs the territory or exercises the authority and control on the entity, is a UN member (eg, Morocco with regard to Western Sahara; Cyprus or – according to EC-

⁶¹ ICC Prosecutor's 2012 Report (n 6) para 8.

⁶² Cimiotta (n 2) 692.

tHR case-law⁶³ – Turkey with regard to Northern Cyprus; Moldova or – considering the ECtHR case-law⁶⁴ – Russia with regard to Transnistria; Georgia with regard to Abkhazia; Georgia or Russia with regard to South Ossetia). Secondly, when a State or an entity is still in the embryo stage, but its territory is directly administrated by the United Nations, namely, for instance, UNMIK in Kosovo until 2008, and UNTAET in East Timor until 2004.⁶⁵

As far as the aforementioned situations are concerned, it is important to take into account that the role of the Security Council cannot be established *a priori* and *in abstracto*, but *in concreto* and on a case-by-case basis, as it depends on the changing situations of the *status* of the territories concerned, on the evolution of the self-determination movement and, above all, on the effective governmental authority and control that the entity is capable of exercising *de iure* or *de facto* on its territory and its population.

⁶³ ECtHR, *Cyprus v Turkey*, App no 25781/94 ([GC] Judgment 10 May 2001) para 76.

⁶⁴ ECtHR, *Catan and Others v Moldova and Russia*, Apps nos 43370/04, 18454/06, 8252/05 (Judgment 19 October 2012) para 102ff.

⁶⁵ E De Wet, 'The Direct Administration of Territories by the United Nations and its Members States in the Post Cold War Era: Legal Bases and Implications for National Law' (2004) 8 Max Planck YB UN L 291–340, 301ff.



The question:

Sustainable investment in natural resources: How is international law doing?

Introduced by Angelica Bonfanti

Trade liberalization and foreign investments in developing countries are important drivers for economic development. However, the willingness of recipient States to attract direct foreign investments may find itself at odds with the protection of fundamental human rights and the environment. A number of developing and underdeveloped countries rich in natural resources are even affected by the so called ‘resource curse’, ie instead of being drivers of development, their natural resources are at the heart of civil war and political and social disorder. The exhaustibility or the scarcity of natural resources, either those necessary for the sustenance of local peoples or those subject to ‘commodification’ for trade and investment activities, exacerbates the phenomenon. Several actors contribute or are affected by it, including: States, foreign investors, multinational corporations, individuals, indigenous communities and local peoples, intergovernmental organizations, financial institutions, NGOs.

This Zoom-in focuses on the exploitation of natural resources, with the aim of drawing a line between ‘sustainable investment’ and ‘natural resource grabbing.’ It being acknowledged that ‘territorial sovereignty confers upon the State an exclusive competence to organize as it wishes the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it’ (*Texaco Overseas Petroleum Co v Libya*, 17 ILM (1978) para 59), this Zoom-in aims at examining whether international law requires that investments in natural resources are carried out in compliance with a sustainable approach, and if this is the case, which rules and principles are suitable to guarantee it. Besides this normative dimension, it also investigates how the legal framework

on sustainable development can be enforced, and to what extent it proves to be effective in practice.

Several issues connected with the notion of ‘sustainable investment’ are also worthy of examination, that is to say: how and to what extent the exploitation of natural resources affects State sovereignty and peoples’ right to self-determination? Can a balance be struck between diverging interests of economic development and human rights and environmental protection, and if so, how? How should the public-private relationship be shaped? How exactly do the different actors and legal sources that are relevant in this field interact with each other? What is the role and the effectiveness of international organizations, financial institutions, international courts and quasi-judicial bodies in guaranteeing the protection of human rights and of the environment from practices amounting to natural resource grabbing? And, as a general assessment, can a comprehensive legal regime on sustainable investment in natural resources be envisaged, at least in its early stages. And if so, what basic common principles and standards of conduct would it embrace?

QIL puts these questions to Francesca Romanin Jacur and Elisabeth Bürgi Bonanomi, who offer two different perspectives on them. On the one hand, Francesca Romanin Jacur follows a legal approach, based on the analysis of the international legal rules and case-law in the fields of investment, human rights and environmental protection. On the other hand, Elisabeth Bürgi Bonanomi derives her reflections from sustainable development law and human rights theory, with a specific perspective on international economic regimes, and illustrates her arguments through a Sierra Leonian case that she has studied in depth.



Lights and shadows in the relationship between international law and sustainable investments: The challenges of ‘natural resources grabbing’ and their effects on State sovereignty

*Francesca Romanin Jacur**

1. *The nexus between investments in natural resources and sustainable development*

It is reasonable to enquire as to whether international law has evolved to require that today, investments in natural resources be carried out in compliance with a sustainable approach. A positive answer can be given in response to this question, based on the following considerations. In 1987, the Brundtland report provided what is now the famous definition of sustainable development, stating that it is: ‘development which meets the needs of the present without compromising the ability of future generations to meet their own needs.’¹ Subsequently, several legal instruments were adopted in the 1990s, *inter alia* the adoption of the Rio Conventions, the ‘restyling’ of the preamble of the WTO, the ‘greening’ of the World Bank policies and the restructuring of the Global Environment Facility (GEF). The sustainable development discourse finds its roots in these legal instruments, which call for a convergence between the three pillars of economic development, social equity and environmental protection. All these developments, across various sectors of international law, marked a decisive change in the approach taken to the exploitation of natural resources which meant mov-

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¹ Report of the World Commission on Environment and Development: Our Common Future (4 August 1987) UN Doc A/42/427, Annex (‘Our Common Future’), Part I, Chapter 2, section I (‘The Concept of Sustainable Development’).



ing towards a more sustainable path.² In light of these developments, generally speaking, it seems safe to say that any investment in natural resources must respect sustainable development criteria. ‘Zooming-in’ on what are the most relevant rules and principles that characterise an investment as being sustainable, the first that come to mind are participatory rights, such as public participation, access to information and justice in environmental-related decision-making, notably during environment impact assessment (EIA) procedures.³ On this path, more advanced guarantees like the Free Prior Informed Consent (FPIC) are being recognised by human rights instruments⁴ and by the recent entry into force of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, under the biodiversity regime.⁵

These procedural rules lie at the crossroads between environment and human rights protection and contribute to enhancing Government accountability towards more sustainable behaviours. The recurrent endorsement of these procedural requirements and obligations by Multilateral Environmental Agreements (MEAs),⁶ as well as by international human rights courts,⁷ their implementation by States and their adoption

² N Schrijver, ‘The Evolution of Sustainable Development in International Law: Inception, Meaning, and Status’ (2007) 329 *Recueil des Cours de l’Académie de Droit International* 217–412.

³ These are some of the principles identified by the International Law Association (ILA) as part of the concept of sustainable development. ILA Resolution 3/2002 ‘New Delhi Declaration of Principles of International Law Relating to Sustainable Development’ in *International Law Association Report the Seventieth Conference (New Delhi 2002)* (International Law Association, London, 2002).

⁴ See, for example, the 2007 UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly, UNGA Res 61/295 (13 September 2007) art 32: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.’

⁵ Nagoya Protocol to the Convention on Biological Diversity, art 6 <www.cbd.int>.

⁶ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1995) <www.unece.org/env/eia/welcome.html>; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) <www.unece.org/env/pp/treatytext.html>; Cartagena Protocol to the Convention on Biological Diversity, art 23 <www.cbd.int>.

⁷ *Tatar v Romania* App no 67021/01 (ECtHR, 27 January 2009).



as benchmarks for projects to be eligible for financing by International Financial Institutions (IFIs)⁸ are all elements that contribute to the consolidation of new rules of international law, also of a customary nature, as in the case of EIA in a trans-boundary context.

While the normative framework is rich and comprehensive, serious loopholes are found when it comes to the implementation of these principles and norms in practice. There are several international legal tools that have an impact on the sustainability of investments and that characterise the difficult search for a balance between the economic development brought about by the exploitation of natural resources and the respect of fundamental human rights and of environmental protection. In this regard, a somewhat contradictory picture will be drawn in the following paragraphs: on the one hand, international law instruments challenge unsustainable natural resource practices and contribute to the avoidance or mitigation of their negative effects. On the other hand, the limitations on sovereign powers imposed by international law may exacerbate unsustainable investments and the so-called 'grabbing' of natural resources.

2. Looking for a better understanding of 'natural resources grabbing' practices

The term 'grabbing' is generally found with reference to land and is generally perceived as having a negative connotation. This is mainly because its use is associated with practices that not only fail to contribute to the sustainable development of the recipient countries, but also result in an adverse impact on human rights and the environment. Examples of 'natural resources grabbing' are large-scale leases of land for agricultural investment and the taking of resources such as water, forests and other resources essential for ensuring the livelihood of local peoples in developing countries, the taking from indigenous peoples of their ancestral lands and the massive and inhumane killing of endangered animal species in order to derive tradable products from them. The con-

⁸ World Bank Operational Policy 4.01 on Environmental Assessment; IFC, Performance Standard on Social and Environmental Sustainability, adopted by the IFC Board on 21 February 2006 and revised in 2011 <www.ifc.org>.



cept of ‘natural resources grabbing’ can be broken down into two dimensions, which may exist separately or contextually: a qualitative one that relates to the way in which these practices are carried out; and a quantitative one, which refers to the scale or gravity of the phenomenon. Besides looking at how natural resources are accessed or managed, ‘direct natural resources grabbing’ can be identified when the subject entitled to a natural resource is illegally deprived of it. This happens when natural resources – such as land, water, biological and genetic resources, forests, oil, gas and mineral resources, to name a few – are illegitimately obtained, being accessed in violation of the property rights of the owner and/or of the applicable procedural requirements. This is the case, for instance, of genetic resources which are accessed without obtaining the consent of the indigenous peoples who legitimately own them. ‘Indirect natural resources grabbing’, on the other hand, relates to the unsustainable management of the resources and encompasses situations where – even when the natural resources are legally accessed – their subsequent exploitation results in a negative effect on the environment, on the fundamental rights of the local communities and of the other stakeholders involved. This is the case, for instance, of investment contracts leading to long-term breaches of fundamental human rights and adverse environmental effects and the inadequate sharing of the benefits deriving from the exploitation of the natural resources with the local communities.

Despite its broad use, the complexity of the ‘grabbing’ phenomenon, means that at present, consensus on its constituent elements has yet to be reached among legal scholars, who have not yet been able to agree to a legal definition. A tentative definition of the ‘grabbing’ phenomenon with regard to natural resources could be the following:

‘the taking of natural resources that is decided and implemented in disregard of applicable procedural guarantees and that results in short or long-term adverse effects on human rights of local people and/or on the environment in the recipient country.’⁹

⁹ This definition has been outlined as a drawing together and conclusion of a collection of contributions discussing the ‘natural resources grabbing’ practices by F Romanin Jacur, A Bonfanti, F Seatzu, ‘Concluding Observations’ in F Romanin Jacur, A Bonfanti, F Seatzu (eds), *Natural Resources Grabbing: An International Law Perspective* (Brill 2015) 427.



The generic word 'taking' is sufficiently broad to accommodate all the various forms that activities leading to 'grabbing' may take and indicates the main effect that they have, namely the dispossession or loss of control over the resources by their owners.¹⁰ Relevant activities may be private or public, foreign or national investments. They are often of a large-scale dimension, but they may also be smaller deals. The same can be said with regard to the legal structure of the deals, because a wide variety of options can be envisaged: acquisitions, concession agreements, project-financing and long-term leases are the first that come to mind. Relevant operations are not only the ones directly targeting land or other natural resources, as other activities may also result in the dispossession of natural resources, even those which pursue legitimate public interest objectives. One may think, for example, of the construction of roads to improve the communications within a certain area, which causes illegitimate expropriations of lands inhabited by local communities, or of the utilisation of water from a river to provide electricity which significantly reduces access to water for agricultural purposes. Hence, the qualifying character rests on the effects linked to the activity carried out and in the modalities according to which it takes place. This definition then deals with the decision-making process according to which the 'taking' occurs. In this regard, the definition assumes that there are procedural steps and guarantees that need to be respected to make sure that all the stakeholders are adequately informed and able to participate in the process. These aspects will be further examined in depth here-under. Finally, the last part of the definition refers to the negative local impact on the human rights of people and on the environment deriving from these practices and provides for the time and geographical frame.

3. *The exercise of State sovereignty over natural resources*

The State's right to dispose freely of its natural resources means *inter alia* the right to determine and control the prospecting, development, exploration, exploitation, use, and marketing of natural re-

¹⁰ This term is largely used also by L Cotula, *Human Rights, Natural Resources and Investment Law in a Globalised World* (Routledge 2012).



sources. These are some of the many rights that States can confer on foreign investors. States may exercise their sovereignty over natural resources by directly exploiting their resources, or by delegating the task of exploiting their resources to other subjects in exchange for an economic return, for instance by concluding concession contracts.

Permanent sovereignty over natural resources is not absolute and means that States in exercising it must also respect a series of duties: first and foremost, the pursuit of the national development and the wellbeing of the people. Furthermore, the exercise of sovereign power must be consistent with the international environmental and human rights obligations binding on the State and with the international law on the protection of foreign investments. Thus, permanent sovereignty over natural resources is a complex notion, embracing freedoms, rights and duties. While States are free to directly exploit their resources or to delegate this task to other subjects, they remain bound to comply with their international obligations and to respect the self-determination of their peoples.

When the exploitation or alienation of natural resources leads to the transfer not only of possession – but also of control over them, from the host State to foreign private or public investors, this may erode the effective exercise of State authority over lands and any related natural resources. This is typically the case in long-term land deals that lease large portions of a State's territory for periods of up to 99 years. Situations such as these suggest that an erosion of State sovereignty is, indeed, taking place from within the State: by leasing or selling these large portions of their lands, the Governments of the affected countries lose their decision-making authority and damage the fundamental nexus between the central Government, the management of the territory and the wellbeing of its inhabitants.

This phenomenon occurs notably with regard to land grabbing and gravely weakens State sovereignty, because while formally retaining ultimate jurisdictional control over the territory, foreign State entities or private investors gain the right to exploit the land and to dispose of its agricultural products and to take control over vital land resources.¹¹

¹¹ F Violi, 'The Practice of Land Grabbing and Its Compatibility with the Exercise of Territorial Sovereignty' in Romanin Jacur, Bonfanti, Seatzu (n 9) 25.



4. *The internationalisation of human rights to enjoy natural resources and their effects on State sovereignty*

4.1. *The principle of self-determination*

The right to self-determination is recognised by Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states:

- '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. ...'

Here, the right of internal self-determination, which empowers the people to decide over their economic, social and cultural future, including through the control over their lands and natural resources, is regarded as a collective right.¹² The 'internal' dimension of self-determination, namely the relationship between the peoples and the State where they live, is further developed in the context of the recognition of the rights of indigenous peoples, local communities and minori-

¹² The principle of self-determination has been described by the ICJ as the 'need to pay regard to the freely expressed will of people ... in matters concerning their condition': *Western Sahara* (Advisory Opinion, 16 October 1975) [1975] ICJ Rep 33. In the *East Timor (Portugal v Australia)* case, the Court clarified the legal nature of self-determination by recognising that it is 'one of the essential principles of contemporary international law' and that it is also a 'right' with 'an *erga omnes* character': *East Timor (Portugal v Australia)* (Judgment, 30 June 1995) [1995] ICJ Rep 90, 102. While its importance and recognition as a fundamental customary principle of international law is far beyond doubt, differing views emerge when the principle further develops into more specific rules and norms. Scholars debate whether self-determination is a 'soft' legal principle that informs international law and its development, or whether it may also translate into justiciable autonomous rights. These issues are extensively discussed notably by A Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995); J Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in P Alston (ed), *Peoples' Rights* (OUP 2001) 7.

ties by the African Commission, by the UN Human Rights Committee and by the UN Declaration on the Rights of Indigenous People (UNDRIP).¹³

Relevant human rights conventions have acknowledged the right of indigenous peoples to land, both by setting standards of substantive and procedural character. Thus, for example, under Article 27 of the ICCPR, a right of 'effective participation' in decision-making is provided and the ILO Convention 169 (27 June 1989) provides that the indigenous peoples shall be consulted with regard to measures, which may affect them directly. The consultations shall be conducted in good faith and 'with the objective of achieving agreement or consent to the proposed measures.'¹⁴ Furthermore, Articles 14 and 15 of the Convention go further in recognising the substantive land ownership rights of indigenous peoples, which provides a negative right of protection against State interference, as well as positive rights to ownership and use.¹⁵ When indigenous rights on ancestral lands are recognised as being of a customary nature, they derive their legal basis from a source of law that is pre-existent and enjoys a certain degree of autonomy from the State. From this perspective, the international recognition of people's rights over natural resources may be seen as a form of restriction of State sovereignty.

¹³ UN Declaration on the Rights of Indigenous Peoples (n 4) art 19: 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.'

¹⁴ ILO Convention 169, art 6 paras 1 and 2; art 7.

¹⁵ ILO Convention 169, art 14: '1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.' See G Ulfstein, 'Indigenous Peoples' Right to Land' (2004) 8 *Max Planck YB UN L* 1-47.



States are often unwilling or unable to adequately manage the challenge of resources grabbing within their territory, particularly when the economic national interests are not aligned with the interests and rights of their local communities and indigenous peoples. In these cases, States' governmental and administrative authorities often exercise their powers in ways which encroach upon self-determination and other fundamental human rights. Furthermore, it should be noted that many domestic legal orders do not provide for an effective protection of peoples' rights in respect of natural resources. In this context, international law may provide for a complementary protection, by upholding the substantive rights of peoples to their natural resources vis-à-vis their home States. The unsustainable exploitation of natural resources may lead to the violation of the principle of self-determination and of other human rights, and even lead to the suppression of their fundamental freedoms. Many controversial issues arise in this context, first and foremost because there is still uncertainty on the definition of 'people' in international law and on whether the rights on natural resources are individual or collective rights.¹⁶

4.2. *Access of individuals to international adjudication procedures*

International norms recognise the right of individuals and other non-State actors to access human rights Commissions and Courts and other quasi-judicial bodies, like the Compliance Advisor Ombudsman of the International Financial Corporation (IFC) to obtain remedies in case of violation of their rights. A key role is played by international human rights bodies, as reflected in the jurisprudence of the Inter-American Court of Human Rights¹⁷ and the African Commission on Human and Peoples' Rights¹⁸ recognising and strengthening peoples'

¹⁶ Ulfstein (n 15).

¹⁷ The Inter-American Court of Human Rights recognised the right to access information when it found that the refusal by the Chilean Foreign Investment Committee to disclose information on a deforestation project was in violation of art 13 of the Inter-American Convention on Human Rights. (*Claude Reyes v Chile* (Judgment, 19 September 2006) IACtHR No 151).

¹⁸ For example, the African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Decision 4 February 2010) Comm No 276/2003. In this case, the Commission found Kenya in violation of art 21 of the African Charter



rights vis-à-vis their home States.¹⁹ Beside the recognition of procedural and substantive human rights, such as the right to property, to food, and to freely dispose of natural resources, international human rights systems provide for the legal protection of these rights, thereby strengthening the enforcement of international norms. Through their jurisprudence they influence other international jurisdictions, as well as the decisions of national courts and in so doing, they inform the development of lawmaking at the national and international levels.

5. International commitments shrinking State regulatory powers and hampering their capacity to adequately address the exploitation of natural resources

State sovereignty might be limited by international law – this time with counter-productive effects on sustainable investments – when States are unable to effectively address these challenges, because they engaged in international obligations arising from investment and trade agreements that have a shrinking effect on their domestic policy space. Thus, for example, the ability of WTO member States to implement regulatory measures aimed at protecting animals or managing their essential water and energy resources is heavily conditioned, if these measures encroach upon the WTO trade liberalisation commitments. Analogous considerations apply in the investment context: Bilateral Investment Treaties (BITs), Free-Trade Agreements (FTAs) and the financial assistance agreements of IFIs and the European Union impose conditions upon recipient States that limit their sovereign prerogatives.

These are different phenomena that occur whenever States willingly consent to be bound by international treaties that limit their sovereign prerogatives. Though we maintain that these cases are, indeed, formal

affirming peoples' right to freely dispose of their natural resources for not having undertaken proper consultation with the concerned indigenous community and not having obtained their consent. J Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60 ICLQ 245.

¹⁹ On the international protection by the European and Inter-American Courts of Human Rights of property rights of indigenous people over their ancestral lands in the absence of formal title under national law, see Cotula (n 10) 13.



exercises of State sovereignty, nonetheless these situations may – and often do – result in *de facto* limitations of the State regulatory powers.

6. *The emergence of a legal regime on sustainable investment in natural resources*

Natural resources provide for the basic livelihood and sustenance of local people, but at the same time they are tradable goods and commodities with an economic value. This double-sided character is at the root of the inherent diverging interests of economic development, on the one hand, and human rights and environmental protection, on the other. The fundamental purpose of a legal regime that ensures the sustainability of investments in natural resources requires a balance to be struck between these interests, so as to combine the three pillars of sustainable development. First and foremost, States, who are still the main actors in this play, should exercise their sovereign prerogatives on natural resources in a functional manner in order to foster economic development and, at the same time, keep in mind their responsibilities to ensure the protection of human rights, as well as the well-being of people, the proper use of agricultural lands and the environment, by guaranteeing the sustainable access to – and the sound management of – natural resources.²⁰ To achieve these purposes, States should not only refrain from interfering with the enjoyment of human rights, but are increasingly required, *inter alia* pursuant to their international obligations under human rights and environmental treaties to adopt measures that enhance the protection and legal certainty of such rights.

From a normative perspective, looking across the relevant international legal instruments for basic rules and principles informing the legal regime for sustainable investments on natural resources, some common essential elements may be found. They mainly relate to the ways in which natural resources are accessed and managed. With regard to access to natural resources, procedural guarantees are increasingly pro-

²⁰ In this vein, Francioni speaks of 'responsible sovereignty.' F Francioni, 'The private sector and the challenge of implementation' in P-M Dupuy, J Viñuales (eds) *Harnessing Foreign Investment to Promote Environmental Protection. Incentives and Safeguards* (CUP 2013) 34.

vided in favour of the legitimate owners of such resources. One may think, for instance, of the prior informed consent (PIC) requirements set by human rights instruments, such as the UNDRIP, by MEAs, such as the Convention on Biological Diversity (CBD) and its Nagoya Protocol, and by the operational policies of IFIs. These international instruments require States to adopt adequate domestic measures that improve the legal protection of property rights vis-à-vis the host State itself and third parties, such as foreign investors. These mechanisms include collective rights of participation and consultation with affected individuals and communities, and individual rights to access to justice and remedies for potential violations of these rights. The recognition of procedural rights has greatly advanced, but may further develop. For example, a veto power of local populations over the approval of projects that endanger food security, the environment, and/or their traditional livelihoods is not yet endorsed under the international instruments considered. Furthermore, the obligation to consult in good faith with peoples that could potentially be negatively affected by investments in natural resources could be taken in to account in the drafting of new BITs. Furthermore, when procedural or substantive obligations are recognised as being customary law or when the host and home States are parties to human rights instruments that provide them, they could and should be taken into account by investment tribunals either as interpretative tools or as applicable law.²¹

Another fundamental tenet of this emerging legal regime is the sharing of the economic and non-economic benefits deriving from the exploitation of natural resources. This concept and its related rules derive from the principle of equity and are meant to reward the individuals and communities who own and sustainably manage the resources. In this regard, noteworthy advancements are found in the human rights jurisprudence, which clarifies the normative content of such rights and expressly recognises the importance of its cultural dimension. The recognition of the value of the special relationship between ancestral lands and their inhabitants and of traditional knowledge transmitted

²¹ T Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 *J World Investment and Trade* 929–963, 963, optimistically sees a trend towards a better conciliation of the interests of the business community and those of the host State and of other stakeholders.



within indigenous communities concerning their natural resources represents another emerging trend.

In conclusion, natural resource grabbing has recently gained notoriety as a worrisome phenomenon of unsustainable investment that attracts attention and concern and that requires appropriate regulatory tools to contain its negative effects. The inherent double-headed nature of sovereignty over natural resources and the problems arising when its exercise by the governmental authorities is not aligned with, and encroaches upon, the peoples' rights are crucial aspects linked to grabbing practices that raise questions for which international law has yet to provide for satisfactory answers. The recognition of substantial and procedural rights and guarantees seems a well-established trend to address many of the hurdles posed by these challenges, and may be considered as the primary elements of this developing legal regime.



**Sustainable investment in land in the Global South:
What would it require from a coherence perspective?
The case of Sierra Leone**

*Elisabeth Bürgi Bonanomi**

1. *Introduction*

Large scale acquisitions of land in the Global South have significantly increased since the millennium.¹ It is often the case that foreign investors are involved in such acquisitions, which are commonly aimed at facilitating the export of commodities.² These investments in land tend to transform conventional, rather small scale agricultural systems into large scale, industrial agricultural systems.³ While investment in agriculture in the Global South is much needed, large-scale investments in land often goes hand-in-hand with environmental and human rights related challenges. As a consequence, lawyers need to address questions of sovereignty over natural resources (this paper focuses in particular on land resources), to peoples' right to self-determination, to the responsibilities of the home and host States of the investors, including public-private relationships, and the role of international institutions who are involved, as well as relevant jurisprudence. This paper approaches these questions from the perspective of a theory on policy coherence for sustainable development.

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¹ Land matrix <www.landmatrix.org/en/>.

² This paper focuses on large scale land acquisitions of this kind.

³ Land matrix (n 1).



2. *The responsibilities of States vis-à-vis their land based on the principle of sovereignty over natural resources*

When it comes to large-scale investments in land, the State within which the boundaries of the land is located has not only rights, but also bears *responsibilities* vis-à-vis its land, based on the principle of sovereignty over natural resources. This principle has evolved over the last decades.⁴ Primarily rights-based initially, it developed into a principle encompassing both rights and duties. While the rights perspective was related to the developmental dimension of the principle, the duty element was strengthened once environmental claims garnered more attention.⁵ Today, it is recognised that States are not fully free to manage their resources, but that they must also respect the interests of other States and the international community as a whole.⁶

This nuanced understanding is *inter alia* reflected in Principle 2 of the 1992 Rio Declaration.⁷ Accordingly, States have the sovereign right to exploit their own resources pursuant to their own environmental and also developmental policies. But the State also has ‘the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’ This more nuanced principle of sovereignty over natural resource rights has since provided guidance to many environmental treaties, such as for instance the Convention on Biological Diversity (CBD).⁸ Against the backdrop of the concept of sustainable development, this responsibility entails a ‘duty to ensure sustainable

⁴ N Schrijver, ‘Permanent Sovereignty over Natural Resources’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol 3 (OUP 2012).

⁵ *ibid.*

⁶ The notion of ‘sovereignty’ as such already entails elements of responsibility and cooperation. See FX Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer 2000).

⁷ UN Rio Declaration on Environment and Development, Annex I to the Report of the United Nations Conference on Environment and Development of 12 August 1992 (UN Doc A/CONF.151/26, vol I) <www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

⁸ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) art 3 <www.cbd.int>. For an in-depth analysis, see N Schrijver, *Sovereignty over Natural Resource. Balancing Rights and Duties* (CUP 1997).



use.’⁹ ‘Sustainable’ use implies the maintenance of the resources for future generations, or as Edith Brown Weiss puts it: ‘While states have sovereignty over their territory, this sovereignty is of necessity tempered by the requirements of intergenerational equity.’¹⁰ This implies for large scale acquisitions that host Governments have the right to determine who invests in land, but must ensure that such investments imply a careful management of soil and biodiversity resources, but also respect peoples’ right to self-determination and related social standards (which are also reflected in the term ‘sustainable’; see para 2.3).¹¹

3. *Who else bears the responsibility to use natural resources in a sustainable way?*

3.1. *Concepts capturing the sharing of responsibilities*

In the debate about large scale land acquisitions (LSLAs), the focus is often on the responsibility of the country in which the investment is located (the host State). However, the question arises of whether the home State of the investor (the State where the investor is domiciled), international institutions and the investor as such, also bear responsibilities vis-à-vis the land in question.

Since 1970, different legal concepts have evolved which seek to capture shared responsibility. They include the concept of the common heritage of mankind, the concept of global commons, the concept of sustainable development or the concept of common concern. The concept of the common heritage of mankind holds that certain qualified elements of our common natural and cultural heritage should be held on trust for future generations, since they are of global interest. According-

⁹ ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (adopted 6 April 2002) Res 3/2002 (ILA New Delhi Declaration) <www.ila-hq.org>. See eg art 2 of the CBD for a definition of ‘sustainable use.’

¹⁰ EB Weiss, *Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989).

¹¹ Regarding ‘peoples’ right to self-determination’, see F Romanin Jacur, ‘Lights and Shadows in the Relationship between International Law and Sustainable Investments: The Challenges of ‘Natural Resources Grabbing’ and Their Effects on State Sovereignty’ (2015) 2 *QILJ* 411–423.



ly, responsibility is a shared one.¹² The concept of global commons in contrast refers to common goods which can be owned neither by individuals nor States, such as those in Antarctica, deep sea resources, migratory species, the atmosphere, or the climate. In the case of global commons, sovereignty rights are restricted or do not exist, and responsibility is – implicitly – also a shared one.

The concept of sustainable development – as introduced in 1987 and shaped by the 1992 Rio Declaration – takes this one step further by evoking the principle of common but differentiated responsibilities as a core principle of sustainable development. The principle of common but differentiated responsibilities not only asks for a differentiated approach towards responsibilities, but also for responsibilities to be commonly shared.¹³ Similarly, the evolving concept of common concern – invoked in some international treaties¹⁴ – seeks to grasp the idea of shared responsibility in more detail. It goes beyond the concept of the common heritage of mankind and the concept of global commons and captures all uses of natural resources which are of common interest to the global community, independent from the resources being classified as heritage or not. Attempts to more closely define the concept of common concern are ongoing. Evolving theory suggests that it ought to be applied to problems related to natural resources which cannot be solved unilaterally. A common interest in resolving the issue should exist, and equity related questions should be concerned. Given all these premises, a general duty to cooperate is affirmed (even independent from being classified as ‘home’ or ‘host’), and – in the absence of common action – unilateral action can be taken.¹⁵

¹² It found legal foundation in the Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.

¹³ See Principle 7 of the 1992 Rio Declaration.

¹⁴ See eg the preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) (ITPGRFA) <www.planttreaty.org/content/article-xiv>: ‘Cognizant that plant genetic resources for food and agriculture are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere.’

¹⁵ See eg T Cottier, ‘The Emerging Principle of the Common Concern: A Brief Outline’ in E-U Petersmann (ed), *Multilevel Governance of Interdependent Public Goods: Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century* (European University Institute 2012); J Wehrli, *A Single World. Intergenerational*



If management of land was regarded as a common concern, a shared responsibility of home States, host States, business enterprises and the international community as a whole, would exist. Questions of whether *home country* regulation and *international law* also provide for an enabling environment for sustainable investments to occur, and of whether *the investor* as such behaves in a sustainable way, are of equal value from this perspective. This requires a shared responsibility, for instance, when aligning existing investment and agricultural policies with land related environmental and human rights standards (see para 4). Such thinking of land as a common concern is not utopian. Given the importance of land related resources for human society and their degree of degradation, it being used in a sustainable way becomes a concern of the whole of global society.¹⁶

3.2. *A multi-layered governance perspective is needed*

When outlining a 'shared responsibility' framework for LSLAs, it is helpful to complement the concept of common but differentiated responsibilities, respectively the concept of common concern, by a multi-layered governance perspective.¹⁷ This perspective suggests that various levels of governance interact and must be assessed jointly. It depends on different layers of governance as to whether investments in natural resources are carried out in a sustainable way. Accordingly, an enabling environment for sustainable investments is only ensured if all levels of governance are geared towards this aim.

It is generally up to the host State¹⁸ to define the role the investor should play in its regulation. Following the principle of good govern-

Justice and the Concept of Common Concern in Marine Resource Allocation (lecture delivered at the Intergenerational Justice Conference held on 9 October 2015 at the World Trade Institute).

¹⁶ See G Schwilch, HP Liniger, *Saving soils at degradation frontlines: sustainable land management in drylands* (Centre for Development and Environment policy brief 5/2015)

<http://www.cde.unibe.ch/unibe/portal/fak_naturwis/g_dept_kzen/b_cde/content/e65013/e584852/e584910/e584947/e584952/05_CDE_PB_Dryland_Soils_eng.pdf>.

¹⁷ T Cottier, M Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 Max Planck YB UN 261–328.

¹⁸ In practice, a simple dichotomy between home and host countries may fail to account for existing complexities in value chains. In research, each stage should be



ance, home States must discuss investment policies in democratic processes, while assigning a key role to the local communities which are most concerned. Experience shows, however, that host State regulation is often too weak, particularly if other forces contravene. In order to get a more complete picture, it is necessary to assess how the policies of home States, regional policies, rules of international institutions and international law interact, to what extent they support host State's obligations, and whether they should be adapted to ensure that important lacunae are filled.

The concept of common concern – combined by a multilayered governance perspective – is not yet entirely reflected in existing hard law. But it is in part. Since LSLAs usually imply the transformation of traditional farming systems, human rights concerns and biodiversity issues are regulatory at stake. The following section will address the responses thus far taken by international law, highlighting in particular where a response is still needed.

4. *Role of international law in the sustainable management of land*

Both international human rights law and environmental law could contribute to sustainable investments in land if effectively implemented. While a range of almost universally accepted human rights and environmental treaties (and some international customary law) define boundaries of domestic resource use, experience shows that existing legal instruments are often not effective enough. In addition, the list of international regulation is not complete, and many gaps would still need to be covered.

4.1. *International Human Rights Law*

Those human rights treaties which are almost universally accepted – in particular the two Human Rights Covenants ICESCR and ICCPR¹⁹

assessed separately as a vertical activity of foreign direct investment, including related governance structures.

¹⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1996) 993 UNTS 3 (ICESCR) <www.ohchr.org>; International Covenant on Civil and Political Rights (adopted 16

and the main ILO Conventions²⁰ – limit the freedom of States to manage natural resources. When it comes to LSLAs, human rights sensitive land tenure questions are often to the fore. Unfortunately, there is no binding international instrument (yet) specifically regulating protection of land tenure. But Human Rights treaties require States to ensure that land concessions are negotiated in an open, inclusive and non-discriminatory way, and that processes are established which ensure a careful balancing of public and private interests (while requiring consent in the case of indigenous communities), which promote inclusive management schemes and which ensure appropriate compensation in case land is legally expropriated.²¹ Article 17 of the ICCPR, for instance, specifically protects against forced eviction, while claiming that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.’²² The respective ‘Eviction Guidelines’, drafted by the UN Special Rapporteur on Adequate Housing Miloon Kothari, establish strong criteria.²³ Accordingly, evictions shall only occur in exceptional circumstances and require full justification.²⁴ Importantly, the ‘forced eviction framework’ applies to all persons, ‘irrespective of whether they hold title to home and property under domestic law.’²⁵ Of particular relevance is also the right to adequate food

December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) <www.ohchr.org>.

²⁰ ILO Conventions <www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

²¹ C Golay, I Biglino, ‘Human Rights Responses to Land Grabbing: A Right to Food Perspective’ (2013) 34 *Third World Quarterly* 1630, 1650.

²² Art 17 of the ICCPR.

²³ UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, M Kothari, *Basic Principles and Guidelines on Development-Based Evictions and Displacement* (5 February 2007) UN Doc A/HRC/4/18 (Eviction Guidelines) <www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf>.

²⁴ According to para 21 of the Eviction Guidelines, ‘any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.’

²⁵ Para 21 of the Eviction Guidelines. See also UN Special Rapporteur on the Human Rights of Internally Displaced Persons (former), Francis M Deng, *Guiding Principles on Internal Displacement* (11 February 1998) UN Doc



which is enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶ It implicitly covers land tenure issues to a certain extent. The right to food includes, *inter alia*, the obligation of the State to respect the ability of individuals and groups to feed themselves by access to land.²⁷ As recognised by most legal scholars, the international human rights covenants also include an extraterritorial angle.²⁸ Accordingly, while the primary duty lies with the State where the human rights violation takes place, States that are otherwise involved in any investments must ensure that their own activities do not result in human rights violations abroad. This requires from a home State – for instance – that it must only support investments (eg by investment treaties) if they adequately respect existing land tenure rights.

Accordingly, land tenure protection can be partly derived from the Human Rights Covenants. However, a more specific legal instrument would improve implementation. With the FAO Voluntary Guidelines on Land Tenure,²⁹ the international community has taken an important first step in this direction. The Guidelines call on Governments to improve the governance of tenure of land, fisheries and forests, and to place particular emphasis on tenure rights of vulnerable and marginalised people, while requiring protection of both formal and informal tenure rights.³⁰

E/CN.4/1998/53/Add.2 (Guiding Principles on Internal Displacement) <www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx>.

²⁶ ICESCR.

²⁷ Para I(1) of the UN Special Rapporteur on the Right to Food, O de Schutter, Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge (28 December 2009) UN Doc A/HRC/13/33/Add.2, <www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf>.

²⁸ See eg the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (29 February 2012) <www.etoconsortium.org> and the related commentaries.

²⁹ FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security, Food and Agriculture Organization (2012) <www.fao.org/nr/tenure/voluntary-guidelines/en>.

³⁰ It would not be the first time that international law regulates property rights (cf the TRIPS agreement of the WTO).



Further, the UN Guiding Principles on Business and Human Rights (Ruggie Principles, 2011)³¹ interpret the existing Human Rights Covenants for business conduct. They spell out the duties of countries vis-à-vis business enterprises which are active within their boundaries, and the responsibility of the business enterprises themselves. Accordingly, host States have an obligation to ensure that ‘their’ business enterprises – companies who have a production site within their territory – act in a way that is consistent with human rights. The Ruggie Principles also have an extraterritorial angle, by suggesting that home States – the States where the headquarters are located – should regulate the external conduct of these enterprises in a human rights conducive way.³² Also, the *business enterprises as such* bear a ‘corporate responsibility to respect human rights’ and hence require a socially and environmentally responsible conduct.³³ In addition, the ILO-Conventions regulate labour rights which have to be regarded by States when they regulate business enterprises. It is here where today *home State regulation* is brought into focus given that it is not yet adequately adapted on a regular basis.³⁴

While international human rights pave the way for responsible business conduct in cases of LSLAs and – theoretically – provide affected people with legal instruments for redress, they often lack implementation in host States. As Golay and Biglino have indicated, most available literature concerns the question of whether human rights instruments *could* be used, but much less research has been undertaken on whether the instruments have been *effectively* used (see also the case study of Sierra Leone in para 4.2).³⁵

³¹ UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, Final Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, J Ruggie (11 March 2011) UN Doc A/HRC/17/31 (Ruggie Principles) <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

³² Ruggie principles I.A.2.

³³ Ruggie 2011, Chapter II.

³⁴ See the National Action Plans which are currently elaborated upon in various European countries.

³⁵ Golay, Biglino (n 21). Such questions are examined in the ongoing research project R4D SNF Food Sustainability <www.r4d.ch/modules/food-security/food-sustainability>.



4.2. *International Environmental Law*

Environmental treaties also provide for environmental standards to which the member States should bind their investors. In particular, international standards of biological diversity are well advanced. For instance, Article 6 of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) constitutes an interesting entry point for a sustainability assessment of an LSLAs. It upholds the duty to pursue well-targeted agricultural policies which promote ‘diverse farming systems.’ This is based on the suggestion that only a diversity in farming systems can ensure that biological diversity is maintained. For investments in land, this implies that a variety of investments following different patterns should be sought. Both the ITPGRFA and the CBD also include an extraterritorial angle and call for the establishment of enabling international regimes³⁶ (hence for regimes which promote a diversity of investments and farming systems).

The climate regime provides – to some extent contradictory – incentives for agricultural investments. On the one hand, it promotes climate friendly agricultural practices and ‘the art of doing agriculture’ by utilising certain social, economic and environmental practices which are not only scientific, but also are traditionally knowledge based. Such practices are understood as mitigation measures which assist in reducing on-farm greenhouse gas emissions. On the other hand, the climate regime also promotes reduction of greenhouse gas emissions by eg tree planting for palm oil production, which is remunerated by emission trading mechanisms.³⁷ Experience shows that such activities may be drivers of problematic investments in land.³⁸

There are, however, still many gaps in international environmental law which would need to be covered. Lessons can be drawn from national and regional law. Experience with radical processes of land transformation in the last century in *Europe* brought forth legal instruments that ensured that land can serve the diverse interests of societies (in-

³⁶ See eg art 22(1) of the CBD or the preamble to the ITPGRFA.

³⁷ E Bürgi Bonanomi, *Sustainable Development in International Law Making and Trade, international food governance and trade in agriculture* (Edward Elgar Publishing 2015).

³⁸ MB Dwyer, ‘The formalization fix? Land titling and land concessions in Cambodia’ (2015) 42 *J Peasant Studies* 903.



cluding shelter and food production), and that soil resources are maintained. To the fore are spatial planning instruments, soil protection policies and different conceptions of tenure rights.³⁹ Experience with LSLAs in the global south reveals that the problem spots are similar to those in Europe: while in certain contexts, a certain number of large scale investments in land may be beneficial if they help in reviving the local agricultural sector, such investments should not happen at the expense of the small scale farming sector. An effective spatial planning policy could secure such diversity of farming systems. But international minimum standards on spatial planning are absent. Similarly, large scale investments in land often negatively impact on soil resources given that land ecosystems are transformed into monocultures. If international environment law was to effectively require an environmentally sound treatment of soils, more sophisticated farming techniques would be incentivised around the globe. But also in relation to soil protection, international environmental law does not yet play the role it could play. The international instruments which directly or indirectly impact on the use of soils, such as the UNCCD,⁴⁰ the CBD or the ITPGRF, are not specific enough and have proven to be insufficient. Sustainability analysis of LSLAs makes apparent what further avenues international environmental law could take.

4.3. *International Economic Law*

The way that investments are framed also very much depends on the international economic regime. This regime – which includes the trade, investment and tax regimes – confines policy space of both host and home countries, by building the ‘channel through which investments flow.’⁴¹ Depending on the way it is shaped, it provides strong incentives for managing land resources in a sustainable or unsustainable way. But international economic regulation also has many gaps. They would need to be covered to promote sustainable investments in land. In the face of

³⁹ Bürgi Bonanomi (n 37).

⁴⁰ UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3 <www.unccd.int>.

⁴¹ International Land Coalition *et al* (eds), *International Instruments influencing the Rights of People facing Investments in Agricultural Land* (2011).



the pressure of market forces, the pertinent question is whether the economic regime is sufficiently aligned to serve human rights and environmental standards and to enable sustainable land use.

It is often argued that international economic policies limit the competence of States to manage their resources in a way which is too restrictive. While this may be partly correct in the case of both trade, investment or fiscal regimes, the question is not only whether States maintain the ability to manage resources sustainably after having entered into such a regime, but whether States are encouraged, or rather dis-encouraged from managing resources sustainably by these regimes. This is based on the assumption that each economic regime comes with either incentives or dis-incentives regarding the non-economic policy sphere, and that there is no such thing as an ‘incentive-neutral’ economic regime. Accordingly, the following paragraph will delve into the theory of ‘alignment’, respectively ‘policy coherence’, and will explore to what extent the sustainable development framework can assist in operationalising this theory for sustainable investments in land.

5. *Alignment of economic regimes: An imperative of sustainable development law theory*

5.1 *Policy Coherence for Sustainable Development (PCSD) put into Law*

In the debate on LSLAs, scholars and stakeholders increasingly recognise that there is a need to bring trade, investment and fiscal regimes, including agricultural policies, into alignment with human rights and land and soil related environmental policies. The call for an alignment and coherence of policies is founded in the sustainable development debate. It does not only address economic, but also addresses other regimes;⁴² however, economic regulation has always stood at the forefront given its strength and implications flowing from it.

Sustainable development law theory provides a theoretical underpinning for the alignment of legal regimes, respectively for coherence in

⁴² For poverty reduction – for instance – it might be equally relevant that the climate regime is shaped in a human rights-sensitive way.

international law. Since the Rio Conference in 1992, there have been several attempts to translate sustainable development into law. A prominent approach was presented by the International Law Association (ILA) in 2002, which identified seven core principles of international law which – taken together – provide the concept of sustainable development with concrete legal contours. The assumption is that a political process which respects all of the seven principles is geared towards sustainable development. The seven principles are listed in the New Delhi Declaration of the ILA,⁴³ and include (1) the principle of equity (encompassing both intra- and inter-generational equity); (2) the principle of common but differentiated responsibilities; (3) the duty of States to ensure sustainable use of natural resources; (4) the principle of precaution; (5) the principle of public participation; (6) the principle of good governance; and (7) the principle of integration and interrelationship.⁴⁴ The latter requires the integration of social, economic, environmental and human rights standards both in law making and law interpretation. All of the seven core principles of sustainable development are conceived as interrelated and complementary. Some of them have a firmly established legal status while others are emerging.

A more recent theory of sustainable development law has built upon the approach of the ILA but has gone one step further by affirming the existence of a legal principle of sustainable development.⁴⁵ This principle of sustainable development calls for systemic law interpretation and systemic law making. With respect to systemic law interpretation, the principle of sustainable development asks for open textured rules to be interpreted in a systemic way by referring to other legal regimes which are relevant in the context.⁴⁶ Systemic law making requires law making procedures that are shaped by the ‘duty to include’, the ‘duty to struc-

⁴³ ILA New Delhi Declaration.

⁴⁴ *ibid.*

⁴⁵ K Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* (Mohr Siebeck 2011).

⁴⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(c) <http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> and M Koskenniemi, *International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (2006) UN Doc A/CN.4/L.682 <<http://legal.un.org/docs/?symbol=A/CN.4/L.682>>.



ture and weigh' and the 'duty to develop optimal options.'⁴⁷ Accordingly, in such a procedure, the impact of the negotiated proposal on society, on the environment and on the economy, at home and abroad, for current and future generations are assessed, trade-offs are made transparent and effectively debated and, based on these steps, optimal options are identified which live up to all the identified goals so far as is possible.

This theory is an expression of the fact that sustainable development policies are generally located 'somewhere in between', and it seeks to capture the *substantive coherence* of legal regimes (by asking for the dynamics released by a legal regime). It is here where terms such as an 'enabling environment' or 'mutual supportiveness' come in, and where certain policy instruments for integrative law making, such as sustainability impact assessments and deliberative consultation processes become relevant.⁴⁸ Accordingly, the recently adopted UN-Sustainable Development Goal (SDGs) 2 – which calls for achieving food security and promoting sustainable agriculture, and which is of particular relevance in the assessment of LSLAs – has to be interpreted in conjunction with SDG 17. SDG 17 addresses systemic issues and explicitly calls for the enhancement of 'policy coherence for sustainable development' (PCSD). The precise meaning of PCSD has yet to be defined, a task to which the theory of sustainable development law can significantly contribute.

5.2. A PCSD-perspective on a Sierra Leonian Case

When assessing LSLAs, there is a tendency to exclusively look at the *local impacts* of the given LSLA. While this perspective is a crucial one, there are also a range of systemic issues related to international economic regimes which should be addressed in sustainability assessments. The following findings, derived from a case study in Sierra Leone, illustrate how questions both related to local impacts and systemic implications can be framed, by taking a PCSD-perspective.

⁴⁷ Bürgi Bonanomi (n 37).

⁴⁸ S Rist *et al*, 'Moving from sustainable management to sustainable governance of natural resources: The role of social learning processes in rural India, Bolivia and Mali' (2007) 23(1) *Journal of Rural Studies* 23–37.



5.2.1. *Investment in biofuels for export with contradictory local impacts*

A Swiss-based inter-disciplinary research project assessed the investment of Addax Bioenergy in Sierra Leone and its impact on soil and land governance.⁴⁹ In 2010, the company, headquartered in Switzerland, concluded a Memorandum of Understanding (MoU) with the Government of Sierra Leone about a bioethanol project in the Makeni area. Addax also finalised contracts with the landowners in the whole area about leasing 54,000 hectares, of which around 30,000 hectares have been relinquished to date. Until recently, approximately 10,000 hectares were effectively used for sugarcane pivots, which resulted in the production of biofuels destined for export (with some used for electricity for domestic use). 2,000 hectares are used for a farmer development program in which local smallholders are taught to grow rice in a semi-mechanised production system. On the remaining land, farmers grow their own crops while applying traditional slash-and-burn farming methods. For compensation, Addax has set up a rather complex reimbursement scheme under which both local chiefs and the landowning families benefit from the land rent, whereas the land users were not directly included in the schemes. In addition, Addax acted as an employer for a certain number of locals and immigrants. In 2013, Addax was awarded with sustainability certification by the Roundtable on Sustainable Biomaterials (RSB).⁵⁰

Concerning local impacts, findings revealed that even a project labeled as a best-practice example, risks not being adequately embedded in given societal structures. In the given case, the loss of natural resources and more reduced employment possibilities than expected has already had an impact on previously vulnerable groups. At the same time, their strategies of resistance negatively affected the project implementation.⁵¹ In addition, it was found that – in the absence of well-balanced public procedures – investments may have undesired side-effects on land tenure systems, if they do not very carefully deal

⁴⁹ See <<http://p3.snf.ch/Project-143136>>.

⁵⁰ See <<http://rsb.org>>.

⁵¹ F Marfurt, F Käser, S Lustenberger, 'Local Perceptions and Vertical Perspectives of a Large Scale Land Acquisition Project in Northern Sierra Leone' (2016) 33 *Homo Oeconomicus* 261.



with ownership structures including customary land tenure. Although the company tried to be respectful of national law and international guidelines that protect customary land systems, the findings showed that the formalisation procedure, required to secure the land lease, emphasised traditional class-based inequalities, which led to the potential for new conflict amongst local land owners and users.⁵²

While such local knowledge is necessary to assess the costs and benefits of an LSLA, it does not yet provide for the full picture. While it is difficult to judge whether an LSLA is ‘good’ or ‘bad’, utilitarian approaches tend to lead to the conclusion that positive effects prevail, whereas deontological approaches lead to an emphasis on negative aspects. In this respect, it is important that a framework that focuses on the options of local residents is complemented by boundaries of acceptability through the core contents of human rights.⁵³ But the assessment does not stop there; in addition and very importantly, systemic implications on and of economic regimes, including agricultural policies, need to be regarded. It is not least here where the blind spots of private driven approaches to the capture of sustainability – such as the certification schemes of the RSB – become most apparent.

5.2.2. Systemic implications on and of economic regimes

In respect of systemic implications on and of economic regimes, the questions are twofold: on the one hand, it is relevant to assess to what extent the LSLAs impact on given economic regimes; given their large size, the investments will normally influence policy making. On the other hand, it is necessary to examine to what extent the current economic regimes co-determine the pattern of the investment. Concerning the case at hand, interviews with a range of Sierra Leonian stakeholders on the Addax case made apparent that the following systemic issues are at their heart, among others: Does the investment contribute to the development of an inclusive agricultural market, which does not miss out smallholders, but effectively involves them? Does the investment in-

⁵² P Bottazzi, A Goguen, S Rist, ‘Conflicts of customary land tenure in rural Africa: Is large-scale land acquisition a driver of “institutional innovation”?’ (2016) 43 *J Peasant Studies* 971.

⁵³ S Mann, E Bürgi Bonanomi, ‘Grabbing or Investment? On judging large-scale land acquisitions’ (2017) 34 *Agriculture and Human Values* 41.

crease public revenue significantly? Does the investment encourage land policy reforms which are sensitive to local population needs? PCSD-related research can assist in structuring these questions and in broadening the picture.

Concerning investment policies, it is often debated whether investment treaties – which are negotiated between States – and investor contracts – which are negotiated between the investor and the Government – unduly constrain the regulatory space of host countries.⁵⁴ In the given case, this can be affirmed. Sierra Leone has few investment treaties in place, and none with Switzerland (where Addax is headquartered). This implies that the negotiated investment *contract* does not only regulate the investment of Addax, but will probably also influence future investment policy making in Sierra Leone (the Addax case was often adduced by the Government as a best practice example). From this perspective, it seems rather problematic that the MoU between Addax and the Government⁵⁵ includes a range of provisions which are deemed as not sustainable in respective debates. Para 13 of the Annex includes a ‘stabilisation clause’ stating that ‘if any law applied in Sierra Leone comes into effect or is amended, ... which has a material adverse effect on the ability of ABSL’, then the Government ‘undertakes to grant to the Project ... any exemption ... necessary.’ John Ruggie, in contrast, has argued that such stabilisation clauses should ‘not interfere with the State’s *bona fide* efforts to implement laws ... in a non-discriminatory manner, in order to meet its human rights obligations.’⁵⁶ Similarly, para 14 of the Annex promises ‘full compensation (including loss of profit) in case of expropriation.’ The Investment Policy Framework for Sustainable Development (IPFSD) of the UNCTAD, in contrast, holds that compensation should be ‘equitable in light of the circumstances of the

⁵⁴ L Cotula, ‘Do investment treaties unduly constrain regulatory spaces?’ (2014) 9 QIL-Questions of Intl L 19–31; C Smaller *et al*, *Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risks* (World Bank IISD 2015).

⁵⁵ Memorandum of Understanding and Agreement between the Government of the Republic of Sierra Leone, Addax Bioenergy Sierra Leone Ltd and Addax & Oryx Holdings BV (9 February 2010) (MoU) <<http://farmlandgrab.org>>.

⁵⁶ J Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to the Human Rights Council, Addendum, Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators (2011) UN Doc A/HRC/17/31/Add.3, principle 4.



case', and that 'recoverability of lost profits' should be limited.⁵⁷ The Arbitration Clause as included in para 7 of the Annex which states that disputes shall be resolved in London is also problematic seen through a sustainability lens.

Furthermore, there should be an assessment of what kind of investments are promoted through the investment policies of the host countries. In the case of poorer developing countries, these investment policies are regularly co-determined by donors and International Financial Institutions. The Sierra Leone investment and export promotion agency SLIEPA expressly promotes large scale investments in land, by holding that 'Sierra Leone has significant amounts of arable land, most of which remains uncultivated' and promising that 'the Government of Sierra Leone is prepared to take a head lease on provincial lands and sub-lease to foreign investors in order to mitigate risks.'⁵⁸ At the same time, the Ministry of Agriculture together with IFAD and other donors promote the Smallholder Commercialization Programme⁵⁹ which should support smallholder agriculture by increasing its productivity. Both programmes, however, are not shaped in a complementary way. Large scale investors are eg not required to include contract farming or to strive for other ways of cooperation with smallholders. A better alignment of these policies would help shaping investment patterns in a more sustainable way.

It is also important to examine whether trade policies are shaped in such a way as to support sustainable investments in agriculture. This would not least be the case if they supported smallholder inclusive farming systems. This again would presume that the adequate market incentives are in place, since the kind of farming systems which continue to exist are very much dependent on how markets are shaped.⁶⁰ But the interviews and the screening of investment related policy reports

⁵⁷ UNCTAD, *World Investment Report 2012, Towards a New Generation of Investment Policies* (2012) para 6.4.

⁵⁸ SLIEPA, Sector Profile, agriculture (2013). This leaflet was made with the support of the European Union.

⁵⁹ The Smallholder Commercialization Programme under the Global Agriculture and Food Security Programme (SCP-GAFSP).

⁶⁰ E Bürgi Bonanomi, 'Trade Law and Responsible Investment' in International Land Coalition *et al* (eds), *International Instruments Influencing the Rights of People Facing Investments in Agricultural Land* (2011) 68–88.



have indicated that a discussion on well-shaped trade related policies is almost absent in Sierra Leone, except for providing good conditions for commodity export. This might have something to do with the fact that tariff autonomy has been lost to a certain degree. As a member of the WTO, Sierra Leone would still have some flexibility in shaping markets; given that the current trade regime often restricts the policy space of member countries less than one tends to believe, as it is illustrated by WTO case law.⁶¹ Given uncertainty vis-à-vis current trade rules, however, member countries tend to refrain from taking trade measures which may *prima vista* violate prior trade commitments. In the given case, Sierra Leone has also become a member to the Economic Community of West African States (ECOWAS), restricting its tariff autonomy as long as such measures are not envisaged jointly. Such joint action for more enabling markets would, however, still be possible, even in the context of the European Partnership Agreement to which Sierra Leone will be a partner. Beyond maintaining regulatory space for developing countries, the trade regime could do more to provide an enabling environment for sustainable investments to occur. This includes the improvement of market access to OECD markets and the inclusion of sustainability requirements which do not exclude, but rather include processed goods from developing countries.⁶² Current international trade rules, however, do not yet ensure that ‘different forms of farming can coexist, each fulfilling a different function’; instead, ‘the balance has shifted almost entirely in favour of the large-scale export-led agricultural sector.’⁶³

With regard to tax issues, it is nowadays widely accepted that taxation should take place at the site of the production and actual added value and in such a way as to not erode the tax base.⁶⁴ From this perspective it is problematic that the MoU between the Government and Addax allows for very significant tax deduction and exemptions over

⁶¹ See eg WTO, *China: Measures Related to the Exportation of Various Raw Materials*, WT/DS394,395,398/R, *Panel Report* (1 April 2011), *Report of the Appellate Body* (22 February 2012) <www.wto.org>.

⁶² Bürgi Bonanomi (n 37).

⁶³ O De Schutter, former UN Special Rapporteur on the Right to Food, *Final Report to the Human Rights Council* (2014).

⁶⁴ See the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015) UN Doc A/69/L.82.



the period of 20 years.⁶⁵ The OECD has argued in a recent report that ‘tax incentives ... may erode the country’s tax base with little demonstrable benefits’ and that there is a ‘need to assess the cost-benefit aspects of tax incentives.’⁶⁶ While this is an issue for the Government of Sierra Leone, it is also an issue for international law, which falls short in providing a level playing field and limiting aggressive tax competition. To counter aggressive tax avoidance practices, developing countries tend to keep the tax rates for active multinational companies very low. From a sustainability perspective, there are still many gaps which need to be filled, and imbalances which need to be tackled in international tax regulation.⁶⁷

These examples illustrate that private-led sustainability certification schemes – such as the one provided by the RSB – do not capture the full picture. From a sustainable law perspective, sustainability certification should only be awarded if underlying contracts are well-balanced and agricultural investment policies inclusive (which are – explicitly or implicitly – promoted by the investor). This again would require some public control over private-led initiatives and broadly based discussions on what is deemed sustainable. The Principles of Responsible Investment in Agriculture and Food Systems (RAI Principles) of the Committee on World Food Security (CFS)⁶⁸ provide an important reference point in this regard, since they were elaborated upon in a broad stakeholder process.

6. Conclusion

As a consequence, the common concern at land resources must be taken seriously. This requires that international law is shaped in such a

⁶⁵ MoU, para 9 of the Annex.

⁶⁶ OECD, *Part 1 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries* (2014) 5.

⁶⁷ See eg for Switzerland: W Thut, ‘Unlautere und illegale Finanzflüsse – Illicit financial flows’ (2014) 30 Jusletter; E Bürgi Bonanomi, S Meyer-Nandi, ‘Schweizer Doppelbesteuerungsabkommen: Aktuelle Politik und Entwicklungsrelevanz’ (2014) 30 Jusletter.

⁶⁸ Committee on World Food Security CFS, *Principles for Responsible Investment in Agriculture and Food Systems* (CFS 2014) <www.fao.org>.

way as to enable local Government to comply with the duties they hold in relation to sovereignty over natural resources. International law in the fields of human rights and environmental law already fulfil this function to a certain degree. But their effectiveness must be improved, not least by strengthening the requirements of home States aimed towards the investors domiciled in their territory. In addition, remaining gaps regarding the protection of land tenure and soil resources must be filled, by *inter alia* emphasising instruments of spatial planning. Equally important is, however, that both international and national economic laws and policies – including investment, trade and tax policies – are brought in line with sustainability goals. It is in this area where there is the largest persistent deficit. Here, taking a ‘policy coherence for sustainable law’ perspective assists in capturing the full picture.



The question:

Assessing the requirements for the indication of provisional measures by ITLOS: The order of 24 August 2015 in the *Enrica Lexie* case

Introduced by Paolo Palchetti and Maurizio Arcari

On 24 August 2015, the International Tribunal for the Law of the Sea (ITLOS) rendered an order on a request by Italy for the prescription of provisional measures under Article 290(5) UNCLOS. The case concerned a dispute between Italy and India relating to the exercise of jurisdiction by India over an incident involving an oil tanker flying the Italian flag, the *Enrica Lexie*. The Tribunal indicated provisional measures which differed in part from those requested by Italy, deciding that both Parties were under a duty to suspend all court proceedings relating to the incident.

The order of 24 August 2015 raises a number of interesting questions concerning the requirements for the indication of provisional measures. QIL asked Massimo Lando and Irini Papanicolopulu to focus on just two of those issues.

The first one, which is addressed in Lando's contribution, pertains to the competence of the Tribunal to indicate provisional measures in the case at hand. This presupposes an examination of a preliminary issue, namely whether there existed a dispute between the Parties relating to the interpretation and application of UNCLOS. The question of determining the real subject-matter of the dispute was very much relevant in the case Italy submitted before the Tribunal. India had objected that no dispute concerning the application and interpretation of UNCLOS existed between the Parties. In its order, the Tribunal admitted the existence of a dispute by mainly relying on the fact that Italy had invoked a number of provisions of UNCLOS. While it is true that, in the context of the proceedings on provisional measures, the Tribunal has only to determine the existence *prima facie* of a dispute, it may be asked

whether the Tribunal resorted to too low a threshold in order to determine the existence of a dispute falling within its competence. Is the Tribunal's approach to the determination of a dispute in line with its previous case law? Is such an approach justified? Is there a risk that, because of the very low threshold used by the Tribunal, States may be willing to request provisional measures from the Tribunal even in the cases in which the law of the sea aspects of a dispute are of secondary importance, if not artificially raised by the State in order to be able to have access to an international tribunal?

Irini Papanicolopulu addresses the role of the so-called 'considerations of humanity' in the formulation, interpretation and application of law of the sea rules. Both Italy and India referred to considerations of humanity to support their contention before the Tribunal. In paragraph 133 of its order, the Tribunal stressed that 'considerations of humanity must apply in the law of the sea as they do in other areas of international law.' While, as shown by the author, this is not the first case where ITLOS has referred to considerations of humanity in its case law, the use of this concept has been somewhat ambiguous. Thus, one may ask what is the practical meaning of the ITLOS statement? What does this statement add to the provisional measures indicated to the Parties? Is the Tribunal competent to assess whether the Parties, in fulfilling their duties under the order, acted in full compliance of these 'considerations of humanity'? Is the use of 'considerations of humanity' in the *Enrica Lexie* case different from the use made of the same concept in previous cases? More broadly, is there a need for a bolder attitude from law of the sea judges in adapting the law of the sea to the values attached to human rights?



Establishing the existence of a ‘dispute’ under UNCLOS at the provisional measures stage: The *Enrica Lexie* case

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1. Introduction: The *Enrica Lexie* ‘dispute’

Article 290 of the United Nations Convention on the Law of the Sea¹ empowers an international court or tribunal having jurisdiction under Part XV to prescribe provisional measures pending the final decision of a dispute on the merits.² In addition, under Article 290(5) UNCLOS, the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) has jurisdiction to prescribe provisional measures in case an ad hoc arbitral tribunal is competent to settle the merits, but has not yet been constituted.³ In the latter scenario, ITLOS plays an anticipatory function by acting as a compulsory forum for the preservation of

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¹ United Nations Convention on the Law of the Sea, 1833 UNTS 3 (UNCLOS or the Convention).

² Under art 290(1) UNCLOS, ‘[i]f a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.’

³ Under art 290(5) UNCLOS, ‘Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.’ On provisional measures before ITLOS, see TA Mensah, ‘Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)’ (2002) 62 ZaöRV 43; R Wolfrum, ‘Provisional Measures of the International Tribunal for the Law of the Sea’ (1997) 37 Indian J Intl L 420.



the rights *pendente lite* when the judicial organ under Part XV UNCLOS requires time to be constituted.

This was the situation in *Enrica Lexie*. Pending the constitution of the arbitral tribunal, Italy requested ITLOS to prescribe provisional measures, namely that India refrain from exercising jurisdiction over the incident and that restrictions on the liberty, security and freedom of the marines who were involved be lifted during the arbitral proceedings.⁴ In its order of 24 August 2015, ITLOS prescribed that:

‘Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render.’⁵

In accordance with Article 290(5) UNCLOS, ITLOS addressed the question of whether there were grounds for it to find that *prima facie* the arbitral tribunal to be constituted would have jurisdiction over the merits of the case. In its order, the Tribunal limited its examination to reiterating the views that Italy⁶ and India⁷ had expressed in their submissions, and reached the conclusion that, ‘having examined the positions of the Parties, ... a dispute appears to exist between the Parties concerning the interpretation or application of the Convention.’⁸

The question arises whether ITLOS’s brief examination of the existence of a dispute under UNCLOS is in line with the Tribunal’s jurisprudence, as well as with the case law of the International Court of Justice (ICJ or the Court). The present paper focuses on that issue, which is at the core of the most basic requirement for the prescription of provisional measures under UNCLOS, namely *prima facie* jurisdiction. The paper first addresses some general points on provisional measures under UNCLOS, as well as the test for determining the existence of a dispute. Secondly, the paper discusses ITLOS’s jurisprudence on the de-

⁴ *Enrica Lexie Incident (Italy v India)* (Provisional measures, Order of 24 August 2015) para 29 <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf>.

⁵ *ibid* para 141.

⁶ *ibid* paras 35–42.

⁷ *ibid* paras 43–50.

⁸ *ibid* para 53.



termination of the existence of a dispute. Thirdly, the paper turns to Italy's claims in *Enrica Lexie*, analysing them from the perspective of the existence of a dispute. Fourthly, the paper conducts an appraisal of the situation as it presents itself after *Enrica Lexie*.

2. *Provisional measures and the definition of a 'dispute' under UNCLOS*

The Convention sets forth a number of cumulative requirements to be met in order for provisional measures to be prescribed under Article 290, thus laying down a detailed test relating to the prescription of provisional measures. The wording of paragraphs 1 and 5 of Article 290 is not identical, but the test enshrined in both paragraphs is, in essence, very similar.⁹ The differences between the two provisions are due to the fact that while in the former case the organ prescribing provisional measures is the same as the one deciding the merits, in the latter case the organ deciding the merits is not the one prescribing provisional measures. In fact, under Article 290(5), ITLOS has compulsory jurisdiction for the prescription of provisional measures pending the constitution of an Annex VII arbitral tribunal. Accordingly, while under paragraph 1 measures are prescribed 'pending the final decision', under paragraph 5 they are prescribed '[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted.' A consequence of such a distinction is that one of the requirements for the prescription of provisional measures, that of *prima facie* jurisdiction, must be assessed with reference to different organs. Under Article 290(1), the organ having jurisdiction to hear the merits ascertains its own *prima facie* jurisdiction; under paragraph 5, ITLOS has to establish *prima facie* that an Annex VII arbitral tribunal would have jurisdiction on the merits.

Beyond *prima facie* jurisdiction, other requirements must be met in order to prescribe provisional measures. Under paragraph 1, provisional measures may be prescribed 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment'; while this specification is not mentioned in paragraph 5, it is

⁹ S Rosenne, *Provisional Measures in International Law – The International Court of Justice and the International Tribunal for the Law of the Sea* (OUP 2005) 44–51.

nonetheless implied in it.¹⁰ Similarly, the requirement of urgency is referred to in paragraph 5, but it is considered implied in paragraph 1.¹¹ Moreover, ITLOS has introduced, by way of its case law, the requirement of plausibility of the rights claimed on the merits, both under Article 290(1)¹² and Article 290(5).¹³ Overall, the tests set forth in Articles 290(1) and 290(5) are similar. The main difference, as underscored, concerns *prima facie* jurisdiction.

Prima facie jurisdiction, the focus of this paper, is established by ascertaining the existence of a dispute between the parties under the Convention. According to Article 288(1) UNCLOS:

‘[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.’

It emerges that the necessary and sufficient condition for the exercise of jurisdiction under UNCLOS is the existence of a dispute ‘concerning the interpretation or application of this Convention.’ Therefore, a dispute under UNCLOS is limited *ratione materiae* to the interpretation and application of the Convention itself. In *Mavrommatis*, the Permanent Court of International Justice (PCIJ) formulated the classic definition of a dispute in international law:

‘[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’¹⁴

In *South West Africa*, the ICJ further held that ‘[a] mere assertion is not sufficient to prove the existence of a dispute any more than a mere

¹⁰ S Rosenne, LB Sohn (eds), *United Nations Convention on the Law of the Sea – A Commentary*, vol V (Martinus Nijhoff 1989) 58.

¹¹ Rosenne (n 9) 135.

¹² *Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana v Côte d’Ivoire)* (Provisional measures, Order of 25 April 2015) para 58, <www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/C23_Order_prov.measures_25.04.2015_orig_Eng.pdf>.

¹³ *Enrica Lexie* (n 4) para 84.

¹⁴ *Mavrommatis Palestine Concession (Greece v United Kingdom)* (Judgment of 30 August 1924) PCIJ Series A No 2, 11. See also R Kolb, *The International Court of Justice* (Hart 2013) 305.



denial of the existence of the dispute proves its non-existence',¹⁵ and concluded that, in order to prove the existence of a dispute, it must be shown that 'the claim of one party is positively opposed by the other.'¹⁶ Moreover, in *Interpretation of Peace Treaties* the ICJ held that 'whether there exists an international dispute is a matter for objective determination.'¹⁷ The *Interpretation of Peace Treaties* test has become a *locus classicus* in international dispute settlement, as demonstrated by the fact that subsequent cases have consistently reiterated it.¹⁸ ITLOS upheld the ICJ's jurisprudence in relation to the existence of a dispute in *M/V Louisa*,¹⁹ where it held that:

[t]o enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines.²⁰

Certainly, this statement holds true in relation to the manner in which the jurisdictional issue is treated when deciding the case on the merits. On the other hand, one may doubt whether the same test is used at the provisional measures stage, where all the Convention requires is for ITLOS to make a *prima facie* finding on jurisdiction. As conceived for the first time by Sir Hersch Lauterpacht in *Interhandel*, *prima facie*

¹⁵ *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections, Judgment of 21 December 1962) [1962] ICJ Rep 319, 328.

¹⁶ *ibid.*

¹⁷ *Interpretation of Peace Treaties* (Advisory Opinion of 30 March 1950) [1950] ICJ Rep 65, 74. See also C Tomuschat, 'Article 36' in A Zimmermann *et al* (eds), *The Statute of the International Court of Justice – A Commentary* (OUP 2012) 633, 642.

¹⁸ See *East Timor (Portugal v Australia)* (Judgment of 30 June 1995) [1995] ICJ Rep 90, 100, para 22; *Fisheries Jurisdiction (Spain v Canada)* (Judgment of 4 December 1998) [1998] ICJ Rep 432, 448, para 30; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Preliminary Objection, Judgment of 24 September 2015) para 26, <www.icj-cij.org/docket/files/153/18746.pdf>. See also J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 694.

¹⁹ *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)* (Judgment of 28 May 2013) 157 ILR 432, 461–473, paras 93–155.

²⁰ *ibid.*, 462, para 99. See also *ARA Libertad (Argentina v Ghana)* (Provisional Measures, Order of 15 December 2012) [2012] ITLOS Rep 326, 366–369, paras 11–21 (Sep Op Wolfrum and Cot).

jurisdiction is a very low threshold of jurisdictional certainty,²¹ which does not require a full enquiry into the jurisdiction of the organ seised of the request of provisional measures. The following section explores the approach taken by ITLOS to the establishment of the existence of a dispute in its case law.

3. ITLOS's jurisprudence on the existence of a 'dispute' under UNCLOS

ITLOS has taken two different approaches to establishing a dispute in order to make a finding on *prima facie* jurisdiction: on the one hand, it sometimes simply states that, based on the parties' opposing arguments, there is a dispute between them; on the other hand, it sometimes develops its reasoning further, by addressing the controversial provisions of the Convention and asking whether they afford a basis on which jurisdiction could *prima facie* be established. The following analysis addresses this question, and deals first with provisional measures cases under Article 290(1) UNCLOS, and second with cases under Article 290(5) UNCLOS.

In *M/V Saiga (No 2)*, no question on the existence of a dispute arose: the parties had in fact submitted the case to ITLOS by means of a special agreement,²² which meant the parties were in agreement that a dispute existed between them. The jurisdiction of the Tribunal was nevertheless contested, albeit for a different reason, relating to whether the claim of Saint Vincent and the Grenadines' fell within the purview of Article 297 UNCLOS. A similar situation also existed in the recent case between Ghana and Côte d'Ivoire, which was also introduced by special agreement, and where the special chamber of ITLOS found that the parties had both 'recognized the existence of a dispute concerning

²¹ *Interhandel (Switzerland v US)* (Provisional Measures, Order of 24 October 1957) [1957] ICJ Rep 105, 118–119 (Sep Op Lauterpacht).

²² *M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)* (Provisional Measures, Order of 11 March 1998) 117 ILR 111, 122, para 28. See V Lowe, MD Evans, 'The M/V Saiga: The First Case in the International Tribunal for the Law of the Sea' (1999) 48 ICLQ 187, 196.



the maritime boundary between the two States and the existence of opposing claims of the Parties to the disputed area.²³

In *M/V Louisa*, ITLOS was faced with a more complex situation. In that instance, Saint Vincent and the Grenadines argued that a dispute existed concerning the interpretation and application of Articles 73, 87, 226, 245, 290, 292 and 303 UNCLOS; Saint Vincent claimed that Spain had breached its UNCLOS obligations relating to the inspection of foreign vessels, the archaeological objects found at sea and marine scientific research. The claim was opposed by Spain, which underscored that no provision invoked by Saint Vincent was relevant.²⁴ ITLOS made a quick assessment of the parties' arguments, and, without any addition on its part, declared that 'it appears *prima facie* that a dispute as to the interpretation and application of provisions of the Convention existed between the parties on the date on which the Application was filed.'²⁵ ITLOS's reasoning was very brief, and entirely based on the parties' contentions. The Tribunal's assessment was criticised by the dissenting opinions attached by four judges, who all shared the view that the Tribunal had no *prima facie* jurisdiction due to the lack of a dispute on the interpretation or application of the Convention.²⁶ In particular, Judge Cot wrote that the Tribunal's reasoning was:

'... somewhat succinct. I would have expected the Tribunal to examine each of the provisions invoked by the Applicant in support of its claim. If there is no article of the Convention to be interpreted, there is no possible interpretation and no plausible right under the Convention.'²⁷

Judge Cot critically underscored the Tribunal's *glissando* on the existence of a dispute. ITLOS's appraisal of the jurisdictional bases invoked

²³ *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (n 12) para 59.

²⁴ *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)* (Provisional Measures, Order of 23 December 2010) [2010] ITLOS Rep 58, 66–67, paras 46–54. See Y Tanaka, 'The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain, 23 December 2010: Request for Provisional Measures' (2011) 26 *Intl J Marine and Coastal L* 481.

²⁵ *M/V Louisa* (n 24) 67, para 56.

²⁶ *ibid* 77 (Diss Op Wolfrum); *ibid* 87 (Diss Op Treves); *ibid* 93 (Diss Op Cot); *ibid* 100 (Diss Op Golitsyn).

²⁷ *ibid* 96–97, para 19 (Diss Op Cot).

by Saint Vincent and the Grenadines at the provisional measures stage could also be criticised in light of the subsequent decision of the Tribunal that it lacked jurisdiction on the merits.²⁸ It is not possible to be certain of the reason why ITLOS upheld *prima facie* jurisdiction at the provisional measures stage, only to find there was no jurisdiction when deciding the merits. The parties provided no new information that would justify a final decision that contradicts the provisional measures findings. Moreover, the composition on ITLOS's bench did not change dramatically. It is possible to suggest that ITLOS made a mistake in the order on provisional measures; perhaps, had it further developed its reasoning on *prima facie* jurisdiction, it could have found that no provision invoked by Saint Vincent could be a valid jurisdictional basis.

The first request for provisional measures under Article 290(5) UNCLOS was in the case concerning the *Southern Bluefin Tuna*. In that instance, ITLOS recalled the parties' opposing arguments,²⁹ but then further analysed such arguments in order to establish whether a dispute existed. While Australia and New Zealand contended that a dispute existed concerning the interpretation and application of Articles 64 and 116-119 UNCLOS, ITLOS added that:

'48. *Considering* that under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

49. *Considering* that the list of highly migratory species contained in Annex I to the Convention includes southern bluefin tuna: *thunnus maccoyii*.³⁰

The Tribunal appeared to conduct a more thorough examination of the existence of a dispute, and reached the conclusion that a dispute ex-

²⁸ See *M/V Louisa (Saint Vincent and the Grenadines v Kingdom of Spain)* (n 19) 472, para 151. See Y Tanaka, 'A note on the M/V "Louisa" Case' (2014) 45 *Ocean Development & Intl L* 205.

²⁹ *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)* (Provisional Measures, Order of 27 August 1999) 117 *ILR* 148, 161, paras 45-47. See B Kwiatkowska, 'The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases' (2000) 15 *Intl J Marine and Coastal L* 1.

³⁰ *Southern Bluefin Tuna* (n 29) 161, paras 48-49.



isted, confirming that the Annex VII tribunal would have jurisdiction on the merits.³¹ In particular, ITLOS did not seem to content itself with the parties' assertions that there existed a dispute concerning Articles 64 and 116-119 UNCLOS. On the contrary, the Tribunal explored what the reading of such articles suggested, which was linked to the Australian and New Zealand contention concerning Japan's breaches of the Convention. However, and similarly to *M/V Louisa*, the case was subsequently dismissed by the Annex VII arbitral tribunal for want of jurisdiction. However, the reason for the dismissal was not the non-existence of a dispute, but the fact that the dispute settlement mechanisms of the Convention for the Conservation of Southern Bluefin Tuna³² took precedence over that under Part XV UNCLOS.³³

In both *MOX Plant* and *Land Reclamation by Singapore in and around the Strait of Johor* there was no opposition of views as to the existence of a dispute under UNCLOS.³⁴ In *ARA Libertad*, however there was a difference of views as to the existence of a dispute. Argentina argued that the dispute concerned the interpretation and application of Articles 18(1)(b), 32, 87(1)(a) and 90 UNCLOS,³⁵ which related to passage in the territorial sea, warship immunity and freedom of navigation. Ghana denied that any dispute existed, and thus the Annex VII tribunal would lack jurisdiction.³⁶ ITLOS discussed the existence of a dispute at some length. It first dismissed that *prima facie* jurisdiction could be based on Articles 18(1)(b), 87(1)(a) and 90 UNCLOS,³⁷ and then dedicated four paragraphs to the analysis of whether Article 32 could pro-

³¹ *ibid* 161, para 52.

³² Convention for the Conservation of Southern Bluefin Tuna, 1819 UNTS 359.

³³ *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)* (Jurisdiction and Admissibility, Judgment of 4 August 2000) 119 ILR 508, 553–554, paras 63–65. See C Romano, 'The *Southern Bluefin Tuna* Dispute: Hints of a World to Come... Like It or Not' (2001) 32 *Ocean Development & Intl L* 313.

³⁴ See *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) 126 ILR 259, 271–274, paras 35–53. See RR Churchill, J Scott, 'The *MOX Plant* Litigation: The First Half-Life' (2004) 53 *ICLQ* 643, 647. See also *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) 126 ILR 487, 498, para 36. See T Koh, J Lin, 'The Land Reclamation Case: Thoughts and Reflections' (2006) 10 *Singapore YB Intl L* 1.

³⁵ *ARA Libertad* (n 20) 341, para 39.

³⁶ *ibid* 342, para 51.

³⁷ *ibid* 343–344, para 61.



vide a basis on which the Annex tribunal's jurisdiction might be founded.³⁸ ITLOS devoted some effort to establishing the existence of a dispute under the Convention, and thus the Annex VII tribunal's *prima facie* jurisdiction. The question of the scope of application *ratione loci* of Article 32 UNCLOS, disputed between the parties, was also analysed in some detail in two separate opinions appended to the order.³⁹ Similarly to the decision in *Southern Bluefin Tuna*, in *ARA Libertad* ITLOS conducted an examination of whether the articles invoked by the applicant could afford a basis on which the jurisdiction of the Annex VII tribunal might be founded. ITLOS did not simply rely on the parties' arguments, but canvassed its own reflections on the provisions invoked by the applicants, in order to justify a finding of *prima facie* jurisdiction.

Arctic Sunrise, on the other hand, marked a different approach by ITLOS to the determination of the existence of a dispute. Russia, the respondent in the provisional measures proceedings, did not appear before ITLOS, sending a note to the Tribunal and setting forth its position that the Annex VII tribunal would lack jurisdiction pursuant to a declaration made by Russia itself upon ratification of UNCLOS.⁴⁰ One might expect that Russia's non-appearance would have meant a longer reasoning concerning the existence of a dispute between the parties; however, that was not the case. The Tribunal contented itself with stating the position of the parties concerning the *prima facie* jurisdiction of the Annex VII tribunal,⁴¹ and reached the conclusion that:

'a difference of opinions exists as to the applicability of the provisions of the Convention in regard to the rights and obligations of a flag State and a coastal State, notably, its articles 56, 58, 60, 87 and 110, and thus the Tribunal is of the view that a dispute appears to exist between these two States concerning the interpretation or application of the Convention.'⁴²

³⁸ *ibid* 344, paras 63–66.

³⁹ *ibid* 365–76, paras 10–51 (Sep Op Wolfrum and Cot); *ibid* 383–384, paras 8–13 (Sep Op Lucky).

⁴⁰ *Arctic Sunrise (Kingdom of the Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013) 53 ILM 603, 612, para 42. See D Guilfoyle, CA Miles, 'Provisional Measures and the MV *Arctic Sunrise*' (2014) 108 AJIL 271.

⁴¹ *ibid* 614–615, paras 59–67.

⁴² *ibid* 615, para 68.



It has been suggested that the enquiry on jurisdiction in *Arctic Sunrise* was due to ITLOS's intention to 'punish' Russia for its non-appearance.⁴³ On closer examination it appears that ITLOS correctly envisaged the existence of a dispute between the parties: both the Netherlands and Russia referred to the same UNCLOS provisions when expressing their positions in respect of jurisdiction.⁴⁴ Although, it seems that relying only on the parties' contentions does not correctly follow the *Interpretation of Peace Treaties* test, whereby ITLOS should make its own objective assessment of the existence of a dispute.

4. *Italy's claims in Enrica Lexie and the existence of a dispute under UNCLOS*

One could wonder whether the establishment of the existence of a dispute between Italy and India in the *Enrica Lexie* case follows the patterns established by ITLOS on the matter. As held by the ICJ in *Nuclear Tests*, the starting point of an enquiry into the existence of a dispute is the statement of the claims set forth by the applicant.⁴⁵ Similarly, in order to appreciate the effects of the *Enrica Lexie* case on the ascertainment of the existence of a dispute by ITLOS at provisional measures stage, it is necessary to analyse Italy's claims before the Tribunal and how they relate to the existence of a dispute under UNCLOS.

In the request for the prescription of provisional measures, Italy claimed *inter alia* that India had breached its UNCLOS obligations concerning criminal jurisdiction on board of a foreign ship,⁴⁶ freedom of navigation,⁴⁷ duties of coastal states and flag states in the EEZ,⁴⁸ and jurisdiction over incidents of navigation.⁴⁹ The Italian claim on the merits boils down to the question of which state can exercise jurisdiction

⁴³ Guilfoyle, Miles (n 40) 277.

⁴⁴ See *Arctic Sunrise* (Provisional Measures) (n 40) 614–615, paras 64 and 67.

⁴⁵ *Nuclear Tests (Australia v France)* (Judgment of 20 December 1974) [1974] ICJ Rep 253, 260, para 24. See also JJ Ruiz, 'Mootness in International Adjudication: The Nuclear Tests Cases' (1977) 20 German YB Intl L 358.

⁴⁶ Art 27 UNCLOS.

⁴⁷ Art 87 UNCLOS.

⁴⁸ Arts 58 and 94 UNCLOS.

⁴⁹ Art 97 UNCLOS.

over the marines in accordance with UNCLOS. Since the question of jurisdiction is intimately linked to that of sovereign immunity,⁵⁰ immunity appears to be the basis of the Italian claim. In fact, Italy submitted to ITLOS that the marines 'are agents and officials of the Italian State. At the time of the events that led to their arrest, they were exercising official functions as members of a Vessel Protection Detachment deployed by the Italian Navy on a counter-piracy operation.'⁵¹

However, UNCLOS does not contain any rule on immunity of state officials, the so-called functional immunity. Before the Tribunal, India correctly noted that, apart from the provisions on the immunities of ITLOS and the International Seabed Authority, Article 32 UNCLOS is the only rule on immunity.⁵² That article does not address the immunity of state officials, but only the immunity of warships, and therefore does not apply in *Enrica Lexie*. Accordingly, Italy could only ground the immunity of the marines either in Article 97 UNCLOS or in customary international law. Each is addressed in turn. Under Article 97 UNCLOS:

'[i]n the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.'

Article 97 cited also applies to the EEZ by virtue of Article 58(2) UNCLOS,⁵³ and is therefore applicable to the *Enrica Lexie* case, where the incident took place 20.5 nautical miles from India's coast.⁵⁴ The main question concerning Article 97 UNCLOS is whether the killing of

⁵⁰ The link between jurisdiction and immunity was underscored by Italy, which argued that the question is to establish 'who has jurisdiction to pursue the investigation and, as appropriate, prosecution, and what account is to be taken of the immunity of State officials.' See ITLOS/PV.15/C24/3 (Italy), 1. See also H Fox, *The Law of State Immunity* (OUP 2008) 75.

⁵¹ Request for the prescription of provisional measures, para 18, <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Request/Request_of_the_Italian_Republic_r.pdf>.

⁵² ITLOS/PV.15/C24/3 (India) 15–16.

⁵³ SN Nandan and S Rosenne (eds), *United Nations Convention on the Law of the Sea – A Commentary*, vol III (Martinus Nijhoff 1995) 169.

⁵⁴ *Enrica Lexie* (n 4) paras 36–43.



the two Indian fishermen qualifies as an 'incident of navigation' in the sense of Article 97 UNCLOS. While Italy argued that Article 97 applies to *Enrica Lexie* because it concerns an 'incident of navigation',⁵⁵ India stated that 'there was in reality no "incident of navigation", ... Article 97 of the UNCLOS – which is vital for Italy's case – is irrelevant by any means.'⁵⁶ On the basis of the opposition of the Italian and Indian views, it cannot be denied that a dispute between them exists; further, that dispute relates to the 'interpretation or application' of Article 97 UNCLOS.⁵⁷ As argued on behalf of Italy:

'it is clear from India's Written Observations that there is a dispute concerning the interpretation and application of the provisions of the Convention; it sets out its position on the interpretation and application of Article 97 which is in opposition to that of Italy.'⁵⁸

It could be safely concluded that there existed a dispute over which the Annex VII tribunal would have jurisdiction. Accordingly, ITLOS, at the provisional measures stage, could certainly conclude that the Annex VII tribunal would have *prima facie* jurisdiction in accordance with Article 290(5) UNCLOS, as it did.⁵⁹

In addition to Article 97 UNCLOS, Italy based the immunity of the two marines on customary international law. Unlike immunity pursuant to Article 97, a claim of immunity under customary international law is based on a theory of functional immunity. Immunity under Article 97 is not immunity *ratione materiae* of state officials, deriving from the sovereign immunity enjoyed by the state under international law,⁶⁰ but a stand-alone case of immunity created by UNCLOS. If Italy had based the marines' immunity only on customary international law, that could have proven problematic for the jurisdiction of ITLOS and the arbitral

⁵⁵ Request for the prescription of provisional measures (n 51) para 35.

⁵⁶ Written observations of the Republic of India, para 1.8, <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/Response/VOL_1.pdf>.

⁵⁷ See *Certain Property (Liechtenstein v Germany)* (Preliminary Objections, Judgment of 10 February 2005) [2005] ICJ Rep 6, 19, para 25.

⁵⁸ ITLOS/PV.15/C24/1 (Italy) 22.

⁵⁹ *Enrica Lexie* (n 4) para 54.

⁶⁰ See A Sanger, 'Immunity of State Officials from the Criminal Jurisdiction of a Foreign State' (2013) 62 ICLQ 193, 200; Z Douglas, 'State Immunity for the Acts of State Officials' (2012) 82 BYIL 281, 288.

tribunal, as ‘a dispute concerning the interpretation and application of a rule of customary law ... does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention.’⁶¹ Italy could have argued that the customary rules of international law on functional immunity have been incorporated in the Convention; however, it did not do so, probably on account of its stronger case on the existence of a dispute in respect of Article 97 UNCLOS. It is not possible to state with certainty what ITLOS would have decided if such an argument had been made. In any event, it seems that such an argument, due to its complexity, would more likely be set out in the merits phase.

Enrica Lexie exemplifies the ICJ statement, that ‘[o]ne situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures.’⁶² In the *Enrica Lexie* case, besides a dispute concerning UNCLOS there also seems to be a dispute about functional immunity under customary international law. While it could be argued that the ‘real’ subject-matter of the dispute is the marines’ functional immunity, it seems that Article 97 UNCLOS affords a solid basis on which the jurisdiction of the Annex VII tribunal might be founded. The determination of the ‘real’ subject-matter of the dispute requires a comprehensive enquiry into the Annex VII tribunal’s jurisdiction, and, accordingly, it is a matter for the further phases of the dispute; it does not concern ITLOS at the provisional measures stage, where it is only necessary to establish *prima facie* jurisdiction.⁶³ As a consequence, Judge Koroma’s warning in *Georgia v Russia* that ‘States could use ... compromissory clause[s] as a vehicle for

⁶¹ *ARA Libertad* (n 20) 365, para 7 (Sep Op Wolfrum and Cot). See N Peiris, ‘Provisional Measures in *ARA Libertad*: On the Margins of Jurisdictional Discourse’ (2014) 28 *Ocean YB* 134.

⁶² *Application of the International Convention for the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections, Judgment of 1 April 2011) [2011] ICJ Rep 70, 85–86, para 32. See also *ibid*, 326, para 9 (Sep Op Greenwood).

⁶³ On the determination of the ‘real’ subject-matter of the dispute, see *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award of 18 March 2015, paras 203–221, <www.pca-cpa.org/MU-UK%2020150318%20Awardd4b1.pdf?fil_id=2899>. See also *Fisberies Jurisdiction (Spain v Canada)* (n 18) 449, para 31; *Certain Property* (n 57) 49–50, para 8 (Diss Op Owada).



forcing an unrelated dispute with another State before the Court⁶⁴ is of no application in the case of provisional measures, both under UNCLOS and under general international law.

5. *Appraisal: more of the same?*

ITLOS's jurisprudence does not seem to highlight any preferred approach to the establishment of the existence of a dispute. As explained above, and excluding *Enrica Lexie*, in four cases neither party contested the existence of a dispute between the parties;⁶⁵ in four other cases the existence of a dispute was debated, and ITLOS twice examined the articles invoked by the applicant,⁶⁶ and twice chose only to reiterate the parties' argument, concluding in both cases that a dispute *prima facie* existed (see table below).⁶⁷

Case	Existence of dispute not debated	Analysis of UNCLOS articles invoked	Reiteration of the parties' arguments	Case under article	
				290(1)	290(5)
<i>M/V Saiga (No 2)</i>	X			X	
<i>Southern Bluefin Tuna</i>		X			X
<i>MOX Plant</i>	X				X
<i>Land Reclamation by Singapore</i>	X				X
<i>M/V Louisa</i>			X	X	
<i>ARA Libertad</i>		X			X
<i>Arctic Sunrise</i>			X		X
<i>Delimitation in the Atlantic Ocean</i>	X			X	

Table 1 – ITLOS's approach to establishing the existence of a dispute

⁶⁴ *Application of the International Convention for the Elimination of all Forms of Racial Discrimination* (n 62) 185, para 7 (Sep Op Koroma).

⁶⁵ *M/V Saiga (No 2)*; *MOX Plant*; *Land Reclamation by Singapore in and around the Straits of Johor*; *Delimitation between Ghana and Côte D'Ivoire in the Atlantic Ocean*.

⁶⁶ *Southern Bluefin Tuna*; *ARA Libertad*.

⁶⁷ *M/V Louisa*; *Arctic Sunrise*.



One might expect a difference in the Tribunal's approach to cases initiated under Article 290(1) from those initiated under Article 290(5) UNCLOS. In the former instance ITLOS has jurisdiction both to prescribe provisional measures and over the merits; therefore, ITLOS could be less strict in assessing the existence of a dispute than in the case of provisional measures requested under Article 290(5). Since ITLOS is a standing tribunal, the proceedings on the merits would start soon after the provisional measures phase and finish earlier than arbitral proceedings,⁶⁸ which means that: (i) should jurisdiction be found to be lacking, provisional measures would be in force for a shorter period of time; and (ii) should provisional measures be denied, they could be swiftly requested again to urgently prevent irreparable prejudice.⁶⁹ If the case were filed under Article 290(5), ITLOS should arguably be more cautious since: (i) due to the time needed to constitute the Annex VII tribunal, should there be a finding of no jurisdiction over the merits, provisional measures would be in force for a longer period of time;

⁶⁸ In *M/V Saiga (No 2)*, Saint Vincent and the Grenadines requested provisional measures on 5 January 1998, and the final judgment on the merits was handed down on 1 July 1999 (a year and a half later). In *M/V Louisa*, Saint Vincent and the Grenadines requested provisional measures on 23 November 2010, while the judgment was delivered on 28 May 2013 (two and a half years). In *M/V Virginia G*, which did not include provisional measures, the application instituting proceedings was sent on 4 November 2011, and the judgment rendered on 14 April 2014 (two and half years). By contrast, in *MOX Plant* the arbitration finished around 7 years after the request for provisional measures of 9 November 2001 (6 June 2008). In *Land Reclamation*, provisional measures were requested in 4 September 2003. The tribunal never reached an actual award, as it simply endorsed the parties' settlement on 1 September 2005; proceedings would presumably have taken longer. The same took place in *ARA Libertad*, where provisional measures were requested on 9 November 2012, and the parties reached an agreed settlement 27 September 2013. In *Arctic Sunrise*, the Netherlands requested provisional measures on 21 October 2013, and the award was delivered on 14 August 2015; the short time-span (a year and ten months) is probably due to Russia's non-appearance, and should be regarded as exceptional. Last, in *Southern Bluefin Tuna* the applicants requested provisional measures on 30 July 1999, and the award on jurisdiction was handed down a year later, on 4 August 2000. This last case appears to be an exception, since the parties only discussed the jurisdictional point, and did not address the merits of the case, either in the written or in the oral proceedings, see *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (2000) 23 RIAA 1, 6, paras 10–15.

⁶⁹ Judge Treves underscored the different standard of urgency under arts 290(1) and 290(5) UNCLOS, see *Southern Bluefin Tuna* (n 29) 178, para 4 (Sep Op Treves). See also Rosenne (n 9) 142–143.



and (iii) there is a greater need to urgently prevent irreparable prejudice in light of the fact that months could pass before the Annex VII tribunal could hear a request for provisional measures.

However, such a pattern is not easily discernible. Consistently with the hypothesis formulated above, in both *Southern Bluefin Tuna* and *ARA Libertad*, ITLOS examined the legal provisions invoked by the applicant in order to determine whether a dispute existed, while in *M/V Louisa* it conducted a brief review. However, *Arctic Sunrise* is not consistent with the pattern described above. The same could be said with regard to *Enrica Lexie*, where the Tribunal recalled the parties' arguments and concluded without further ado that a dispute between Italy and India existed. Therefore, it is difficult to find an appreciable pattern in how ITLOS approaches the existence of a dispute based on the provision under which the provisional measures are requested. Nevertheless, it is almost certain that ITLOS would find that a dispute exists when the case is introduced by special agreement.⁷⁰

The order in *Enrica Lexie* does not seem to mark a turning point in the manner in which ITLOS approaches the establishment of the existence of a dispute. On the contrary, the fact that *Enrica Lexie* shows a brief assessment of *prima facie* jurisdiction where, based on the above considerations, a more thorough examination could be expected confirms that there is no difference between assessing the existence of a dispute under Article 290(1) and Article 290(5). One could conclude that ITLOS's approach to establishing that a dispute exists depends on the circumstances of the case, on whether, for instance, the case was brought by special agreement, the parties agree that a dispute exists, and the provisions invoked by the applicant to base the jurisdiction on the merits are interpreted differently by the respondent. One could agree that ITLOS's 'standard for deciding on *prima facie* jurisdiction [in respect of an Annex VII tribunal] is no different from the standard for deciding on its own jurisdiction.'⁷¹

⁷⁰ *M/V Saiga (No 2); Delimitation between Ghana and Cote d'Ivoire in the Atlantic Ocean*.

⁷¹ P Tomka, GI Hernández, 'Provisional Measures in the International Tribunal for the Law of the Sea' in HP Hestermeyer *et al* (eds), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum*, vol II (Martinus Nijhoff 2012) 1763, 1778.

The question arises as to whether ITLOS's approach, as identified above, is consistent with the ICJ's approach to the same issue. Under the ICJ Statute the question as to the existence of a dispute is framed in terms different to those under the UNCLOS régime. While under Article 288 UNCLOS jurisdiction is limited to either the 'interpretation or application of the Convention', under the ICJ Statute, jurisdiction may be founded on a range of different titles of jurisdiction. If jurisdiction were based on the optional clause (Article 36(2) ICJ Statute), any dispute could fall within its purview, unless there existed reservations limiting the subject-matter jurisdiction of the Court in respect of certain issues.⁷² The situation could be more complex in cases where the Court's jurisdiction were based on a compromissory clause in a treaty: in that instance, the ICJ's jurisdiction is generally limited to matters relating to the interpretation or application of the treaty invoked.⁷³

These peculiarities of the ICJ Statute paint a picture distinct from the one that has emerged in relation to UNCLOS dispute settlement. Since under UNCLOS, subject-matter jurisdiction is always limited to the 'interpretation or application of the Convention', states are more prone to challenging the competent organ's jurisdiction at the provisional measures phase, arguing for the non-existence of a dispute under UNCLOS. On the contrary, due to a significant number of cases being filed with the ICJ based on the acceptance of the optional clause,⁷⁴ states seem less prone to contending that a dispute does not exist between them at the provisional measures stage.⁷⁵ Such a contention has in

⁷² V Lowe, *International Law* (OUP 2007) 129–131.

⁷³ A Clapham, *Brierly's Law of Nations* (OUP 2012) 421.

⁷⁴ S Rosenne, *The Law and Practice of the International Court – 1920–2005*, vol II (Martinus Nijhoff 2006) 799.

⁷⁵ At the provisional measures stage, the existence of a dispute was challenged in very few cases before the ICJ, and always in relation to a compromissory clause in a treaty. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3, 10, paras 23–24; *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) [1999] ICJ Rep 124, 136–138, paras 34–41; *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* (Provisional Measures) [2002] ICJ Rep 210, 237, para 46 (in respect of the WHO Constitution); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Rep 353, 386, para 110; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Provisional Measures) [2009] ICJ Rep 139, 147–148, paras 44–45.



fact been made infrequently before the ICJ. For instance, the non-existence of a dispute was argued in *Belgium v Senegal*⁷⁶ and in *Georgia v Russia*,⁷⁷ both filed under a compromissory clause in a treaty. In both instances at the provisional measures phase, the ICJ found that a dispute *prima facie* existed based on the parties' arguments and allegations. While in *Georgia v Russia* the ICJ based its conclusion on a mere paragraph, it appeared to be slightly more detailed in *Belgium v Senegal*.⁷⁸ The Court developed an even less detailed reasoning in *Land and Maritime Boundary*, where Nigeria had argued that the non-existence of a dispute with Cameroon made the latter state's request for provisional measures inadmissible: the ICJ rejected that argument outright, with little or no explanation.⁷⁹ The Court's approach seems to be that at the provisional measures stage it need not establish conclusively that a dispute exists, but only needs to conduct a *prima facie* examination of the matter for the existence of a dispute. It stated as much in *Temple (Interpretation)*, when it held that at the provisional measures stage it 'need not satisfy itself in a definitive manner that ... a dispute exists.'⁸⁰

Concerning the question of the 'real' subject-matter of the dispute, the ICJ recognises that this is a question for the further stages of the proceedings, not to be addressed at the provisional measures phase. This appears implicit in the order in *US Diplomatic and Consular Staff in Tebran*. In that instance, by sending a letter to the ICJ Iran had set forth that:

⁷⁶ *Questions relating to the Obligation to Prosecute or Extradite* (n 75) 143–145, paras 22–30. See A Leandro, 'Sull'accertamento dell'esistenza di una controversia dinanzi alla Corte internazionale di giustizia' (2012) 95 *Rivista di Diritto Internazionale* 1111.

⁷⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Provisional Measures) (n 75) 386–387, paras 110–111.

⁷⁸ *Questions relating to the Obligation to Prosecute or Extradite* (Provisional Measures) (n 75) 148–149, paras 46–47; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n 75) 387, para 112.

⁷⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Provisional Measures) [1996] ICJ Rep 13, 21, paras 32–33.

⁸⁰ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Provisional Measures) [2011] ICJ Rep 537, 542, para 21. Although the Court referred to proceedings of interpretation under art 60 ICJ Statute, the same principle applies to 'normal' contentious proceedings.

‘the Court cannot and should not take cognizance of the ... case, for the reason that the question of the hostages forms only “a marginal and secondary aspect of an overall problem” involving the activities of the United States in Iran over a period of more than 25 years.’⁸¹

The Court held that ‘no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.’⁸² While the point made by the Court could also relate to disputes of a political character, it seems to validly apply to disputes arising under different rules of customary international law, whose scrutiny by the Court would depend on the jurisdictional basis of the claim on the merits.

It appears that the ICJ’s and ITLOS’s practice is similar.⁸³ When confronted with opposing claims as to the existence of a dispute at the provisional measures stage, both organs tend to conduct a brief review of the parties’ arguments, based on which they typically decide for the existence of a dispute and, therefore, for *prima facie* jurisdiction.⁸⁴ The in-depth analysis on the existence of a dispute, and hence on jurisdiction, as well as the determination of the ‘real’ subject-matter of the dispute, are left to the later stages of the proceedings. ITLOS and the ICJ may devote a longer part of their order to the existence of a dispute. Nevertheless, one should agree with Judge Abraham that:

⁸¹ *US Diplomatic and Consular Staff in Tebran (United States v Iran)* (Provisional Measures) [1979] ICJ Rep 7, 15, para 22.

⁸² *ibid* para 24.

⁸³ Brown points out that the same test is applied by the ICJ and ITLOS. See C Brown, *A Common Law of International Adjudication* (OUP 2007) 137.

⁸⁴ However, depending on the jurisdictional title, the ICJ may be requested to assess, in addition to the existence of a dispute, whether any preconditions to jurisdiction have been met. For instance, certain compromissory clauses may require that the parties conduct negotiations prior to initiating a dispute. This is the case for art 30 of the Torture Convention (1465 UNTS 85), see *Questions relating to the Obligation to Prosecute or Extradite* (n 75) 149–150, paras 49–50. Under UNCLOS, the exchange of views between the parties is required under art 283, see *Land Reclamation by Singapore in and around the Straits of Johor* (n 34) 498, paras 33–51.



'[i]t is enough ... to find that the two parties hold opposing views on the matters referred to the Court, and this difference may be evidenced in any manner.'⁸⁵

Judge Abraham's view, critical of the Court's approach in *Georgia v Russia*, reiterates the orthodox position in *Interpretation of Peace Treaties* on establishing the existence of a dispute. *Enrica Lexie* did not change this position; it confirmed the already settled method for the assessment of the existence of a dispute at provisional measures stage.⁸⁶ *Enrica Lexie* confirmed that both the establishment of the existence of a dispute and of its subject-matter are only subject to a *prima facie* evaluation, leaving additional enquiries, including that on the 'real' subject-matter of the dispute, for the further phases of judicial proceedings.

However, it should be noted that certain judges did not seem to follow the established jurisprudence on the existence of a dispute. For instance, Judge Jesus wrote in his separate opinion that 'the opposing views of the two Parties ... confirm that there is, indeed, a dispute concerning the interpretation or application of the Convention.'⁸⁷ Judge Jesus appears to base his conclusion on the appreciation of the parties' contentions, which would be a subjective, and not an objective, method of determining the existence of a dispute. For his part, Judge Bouguetaia linked the question of *prima facie* jurisdiction to that of *fumus boni iuris*, or plausibility of the rights claimed on the merits.⁸⁸ Although the two requirements are inter-dependent, since jurisdiction could *prima facie* be established only if the rights claimed plausibly exist, they should not be conflated. As interpreted in the recent case law, plausibility and *prima facie* jurisdiction remain distinct requirements. In addition, Judge Bouguetaia appeared to go beyond the analysis required at the provisional measures phase, by conducting a deeper analysis of the provisions invoked by Italy to found the Annex VII arbitral tribunal's

⁸⁵ *Application of the International Convention for the Elimination of all Forms of Racial Discrimination* (Preliminary Objections), 228, para 14 (Sep Op Abraham). See also Rosenne (n 9) 126.

⁸⁶ Judge Bouguetaia expressed the opposite view, see *Enrica Lexie* (n 4) paras 9–14 (Diss Op Bouguetaia).

⁸⁷ *ibid* para 7 (Sep Op Jesus).

⁸⁸ *ibid* para 11 (Diss Op Bouguetaia).

jurisdiction.⁸⁹ Although Judge Bouguetaia seemingly followed the *Interpretation of Peace Treaties* objective test, he conducted an analysis which one might have expected at the merits stage.

Concerning the ‘real’ subject-matter of the dispute, *Enrica Lexie* does not seem to incentivise states to request provisional measures in case where there is no dispute under UNCLOS. Such a situation had previously occurred in *ARA Libertad* with respect to sovereign immunity; in both cases, ITLOS solved the jurisdictional question in a similar manner, leaving further determinations for later stages of the proceedings. The risk that provisional measures could be requested from ITLOS in extra-UNCLOS disputes has always existed, and is inherent in the limitation of subject-matter jurisdiction under Article 288 UNCLOS.

6. Conclusion: A confirmation

Enrica Lexie appears to confirm the approach previously taken by ITLOS and the ICJ to the establishment of the existence of a dispute. However, it must be noted that such an approach is not always consistent with the test set out in *Interpretation of Peace Treaties*, where the Court held that the existence of a dispute must be objectively assessed. From this perspective, ITLOS should not rely too heavily on the statements by the parties to a case that a dispute between them exists or not, since such an approach would not be an objective, but rather a subjective assessment of the existence of a dispute. For its part, the ICJ may also rely on the statements of the parties, for the same reason explained above with reference to ITLOS. It could be suggested that, since *prima facie* jurisdiction is the most fundamental requirement in the indication of provisional measures, ITLOS should take a strict approach to establishing the existence of a dispute. It has already done so on various occasions, albeit not in *Enrica Lexie*. It is to be hoped that ITLOS will do so in future cases as well.

⁸⁹ *ibid* paras 12–14 (Diss Op Bouguetaia). See, in particular, the comments on art 87 UNCLOS.



Considerations of humanity in the *Enrica Lexie* case

*Irini Papanicolopulu**

1. Introduction

The Order by the International Tribunal for the Law of the Sea (ITLOS or Tribunal) in the *Enrica Lexie* case¹ has provided the first opportunity for judicial scrutiny of the dispute that has involved India and Italy over the past four years. The order was rendered following a request for the prescription of provisional measures by Italy, in accordance with Article 290(5) United Nations Convention on the Law of the Sea (UNCLOS) pending the constitution of an arbitral tribunal. In its Order, the ITLOS ordered both Italy and India to suspend all court proceeding and refrain from initiating new ones pending the decision of the arbitral tribunal.

In general terms, the order seems to be well balanced and to generally follow the approach adopted in previous orders on provisional measures by both the ITLOS and the International Court of Justice (ICJ or Court). Novel aspects include its combination of the law of the sea with concepts from other areas of international law, including human rights law, but also, in practical terms, by the fundamental disagreement of the parties as to the facts underlying the case. It is therefore not surprising that it has generated much debate in the Tribunal, which is well testified by the numerous and varied individual opinions attached to the Order.² This is indeed a signal of the vitality of the ITLOS, since it shows the engagement of its judges with the various

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¹ *The 'Enrica Lexie' Incident (Italy v India)* (Provisional Measures, Order of 24 August 2015), <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf>.

² The order was approved by 15 votes to 6, with 10 judges (half the Tribunal) attaching declarations, separate opinions or dissenting opinions.



issues raised by the parties, but also its ability to mediate different views and produce an order that is widely accepted and takes a balanced approach to controversial issues.

While relatively concise, as all similar orders have been, the ITLOS order contains the seed of many issues, which are hinted at, if not developed, by the Tribunal. One of these is the role of the so-called ‘considerations of humanity’ in the formulation, interpretation and application of law of the sea rules.

This contribution will set out to examine such issues. It will first contextualise the Order by looking at the origin of the phrase ‘considerations of humanity’ in relation to events happening at sea and the recent case law of other international judicial bodies established under the UNCLOS. It will then look at the *Enrica Lexie* case and how the order deals with ‘considerations of humanity’ in the present case. In its conclusion, it will discuss the role of ‘considerations of humanity’ in the case law of law of the sea tribunals, submitting that the *Enrica Lexie* case constitutes a test for such concept and an occasion for the further humanisation of the law of the sea.

2. *Considerations of humanity in the ICJ*

The first mention of ‘considerations of humanity’ in a law of the sea case dates back to the *Corfu Channel* judgment by the ICJ.³ In this case, the Court had been called upon to assess whether Albania was internationally responsible for the damage caused to British warships by a minefield laid in the Corfu Channel waters. The Court and the parties all recognised the existence of the obligation of the coastal State to give warning to ships transiting through its territorial waters of any minefield existing therein. In the absence of any applicable treaty, the Court grounded this legal obligation

‘on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every

³ *Corfu Channel Case (UK v Albania) (Merits)* [1949] ICJ Rep 4.



State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁴

The first principle, 'elementary considerations of humanity' is what interests us here. The ICJ was in fact faced with a paradoxical situation, where the laws of war were in fact more protective of persons than the laws of peace. While the former included a treaty that imposed obligations on States laying minefields, the latter did not contain any such provision or any other provision aiming at the protection of persons from harm.⁵ The Court avoided the illogical conclusion that people are more protected during wartime than during peacetime through reference to 'considerations of humanity' as a principle that should guide the determination and application of more specific obligations pending on States. With this statement, the ICJ re-established the natural order and recognised that there does exist a legal obligation, pending on States during peacetime, to take measures to protect persons from harm that may occur to them at sea, as well as on land.⁶

The *Corfu Channel* judgment is particularly significant for two reasons. On the one hand, it can be considered as giving expression to concerns underlying early treaties regulating human activities at sea, namely the creation of a safe and secure environment for people. On the other, it can be considered as the first expression of a more generalised intent of the international community to elaborate normative standards that would flesh out specific duties pending on States as far as the protection of persons is concerned. At a time when the UN Charter had just entered into force and human rights treaties did not exist, 'considerations of humanity' were 'related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy.'⁷

⁴ *ibid* 22.

⁵ This was due to the existence of a treaty posing obligations concerning the laying of minefields during war (Hague Convention VIII).

⁶ It is worth noting that the existence of a legal obligation was also well accepted by both parties to the dispute. Note, in particular, that Counsel for Albania stated that 'if Albania had been informed of the operation [of laying the minefield] before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved' (*Corfu Channel* (n 3) 22).

⁷ I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 27.



3. *Considerations of humanity in the ITLOS and other law of the sea tribunals*

The term coined by the ICJ was taken up some decades later by the ITLOS in deciding its first case on the merits. In the *Saiga n 2* case, the Tribunal had been called upon to assess, among other things, the lawfulness of the enforcement measures carried out by Guinea against the *M/V Saiga*, an oil tanker flying the flag of Saint Vincent and the Grenadines.⁸ In a rightly famous passage, the Tribunal, engaged in the finding of rules that apply to the use of force in law enforcement activities at sea, concluded by referring to the general obligation to take into account considerations of humanity:

‘In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’⁹

What the Tribunal does not clarify, is what exactly those ‘considerations of humanity’ are and what consequences flow from them. For some judges, the expression seemed to point towards human rights law,¹⁰ thus possibly introducing into the picture specific norms that regulate the duties of States towards persons. Others seemed to consider it a pre-legal factor, which should serve to adapt the existing rules towards a more human-oriented content from a *lex ferenda* perspective, without however having any practical consequences on the *lex lata*.¹¹

⁸ *The M/V ‘SAIGA’ (No 2) Case (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) [1999] ITLOS.

⁹ *ibid* para 155.

¹⁰ *ibid* para 20 (Sep Op Mensah).

¹¹ *ibid* para 90 (Diss Op Ndiaye), according to whom ‘humanitarian considerations may inspire rules of law ... are not, however, rules of law in themselves.’



The trend towards a general reference to ‘considerations of humanity’ by individual judges or the Tribunal was consolidated in the subsequent cases, in particular those considering prompt release claims and those involving the arrest or other forcible acts against persons.¹²

The ITLOS however also referred to different, yet similar, concepts. In the *Tomimaru* case, for example, it considered that the confiscation of a vessel should not ‘be taken through proceedings inconsistent with international standards of due process of law.’¹³ In the *Louisa* case, the ITLOS went further than ever before when it affirmed that ‘States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances.’¹⁴

The statement in the *Louisa* case is all the more impressive considering it was not required in the logic of the judgment and shows the concern of the ITLOS to keep in mind the bigger picture, and not just the specific UNCLOS provisions it is called upon to apply from time to time. The ITLOS had in fact just declared that it did not have jurisdiction to decide the case. Notwithstanding this conclusion, it also considered that ‘it cannot but take note of the issues of human rights’ raised and thus went on to make the statement just reported.

Somewhat surprisingly, ‘considerations of humanity’ were not expressly mentioned by the ITLOS in its Order in the *Arctic Sunrise* case. The surprise is due to the fact that the case was greatly concerned with the arrest and detention of the crew of a vessel, the *Arctic Sunrise*. The Netherlands claimed that the arrest and detention were in violation of both law of the sea and human rights law standards, the latter point also argued extensively, and that the vessel and crew should be released upon posting of a bond.¹⁵ The case was therefore very similar to the prompt release cases in which the Tribunal had used reference to ‘con-

¹² *The ‘Juno Trader’ Case (Saint Vincent and the Grenadines v Guinea-Bissau)* (Prompt Release, Judgment of 18 December 2004) [2004] ITLOS, para 77. See also para 1 (Sep Op Treves); paras 3–4 (Sep Op Mensah and Wolfrum).

¹³ *The ‘Tomimaru’ Case (Japan v Russian Federation)* (Prompt Release, Judgment of 6 August 2007) [2007] ITLOS, para 76.

¹⁴ *The M/V ‘Louisa’ Case (Saint Vincent and the Grenadines v Kingdom of Spain)* (Judgment of 28 May 2013) [2013] ITLOS, para 155.

¹⁵ *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013) [2013] ITLOS, para 33.



siderations of humanity' to remind the parties of their duties beyond those in the UNCLOS. There are however two differences that may have warranted a different treatment of the issue. The first one is that here the Tribunal was requested to prescribe only provisional measures pending the constitution of the arbitral Tribunal and that it had therefore adopted a very strict approach to its jurisdiction.¹⁶ The second is that the ITLOS eventually ordered the immediate release of the persons involved, thereby making it superfluous for it to indicate how these persons had to be treated, since they were to be set immediately free.¹⁷

Considerations of humanity have been invoked not only by the ITLOS but also by other arbitral tribunals ruling on the basis of the UNCLOS (Annex VII Tribunals). In the *Guyana/Suriname* case, the arbitral Tribunal recalled the statement in the ITLOS *Saiga no 2* decision, although it did not elaborate on it.¹⁸ In the *Arctic Sunrise* case, the Arbitral Tribunal similarly recalled the *Saiga no 2* statement in discussing the applicability of human rights law.¹⁹ In both cases, the passage was cited in the context of ascertaining the rules regulating law enforcement activities at sea, in particular the use of force and, in the *Arctic Sunrise* case, deprivation of personal liberty. Thus, reference to 'considerations of humanity' served the purpose of protecting the weak party, that is the persons against whom force had been used or threatened.

4. *The Enrica Lexie case*

In analysing how 'considerations of humanity' were used in the *Enrica Lexie* case before the ITLOS, it seems useful to recall that this case is just one among a number of cases which see Italy and India opposed with respect to the killing of two Indian fishermen and the detention of two Italian marines. Before examining the ITLOS case, it should be

¹⁶ *ibid* para 2 (Sep Op Wolfrum and Kelly).

¹⁷ Similar considerations may also have prevented any mention of 'considerations of humanity' in the *Ara Libertad* case, which was also concerned with provisional measures pending the constitution of an Annex VII Tribunal.

¹⁸ *Guyana v Suriname* (Award of 17 September 2007) [2007] PCA, para 405.

¹⁹ *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Award of 14 August 2015) [2015] PCA, para 191.



mentioned that there are a number of disputes arising from these events, which are forming the object of proceedings in front of national and international judges.

The parties are at variance, in the first instance, with respect to the facts of the case. India claims that the two fishermen were killed by the Italian marines, who were engaged in anti-piracy protection on board the Italian-flagged vessel *Enrica Lexie*. Italy objects and claims that the two fishermen were not killed by the two marines. Proceedings have been initiated in both States, creating a further disagreement as to which one has jurisdiction over the case and whether Italy has exclusive jurisdiction, as the State claims. With the arrest of the two marines by India and their detention, a further dispute arose concerning the lawfulness of such arrest and detention.²⁰ The dispute on the exercise of jurisdiction and the lawfulness of detention are now submitted by Italy to an arbitral tribunal constituted in accordance with Part XV UNCLOS.²¹

Within this context, it is evident that ‘considerations of humanity’ could be invoked with respect to a number of issues, both procedural and substantial. Turning back to the *Enrica Lexie* case before the ITLOS, ‘humanitarian’ considerations were invoked by Italy to justify the necessity of the required provisional measures, in particular the second measure requested, according to which Italy asked for the lifting of any restrictive measures on the personal freedom of the two marines.²² Their use is therefore procedural, to justify the urgency of the requested measure, rather than substantial, which would ask for an evaluation of the applicable substantial standards to the detention of the two marines.

²⁰ Measures against the two marines were subsequently relaxed and one of them is presently in Italy on medical grounds, while the other is still in India.

²¹ Regrettably, the proceedings of the Tribunal are not public and no documents have been posted on the dedicated webpage of the Permanent Court of Arbitration, <www.pcacases.com/web/view/117>. No reasons are given for this choice, nor can it be inferred, from the material published in the ITLOS webpage of the case, that an appropriate decision as to information that should not be disclosed would not be sufficient to render the majority of the information public.

²² ‘India shall take all measures necessary to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant Girone to travel to and remain in Italy and Sergeant Latorre to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal’, *Request under article 290, paragraph 5, of the Convention, submitted by Italy on 21 July 2015*, para 57(b).

After recalling that the ‘rights of liberty and movement [of the two marines] have been restricted, notwithstanding the absence of any formal charges, for nearly three-and-a-half years’,²³ Italy in fact evokes the *Saiga no 2* judgment and the *Arctic Sunrise* order. The Italian argument seems to put particular weight on the ‘risk of severe and irreversible prejudice to the Marines, and therefore to Italy's rights’ due to the prolonged restriction on personal liberty, which would provide the basis for the request of provisional measures.

It is in this context that Italy mentions ‘considerations of humanity’ and recalls the *Saiga no 2* passage and the one in the *Corfu Channel* judgment and links them with the situation of the two marines:

‘The duration and circumstances of the custody and bail conditions imposed on the Marines already amount to a breach of their fundamental rights guaranteed, inter alia, under Articles 9 and 14 of the International Covenant on Civil and Political Rights, to which both Italy and India are parties. Despite nearly three-and-a-half years since the Marines were first arrested, they have not yet been informed of the charges against them — an inexcusable breach of their fundamental rights and a situation so deplorable that it was criticised by the Chief Justice of the Indian Supreme Court at a hearing on 16 December 2014.’²⁴

This passage shows that Italy deems ‘considerations of humanity’ as a shorthand for human rights law, which is not only deemed applicable under the circumstances, but also as a matter that can be submitted to law of the sea judges for adjudication. The argument is expanded upon in the oral pleadings, where Italy considered that restrictions on the liberty and movement of the marines ‘are contrary to international standards of due process applicable under the law of the sea’²⁵ and argued on the basis of human rights instruments and case law from international human rights bodies.²⁶

²³ *ibid* para 45.

²⁴ *ibid* para 49.

²⁵ Verbatim Record of the public sitting, doc ITLOS/PV.15/C24/1, 31.

²⁶ It could be mentioned that human rights standards are linked with the law of the sea in a somewhat convoluted way. Italy maintains that ‘we are faced here with a special category of unlawful detention, namely detention which the law of the sea specifically characterises as unlawful, in this particular case by virtue of the fact that the detention is



What is new in the *Enrica Lexie* case, however, is the fact that India, the other party to the dispute, not only objected to the invocation of considerations of humanity by Italy arguing that it had treated the marines humanely,²⁷ but raised similar issues with respect to people involved in the case from the Indian side, namely the families of the fishermen killed:

‘Italy has referred to circumstances of a medical and humanitarian nature in the case. In this context, I would request the Tribunal to recall the greater loss, trauma and suffering of the families of the two Indian fishermen who have been killed. Their loss, Mr President, is permanent and irreversible. They are still waiting for the justice that has been delayed by Italy’s intransigence.’²⁸

‘It cannot be said that Italy has shown the same compassion towards the victims and their families, who are the forgotten ones in Italy’s written submissions. The Notification and the Request, not to mention the oral argument this morning, endeavour to move you to pity the fate of the two accused, but there is no mention of the victims.’²⁹

In this case, India, without referring directly to ‘considerations of humanity’ and the law of the sea tribunals case law, uses the ‘humanitarian’ argument not to invoke any specific human right, but rather to contextualise the facts of the case recalling their social and economic consequences. The proposed solution would be a balancing of humanitari-

not premised on a permissible exercise of jurisdiction and violates immunity’ and that the ‘restrictions on the liberty and movement of the marines further breach the law of the sea because they violate international standards of due process which, as this Tribunal has held on several occasions, must inform the operation of the law of the sea.’ The first argument seems to conflate the unlawfulness of an arrest that has taken place at sea, and which has formed the object of the cases mentioned by Italy, and an arrest that has happened on land, as in the case of the two Italian marines, although in relation to events that have happened at sea. The second argument does not clarify what ‘inform’ should mean, ie whether it has an impact on the interpretation and application of rules contained in law of the sea instruments or whether it could also introduce rules from instruments belonging to other fields of law, such as human rights law. Furthermore, the arguments advanced by Italy seem better suited to argue the merits of the case, rather than the necessity for provisional measures.

²⁷ *Written observations submitted by India on 6 August 2015*, 54.

²⁸ Verbatim Record of the public sitting, doc ITLOS/PV.15/C24/2, 43.

²⁹ *ibid.*

an considerations on the two sides, since the ‘well-being and humanitarian considerations in favour of persons accused of a serious crime have to be balanced with that of the victims of the crime’, the latter considered as prevailing in case of conflict.³⁰

India’s use of humanitarian considerations also leaves some uncertainties as to its purpose and extent. Rather than a basis for claiming a specific right, were it the right of the victims’ families for redress, a right that is also protected under human rights law, India appears to use humanitarian considerations as an emotional call to counter-balance the call for a more ‘humane’ approach towards the two marines, advocated by Italy, and to justify its treatment of them.

Faced with these two calls for ‘humanity’, the ITLOS seems to pay attention to both uses of ‘humanitarian considerations.’ As a matter of principle, it reaffirms that ‘considerations of humanity must apply in the law of the sea as they do in other areas of international law.’³¹ This is however a neutral statement and the Tribunal proceeds to apply it to the people involved on both sides of the dispute. On one hand the Tribunal ‘is aware of the grief and suffering of the families of the two Indian fishermen who were killed’³² and on the other it ‘is also aware of the consequences that the lengthy restrictions on liberty entail for the two Marines and their families.’³³

One can only guess as to the reasons for this equanimity. On one hand, it might derive from an effort to accommodate the divergent opinions of judges.³⁴ A part of the judges seems convinced by the human rights argument advanced by Italy,³⁵ whilst other judges seem to agree with the Indian position and object to what Vice-President Bouguetaia refers to as a ‘selective reference to humanity.’³⁶ On the other hand, it might also be the result of a generalised consideration that all

³⁰ *Observations by India* (n 27) 5, para 1.15.

³¹ *Enrica Lexie* (n 1) para 133.

³² *ibid* para 134.

³³ *ibid* para 135.

³⁴ As hinted in *Enrica Lexie* (n 1) para 1 (Diss Op Bouguetaia).

³⁵ *Enrica Lexie* (n 1) para 6 (Declaration Kelly); paras 10–11 (Sep Op Jesus).

³⁶ *Enrica Lexie* (n 1) para 26 (Diss Op Bouguetaia), see also para 32. In similar terms, paras 6–8 (Declaration Paik); para 16 (Diss Op Chandrasekhara Rao). Interestingly, while Vice-President Bouguetaia and Judge Chandrasekhara Rao voted against, Judge Paik voted in favour of the Order.



the people involved in a case, whatever their role and the party to whom they refer, deserve to be treated with humanity.

Under a different reading, recalling the general principle and then declining it for both parties might also be seen as a way of dismissing both the procedural argument advanced by Italy and the emotional claim submitted by India. The test for granting provisional measures, according to the Tribunal, is that there should be ‘a real and imminent risk that irreparable prejudice could be caused to the rights of the parties.’ Italy had tried to argue that the continuing restrictions on their liberty affected irremediably the rights of the marines and therefore those of Italy. The Tribunal, however, does not appear to have taken this into account, as it eventually did not grant the measure requested, ‘because that touches upon issues related to the merits of the case.’³⁷

5. *A test for ‘considerations of humanity’ in the law of the sea*

Following from a number of cases where the ITLOS and other law of the sea tribunals have consolidated the role of ‘considerations of humanity’ and human rights law in law of the sea disputes, the *Enrica Lexie* case, and the ITLOS Order, may be seen as a natural evolution and at the same time a test for the concept.

Until this case, in fact, the use of considerations of humanity had been univocal, though somewhat ambivalent. On one hand, considerations of humanity have been the shorthand for the introduction of human rights into law of the sea cases, in particular such fundamental civil rights as the right to life, the right not to be subject to torture, the right to personal freedom and the right to due process of law. On the other, considerations of humanity would appear to be a call for the application of extra-legal concepts, in particular a humanitarian perspective on the protection of people, which however does not necessarily find its expression in concrete legal rules. In both cases, considerations of humanity were invoked by one party only, that which was taking up the rights of its people against allegedly unlawful action exercised by the other State.

³⁷ *Enrica Lexie* (n 1) para 132.



In the *Enrica Lexie* case, the situation is different, since both parties use the ‘considerations of humanity’ argument to invoke protection for their people against the acts of the other State and its organs. On one hand, Italy advances considerations of humanity to safeguard its marines from the alleged breaches of due process at the hands of the Indian authorities. On the other hand, India invokes humanitarian considerations in its effort to bring to justice the people – who Italy claims are its organs – who have allegedly killed two fishermen, violating their right to life. These are not just procedural arguments, concerned with the plausibility of provisional measures, but go to the heart of the dispute involving an evaluation of the substantial standards that should be applied. The point was finely noted by the ITLOS, which considered it to be tied closely to the merits of the case.

This double invocation shows that considerations of humanity, which have played an important role in adapting the law of the sea to the values attached to human rights,³⁸ are not a panacea and cannot by themselves provide the solution to all cases involving individuals. The issue underlying the request by Italy that any measure of restraint over the marines be lifted, is, in fact more nuanced and requires the balancing of the human rights of two groups of individuals: the Italian marines, on the one hand, and the Indian victims' families, on the other. This is what makes the *Enrica Lexie* case different from those concerning prompt release of vessels and crews and provisional measures. As Judge Paik has observed, ‘there are differences between the present case and those other cases, the most critical one being the difference in

³⁸ On the interaction between human rights and the law of the sea see BH Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ in JI Charney, DK Anton (eds), *Politics, Values and Functions: International Law in the 21st Century: Essays in Honor of Professor Louis Henkin* (Martinus Nijhoff 1997); B Vukas, ‘Droit de la mer et droits de l’homme’ in G Cataldi (ed), *The Mediterranean and the Law of the Sea at the Dawn of the 21st Century* (Bruylant 2002); S Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 Sri Lanka J Intl L 85; T Treves, ‘Human Rights and the Law of the Sea’ (2010) 28 Berkeley J Intl L 1; E Papastavridis, ‘European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?’ in M Fitzmaurice, P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (Martinus Nijhoff 2013) 117; I Papanicolopulu, ‘Human Rights and the Law of the Sea’ in DJ Attard, M Fitzmaurice, NA Martinez (eds), *The IMLI Manual on International Maritime Law*, vol I (Oxford 2014) 509.



terms of the gravity of the offence allegedly committed by the accused.’³⁹

The *Enrica Lexie* case has therefore shown the limits of ‘considerations of humanity’ in addressing law of the sea disputes. This phrase may work well in cases where there are the rights of people on one side only to consider. However, it presents drawbacks when there are the rights of two opposing sides, each of which claims considerations of humanity, to consider and balance. ‘Considerations of humanity’, in fact, does not by itself alone allow the judge to operate a balancing of the different ‘humans’ and their interests involved in the case.⁴⁰

This limit makes it more urgent that law of the sea judges go the extra mile and boldly add human rights and their lexicon to their case law. It is in fact only human rights law that not only provides for the protection of the rights of individuals, in application of the principles of humanity first recalled by the ICJ in the *Corfu Channel* case, but also allows the balancing of competing interests of humans and provides methods for deciding which prevails. It remains to be seen whether the arbitral tribunal that has been seised with the merits of the case will seize the challenge to clarify and further develop the law in this respect.

³⁹ *Enrica Lexie* (n 1) para 7 (Declaration Paik).

⁴⁰ A different balancing act that the case may require would be the balancing of the rights of the victims against the immunity which, according to Italy, should be granted to the marines and would be the basis for the exclusive jurisdiction of Italy.



The question:

Is the settlement of trade disputes under Regional Trade Agreements undermining the WTO dispute settlement mechanism and the integrity of the world trading system?

Introduced by Angelica Bonfanti and Cesare Pitea

The number of Regional Trade Agreements (RTAs) has increased sharply since the 1990s. As of April 2015, the WTO had received some 612 notifications of RTAs. This situation leads to two parallel phenomena. From the point of view of the substantive trade rules, it generates what has been called the ‘spaghetti bowl’, ie a mass of RTAs establishing preferential commitments as between the WTO member States that are parties to them, thus undermining the non-discrimination principle. From a different perspective, which forms the focus of this Zoom-in, regionalism also leads to a situation of concurrent dispute settlement mechanisms (DSMs), given that most RTAs provide for specific adjudication of disputes arising from their application.

Although the risks connected to the rise of regionalism and the proliferation of DSMs have been widely debated in the past, the issue is nonetheless becoming increasingly problematic, due to the negotiation, conclusion and entry into force of the so-called ‘mega-regionals’, such as the Comprehensive Trade and Economic Agreement (CETA), the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TTP), the Trade in Services Agreement (TISA), and the Regional Comprehensive Economic Partnership (RCEP). These agreements, as well as the newly negotiated Economic Partnership Agreements of the European Union, are likely to institutionalize *ad hoc* DSMs for the disputes arising in their respective fields of application. Since they generally overlap *ratione materiae* with the WTO covered agreements, potential conflicts of jurisdiction between the respective DSMs might arise.

RTAs usually address these concerns through differing techniques: some provide for the exclusive and compulsory jurisdiction of their DSMs; others allow the requesting party to exercise a limited choice of forum while still others establish that the WTO dispute settlement bodies have exclusive jurisdiction. Moreover, often they aim to avoid parallel or successive proceedings by providing for ‘fork-in-the-road’ clauses. Finally, in order to mitigate the risk of substantive fragmentation resulting from conflicting decisions, some RTAs defer to the WTO interpretation of overlapping substantive rules.

Notwithstanding these techniques, parallel proceedings before competing DSMs have arisen and are likely to arise in the future, with the risk of conflicting decisions. This raises complex questions of coordination with the WTO, as demonstrated by its jurisprudence.

In light of the foregoing, we have asked Gabrielle Marceau and Luiz Eduardo Salles to address the following questions: once a parallel proceeding is initiated before a regional DSM, may or should the WTO refrain from exercising its adjudicative powers, in order to neutralize potential conflicts of jurisdiction? Should it take the decisions adopted by the regional DSMs into account and what legal value should it ascribe to them? Should regional DSMs be considered as the most appropriate *fora* to adjudicate disputes arising from RTAs? Alternatively, is the WTO the proper forum to maintain the consistency of international trade law? Can the WTO and the regional DSMs’ conflicts of jurisdiction be coordinated in accordance with any general principles of law? What clauses can guarantee the most efficient coordination between WTO and regional DSMs? And, as a general assessment, will the rise of regionalism and the proliferation of DSMs either lead to forum shopping and fragmentation of international trade law, or will they contribute to the development of a uniform interpretation capable of preserving the integrity of the WTO system of law?

The primacy of the WTO dispute settlement system

Gabrielle Marceau *

1. *Introduction*

The world trading system has seen a proliferation of Regional Trade Agreements (RTAs) since the early 1990s. Many of the RTAs negotiated in the recent times are equipped with a sophisticated dispute settlement mechanism (DSM) clause. There is a belief that these RTA-DSMs have the potential of interfering with the integrity of the WTO-DSM. This short note comments on this belief. For this purpose, my comments will proceed to examine: 1) the nature of the jurisdiction of the WTO-DSM; 2) the issue of ‘choice of appropriate forum’ for resolving a trade dispute given the potential overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM;¹ 3) the legal value of the RTA-DSMs decisions in the WTO-DSM; 4) principles of private international law which could be used to deal with potential overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM; and 5) the provisions within the WTO which could be used to coordinate RTA’s and WTO’s DSMs. This note suggests that there is no thumb rule to answer the complex question of allocation of jurisdiction, and that each overlap or conflict of jurisdiction between RTA-DSMs and WTO-

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¹ This issue has been explored in my earlier scholarship entitled K Kwak, G Marceau, ‘Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements’ in L Bartels, F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 465. But it needs to be revisited in light of the current WTO jurisprudence, particularly *Peru – Additional Duty on Imports of Certain Agricultural Products* (*Peru – Agricultural Products*), Report of the Appellate Body (31 August 2015) WT/DS/457/AB/R.



DSMs merits consideration on a case-by-case basis. However, the integrity of the WTO should never be undermined in any given scenario.

2. *The nature of the jurisdiction of the WTO-DSM*

The nature of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is quite unique.² Article 23 of the DSU prescribes that the WTO-DSM has exclusive jurisdiction to resolve disputes arising from the violations of the WTO covered agreements (covered agreements). In addition, Article 3.8 provides that the jurisdiction of the WTO-DSM is compulsory and quasi-automatic, i.e. when bringing a claim to the WTO-DSM, the challenging Member in a dispute is not required to prove any specific economic or legal interest in that dispute, or evidence of any negative trade impacts caused by the challenged measure. Furthermore, the responding Member cannot refuse to participate in the dispute process. The issue of ‘choice of appropriate forum’ surfaces in case of overlaps or conflicts of jurisdiction. For instance, jurisdictional overlap can happen when a dispute between two parties can be brought to two distinct fora or two different DSMs.³ When trade disputes arise between RTA parties, who are also WTO Members, such overlaps of jurisdiction could occur if an obligation included in an RTA is the same as or similar to that of a covered agreement.⁴

² G Marceau, ‘Consultations and the Panel Process in the WTO Dispute Settlement System’ in R Yerxa, B Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005) 30. Also, see in general, W Davey, ‘Dispute Settlement in the WTO and RTAs: A Comment’ in Bartels, Ortino (eds) (n 1) 343.

³ Kwak, Marceau (n 1) 467. We shall see that in private international law principles of *lis pendence* and *res judicata* have stricter requirements for those specific overlaps.

⁴ This is only one such scenarios of overlap of jurisdictions between the RTAs-DSM and the WTO-DSM. Note that there is an overlap even if the ‘applicable law’ between WTO and RTA are strictly speaking not the same: for example, WTO law on remedies is different from most RTA law on remedies.



3. *The 'choice of appropriate forum' for trade disputes in case of overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM*

In that context, it should be recalled that Article XXIV of the General Agreement on Trade and Tariff 1994 (GATT) and Article V of the General Agreement on Trade in Services (GATS) authorize Members to form RTAs. The WTO jurisprudence confirms that Members have a 'right' to form RTAs,⁵ but this right is conditional upon fulfilling the specific conditions set forth in GATT Article XXIV.⁶ Therefore, there is no doubt that a Member would be justified in invoking the RTA's DSM in order to enforce norms pursuant to an RTA, even if the concerned RTA violation could also constitute a WTO violation. As noted earlier, many RTAs have substantive provisions that are parallel to provisions of the covered agreements and, generally, these RTAs provide for their own dispute settlement mechanism, thereby making it possible for a Member to resort to parallel DSMs for the same set of rights and obligations. A large number of RTAs have built-in mechanisms such as 'choice of forum' clauses, 'exclusive forum' clauses or 'fork in the road' provisions to deal with such overlaps of jurisdiction.⁷ These clauses or provisions may nonetheless lead to an apparent and temporary jurisdictional conflict since, in principle, as further discussed below, the WTO-DSM cannot be restrained from exercising its jurisdiction given the quasi-automatic ac-

⁵ *Peru – Agricultural Products* (n 1) fn 276; WTO, *Turkey – Restrictions on Imports of Textile and Clothing Product (Turkey – Textiles)*, Report of the Appellate Body (19 November 1999) WT/DS34/AB/R, para 58. Presently, art XXIV and WTO jurisprudence clearly establish that it is for the parties to the RTA to prove that the concerned free-trade area or customs union is compatible with art XXIV of GATT (and/or art IV of GATS).

⁶ See Kwak, Marceau (n 1) 466: 'In case of an RTA, Article XXIV may justify a measure, which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this RTA "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both of these conditions must be met to have the benefit of the defence under Article XXIV of GATT.'

⁷ See in general C Chase, A Yanovich, J-A Crawford, P Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, WTO Staff Working Paper ERSD-2013-07 (2013).



cess and compulsory nature of the WTO's DSM, even if the governments concerned are using or have used the parallel RTA-DSM.

In light of such conflicts and overlaps of jurisdiction, the question that arises is whether the WTO adjudicative bodies should refrain from exercising their powers to resolve such disputes in case such disputes (or part thereof) are initiated concomitantly at two distinct fora. To answer this question, it may be appropriate to recall that in the *Mexico – Soft Drinks* dispute, the Appellate Body (AB) had ruled that the DSU obliged WTO panels (panels) to exercise their jurisdiction unless a legal impediment precluded them from ruling on the merits of a claim.⁸ In this context, the AB noted that for 'a panel to decline to exercise validly established jurisdiction would seem to "diminish" the rights of a complaining Member to "seek the redress of a violation of obligations"'⁹ Once murky, the issue seems to have been clarified with the AB Report on *Peru – Agricultural Products* where the AB noted that '... the relinquishment of rights granted by the DSU cannot be lightly assumed', and that

'the language in the Understandings must clearly reveal that the parties intended to relinquish their rights ... Thus, while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, any such relinquishment must be made clearly'¹⁰

In that dispute, the AB concluded 'we do not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case in relation to, or within the context of, the DSU.'¹¹ Thus, the WTO adjudicative bodies cannot refrain from exercising jurisdiction unless this right to access the WTO-DSM's jurisdiction has been clearly relinquished by the parties to a dispute. The AB went further to note that 'the references in paragraph 4 of Article XXIV to facilitating trade and closer integration are not

⁸ WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, Report of the Appellate Body (24 March 2006) WT/DS308/AB/R, paras 48–54.

⁹ *ibid* para 53.

¹⁰ *Peru – Agricultural Products* (n 1) para 5.25.

¹¹ *ibid* para 5.28.



consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the covered agreements.¹² This statement reinforces the principle that the right of Members to initiate a WTO dispute is a fundamental one, which could be modified or restrained in the context of the DSU and therefore in the WTO forum.

The choice of an appropriate forum is ultimately that of the challenging Member. For instance, in the *Peru – Agricultural Products* dispute, the AB noted that

'Members enjoy discretion in deciding whether to bring a case, and are thus expected to be "largely self-regulating" in deciding whether any such action would be "fruitful". The "largely self-regulating" nature of a Member's decision to bring a dispute is "borne out by Article 3.3, which provides that the prompt settlement of situations in which a Member, *in its own judgement*, considers that a benefit accruing to it under the covered agreements is being impaired by a measure taken by another Member is essential to the effective functioning of the WTO".'¹³

Therefore, there is no absolute response as to what is the best forum to settle a dispute – the RTA or the WTO? In this regard, certain factors contribute to the decision of challenging Members, which include assessing the impact of the dispute. For instance, if a dispute is largely local with negligible ramifications for the global trade then the RTAs may serve as the most suitable choice. However, if the dispute involves systemic issues with multilateral implications, the challenging Member may consider the WTO-DSM to be the most appropriate forum for handling such a dispute, as was done by Mexico when accessing the WTO for resolving the *US – Tuna II (Mexico)* dispute. If a dispute is adjudicated at the WTO, other WTO-Members that have a substantial interest in the matter may also participate in the proceedings as third parties but such participation is not possible at an RTA-DSM. Indeed, the existence of such a bilateral RTA dispute may encourage a parallel dispute by a Member, who is not party to that RTA but is concerned with that dispute. Thus, in order to avoid multiplicity of disputes, the

¹² *ibid* para 5.116.

¹³ *ibid* para 5.18.



challenging Member may prefer the WTO when dealing with a dispute that has multilateral implications. Another deciding factor for the challenging Member could be the subject of the dispute. For example, if the subject of the dispute is only covered by an RTA and does not find a parallel coverage in the covered agreements, the RTA-DSM would serve as the obvious choice for the challenging Members. Other relevant factors may also range from costs of bringing a dispute to the efficacy of the forum.¹⁴

If there is an allegation of a WTO violation, it would be difficult for a WTO panel to refuse to hear a WTO Member complaining about a measure that is inconsistent with the WTO.¹⁵ In this regard, in order to avoid duplication of disputes, RTA parties can either make the RTA-DSM provisions more appealing, for example by providing interim-relief, and/or by penalizing RTA parties, through liquidated damages in the RTAs, which would subsequently bring the dispute to the WTO.

4. *The legal value of the RTA-DSMs decisions in the WTO-DSM*

What is clear is that the choice of an appropriate dispute forum cannot undermine the integrity of the WTO-DSM. At the same time, the importance that the WTO-DSM attaches to RTA decisions or the lack thereof, may affect the legitimacy and integrity of the WTO-DSM. The WTO adjudicating bodies must refrain from ruling on provisions, which are exclusive to an RTA, in case such provisions are raised as substantive claims by the disputing parties. However, if a trade dispute has already been addressed at an RTA-DSM, Article 13 of the DSU allows any WTO panel to request from the parties, or from any source, any relevant information, and panels can take such proceedings and decisions into consideration. If the decision of an RTA-DSM is submitted as evidence by one of the parties to a WTO dispute, then in such cases, panels can ascribe evidentiary value to the decision rendered by an RTA-DSM. It is to be noted that the assessment of the relevance of the decision of an RTA-DSM would be made like any other evidence received by panels, which can enjoy a considerable margin of discretion in

¹⁴ See in general C Chase *et al* (n 7).

¹⁵ Kwak, Marceau (n 1) 469.

performing this task.¹⁶ Even if the decision of an RTA-DSM is intertwined with questions of law, the WTO adjudicating body can read such decision as a ‘fact’ – as it can read an article of doctrine – and the WTO panel can simply be ‘inspired’ for the assessment requested to do so under WTO law. In the *Brazil – Retreaded Tyres* dispute, the AB had to decide whether the exemption from Brazil’s import restriction benefiting tyre imports from MERCOSUR countries, in view of a decision by a MERCOSUR arbitral tribunal, could be justified under Article XX of the GATT. The AB held that Brazil’s MERCOSUR exemption, introduced as a result of the MERCOSUR tribunal’s ruling, had no relationship with the objective of the ban on tyres, and the exemption even went against that objective.¹⁷

5. *Principles of private international law which could be used to deal with potential overlap and conflict of jurisdictions between the RTA-DSMs and the WTO-DSM*

It has been ascertained that in some scenarios, overlaps of jurisdiction between RTAs and the WTO are unavoidable. For such scenarios, it may be worthwhile to examine the principles and rules of private international law on overlaps and repetitions of disputes. Such principles may provide guidance for dealing with unavoidable overlaps but legally speaking, for the reasons discussed below, none of these principles can be used to tackle formally a WTO/RTA jurisdictional overlap. In this regard, I will be limiting my comments to four principles or doctrines, namely: *forum conveniens*, *forum non conveniens*, *lis alibi pendens*, and *res judicata*.

¹⁶ WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC – Hormones)*, Reports of the Appellate Body (13 February 1998) WT/DS26/AB/R and WT/DS48/AB/R, para 132; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, Report of the Appellate Body (5 April 2001) WT/DS135/AB/R, para 161; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea – Dairy)*, Report of the Appellate Body (12 January 2000) WT/DS98/AB/R, para 137; and *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, Report of the Appellate Body (17 December 2007) WT/DS332/AB/R, para 202.

¹⁷ *ibid* para 228.



The doctrine of *forum conveniens* is defined as

‘a court taking jurisdiction on the ground that the local forum is the appropriate forum (or an appropriate forum) for trial or that the forum abroad is inappropriate. It is said to be a positive doctrine, unlike *forum non conveniens* which is a negative doctrine defined as a general discretionary power for a court to decline jurisdiction.’¹⁸

The objective of the first two principles is to identify the most convenient forum. Domestic courts in certain jurisdictions rely on the doctrine of *forum conveniens* as one of the discretionary criteria for assessing their jurisdiction over a particular dispute. However, the doctrine of *forum non conveniens*, or of *forum conveniens*, in the absence of an agreement among States, seems to be inapplicable to overlaps of jurisdictions in the current state of international jurisdictional law notably because Article 23 of the DSU explicitly provides that the WTO-DSM shall be the most appropriate forum for any dispute arising from a claim made subsequent to any of the covered agreements and as discussed earlier. As noted, formally, the WTO-DSM shall have the exclusive jurisdiction to deal with WTO-related claims until Members introduce amendments to Article 23. The principle of *lis alibi pendens* provides that no other parallel proceedings may be pursued once proceedings involving the same parties and the same cause of action have begun in another forum. The objective of the rule of *lis alibi pendens* is to avoid such proceedings, which may result in irreconcilable judgments.¹⁹ However, it is difficult to use this rule as the disputes which can be dealt at an RTA-DSM and the WTO-DSM usually arise from claims arising from two different treaties and, thus, involve a different cause of action. Finally, another principle worth considering is the *res judicata* doctrine, which provides that the final judgment rendered by a court of competent jurisdiction, conclusively adjudging the rights of the disputing parties, shall constitute an absolute bar to a subsequent action involving the same parties, same claim or cause of action. In the case of RTAs and the WTO DSMs, the parties may be the same and the subject matter might be related, but formally the rights of the parties and the applica-

¹⁸ JJ Fawcett, *Deciding Jurisdiction in Private International Law* (OUP 1995) 5–6 and 10.

¹⁹ *ibid* 26.

ble law between RTA and WTO are different and foreclose the invocation of *res judicata*.

6. *The provisions within the WTO law which could be used to coordinate RTA's and WTO's DSMs*

An examination of these principles reinforces my conclusion that RTA's need to 'attract' the challenging Member by making its provisions more appealing and by 'discouraging' Members from using the WTO-DSM. There are some good-faith provisions within WTO law which could be used to coordinate RTAs and WTO's DSM. Article 3.7 of the DSU reads, in the relevant part:

'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.'

Article 3.10 of the DSU reads, in the relevant part:

'It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.'

Article 3.10 of the DSU is one of the explicit limitations on the right of Members to bring a dispute to the WTO-DSM based on WTO law claims. In several cases, the responding party has claimed that the challenging Member has not exercised its right to access the WTO-DSM in good faith.²⁰ However, such claims have never been successful. In the

²⁰ See for example *Peru – Agricultural Products* (n 1); *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia* (*Korea – Certain Paper*), Panel Report (28 November 2005) WT/DS312/R; *China – Measures Affecting Imports of Automobile Parts* (*China – Auto Parts*), Panel Reports (12 January 2009) WT/DS339/R, Add.1 and Add.2, WT/DS340/R, Add.1 and Add.2, and WT/DS342/R, Add.1 and Add.2, upheld (WT/DS339/R) and as modified (WT/DS340/R and WT/DS342/R) by the Reports of



Korea – Certain Paper dispute, the Panel found that ‘we have to assume that WTO Members engage in dispute settlement in good faith, as required under Article 3.10 of the DSU.’²¹ In the *Peru – Agricultural Products* dispute, both the Panel and the AB concluded that Guatemala had not acted against its WTO good faith obligations in challenging Peru’s use of variable levies, arguably permitted under the FTA but prohibited under WTO law.²² At the time of writing, the WTO adjudicating bodies have not found an instance wherein the challenging Member has not acted in good faith by accessing the WTO-DSM as provided for in Article 23 of the DSU. It seems nearly impossible to rebut the assumption that WTO Members engage in dispute settlements in good faith. The threshold for proving that the challenging Member has not acted in good faith is extremely high. In the *EC – Export Subsidies on Sugar* case, the AB stated that

‘... We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their “judgement as to whether action under these procedures would be fruitful”, by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation ...’²³

7. Conclusion

An increase in RTAs with built-in DSMs has given Members an opportunity to access different fora for resolving their disputes, but the choice of selecting one forum over another remains that of the challenging Member. Reasons for the Members’ choice of forum range from the conflicts or overlaps of jurisdiction between the WTO and an RTA, the

the Appellate Body (12 January 2009) WT/DS339/AB/R, WT/DS340/AB/R and WT/DS342/AB/R.

²¹ *Korea – Certain Paper* (n 20) para 6.97.

²² *Peru – Agricultural Product* (n 1) para 5.28.

²³ WTO, *European Communities – Export Subsidies on Sugar (EC – Export Subsidies on Sugar)*, Reports of the Appellate Body (19 May 2005) WT/DS265/AB/R, WT/DS266/AB/R and WT/DS283/AB/R, para 312.



cost-benefit analysis which is carried out in terms of economic as well as political costs, to the efficacy of a specific DSM. Ultimately, it is the legitimacy of a mechanism that drives the choice-making process of a challenging Member. The ever-increasing number of disputes at the WTO, in which almost 25% of the cases could have been handled in the RTA-DSM, show that the Members continue to place more reliance on WTO's DSM rather than resorting to RTA-DSMs. The proliferation of RTAs has not yet interfered with the integrity of the WTO-DSM and is unlikely to impact it even in the future. It seems difficult to conceive whether and how an RTA can possibly foreclose the use of the WTO-DSM for the violation of WTO provisions, unless WTO Members decide to do so in the context of the DSU.



A deal is a deal: Party autonomy, the multiplication of PTAs, and WTO dispute settlement

Luiz Eduardo Salles *

1. Introduction

With the multiplication of preferential trade agreements (PTAs),¹ the landscape of international trade dispute settlement is becoming increasingly populated. Many of the new-generation PTAs are equipped with dispute settlement mechanisms (DSM) modelled on that of the WTO.² There is an expectation that the conclusion of the so-called mega-regional agreements will significantly add to this scenario in relation to important subsets of the WTO membership, increasing the possibility of overlap between WTO and PTA dispute settlement procedures. Moreover, since the WTO does not have jurisdiction to adjudicate disputes on ‘WTO-plus’ or ‘WTO-extra’ commitments between given PTA members, the deepening of trade liberalization by subsets of the WTO membership creates the conditions for new disputes that will necessarily need to be addressed in the PTA context – and therefore outside of the WTO. These developments have renewed hotly debated questions about the coexistence and coordination of PTAs’ and the WTO’s DSMs.

Interestingly, a parallel phenomenon to the spread of PTAs and their DSMs has been the increase in and intensification of the activity

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¹ Although much of the literature refers to the acronym RTAs (regional trade agreements), this Note employs the acronym PTA as it is thought to better encompass the collection of different types of preferential trade agreements.

² See C Chase, A Yanovich, J-A Crawford, P Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, WTO Staff Working Paper ERSD-2013-07 (2013).



within the WTO DSM itself. WTO adjudication has operated at particularly high rates over the past few years,³ notwithstanding a protracted stalemate in the organization's negotiating front – softened, more recently, by the conclusion of the Agreement on Trade Facilitation and of the Nairobi Package. At the same time, and quite remarkably, very few PTA's DSMs have been active.⁴ In fact, many of the disputes that have congested the WTO's docket could also be litigated under a PTA against the background of provisions textually similar to those of the WTO. This confirms the clear resilience of the WTO as the forum of preference for interstate trade disputes.

In light of this combination of developments, this note argues that WTO members addressing forum selection and curbing multiplicative litigation through PTA provisions may and should be given recognition by WTO panels and the Appellate Body. This is a matter of party autonomy which may and should be properly addressed on a PTA-level and recognized in WTO adjudication from both a policy and a legal perspective. In the first section, it is suggested that coordination rather than a policy of alienation is a better course for the international trading system and the countries involved in a given dispute arising under both WTO and PTA rules. The second section then outlines three legal avenues for the potential recognition by WTO panels and the Appellate Body of PTA provisions which address forum shopping.

2. *The policy: alienation or coordination*

Underlying the discussion about WTO law that permits the coordination with PTA dispute settlement is the question of whether coordi-

³ See, for example, DG Roberto Azevêdo's address to the WTO Dispute Settlement Body on 26 September 2014, <www.wto.org/english/news_e/spra_e/spra32_e.htm>, and DSB's Chair Fernando de Mateo remarks at the Graduate Institute of International and Development Studies on 15 March 2015, <www.wto.org/english/tratop_e/dispu_e/fmateo_14_e.htm>.

⁴ See Chase *et al* (n 2). One could call this a paradox: more PTA DSMs, *but* more WTO disputes. However, the conjecture is possible that more PTAs are a factor behind the increase in WTO disputes: given the WTO's magnetism and more PTAs, there are more WTO disputes between PTA members themselves (for instance, in line with increased trade) and between parties and non-parties to given PTAs (for instance, related to lost trade or as an attempt to influence negotiations towards a PTA).



nation should be fostered or restrained, and of how coordination might be implemented from a WTO-perspective.⁵ When the WTO was established, there were considerably fewer PTAs in place, and dispute resolution was dominated by a diplomacy-oriented ethos. It would have been hard to imagine that two decades later more than 500 disputes would have been formally brought to a DSM that stands-out in international adjudication under almost any count or account; one which has delivered many thousands of pages of very detailed legal reasoning interpreting the global ground-rules of trade. It would also have been hard to foresee the now commonly made contrast between a relative lack of new firm commitments after the end of the Uruguay Round on the one hand, and the intense use of the WTO DSM on the other hand. And it would have been equally hard to imagine that an impressively growing number of PTAs would have been negotiated and concluded, repeating commitments bound at the WTO, providing for deepened commitments and for commitments in areas not regulated by WTO rules at all, and establishing DSMs that often mimic that of the WTO, but that have remained relatively inactive nonetheless.

The combination of the WTO DSM's relative success contributing to the crystallization and densification of WTO rules, with the spread of PTAs overlapping with WTO regulation raises the issue of structuring and implementing a division of labour between the adjudicative systems of the WTO and of PTAs – particularly regarding disputes between two members of a PTA. This challenge did not arise in the same manner when the WTO was established. The challenge is now compounded by the fact that the WTO DSM has been recently strained by an overflow of disputes, at least some of which could theoretically be addressed through other means.

Broadly speaking, there are two possibilities for conceiving the division of labour between the WTO's and PTA's DSMs in the current institutional landscape. Envisaging these two possibilities assumes that the WTO does not clearly spell-out how the said division of labour is to be established as a legal matter.

⁵ This Note does not focus on the question of coordination from the perspective of PTA adjudicative bodies. Many PTA adjudicative bodies are mandated to take into account developments under WTO case law and the discussion about coordination from a PTA-perspective does not raise the question about the avenues for coordination discussed in Section 3 below in the same manner as it is dealt with here.

2.1. *First possibility: no division of labour or alienation*

A first possibility for WTO adjudicative bodies' conceiving their division of labour with PTA bodies would be to reject any such division. From this perspective, the WTO would constitute a separate legal order, sealed-off from PTA developments, including rules in PTAs and decisions by PTA adjudicators. Regardless of whether given disputes might be about identical or similar factual backgrounds and between the same parties, and of whether the rules at play might be similarly or even identically crafted, the fact that the sources of law (i.e., WTO versus PTAs) are different alone would suffice to prevent PTA developments from being recognized in WTO disputes. In effect, this approach would mean that decisions by PTAs have no value as such for the WTO other than as facts to be adjudicated from the perspective of the WTO DSM.⁶ More importantly, procedure regulating rules in PTAs would never be validly invoked in WTO dispute settlement, as any principles and provisions in PTAs regulating access to dispute settlement under the DSU would fail to be recognized by a WTO panel. In sum, the WTO would refuse to attach relevance to apparent jurisdictional overlaps: it would always be available as a forum and it would always be an appropriate forum to try issues under its jurisdiction, similar litigation could always move forward in parallel at the WTO and PTAs, and potentially inconsistent decisions would never be a (formal) cause of concern to the WTO, a decision of which would never be affected by the developments within a PTA.⁷

The main problems with this approach are denying the party autonomy of WTO members, enabling the proliferation of substantially similar cases, and the incapacity to prevent or deal with conflicting decisions which would leave disputes unresolved. Imagine France taking a case to the WTO rather than to the European Court of Justice about a German ban on the importation of a certain product. Imagine a WTO panel ignoring the allegedly exclusive jurisdiction of the European

⁶ In practice, a decision by a PTA DSM might be used as a source of inspiration for a WTO panel. But any value accorded to the decision would be based on the persuasiveness of the subjacent reasoning at best, instead of the formal status of the decision.

⁷ Conversely, any attempt to coordinate between the WTO- and PTA proceedings would take place exclusively before PTAs.



Court and a previous decision under the same fact pattern negative to France, and then issuing a holding positive to France in contrast to a previous decision by the European Court. This result would be contrary to a widespread preference for order over randomness, to settlement over the extension of disputes, and to coherence and consistency over incoherence and inconsistency. And it would deny effect to France and Germany's commitment to deal with their trade grievances within the European Union.

2.2. *Second possibility: coordination*

The institutional alternative to alienation is coordination. In this scenario, WTO adjudicative bodies would recognize applicable principles and provisions in PTAs regulating access to dispute settlement,⁸ thus respecting the party autonomy of the members of the WTO and the PTA. For instance, a fork in the road clause in a PTA could preclude access to WTO dispute settlement after a similar case had been taken before a PTA DSM by the same complainant. Or an exclusive jurisdiction clause in a PTA could preclude access to WTO dispute settlement full stop between two countries. In either case, if the responding party at the WTO raised the issue as a preliminary objection, a WTO panel would then stop its examination of the case based on the legal impediment arising from the situation (or rule) in the PTA. In this examination, while this would not place a requirement on an WTO panel decision to coordinate, a potential holding within the PTA DSM that the WTO complainant was violating the PTA could help resolve potential doubts and should be accorded persuasive force by a WTO panel.

Granted, coordination will raise difficult practical questions and can only take place on a case by case basis. The WTO DSM should nevertheless face and address the issues as they arise, given the benefits of coordination over alienation. Coordination would make functional doz-

⁸ If there is no explicit regulation on choice of forum or multiplicative litigation, it is difficult to conceive of general principles of law applying as such to foster relevant coordination between PTA and WTO dispute settlement. While doctrines such as *res judicata*, *collateral estoppel* and the protection of *lis pendens* might apply to some extent, they require rather specific conditions, and in any event at least substantial of parties, issues and requests.

ens of choice of forum and procedure regulating-clauses carefully negotiated by numerous different subsets of the WTO membership. Coordination may help in taming multiplicative litigation across the WTO and PTAs – which would be worrisome, especially for developing and least developed countries with scarcer legal resources. Recognizing procedure regulating rules in PTAs may also help in alleviating the burden over the WTO DSM, which is under serious pressure given the amount of cases being processed presently. Coordination may contribute to avoiding conflicting decisions under PTAs and the WTO. Furthermore, coordination would lead to more conscientious choice of forum by WTO members and provide more legal certainty to their selection of a forum. This is particularly important as PTAs increasingly include WTO-plus and WTO-extra provisions which will necessarily be litigated at the PTA, and as disputes about those provisions may be entangled with issues under WTO law. Accordingly, the choice to use a PTA DSM should attract the legal consequences that the PTA establishes.

There may be a concern that recognizing WTO members' right to contract-out of the DSU might diminish the relevance of the WTO and its DSM. However, the WTO DSM's current comparative advantages have naturally made it a magnet forum. Members value the expertise and availability of the WTO secretariat, the multilateral surveillance process and the informal pressures for compliance, the legitimacy of decisions, the possibility of appeals and the credibility of the Appellate Body, the strong inclination to abide by legal text, the detailed case law and the legal certainty that this engenders. The spread of PTAs has not changed that: the WTO DSM has a solid tradition of deciding trade disputes with considerable effectiveness and efficiency and will likely remain the key forum adjudicating these cases in the foreseeable future. The fact that the WTO DSM will not adjudicate disputes referring to WTO-plus and WTO-extra commitments in PTAs is inherent to the political process at the WTO – and is not directly related to the strength or weakness of the WTO DSM.

There may be another concern that stronger WTO members 'force' weaker WTO members to forego the latter's DSU rights in PTAs in order to facilitate the perpetuation of WTO-inconsistent measures. But this paternalistic concern has not arisen thus far in relevant form in practice. By contrast, at least assuming the overall compatibility of PTAs with WTO rules, further and substantial trade liberalization



through PTAs would benefit the WTO member that eventually foregoes a limited set of DSU rights in exchange. It may also benefit other WTO members to the extent that there are commitments in PTAs which in practice apply on a MFN-basis and can be locked-in later at the WTO. The fact that given WTO-inconsistent measures might perpetuate, notwithstanding WTO and PTA commitments, and might be partially carved out of WTO dispute settlement concerning PTA members could be considered a small price to pay in exchange for bigger concessions. In addition, any WTO member that is not a PTA member could still challenge any allegedly WTO-inconsistent measure under the DSU, and the solution to this kind of dispute must be implemented on a MFN-basis by the PTA member in question. Hence, WTO members considering shielding WTO-inconsistent measures from WTO scrutiny in PTA clauses would still be subject to the WTO DSM.

3. *The law: collectivism or party autonomy*

Alongside the policy-dimension of the debate, twenty years of case law have not resolved all of the underlying questions about the status of non-WTO law within WTO dispute settlement. The effect of PTA clauses that aim to regulate choice of forum and multiplicative litigation involving the WTO in particular remains open to discussion. Certain scholars have argued that, from a WTO-perspective, dispute settlement clauses in PTAs can hardly be used to coordinate WTO- and PTA-dispute settlement. This view interprets Article 23(1) of the DSU as an absolute jurisdictional promise by WTO members,⁹ one effect of which is to prevent WTO members from relinquishing their right to resort to WTO dispute settlement under the DSU.¹⁰ This view may be said to

⁹ Art 23(1) of the DSU is drafted in the style of an exclusive jurisdiction clause: 'When Members seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding.'

¹⁰ See, for example, K Kwak, G Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in L Bartels, F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 465, 484; see also F Piérola, G Horlick, 'WTO Dispute Settlement and Dispute Settlement in the "North-South" Agreements of the Americas' 41 *J World Trade* (2007) 885, 893.



resonate with the broader position that WTO law would limit the application of international rules from outside the WTO by panels and the Appellate Body,¹¹ to the extent that the lack of WTO-recognition of any relinquishment of DSU rights is related to an alleged broader impermissibility of modifying WTO rights and obligations *inter partes*. The underlying premise of this view is that the WTO Treaty outlaws modifications of WTO-based rights and obligations by subsets of the membership among them. This view prioritises collectivism and an arguably *erga omnes partes* character of WTO obligations over and above conceiving WTO provisions as bundles of bilateral relationships¹² governed by the notion of party autonomy or ‘contractual freedom.’

The present author does not adhere to this view, which downplays the party autonomy of subsets of the WTO membership to derogate from most WTO provisions among themselves – provided that third-parties are not negatively affected and that the WTO Treaty does not prohibit the modification in question. In *Mexico – Taxes on Soft Drinks*, the Appellate Body recognized that a legal impediment could lead a WTO panel to decline from exercising validly established jurisdiction, but it left open what could constitute such a legal impediment.¹³ Accordingly, the remainder of this section will briefly present three potential legal avenues whereby dispute settlement clauses from PTAs could be invoked in raising an ‘impediment’ to the exercise of jurisdiction by WTO adjudicators over the merits of a WTO case. It is argued that by any of these three avenues it is theoretically possible for WTO panels to refrain from deciding cases, and therefore to implement coordination with PTAs in line with *Soft Drinks*.¹⁴ Yet, the scope for coordination under PTA rules can be widened or restrained depending on the path taken. While this author does not consider that the avenues are mutual-

¹¹ See, for example, J Trachtman, ‘Jurisdiction in WTO Dispute Settlement’ in R Yerxa, B Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005) 136.

¹² See also J Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ 14 *European J Int L* (2003) 907.

¹³ *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*, Report of the Appellate Body (24 March 2006) WT/DS/308/AB/R, paras 48–54.

¹⁴ For a more complete discussion, which refers to the WTO, PTAs and tribunals operating in other areas of international law, see LE Salles, *Forum Shopping in International Adjudication: The Role of Preliminary Objections* (CUP 2013).



ly exclusive and believes that they may apply together or independently, the recent Appellate Body decision in *Peru – Agricultural Products* arguably points respondents to the first avenue presented below in asking panels not to decide a WTO case based on a PTA rule.¹⁵

3.1. *First avenue: GATT Article XXIV, GATS Article V and the enabling clause*

A first, more conservative avenue to avoid the multiplication of disputes and conflicts of jurisdiction between WTO- and PTA-dispute settlement at the WTO is to use the WTO provisions explicitly authorizing the formation of PTAs, namely GATT Article XXIV, GATS Article V and the Enabling Clause as bridges to recognize procedure regulating rules negotiated in PTAs. This route avoids the broader questions of the interrelationship between WTO law and non-WTO law and focuses squarely on the (explicitly regulated) status of PTAs under WTO law.¹⁶ In *Peru – Agricultural Products*, the Appellate Body highlighted this more conservative and narrower path in discussing the *merits* of the case. The question at issue was whether Peru was permitted to maintain a WTO-inconsistent price range system in assessing certain tariffs – in the light of a PTA provision that allegedly authorized the price range system but that was not yet in force. It is equally possible, however, that WTO provisions permitting the formation of PTAs apply as the foundation of *procedural* objections to halt WTO adjudication. The question, then, would be whether WTO members may curb among themselves in a PTA their own ability to resort to WTO dispute settlement.

The Appellate Body reasoned that ‘the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules

¹⁵ *Peru – Additional Duty on Imports of Certain Agricultural Products (Peru – Agricultural Products)*, Report of the Appellate Body (31 August 2015) WT/DS/457/AB/R.

¹⁶ From the perspective of the Vienna Convention on the Law of Treaties (1969), PTAs are expressly permitted *inter se* modifications of the WTO Treaty between subsets of WTO Members under art 41(1)(a). Curiously, the Appellate Body held in *Peru – Agricultural Products* (n 15) that the WTO-specific provisions on amendments, waivers and exceptions for regional trade agreements ‘prevail over’ art 41 of the Vienna Convention (para 5.112). The Appellate Body thereby seems to assume a conflict between WTO-law provisions and the provisions on modifications to a treaty by certain parties only in the Vienna Convention.

is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements.¹⁷ From this perspective, respondents before the WTO can ask WTO panels to take into account and give due recognition to PTA procedure regulating clauses as a matter of both PTA- and WTO-law. For instance, NAFTA Article 2005(1) allows the complainant party to select either the WTO or the NAFTA in disputes regarding matters arising under both the NAFTA and the GATT. However, NAFTA Article 2005(6) states that the forum selected shall be used to the exclusion of the other after dispute settlement proceedings have been initiated. Hence, if a case brought by the United States against Mexico before the NAFTA leads to the initiation of dispute settlement proceedings, and if the U.S. later takes an identical or substantially similar case to the WTO, Mexico would be entitled to ask that the WTO panel refrained from deciding the case and the panel should do so – provided that the conditions for a PTA-based defence under WTO law were met.

If the Appellate Body's ruling in *Turkey – Textiles* on the conditions for a defence based on GATT Article XXIV were to be applied to the hypothetical at hand, Mexico would then be required to show (i) that the measure (in this case, the PTA provision foreclosing subsequent resort to WTO dispute settlement) was introduced upon the formation of a WTO-consistent PTA and (ii) that the absence of the measure would prevent the formation of the PTA.¹⁸ Importantly, if applied to their extreme, these are severely restrictive conditions on the odds of any request for coordination between PTA- and WTO-dispute settlement; especially the demonstration that the absence of the fork in the road clause would prevent the formation of a PTA. Therefore, while the provisions within the WTO Treaty permitting the formation of PTAs provide an avenue to avoid the multiplication of disputes and conflicts of jurisdiction between the WTO and PTAs consistently with recent Appellate Body case law, if the conditions spelled-out in *Turkey – Textiles* were to apply rigorously, this avenue will not be the fast lane one might expect.

¹⁷ *Peru – Agricultural Products* (n 15) para 5.113.

¹⁸ *Turkey – Restrictions on Imports of Textile and Clothing Product (Turkey – Textiles)*, Report of the Appellate Body (19 November 1999) WT/DS34/AB/R, paras 58–59.



3.2. *Second avenue: DSU Article 3(10) and the principle of good faith*

A second, intermediate avenue to avoid the multiplication of disputes and conflicts of jurisdiction between WTO- and PTA-dispute settlement at the WTO is for the respondent to rely on Article 3(10) as a transmission-belt of commitments under PTAs not to sue at the WTO. Such commitments may be found in PTA-procedure regulating rules such as fork in the road clauses, exclusive jurisdiction clauses or preferential jurisdiction clauses. This route also avoids the broader questions of the interrelationship between WTO-law and non-WTO law, this time to focus squarely on the procedural effect of choice of forum and preclusion clauses in PTAs on the assessment of good faith as a condition to a complainants' resorting to and being entitled to WTO dispute settlement. From this perspective, the PTA commitment becomes a factor in the analysis of whether the initiation of WTO procedures is estopped or could amount to an abuse of rights, as part of an assessment of the complainant's engagement in WTO procedures in good faith.

Article 3(10) of the DSU states that WTO members will engage in WTO procedures in good faith, an obligation that covers the entire spectrum of WTO dispute settlement.¹⁹ Accordingly, to the extent that a respondent can show that a complainant's resorting to WTO dispute settlement is contrary to the latter's good faith obligation (for instance, contrary to a PTA commitment), the former may succeed in having a WTO panel refrain from deciding a case on its merits based on Article 3(10) of the DSU.

In *Peru – Agricultural Products*, Peru argued that Guatemala had relinquished its right to have recourse to WTO dispute settlement in an FTA that had been signed, but that Peru had not ratified. In Peru's view, Guatemala's FTA commitment that Peru 'may maintain' a certain price range system followed by Guatemala's resorting to WTO dispute settlement was contrary to Guatemala's obligation of good faith under the DSU. The fact that the FTA between Guatemala and Peru was not

¹⁹ See *European Communities – Export Subsidies on Sugar (EC – Sugar)*, Reports of the Appellate Body (28 April 2005) WT/DS/265/AB/R, WT/DS/266/AB/R and WT/DS/283/AB/R, para 312.



in force,²⁰ the fact that Peru conceded that there was no procedural bar for Guatemala's WTO action, and the fact that the provision in the FTA relied upon by Peru potentially affected the merits of the case (instead of the ability of Guatemala to resort to WTO dispute settlement) gave sufficient grounds for the Appellate Body to rule out Peru's argument without further notice. Yet, the Appellate Body interestingly went on to leave open a door to WTO members' 'clearly' agreeing not to use WTO dispute settlement. The Appellate Body stated that 'while we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution ... , any such relinquishment must be made clearly.'²¹ The requirement that the relinquishment of DSU rights is 'clear' does raise the bar for respondents' objecting to a case being decided at the WTO. But the Appellate Body's recognition that such a relinquishment is possible leaves another avenue open for indirectly enforcing, at the WTO, PTA clauses regulating choice of forum and the multiplication of litigation.²²

3.3. *Third avenue: modifications of Article 23(1) of the DSU through PTA provisions*

A third avenue for WTO dispute settlement's recognizing PTA rules on choice of forum or that restrict multiplicative litigation depends on the possibility that subsets of WTO members are entitled to contract out of Article 23(1) of the DSU between or among themselves in PTAs, and that WTO panels may apply PTA provisions as procedural defences. This is potentially the widest avenue of the three outlined here, as it might allow unilateral acts and agreements other than exclusively WTO-consistent PTAs to curb access to WTO adjudication. The

²⁰ See, for a similar fact pattern in this regard and a rejection of an argument of estoppel, *Argentina – Poultry Anti-Dumping Duties (Argentina – Poultry)*, Report of the Panel (22 April 2003) WT/DS/241/R.

²¹ *Peru – Agricultural Products* (n 15) para 5.25.

²² The Appellate Body's reasoning is not entirely clear and difficult to pin down. There is an allusion in a footnote to the fact that members may not relinquish their rights and obligations under the DSU beyond the settlement of specific disputes. This allusion, nevertheless, seems to be restricted to a discussion of whether the contested measure by Peru had been the object of a solution mutually agreed by the parties. See *ibid* para 5.26 and fn 106.



two other avenues presented above to coordinate PTA and WTO dispute settlement refer directly to WTO provisions (for instance, GATT Article XXIV or DSU Article 3(10) as the anchor of coordination. On the other hand, if the ability of subsets of WTO members to derogate from Article 23(1) of the DSU is recognized, then WTO adjudicative bodies should take into account derogations to Article 23(1) to the extent that the respondent raises an objection to the admissibility of the WTO-based claims in the light of a commitment elsewhere by the WTO complainant.

The Appellate Body has until recently avoided taking a clear stance on the possibility of modifications to WTO provisions *inter partes*, and the occasion had never presented itself for an explicit holding about this regarding Article 23(1) of the DSU.²³ Apart from *Peru – Agricultural Products, US – Continued Suspension* perhaps offers the most interesting illustration in the DSU context to date. In that case, the disputing parties had jointly asked the Appellate Body to make public its substantive hearing, in stark contrast to Article 17(10) of the DSU that establishes the confidentiality of appellate proceedings. Notably, the Appellate Body acceded to the request notwithstanding Article 17(10). The Appellate Body reasoned that the provision at stake was ‘more properly understood as operating in a relational manner’²⁴ and that the confidentiality requirement was not ‘absolute.’²⁵ In short, the Appellate Body conceded that a DSU provision could be derogated from, even if third parties held different views. Likewise, in the hypothesis under consideration here, DSU Article 23(1) could be said to operate in a relational manner, as a promise of each WTO member to each other WTO member, and it could be said to implicate a less than absolute commitment that is subject to derogation by two disputing parties jointly.

However, as described above, in *Peru – Agricultural Products* the Appellate Body directed WTO respondents mounting defences based on PTA provisions to channel their case through the WTO provisions explicitly authorizing a departure from WTO rules in PTAs: GATT Article XXIV, GATS Article V, and the Enabling Clause, which, accord-

²³ But see (n 22) above.

²⁴ *United States – Continued Suspension of Obligations in the EC – Hormones Dispute (US – Continued Suspension)*, Report of the Appellate Body (16 October 2008) WT/DS/320/AB/R, Annex VI, para 6.

²⁵ *ibid* Annex VI, para 4.



ing to the Appellate Body, would 'prevail over' the general provisions on treaty modifications by certain parties under the Vienna Convention on the Law of Treaties (Article 41). In this sense, the Appellate Body in *Peru – Agricultural Products* seems to have clogged up the avenue under discussion here.

On the other hand, if this reading is correct, under the line of reasoning of the Appellate Body, parties to PTAs could still modify Article 23(1) and regulate their entitlements to resort to DSU proceedings between or among themselves as in the first avenue described here. Consequently, choice of forum provisions and provisions curbing multiplicative litigation in PTAs would still be applicable in WTO dispute settlement. One might conclude that, for the purposes of the present discussion (which refers specifically to PTAs), there is no major difference in finding a legal hook for coordination based on a residual ability to modify Article 23(1) (third avenue outlined here) or in an ability to modify Article 23(1) by reason of the formation of a PTA (first avenue outlined here). Yet, if the success of an objection to the admissibility of a WTO case based on a PTA provision depended upon a respondent strictly meeting the test for a PTA-based defence established in *Turkey – Textiles*, the practicality of coordinating proceedings under the DSU and under PTAs would be significantly affected.

4. *Conclusion*

The spread of PTAs next to the WTO raises the question of how a division of labour between PTA's DSMs and WTO DSM might be implemented under the current institutional set-up. Coordination would be a welcome development, and may take place if the party autonomy of WTO members to negotiate other dispute settlement options between themselves is duly recognized. This recognition can take place especially (i) under WTO provisions concerning the formation of PTAs and explicitly authorizing departure from WTO rules (which would consequently authorize PTA procedure regulating rules); (ii) under the requirement that WTO members engage in dispute settlement proceedings in good faith (which would consequently permit giving effect to commitments not to resort to WTO dispute settlement); (iii) or by approaching Article 23(1) as a bilateral promise of each WTO member to



another which is subject to modification *inter partes* under the conditions provided for in general international law, and by identifying the incidental jurisdiction of WTO adjudicative bodies to recognize such modification. In *Peru – Agricultural Products*, while apparently stating that it could uphold a clear relinquishment of DSU rights in the context of a good faith-assessment, the Appellate Body seemed to route respondents through the first option above in raising a procedural bar to WTO dispute settlement based on PTA provisions. As a result, the conditions for a PTA-based defence under GATT Article XXIV, GATS Article V or the Enabling Clause may become an important element in the WTO DSM's overall ability and promptness to coordinate with PTA DSMs.

