



VOLUME 5 / ISSUE 1 / 2017



Migration and International Law



PRESIDENT'S NOTE

Dear reader,

It is a privilege to properly introduce Volume 5, Issue I of the *Groningen Journal of International Law*. This issue marks the Journal's five-year anniversary and warrants some slightly self-celebratory remarks. During these first five years the students at the helm of this Journal have continuously strived to establish the Journal as a known entity in international legal academia. Therefore, I would like to express my thanks to all the authors for their contributions and all students at the University of Groningen and everyone else who has been involved with the Journal in some capacity for their efforts and continued support. Furthermore, it is only appropriate to congratulate all previous and current members of GroJIL and my predecessors Philip Reppen, Lottie Lane, and Júlia Ortí Costa in particular. We made it!

Over the last year we have made efforts to streamline internal processes, intensify our article soliciting processes, expand our online audience, and reaffirm our cooperation with the GroJIL Advisory Board and the International Law Department at the University of Groningen. Nonetheless, as we started to look to the future this year has also become one of many firsts. One of the more publicly visible examples is our recently established blog 'International Law Under Construction', which can be found at grojil.org/blog (and where you may well be currently reading this editorial). Another example is the introduction of rolling submissions to the Journal, starting with this issue. Finally, the Editorial Board has set some other exciting projects into motion that we will soon be able to share. Keep an eye on our website for future announcements in that respect.

Regarding Part I of the current issue on Migration and International Law, the Journal aimed to highlight scholarship on a broader spectrum of international migration law rather than to merely focus on the global refugee crisis of recent years. The first article sees Nafees Ahmad extensively examine the development of the right to nationality and statelessness under the international migration law framework. Šárka Dušková demonstrates in the second article that the ever-increasing reliance of European Union member states on detention of migrants and asylum seekers finds more basis in political and symbolic rationales rather than practical motives, which would have steered member states to pursue more pragmatic alternatives to detention. In the next article, Liliana Lyra Jubilit and Rachel de Oliveira Lopes propose four strategies to enhance the protection of migrants through international law by shifting the discussion from regulation of migration to protection of migrants using human rights, soft law and regional approaches. In the fourth article, Antoine Pécoud examines two contrasting interpretations for the low ratification rate of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families while advancing a more exhaustive third interpretation to identify possible approaches to the highly political, and non-legal, nature of policies on the rights of migrant workers. Part I closes with an article from Beatriz Eugenia Sánchez and René Urueña who tackle the omission of development-induced displacement in Colombian internal displacement policies and look at factors beyond the internal armed conflict at the root of Colombia's record number of internally displaced persons.

Part II of this issue introduces the Journal's first rolling submissions. Shams Al Din Al Hajjaji focuses on fishery cases in the first article while arguing that countries that have adopted criminal liability for environmental damage should adopt civil liability instead in order to conform to the International Tribunal for the Law of the Seas and to increase the legal certainty of national

judgments in case they are subjected to re-examination by the Tribunal. In the second article, Brenda K. Kombo attempts to close the “remedy gap” for victims of the Haitian cholera epidemic stemming from the immunity of the United Nations in suits by reflecting on the limits and potential of diplomatic protection.

The issue concludes in Part III with the winning submission from this year’s GroJIL Student Writing Competition, Medes Malaihollo. This article examines a local government rule in force since 1975 in Yogyakarta that prohibits non-native Indonesian citizens from owning or purchasing land in light of the International Convention on the Elimination of All Forms of Racial Discrimination.

In closing, I would like to thank my fellow members of the Editorial Board for their efforts in the realisation of this issue and further development of the Journal. Final thanks go out to the Managing Editor and everyone on the Editing Committee for helping our Publishing Director turn this milestone issue into one of our most ambitious outings yet. Overall, this has been quite a productive and fulfilling time for the GroJIL and I am confident in saying that the Journal is eager to continue this trend for the foreseeable future.

Happy reading!



Ferdinand Quist
President and Editor-in-chief
Groningen Journal of International Law

Groningen Journal of International Law

Crafting Horizons

ABOUT

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

MISSION

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

PUBLISHING PROFILE

The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact [groningenjil@gmail.com](mailto: groningenjil@gmail.com).

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Groningen Journal of International Law

Migration and International Law

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The Right to Nationality and the Reduction of Statelessness – The Responses of the International Migration Law Framework

Nafees Ahmad*

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Abstract

Statelessness is the absence of the right to have a legal connection between nationality and state. The state of nationality is an identity to enjoy a 'right to have rights'. Statelessness disrupts the enjoyment of all the rights which are generally perceived or purported to have been granted for all including *inter alia* the right to work, the right to vote, the right to health, the right to welfare benefits or welfare and a child's right to education. Statelessness precludes people from relocating and proliferates their chances of arbitrary arrest, confinement or detention with no adequate answers. Succinctly averring, statelessness demotes and generates a state of irrelevance among the people with no hope of their condition ever improving, no possibility for a better future for themselves or their posterity. The state of statelessness dismantles the idea of cohesive human existence in a civilized world. Therefore, statelessness is a deprivation of a range of rights and benefits that bestow upon individuals constitutional identity, national security and state protection popularly known as nationality or citizenship. Statelessness may be imputed to a catena of causes *inter-alia* administrative practices, conflict of laws, discrimination, denationalization, matrimonial litigation, non-registration of births, persecution, renunciation, transfer of territories, re-demarcation of new boundaries, state succession, terrorism, climate change and forced displacement and migration. But its magnitude and scale still remains to be mapped because the problem of statelessness is a new predicament for international law and its offshoots. It has emerged as an ordeal for the international community that has to attend to the plight of 10 million stateless persons worldwide. Thus, it is abundantly clear that the United Nations High Commissioner for Refugees' (UNHCR) mandate is well founded in light of the sheer amount of stateless persons. Furthermore, there are also at least 1.5 million stateless refugees and around 3.5 million stateless refugees from Palestinian origin whose problems have posed challenges to the international law framework. In this paper, an attempt has been made to decipher the miasma of statelessness while locating the right to nationality of stateless persons. Suggestions are made with respect to how to end and ensure the reduction of statelessness under the architecture of international law within

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and beyond the pragmatism of international relations, diplomatic narratives and orientations engrossed in Occidentalism and orientalism.

I. Introduction

While statelessness has long been recognised as an important problem in international law, the desire of states to exercise control over stateless persons in their jurisdictions has prevented effective action. The 1954 Convention Relating to the Status of Stateless Persons has attracted only 86 signatories, and a mere 61 states have ratified the United Nations Convention on the Reduction of Statelessness of 1961. The indifference of national governments and the inaction of the international community have affected a large number of persons who are particularly vulnerable to oppression because they lack the protection afforded by rights of citizenship. The stateless are ‘denied the vehicle for access to fundamental rights, access to protection and access to expression as person(s) under the law.’¹ However, the entire gamut of statelessness has to be addressed within the framework of International Law. The problem of statelessness has posed new challenges to the international community that is mired in a responsibility shifting game. Presently, there are 10 million stateless persons worldwide who are under the UNHCR’s protection mandate. In addition, there are also around 3.5 million Palestinian stateless persons in need of international protection.² The real number of stateless persons, however, is probably drastically greater due to data gaps. Therefore, the collection of proper data on statelessness would definitely pave the way to pro-actively bring the problem to its logical conclusion.

Nowhere is the problem of statelessness more acute than in South and South East Asia. Sri Lankan repatriates in India, Burmese refugees in Cambodia, and many ethnic Chinese in all parts of South East Asia are currently stateless and, thus, especially vulnerable to the same types of human rights abuses as those suffered by Chakmas and Hajongs of Arunachal Pradesh.³ The United Nations High Commission for Refugees has been actively involved since 1991 in addressing refugee-related problems in the states of the former Soviet Union. Already, the scores of people are on the move,⁴ either displaced by conflicts or returning to their places of origin. The new states lack the resources and the institutional capacity both to absorb flows of peoples and to deal effectively with the problems associated with population movements.

Over 200 different ethnic groups lived for centuries within the cultural mosaic of the Russian Empire. The Social Federal system that emerged from the Bolshevik⁵ revolution was based on a hierarchy of different ethnic groups. Artificial borders were drawn to divide national groups,⁶ decreasing the likelihood of threats to the central government in Moscow. Stalin’s policies of relocation and colonization still have

¹ As of 1 September 2016, 89 States were party to the 1954 Convention on Statelessness and as of May 2016, 69 States have become the parties to 1961 UN Convention on Reduction of Statelessness, *See*; Batchelor, CA, “Stateless Persons: Some Gaps in International Protection” 7(2) *International Journal of Refugee Law* (1995) 232, 235.

² Van Waas, L, De Chickera, A and Albarazi, Z, *The World’s Stateless: A New Report on Why Size does and doesn’t Matter* (Institute of Statelessness and Inclusion 2014).

³ Limpert, NA, “*People Without a Country*” Seminar 463, March 1998, (Yale University, New Haven, USA).

⁴ *Ibid.*

⁵ The October Revolution of 1917 that established the ideology of Marxism in Russia and new government decreed the abolition of private land ownership and set up a dictatorship of the Proletariat. In 1923, the Union of Soviet Socialist Republics came into being.

⁶ Qualls, KD, “The Russian Revolutions: The Impact and Limitations of Western Influence” Dickinson College Faculty Publications Paper 8 (2003).

repercussions today. Balts, Poles, Chechens, Germans, Kalmyles and the Crimean Tatars,⁷ to name a few, were among those forcibly relocated in Central Asia and Siberia. At the same time, Stalin and subsequent Soviet leaders encouraged large numbers of Russians to settle in non-Russian republics of the former USSR.⁸ These population movements had the effect of diluting the ethnic homogeneity⁹ of each republic and reducing the titular nationality and other non-Russian minorities to lesser status.

II. International Law on Statelessness: Historical Development

The state is not a private club, which can induct or expel members arbitrarily. Rather, the development of customary international law has placed certain limitations upon states as regards the conferment of citizenship. The 1930 Hague Convention was one of the first documents to recognise those limitations. Article I of the Convention states:

It is for each state to determine under its own law who are its nationals. This law shall be recognised by other states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.¹⁰

Therefore, decisions regarding the acquisition or loss of nationality will be recognised only insofar as they are consistent with contemporary legal norms. Currently, these norms are expressed in the 1954 U.N. Convention Relating to the Status of Stateless Persons (entered into force 1960) and the 1961 U.N. Convention on the Reduction of Statelessness (entered into force 1975). Prior to the 1954 Convention statelessness was viewed merely as an indication of one's status as a refugee. The mandate of the 1946 Intergovernmental Committee on Refugees did not mention statelessness at all and, thus, the committee regarded *de jure* and *de facto* stateless merely as one of the criteria of eligibility to determine the refugee status in conjunction with others,¹¹ e.g. flight into one's home state as a result of racial, political or religious persecution.

As the definition of refugee status was being continually narrowed during the 1940s, many stateless persons could no longer receive the protection afforded by the League of Nations High Commission for Refugees, (LNHCR), the Inter-governmental Commission for Refugees, or the International Refugee Organisation.¹² This led the Commission on Human Rights to request that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality',¹³ as regards their legal and social protection and their documentation in the countries of reception.

⁷ Kotkin, S, "1991 and the Russian Revolution: Sources, Conceptual Categories, Analytical Frameworks" 70(2) *The Journal of Modern History* (1998) 384.

⁸ Georgy Malenkov, Nikita Khrushchev, Leonid Brezhnev, Yuri Andropov, and Konstantin Chernenko encouraged the mainland Russians to move and settle in non-Russian settlements in the USSR.

⁹ Iogna-Prat, M, "Nationality & Statelessness Issues in the Newly Independent States" in Gowlland-Debbas, V, ed, *The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff, The Hague, 1996), 25-31.

¹⁰ League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 1930, 179 TS 89.

¹¹ Intergovernmental Committee on Refugees, Statelessness and Some of its Causes: An Outline, (Intergovernmental Committee on Refugees, London, 1946), 2.

¹² Batchelor, *supra* nt 1, 240.

¹³ UN Economic and Social Council, Report of the Commission on Human Rights, 17 December 1947 (2nd Session) E/600.

Seven years were to pass, however, before the U.N. was to take action upon this recommendation. During the consideration of the 1951 Convention Relating to the Status of Refugees, the problem of statelessness was put aside for lack of time.¹⁴ In view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to first address the problem of refugees, whether stateless or not, and to leave to later stages of its deliberations the problems of stateless persons who are not refugees.¹⁵

This is a recurring theme central to the development of statelessness rights in international law. Moreover, the stateless persons have been neglected because their grievances, anxieties and concerns have been viewed as sequel to greater problems. These issues require a diversified mechanism of investigation and redress based on pragmatism.

The 1954 Convention Relating to the Status of Stateless Persons was an early attempt to deal with the problem of statelessness in its own right. The Convention requires states to grant stateless persons many of the same rights accorded to citizens under national law. It also protects stateless persons from expulsions in all but exceptional circumstances. However, through an apparent oversight,¹⁶ no provision was made for a supervisory body similar to the U.N. High Commission for Refugees. Additionally, the definition of a stateless person is provided under 1954 convention as '[a] person who is not considered as a national by any state under the operation of its law.'¹⁷ The aforesaid definition is couched in general terms and excludes large numbers of persons who have no *effective* nationality. For example, among the massive numbers of *boat people*¹⁸ from Vietnam were ethnic Chinese who had never set foot in either Mainland China (PRC) or Taiwan (ROC). The People's Republic does not recognize them at all, and the ROC grants them merely 'over-seas nationality.' Those granted overseas nationality have no necessary right of entry or residence in Taiwan. Thus, while these ethnic Chinese are technically considered nationals under Taiwanese law, they receive none of the benefits of citizenship and are effectively stateless. Nonetheless, they are not considered stateless persons under the 1954 Convention.¹⁹

The 1961 Convention on the Reduction of Statelessness defines stateless persons in the same manner as the 1954 Convention. Additionally, unlike the 1951 Convention relating to the Status of Refugees, this convention was not promulgated for the purpose of providing assistance to a specific group of people. The authors of the Convention tended to view their work as little more than codifying existing practice regarding the recognition of nationality judgements. Further, a proposal to create an independent tribunal for stateless persons to press nationality claims was quickly squashed.²⁰

A document drafted under such conditions was not likely to greatly improve the condition of stateless persons, nor has it. However, Article 11 of the convention did provide for a relief agency to deal with the problems of the stateless. The UNHCR was charged with the responsibilities of Article 11 and, thus, the problem of statelessness was again connected to, and to some degree overshadowed by, the concerns of refugees. For

¹⁴ Limpert, *supra* nt 3.

¹⁵ UN Economic and Social Council, *Report of the Ad hoc Committee on Statelessness and Related Problems*, 26 January 1950, (1st Session) E/AC.32/SR.3.

¹⁶ Batchelor, *supra* nt 1, 246.

¹⁷ Article 1, UN *Convention Relating to the Status of Stateless Persons (1954)* 360 UNTS 117.

¹⁸ Pugh, M, "Drowning not Waving: Boat People and Humanitarianism at Sea" 17(1) *Journal of Refugee Studies* (2004) 50.

¹⁹ Batchelor, *supra* nt 1, 233.

²⁰ Batchelor, *supra* nt 1, 252.

nearly 30 years following the 1961 convention, the problem of statelessness was given little attention by the international community.

The right of all persons to a nationality²¹ was reiterated in the International Convention on Civil and Political Rights²² and the Convention on the Rights of the Child,²³ but again, no specific²⁴ measures or procedures were mandated. Although the provisions of the 1985 Declaration on the Human Rights of Individuals who are not nationals of the country in which they live applied to stateless persons and established the fundamental rights of aliens, the declaration was addressed to aliens more generally (especially guest workers) and does not elaborate upon or even mention the fundamental right to a nationality established by Article 15 of the Universal Declaration of Human Rights.²⁵ Thus, the right to have a nationality was created and designed basically to eliminate the menace of statelessness.

The issue of citizenship has received greater attention recently in response to the nationality legislation of the newly created states of Central Asia and the former Yugoslavia. In response to the growing numbers of stateless persons, the Executive Committee of the High Commissioner's programme has recommended that UNHCR strengthen its efforts in this domain. Efforts include promoting accession to the Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons, training for UNHCR staff and government officials, and a systematic gathering of information on the dimension of the problem and to keep the Executive Committee informed of these activities.²⁶ Further, the Executive Committee has adopted the Conclusion on the Prevention of and Reduction of Statelessness and the Protection of Stateless Persons, which reiterate the need for the UNHCR to more actively promote the welfare of stateless persons.²⁷

The United Nations former High Commissioner for Refugees has also noted that the UNHCR has a 'special responsibility' for stateless persons and that her office has been designed as an intermediary between states and stateless persons under the 1961 convention. Most recently, UNHCR has been requested by its executive committee to place the matter of stateless on its agenda. We will explore promotional and preventive activities to which UNHCR can contribute in collaboration with concerned states. There is an obvious link between the loss or denial of national protection and the loss or denial of nationality. On the plane of rights, the prevention and reduction of statelessness is an important aspect of securing minority rights.²⁸

²¹ Article 15, Universal Declaration of Human Rights, December 10, 1948, See also, Griffin, WL, "The Right to a Single Nationality" 40 Temple Law Quarterly (1966) 58.

²² Article 24, International Covenant on Civil and Political Rights (ICCPR), 1966, 999 UNTS 171.

²³ Van Bueren, G, *The International Law on the Rights of the Child* (Kluwer Law International 1998), 366; See Veerman, PE, *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff Publishers 1992), 171.

²⁴ *Ibid.*

²⁵ Limpert, *supra* note 3, 42-43.

²⁶ UNHCR, *Report of the 45th Session of the Executive Committee of the High Commissioner's Programme*, 7 October 1994, A/AC.96/839, para 19.

²⁷ UNHCR, *Conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 6 October 2006, (56th Session) 106 (LVII).

²⁸ Ogata, S, UNHCR, Statement to the 51st Session of Commission for Human Rights, 1995.

III. Nationality and Statelessness: Problems and Prospects

The classical view is that, in principle, questions of nationality fall within the domestic jurisdiction of each state. According to Brownlie,²⁹ the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty. According to State practice analysed by Brownlie, there is a general presumption that persons attached to a territory will *ipso facto* lose their former nationality and acquire the nationality of the new State. Nationality would change when sovereignty changed hands. Attachment generally means substantial connection with the territory concerned by citizenship, residence or family relations to a qualified person. The link of the people with the territory is said to be in accord with human and political reality.³⁰

Other scholars do not share this view. O'Connell³¹ argues that, undesirable as it may be for any person to become stateless as a result of a change of sovereignty, it cannot be asserted with any measure of confidence that international law, at least in its present stage of development, imposes any duty on the successor State to grant its nationality. Weis³² holds the view that there is no rule of international law under which the nationals of the predecessor State shall acquire the nationality of the successor State. There is only a presumption in international law that the acquiring State would, through municipal law, confer its nationality on the former nationals of the predecessor state.

Looking from a different angle, Chan³³ considers that, upon a change of sovereignty, all persons who have a genuine and effective link with the new State will automatically acquire the nationality of the new State. It is within the competence of each State to determine what constitutes a genuine and effective link in the granting of its nationality, subject to the presumption of avoidance of statelessness and the duty not to apply any law on a discriminatory basis, which would be in contradiction with Article 15(2) of the Universal Declaration of Human Rights. It is also a settled rule of customary international law that residents of the transferred territory who have a nationality other than that of the predecessor State are not affected by the change of sovereignty.

Municipal law determines the rules of nationality. However, due to the absence of uniformity and coherence in State laws pertaining to the institution of nationality various inconsistencies and difficulties arise. This has resulted in considerable problems and issues of statelessness, double nationality and conflicting citizenship laws. In recent years a new trend can be observed with respect to migration. At the end of the twentieth century individuals are now regarded as subjects of international law. Consequently, national boundaries are losing their meaning and human mobility is being propelled by a human rights agenda. The root of the refugee problem for one can be linked to various human rights issues. However, the majesty and supremacy of democratic and republican vision, values, and principles such as the rule of law, equality, liberty, free speech, universal fraternity, gender justice, peace and harmony must be upheld as the benchmarks³⁴ of human civility beyond the rubrics of power politics. Therefore, any circumvention and transgression of these core values by the governmental instrumentalities and state machinery is tantamount to creating human rights problems and statelessness challenges.

²⁹ Brownlie, I, *Principles of Public International Law* (4th ed, Oxford University Press, 1990).

³⁰ Iogna-Prat, *supra* nt 9, 28.

³¹ O'Connell, DP, *State Succession in Municipal and International Law* (2nd ed, Cambridge University Press, 1967).

³² Weis, P, *Nationality and Statelessness in International Law* (2nd rev ed, Sijthoff and Noordhoff, 1979).

³³ Chan, JM, "The Right to a Nationality as a Human Right" 12 (1) *Human Rights Law Journal (HRLJ)* (1991) 3.

³⁴ Achiron, M, *Nationality and Statelessness: A Handbook for Parliamentarians* (UNHCR Press 2005).

At the Hague Conference of 1930 an endeavour was made to end the conflicts arising out of divergent State laws in respect of nationality. This resulted in the Convention on Certain Questions Relating to the Conflict of Nationality Laws being adopted. In the Convention an attempt was made to resolve the problems relating to nationality and statelessness. A subsequent agreement addressing these issues has been the Convention of the Nationality of Married Women, which was adopted in 1957.³⁵

It is now axiomatic that State laws mostly determine nationality. Nationality is the principle link between an individual and International law.³⁶ Therefore, it shows the importance of nationality at the pedestal of international law. Under international law, nationality has often been used as a justification for the intervention of a government to protect another State.³⁷ It may, however, be noted that international law does not create a correlative right in favour of the individuals. It creates rights only in favour of the states whose nationals they are.³⁸

In the *Panevezys Saldutiskis* case the Permanent Court of International Justice held

in taking up the case of one of its nationals, by restoring to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the persons of its nationals, respect for the rules of international law: The right is necessarily limited to intervention on behalf of its own nationals because, in the absence of special agreement, it is the bond of nationality between the state and individual which alone confers upon the state the right of diplomatic protection, and it is a part of the function of diplomatic protection that the right to take up a claim and ensures respect for the rules of International law must be envisaged.³⁹

The great jurist of international stature J.G. Starke also underlined the international importance of nationality in the following observations:⁴⁰

- (I) The protection of rights of diplomatic agents is the consequence of nationality.
- (II) If a State does not prevent offences of its nationals or allows them to commit such harmful acts as might affect other states, then that state shall be responsible for the acts committed by such a person.
- (III) Ordinarily, states do not refuse to take the persons of their nationality. By nationality we mean loyalty towards particular state.
- (IV) Nationality may also mean that the national of a State may be compelled to do military service for the state.
- (V) Yet another effect of nationality is that the state can refuse to extract its own nationals.
- (VI) According to the practice of a large number of states during war, enemy character is determined on the basis of nationality.

³⁵ Kapoor, SK, *International Law*, (11th ed, Central Law Agency, 1996), 290-291.

³⁶ Jennings, R and Watts, A, *Oppenheim's International Law*, (9th ed. Vol. I, Oxford University Press, 1992) 857.

³⁷ Ralston, J and Permanent Court of International Justice, *The Law and Procedure of International Tribunals: Being a Résumé of the Views of Arbitrators upon Questions Arising Under the Law of Nations and of the Procedure and Practice of International Courts*, (Stanford University Press, 1926), 137-160.

³⁸ Kapoor, *supra* nt 35.

³⁹ PCIJ, *Panevezys-Saldutiskis Railway* (Preliminary objections), PCIJ Series E, No. 15. 91-97.

⁴⁰ Starke, JG, *Introduction to International Law*, (10th ed. Butterworths, Singapore, 1989), 342-343.

(VII) States frequently exercise jurisdiction over criminal and other matters over the persons of their nationality.

In a catena of cases it has been found by the PCIJ that States may take out of national jurisdiction to international jurisdiction for rapid and pragmatic resolution.⁴¹

A. Open Questions in the Context of International Law

There are various questions agitating the minds of the community of States requiring reflection and contemplation. These questions have been identified and put into two questions in the context of public international law in the following words:

The first area of issues centres on international law aspects of matters of nationality.⁴² In international law, is there a recognised right to a nationality? If the answer is positive, which state has an obligation to grant nationality? How is the genuine link⁴³ between the state and the individual established by the nationality laws? What are the contemporary functions⁴⁴ of the law of nationality? What is the content of the right to nationality as a human right? Are there common international standards⁴⁵ in regard to the elimination/reduction/prevention⁴⁶ of the statelessness? How are such efforts to eliminate/reduce/prevent statelessness compatible with the concept of national sovereignty?

The second area of issues is related to the nationality qualification⁴⁷ under public international law in the wake of disintegration⁴⁸ of the various nations – states that create the adverse consequences⁴⁹ for the smooth resolution of nationality matters. The disintegration of various nations and States raise some questions concerning its qualification under public international law. These questions have been raised by the disintegration of countries such as the Soviet Union, Yugoslavia, and Czechoslovakia. Apart from statelessness by disintegration, statelessness is also caused by internal civil strife, insurgency within the country, and armed conflict and rebellion. This is also known as internal displacement.

In recent years a new class of people is emerging and attracting the attention of the refugee workers. These people are also known as internally displaced persons (IDPs). Their displacements are being caused by the environmental imbalances due to rapid and

⁴¹ PCIJ, *Tunis Morocco Nationality Decrees* (Advisory Opinion), PCIJ Series B No. 4; PCIJ, *German Settlers in Poland* (Germany v Poland), PCIJ Series A No.7, 16; PCIJ, *German Interests in Upper Silesia* (Germany v Poland), PCIJ Series A No.6, 14, para 16 and PCIJ, *Treatment of Polish Nationals in Danzig Territory* (Advisory Opinion), PCIJ Series A/B 44, para 121.

⁴² Hailbronner, K, *Nationality in Public International Law and European Law*, at <http://eudocitizenship.eu/docs/chapter1_Hailbronner.pdf> accessed on 29 August 2017.

⁴³ Jennings, R and Watts, A, *supra* nt 36.

⁴⁴ Sloane, RD, “Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality” 50(1) *Harvard International Law Journal* (2009) 1.

⁴⁵ *Ibid.*

⁴⁶ Howard, MM, “Variation in Dual Citizenship Policies in the Countries of the EU” 39(3) *International Migration Review* (2005) 697.

⁴⁷ Bauböck, R, et al (eds.), *EU Project: The Acquisition of Nationality in EU Member States: Rules, Practices and Quantitative Developments* (NATAC), (Institute for European Integration Research Austrian Academy of Sciences 2006).

⁴⁸ Rotberg, RI (ed.), *State Failure and State Weakness in a Time of Terror* (World Peace Foundation 2003), See also Rotberg, RI, “The New Nature of Nation-State Failure” 25 *Washington Quarterly* (2002), 85–96; Rotberg, RI, “Failed States in a World of Terror” 81 *Foreign Affairs* (2002) 127.

⁴⁹ Handelman, D, “Contradictions between Citizenship and Nationality: Their Consequences for Ethnicity and Inequality in Israel” 7(3) *International Journal of Politics, Culture and Society* (1994) 441.

reckless industrialisation, disregard of eco-systems, depletion of the ozone layer, greenhouses effects, gaseous emissions, construction of gigantic thermal power projects, sporadic conflagration in the jungles of southeast Asian nations including recent fire in the Canadian jungles, and building of big dams. These actions of humanity initiated in the name of development have resulted in the creation of a new class of people known as 'environmental refugees'. This type of refugee does not find any protection whatsoever in the existing definition of the word refugee as enshrined in Article 1 of the 1951 Convention Relating to the Status of Refugees.

The exclusion of a growing type of refugee is highly problematic and requires that the definition of a refugee be re-visited in light of these developments. Moreover, this situation requires humanitarian solutions in consonance with the parameters set by the umbrella of human rights norms and standards. It is, thus, essential that the definition of refugee be reformulated and re-defined accordingly.

B. Nationality and Statelessness: Definition and Meaning

An individual's nationality forms a continuing status and not a physical fact, which occurs at a particular moment. Nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of an individual's nationality is membership in an independent political community. This legal relationship involves rights and corresponding duties upon both, the citizens and the State.⁵⁰ Nationality may be defined as the bond, which unites a person with a given State. This constitutes his membership in the particular State, which gives him a claim to the protection of that State and which subjects him to the obligations created by the laws of that State.⁵¹ Nationality is a legal bond having as its basis a social fact of attachment, a psychological and sentimental connection to one's homeland together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom citizenship is conferred either directly by the law or as a result of an act of the authorities is in fact more closely connected with the population of the State conferring nationality than with that of any other State.⁵² In *United States of America V. Wong Kum Ark*⁵³ Justice Gray propounded that the State may determine what type or class of people shall be entitled to citizenship. A State cannot claim that the rules relating to the acquisition of nationality that it has laid down are entitled to recognition by another State unless the former has acted in conformity with this general aim of ensuring that the legal bond of nationality in accordance with an individual's genuine connection with the State is established. The State granting nationality, therefore, assumes the obligation to defend its citizens against other States.⁵⁴ Thus, nationality may be defined 'as the legal status of membership of the collectively of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the state representing those individuals.'⁵⁵

On the other hand, the International Law Commission considered the problem of statelessness in 1954 and the first Convention Relating to the Status of Stateless persons was opened for signature at New York on 28 September in the same year. A stateless person is defined under Article 1 of the aforesaid convention: 'The term 'stateless

⁵⁰ Iogna-Prat, *supra* note 9, 27.

⁵¹ Lynch, R, "British Mexican claims Commission" *Annual Digest of Public International Law cases* (1929-1930) 221-228.

⁵² Fenwick, CG, *International Law*, (3rd ed. Century Co., 1971), 301-302.

⁵³ ICJ, *Nottebohm Case (Liechtenstein v. Guatemala)*, ICJ Reports 1955, 6 April 1955.

⁵⁴ U.S. Supreme Court, *United States of America v Wong Kim Ark*, 169 U.S. 649 (1898).

⁵⁵ Fenwick, *supra* nt 52.

persons' means a person who is not considered as a national by any state under the operation of its law.⁵⁶

IV. The UN Convention on the Reduction of Statelessness, 1961: Main Provisions and Remedial Steps to be Taken

Thereafter, the issue of reduction of statelessness was deliberated by the General Assembly and a conference was convened to conclude a Convention on the Reduction of Statelessness in 1961. The Convention was adopted in same year. The main provisions of the Convention⁵⁷ make ample avenues to a state to grant its nationality to a person born in its territory who would otherwise be stateless and such a nationality shall be granted either by birth or by operation of law.⁵⁸ Any foundling found in the territory of a Contracting State shall be considered to have been born within that territory to parents possessing the nationality of that state⁵⁹ unless evidence to the contrary is provided. Birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the state whose flag the ship flies or in the territory of the state in which the aircraft is registered as the case may be.⁶⁰ Further, a Convention party shall also grant its nationality to a person whose parent was at the time of birth the national of that state party subject to certain conditions as per the operation of law.⁶¹ However, loss of nationality as a result of any change in the personal status of a person such as marriage, termination of marriage, and adoption, shall be conditional upon possession or acquisition of another nationality.⁶² In this context, a person shall not be deprived of his nationality so as to become stateless on the ground of departure, residence abroad or failure to register.⁶³ Naturalization abroad or renunciation of citizenship shall not result in loss of nationality unless the person concerned acquires another nationality.⁶⁴ Generally, a person shall not lose the nationality of the state party to the convention if such loss renders him stateless⁶⁵ contrary to the mandate of the Convention.

Therefore, the challenge of reducing statelessness and obliterating the impediments arising therefrom must be addressed with remedial measures. Such measures could be that state parties develop well-considered grounds on which the definite nationality of a person is based. A state may recognise such nationality or choose not do so. Therefore, the Hague Convention and its subsequent improvement in the form of the convention on the Reduction of Statelessness, 1961 must be adhered to by the state parties by way of general incorporation into domestic legislation. Additionally, states must not deprive individuals of their nationality except when there is a sufficient and plausible cause backed by due process and a procedure established by law. Further, the fundamental principles of universal liberty, equality and fraternity must constitute the criterion of granting nationality to the stateless persons, and stateless persons must be bestowed upon some rights through international treaties and instruments while incorporating the same in municipal legal systems at par with nationals of their country of refuge. Thus, the grant of nationality must be liberal and in conformity with the

⁵⁶ Starke, *supra* nt 40.

⁵⁷ 1961 UN Convention on Reduction of Statelessness (CRS), 989 UNTS 175.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, Article 1, CRS.

⁶⁰ *Ibid.*, Article 2, CRS.

⁶¹ *Ibid.*, Article 3, CRS.

⁶² *Ibid.*, Article 4, CRS.

⁶³ *Ibid.*, Article 5, CRS.

⁶⁴ *Ibid.*, Article 7, CRS.

⁶⁵ *Ibid.*, Article 7, CRS.

mandate of International Conventions thereon *inter-alia* basic tenets of Universal Declaration of Human Rights. However, the procedural difficulties and administrative processes must be simplified to be less time consuming at the national and international level. Statelessness issues and their solutions must be dealt with in a sensitive manner and in tune with fundamental paradigms and principles of egalitarian values and human rights norms. State sovereignty and demography must not come in the way of granting nationality to the stateless. Moreover, stateless persons must be encouraged to contribute their professional skills and expertise to the welfare of the receiving state while ensuring the stateless individuals' socio-economic improvement by the state. Moreover, dissemination of information and awareness of their rights must also be pursued.

Thus, it is evident that there are still numerous obstacles and hurdles, which require a positive and pragmatic solution. The aforesaid suggestion must be taken care of and further efforts to mitigate grievances within the legal parameters of a domestic regime need to be undertaken. Much still remains to be done. The deprivations of nationality of Ugandan-Asians and Bihari-Muslims in Bangladesh have, in recent years, attracted the attention of the international community. On this, Justice V.R. Krishna Iyer has deftly remarked:

Statelessness is sought to be minimised and grant of nationality liberalised and obligated. And if nationality is ensured to a person, he acquires political rights, which stand four squares between the offending state and the expelled. The Ugandan Asians, for instance, without complete disregard of the convention of the statelessness cannot be deported. Nor can any particular racial groups be deported on the arbitrary fiat of any rule.⁶⁶

Therefore, statelessness is a situation that snaps the legal connection between state and nationality and leaves a person in limbo. The conferment of nationality bequeaths upon a person an identity to enjoy a range of benefits in the trajectory of 'right to have rights'⁶⁷ that are made available to all human beings who are considered to exist nowhere. The right to have rights has been there even for savages who lived in some kind of a social order.⁶⁸ Consequently, rights are even available to those persons who live beyond the pale of any civilization including the Stylites (a Christian ascetic living atop a pillar) of the antiquity. Thus, statelessness spoils the gratification of having all human rights necessary for a civilized human survival. In the modern world, all the human rights as enumerated in the International Bill of Human Rights⁶⁹ *inter-alia* the right to work, the rights to vote, the right to health, the right to welfare benefits or welfare, a child's right to education and the right to have a nationality are inalienable and indispensable to the core of civilization. However, statelessness creates difficulties for people who want to travel and multiplies the possibilities of their arbitrary arrest or wrongful confinement. In a nutshell, statelessness germinates the seeds of human worthlessness and creates a state of hopelessness among the stateless persons with no change and improvement in their refugee-like situations. Therefore, statelessness deprives people of many legal entitlements in a geo-political entity such as legal personality, human security, and state

⁶⁶ Krishna Iyer, VR, "Mass Expulsion as Validation of Human Rights" 13(2) *Indian Journal of International Law* (1973), 169-171.

⁶⁷ Arendt, H, *The Origins of Totalitarianism* (Harcourt Books 1994), 292.

⁶⁸ *Ibid.*

⁶⁹ The International Bill of Human Rights consists of the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966 and its two Optional Protocols.

protection, which can only be enjoyed if nationality or citizenship is bestowed upon them. Further, there is no single cause of generating statelessness; it is caused by a plethora of circumstances⁷⁰ and circumventions. For example; state practices, conflict of legal jurisdictions, conjugal causes, discriminatory state behaviour, denationalization, non-registration of births, renunciation, state succession, exchange and transfer of territories, re-drawing of new borders, irregular migration, climate change-induced forced displacement, persecution⁷¹ and terrorism.

V. The United Nations High Commissioner for Refugees' Involvement in Nationality and Statelessness Matters

The UNHCR has a worldwide responsibility for solving the refugee problem. But, upon request of the United Nations Secretary General, the UNHCR is more and more taking upon itself the responsibility to care for persons who are displaced either externally or internally i.e. internally displaced persons (IDPs). The UNHCR is presently involved in emergency operations in the former USSR, Yugoslavia and East Pakistan (now Bangladesh) where massive displacements of persons occurred in Georgia, Armenia, Azerbaijan, Tajikistan, Bosnia & Herzegovina, Croatia, Serbia, Kosovo and Bangladesh. In these regions, the UNHCR has approached persons who are stateless and do not have any sort of national legal protection.

In these countries, the UNHCR is also frequently requested to provide support in building up legal systems aimed at protecting refugees, displaced persons and stateless persons, and has been associated with the drafting process of nationality laws or amendments to the existing nationality laws.⁴⁶ The UNHCR's mandate regarding statelessness derives from a United Nations General Assembly Resolutions on this matter:

Considering the Convention on the Reduction of statelessness of 28 August 1961 and, in particular, Articles 11 and 20 requiring the establishment of a body to which a person claiming the benefit of the convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority. Requests of the Office of the United Nations High Commissioner for Refugees provisionally to undertake the functions foreseen under the convention on the Reduction of Statelessness in accordance with its Articles 11 after the convention has come into force⁷²

The UNHCR has further been mandated to continue to perform these functions on a priority basis under the resolution.⁷³ So far activities pursued under this mandate have been limited, but given the magnitude and the complexity of the problem, especially in the former USSR, it appears essential for the UNHCR to strengthen its efforts to provide a pragmatic umbrella of solutions. However, this would require primarily a clearer definition of its mandate.

⁷⁰ Report of the *Ad Hoc Committee on Statelessness and Related Problems*, UN Doc. E/1618 and Corr. 1, 17 Feb. 1950, 120.

⁷¹ Article 1 (A), UN Convention Relating to the Status of Refugees, 1951 with its Additional Protocol, 1967

⁷² Limpert, *supra* nt 3, 30.

⁷³ UN General Assembly, Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply, 10 December 1974, (2311th plenary meeting), A/RES/3274(XXIX).

The United Nations General Assembly should define the content of the mandate entrusted to the UNHCR by adopting a separate and distinct resolution thereon. This would ensure that the UNHCR would act as the body established under Article 11 of the 1961 Convention. Consequently, the UNHCR should have a supervisory role in the implementation of that Convention including a responsibility to develop a reporting system that informs the UN General Assembly on a regular basis with respect to matters concerning statelessness.

The UNHCR would also have a similar supervisory function concerning the implementation of the 1954 Convention on the Status of Stateless Persons, as both conventions are clearly interlinked. With a more active, clear, and precise mandate the UNHCR would then be in a position to be more active in both the promotion of these two international instruments as well as finding durable and permanent solutions to prevent and to reduce the menace of statelessness. These new capabilities would form part of the comprehensive approach and humanitarian understanding that has been advocated on numerous instances by the UN High Commissioner.

This will also require that the Executive Committee of the High Commissioner's program adopts a decisive and logical conclusion to strengthen the office's mandate concerning statelessness as part of the overall strategy to prevent and mitigate movements of unprotected and persecuted persons. Ultimately, this will also establish a closer link with other organs of the United Nations system dealing with nationality issues and establish a link between the United Nations Centre for Human Rights and the International Law Commission.

VI. Statelessness: A Global View

The Tatar family members are among the countless people around the world who do not have a country they can call home. They are persons who are not recognized by any state as citizens. Trapped in this legal limbo they enjoy only minimal access to national or international legal protection or to basic rights such as health, education and political choice in electing their representatives. Effectively, they are outcasts⁷⁴ from the global political system of the nation-state, which has evolved in the last century.⁷⁵ The UDHR unequivocally states that 'everyone has the right to a nationality'⁷⁶ and that 'no-one shall be arbitrarily deprived of his nationality.'⁷⁷ But millions of people across the world still need the security and protection under the citizenship laws. A considerable number of the world's stateless persons are also victims of forced displacement. In some cases, persons and communities are deprived of their nationality by governmental diktat and are consequently banished from the country, which they believe to be their home.⁷⁸ In other circumstances, stateless people are compelled to flee because of the persecution and discrimination where they have lived for most or all their lives. Stateless people subsequently find it impossible to return to their motherland. Thus, statelessness is not only a cause of human insecurity and a basis of forced displacement, but may also present a danger to national and regional stability.

In this context, citizenship questions have developed into a focal characteristic of the modern world, causing tension and even violence between states and societies.

⁷⁴ Definition of outcast: 'One that has been excluded from a society or system.' - The Free Dictionary.

⁷⁵ Thompson, WR, *Evolutionary Interpretations of World Politics*, (Routledge 2016); See also UNHCR, "New Delhi" 229, *World Focus* (1999), 22-23.

⁷⁶ Article 15, Universal Declaration of Human Rights 1948.

⁷⁷ *Ibid.*

⁷⁸ UN Department of Social Affairs, *A Study on Statelessness* (United Nations 1949).

Humanitarian organizations have an important role to play in preventing such conditions, protecting stateless people and finding just solutions to their predicament. At last, the problems of statelessness and contested nationality can only be effectively addressed through the actions of states themselves. Therefore, the family had been in exile for decades, but when the Crimean Tatars eventually returned to their ancestral homeland they dreamed of a new beginning. Instead, the Tatars found themselves virtually as non-persons. The family was not allowed to own property, find work in nearby towns or even menial farm jobs. During the harsh winter months, four generations of the family huddled together in a single room. When the family's father suffered a fatal heart attack searching for wild berries and roots to feed his wife and children there was no dignity in death; without the proper papers he could not be officially buried.⁷⁹

The above mentioned problem of statelessness has been fuelled by a bewildering vortex of complex developments ranging from sweeping political changes such as the disintegration of the former Soviet Union and former Yugoslavia, disagreements about descent, ownership, tribal affiliations, the role of women and children and power balances between different ethnic groups. These issues have put the statelessness issue once again on the international agenda.

The Tatar family and other Crimeans mentioned above, for instance, were among an estimated 250,000 ethnic Crimeans originally deported by Stalin in 1944 who returned 'home' following the collapse of the Soviet Union to what is modern-day Ukraine. An estimated 17,000 Tatar Crimeans returned stateless, though the majority had already acquired another nationality, such as Uzbek citizenship, or were granted Ukrainian citizenship on independence in 1991. The government faced the tricky dilemma of how to successfully integrate large numbers of people who, while enjoying strong historical links with the region, had few legal ties, and, thus, few rights such as access to work and social services. Many returning Tatars had their own headache: whether to run the risk of surrendering their existing citizenship with no guarantee that they would obtain Ukrainian nationality.⁸⁰

When Czechoslovakia split into two sovereign states in 1992-93, some people were caught in a strange no-man's land. They voted in the Czech Republic where they had lived physically for years. Overnight, however, they were deemed to be citizens of the neighbouring Slovak Republic. To qualify for Czech citizenship, they had first to establish their Slovak status, renounce this citizenship rendering them temporarily stateless, and then apply for Czech nationality. If they were refused, they remained stateless, as happened to some Roma. These individuals were then dependent on Slovak authorities to agree to reinstate their Slovak identities.⁸¹

A world away in Asia, a group of several hundred ethnic Chinese who fled Vietnam to Hong Kong during the exodus of the boat people in the 1970's and 1980's remain trapped in a similar legal and politically charged labyrinth today. Hundreds of thousands of Vietnamese boat people resettled in new countries or eventually returned to Vietnam. There were more than half a million ethnic Chinese who fled directly to the People's Republic and were integrated there. These Chinese, however, became, in legal terms, 'unclaimed'. Hanoi refused to take them back because they were not citizens,

⁷⁹ UN General Assembly, Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply, 30 November 1976, (83rd plenary meeting) A/Res/31/36.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

China turned them away and they did not qualify for residency status in Hong Kong, which subsequently reverted to Chinese rule.⁸²

Even if a country agrees to consider a stateless person for citizenship, rulings are often influenced by the state's historical, political and philosophical makeup. In some cases, families who have lived in a particular country for generations are refused citizenship because of their ethnicity, religion, race or even social and linguistic backgrounds. When governments change or are overthrown people can be retroactively stripped of citizenship and property, detained and finally expelled. As happened with the Asian population in Uganda when Iddi Amin seized power there in the 1970s. During the Cold War years, Romanians and Soviets who wanted to emigrate first had to renounce their citizenship with no guarantee they could obtain a new nationality. Many ended up 'stranded' without a country to call home.⁸³

Inheriting a nationality can also be problematic and in cases where a father is stateless or divorced, individuals are often unable to pass their nationality on to their children even though they are born in their country of origin. Failure or refusal to register a child's birth can also result in statelessness. As the statelessness problem became more pronounced, a General Assembly resolution in 1996 mandated the UNHCR to broaden its role, helping to promote the avoidance and elimination of statelessness on a global scale. The UNHCR established a specific Post for *Statelessness Affairs* within the Organization's Division of International Protection and co-operated with states and international and regional organizations to help accession to existing conventions, strengthen national laws and promote new agreements. Thus, the Office of Stateless Affairs has worked with the Council of Europe on the 1997 European Convention on Nationality, the International Law Commission on the draft Declaration on Nationality following state succession, the Office of the High Representative in drafting new citizenship laws for Bosnia and Herzegovina, and the Organization for Security and Co-operation in Europe (OSCE) in developing programs for minorities.⁸⁴

The UNHCR worked closely with Ukrainian authorities, launching a widespread public information campaign including television videos, posters and brochures and establishing a local non-governmental organization named *Assistance To Offer Legal Advice* to the Tatar Family on citizenship issues. The results have been encouraging. In 1997-98, 4,500 returnees were given Ukrainian citizenship compared with 150 between 1992-96. Additionally, the Czech Republic, with assistance from the UNHCR, has begun a process of reviewing individual cases in that country and hundreds of individual who previously were unable to acquire Czech citizenship had their cases successfully reviewed. This has become a precedent for the development of similar programs in other countries.

The Universal Declaration of Human Rights (UDHR) stipulates that everyone has the right to a nationality. Each state has nationality laws, and citizenship is one of the most precious gifts any governments can bestow. But in an era of increasing ethnic tension, mass migrations of people, and governments, which are even more reluctant to welcome refugees or other groups, the number of stateless persons appears bound to continue growing for the foreseeable future.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

A. Statelessness in South Asia

South Asia is a region where most refugees indulged in violence along the route while leaving their original homelands and heading to their new respective destinations in India and Pakistan after the partition of India in 1947 resulting in the harried and terrified refugee movements owing to ethnic tensions, socio-economic problems, political cleavages and religious persecution for centuries.⁸⁵ Indeed, some of the largest and most fraught movements of refugees in human history have taken place in this region of the world.⁸⁶ Since 1947 around 40 million people have crossed international borders in the South Asia region as displaced persons or refugees.⁸⁷ India and Pakistan experienced a heart-wrenching spectacle of partition and resultant migration, the scars of which are still fresh and haunt those even with ephemeral memory.⁸⁸

Statelessness in South-Asia is still existent, owing to the partition of the Indian sub-continent and internal armed conflict in various countries of the region. The Partition of India displaced the Biharis in 1947.⁸⁹ With the breakup of Pakistan and the formation of Bangladesh in 1971, the Biharis were displaced a second time, giving rise to their international status as refugees. However, this status has seldom been recognized in international law.⁹⁰ The creation of Bangladesh began a process of denationalization of Biharis by Pakistan. In this context, the international law relating to territorial change and the deprivation of nationality of Biharis raises issues of their status as *de facto* stateless refugees.⁹¹

The communal violence after the partition of India in 1947, preceded by the so-called Great Bihar Killing of 30,000 Muslims in October-November,⁹² resulted in a large-scale movement of Muslims into the newly created province of East Pakistan. Consequently, a million refugees migrated into East Bengal in 1947.⁹³ It was estimated that 95.9 per cent of these refugees came from the eastern Indian states of Bihar, West Bengal, Assam, Orissa, Nagaland, Manipur, Tripura and Sikkim.⁹⁴ Although Pakistan was successful in gaining her independence as a theocratic state, it had an ethnically plural society. From the beginning, the crises of national integration and the assimilation of refugees from India created more complexities than solutions, an *insider v/s outsider* syndrome and the existential problem of lack of acceptance and assimilation of the Bihari refugees in East Pakistan.⁹⁵

The culture of Bihari refugees contributed to defining the ethnic boundary between them and the majority Bengali residents. Besides, when the West Pakistan feudal elite began to capture economic and political power in East Pakistan, the Biharis, who shared the linguistic background of the elite, began to covertly identify with them. Their ethnic identity became important in various sectors of the East Pakistani economy,

⁸⁵ *Ibid.*

⁸⁶ Ahmad, Nafees, *Refugees in South Asia & Human Rights*, National Workshop on Human Rights of Refugees, Political Science Department-AMU & UNHCR, Feb. 23, 1999, India.

⁸⁷ *Ibid.*, 7.

⁸⁸ *Ibid.*, 7.

⁸⁹ *Ibid.*, 7.

⁹⁰ Summit Sen, *Stateless in South Asia*, Seminar 463 (1998), 49.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Hashmi, T, *The Bihari Minorities in Bangladesh: Victims of Nationalisms*, (1996), at <http://www.statelesspeopleinbangladesh.net/uploaded_files/articles/TheBihariMinoritiesInBangladesh.p> (accessed 10 May 2017).

⁹⁴ Whitaker, B, *The Biharis in Bangladesh*, 4th ed, (Minority Rights Group, London, 1982) 7.

⁹⁵ Chowdhury, E, *Non-Bengali Refugees in Bangladesh: Patterns, Policies and Consequences* in Rogge, J, ed, *Refugees: A Third World Dilemma* (Rowman and Littlefield, New Jersey, 1987) 220.

and the Bengali majority found the Biharis in a relatively privileged position in getting official patronage. In fact, Biharis acquired the nationality of Pakistan as a precondition to resettlement and priority was given to the *Muhajirs* (refugees in Urdu language) by public policy measures, especially 'in railways, post and telegraph, armed forces, private industries, trade and commerce'.⁹⁶

The process of the disintegration of Pakistan in 1971 led to two simultaneous major refugee movements. The first was the escape of an estimated 10 million refugees into India in the aftermath of the brutal massacre of the Bengali populace and the second flight consisted of the minority Biharis fleeing into refugee camps as a result of the extermination during the liberation struggle. Moreover, thousands of Biharis were brutally massacred, with the Bengali petty bourgeoisie and working class engaging in ethnic cleansing and, unfortunately, the same spectacle of massacre was recently witnessed in Kosovo. The pogrom of Biharis was vividly described by Anthony Mascarenhas:

Thousands of families of unfortunate Muslims, many of them refugees from Bihar ... were mercilessly wiped out. Women were raped and had their breasts torn out with specially fashioned knives. Children did not escape the horror: the lucky ones were killed with their parents' but many thousands of others must go through what life remains for them with their eyes gauged out and limbs roughly amputated. More than 20,000 bodies of the non-Bengalis have been found in the main towns as Chittagong, Khulna and Jessore.⁹⁷

Since Urdu was the *lingua franca*, the Biharis had tended to associate themselves with West Pakistan. Then the West Pakistanis landlords and Urdu-speaking capitalists captured economic and political power in East Pakistan; the Biharis shared their political gain. The government policy of favoritism and isolation of the Bihari community from the Bengali majority led the Biharis to tie their fate to that of the West Pakistani political elite. A majority of Biharis had voted for the Muslim League and Jamat-I-Islami in the elections. Besides, when the Awami League began to grow as an influential political party of the bourgeoisie and middle class, then they found their West Pakistan counterparts to be a hindrance to their prosperity. Consequently, Awami League with their limited approach failed to include Bihari class-consciousness. The Bengali political elite in East Pakistan focused on Urdu as an issue to denounce the repressive attitude of West Pakistan. While it inspired the majority in East Pakistan, it aggravated the alienation of the Biharis, which made them lean towards the West Pakistanis. The Bengalis were initially sympathetic towards the oppressed Biharis, however, Bengalis gradually became suspicious of their exclusive attitude and political activities.⁹⁸

It is understood that political opinion, within substantive limitations in human rights, can be defined as any opinion on any matter in which the machinery of state, government or policy may be engaged or involved. The political opinion of the Bihari community led it to be pursued by a majority-led government and its entities, particularly where the former addressed the unity of the eastern and western wings of Pakistan. The political agenda of the Bihari community exposed it to the reality of persecution.

⁹⁶ Begum, K, "The Stranded Pakistanis in Bangladesh and International Implications" International Centre for Ethnic Studies (1989) 9.

⁹⁷ See Southwick, K, "The Urdu-speakers of Bangladesh: An Unfinished Story of Enforcing Citizenship Rights" in Blitz, BK and Lynch, M, eds, *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar, 2011), 119.

⁹⁸ Mascarenlia, A, "The Rope of Bangladesh" (1971).

Although political opinions may or may not be expressed, they might become the attributive features for the determination of refugee status. Since the Biharis had expressed their political will, and as a result suffered repressive measures, their fear can be clearly evidenced as well founded.

The first political step in formulating categories of non-Bengalis to be accepted in Pakistan began with the recognition of Bangladesh as an independent state. This was primarily because President Bhutto of Pakistan needed to negotiate the return of 93,000 POWs held captive in Bangladesh. However, he was equally anxious to see that the one million Biharis did not move to Pakistan. Pakistan agreed by the New Delhi Agreement of 28 August 1973 to transfer a substantial number of “non-Bengalis” in Bangladesh who had opted for repatriations to Pakistan, in exchange for Bengalis in Pakistan and the return of POWs. He engaged the ICRC as the route for all applications for repatriation from Biharis to the Government of Pakistan. However, the ICRC made it clear that ‘registration with the ICRC does not give a right to repatriation. The final acceptance ... lies with [the] Pakistan and Bangladesh governments.’ Pakistan began issuing clearances in favor of those ‘non-Bengalis’ who were either (i) domiciled in former West Pakistan, (ii) were employees of the central government and their families, or (iii) were members of divided families, irrespective of their original domicile.⁹⁹ Second, it can be argued that the category of divided family applied by Pakistan was unilaterally determined and was more restrictive than that identified by the ICRC in their letter requesting options regarding repatriation. It is estimated that 76 percent of Bihari families remain divided because of the restrictive definition of divided families, since grandparents, parents, and unmarried siblings were not considered part of the same family for the issuance of documents clearance. Bangladesh has asserted the need for the acceptance of a broader and Islamic definition of the family that includes the aforementioned family members based on the western concept of the family, as the present definition is narrow and restrictive. This argument upholds family reunification as one of the fundamental provisions of refugee law in any effective resolution procedure¹⁰⁰ but it was applied unilaterally by Pakistan. Third, it had been agreed between Pakistan and Bangladesh that the antecedents of the persons who returned to Pakistan as a hardship case would be examined. Were it to be established that they fell within the other two categories, then the additional category of hardship cases would be included. At the outset, the definitional and numeric limits of the hardship cases have caused a legal anomaly since it needs to be explained why Pakistan limited the number of repatriations to 25,000. In reality, the hardship cases had essentially included Biharis who fell within the other two categories and certainly were not war victims, orphans or disabled persons. Over the years, Pakistan has failed to give a breakdown of the number of persons listed under the categories and the vacancies in the hardship category. On the other hand, the repatriation figures over the last 45 years have seen a decrease. To date, an estimated 178,069 Bihari refugees have returned to their country of former habitual residence.

While practice has left a majority waiting to return home, Pakistan certainly needs to do much more to assure the Bihari refugees and the international community that there is a solution of this protracted crisis.¹⁰¹ Therefore, the resort to denationalization of Biharis by Pakistan is an abuse of human rights and fundamental freedoms under international law, constituting an attempt to throw off the duty of admission and thereby casting an illegal burden on the state of residence.

⁹⁹ *Ibid*, 52.

¹⁰⁰ *Ibid*, 54.

¹⁰¹ *Ibid*, 54.

B. Statelessness in India and National Legal Protection

India has also proved to have human sufferance and agony. It has around 65,000 Chakma and Hajong refugees who are primarily stateless in the north-eastern state of Arunachal Pradesh along with some sporadic groups of Bihari Muslims in various pockets of northeast India. The stateless persons in India do not have a bright future owing to the absence of a legal structure at national level. India has not acceded to the UN Convention on the Reduction of Statelessness of 1961, nor has the 1951 Convention with its Additional Protocol of 1967 been signed. In such a situation, stateless persons have an uncertain and bleak future in India.

It is, thus, incumbent on the Government of India to abandon its silence with respect to laws for refugees. The country can no longer depend and continue to deal with problems and issues of refugees by resorting to the archaic 19th century principles enshrined in the outdated Foreigners Act of 1946 and the Extradition Act of 1962. India has always been, and remains magnanimous in providing shelter and asylum to people who are fleeing conflict. Nevertheless, as the country became a member of the UNHCR Executive Committee in 1995 and has since been playing a pivotal role in pushing for reformulating and redefining international legal instruments, such as the 1951 Convention on refugees, by incorporating present day realities of refugees' situations, it must also draft a domestic law on refugees to endorse its actions¹⁰² at the international level.

VII. Divine Laws on Nationality and Statelessness

Individual dignity has been accorded a high status in the scheme of Islamic law and the concept of human rights fits naturally within this structure.¹⁰³ The Islamic tradition also ordains sympathetic treatment to the rehabilitation of refugees who are forced to abandon their homes and hearts on account of persecution. Indeed, living in one's homeland, including one's kith and kin is a recommended course of action for Muslims to escape persecution for protecting their religious beliefs or social traditions.¹⁰⁴ Thus, Islamic Law stipulates an order to provide protection and assistance to persons in need. The Quran is replete with references to the earliest Muslim community and the Jews and Christians that came before them as the persecuted people.¹⁰⁵ According to the Holy Quran

Those who have believed and have chosen exile, and have fought for the faith, and those who have granted them help and asylum: these are the true believers.
(Q4:97 & Q7:127)

The Prophet (PBUH) recommended this course in the early days of his mission to the few believers facing cruelties and harassment from society, asking them to migrate to Habsha (Abyssinia) to save them from religious persecution. Later, the Prophet (PBUH) himself, along with his companions, migrated from Mecca to Medina, when their oppression by the Meccans became intolerable. The people of Medina received them with open arms and open hearts, offered them not just shelter but also materials, such as

¹⁰² *Ibid*, 54.

¹⁰³ Ahmad, N, "People without Homes" *The Pioneer* (1999) 9.

¹⁰⁴ Weeramantry, CJ, "Islam and Human Rights" in Weeramantry, CJ, ed, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan, UK, 1988) pp. 113.

¹⁰⁵ The Holy Quran: Q7:137.

land for cultivation, and made them partners in their businesses. Indeed, this migration laid the foundations of the first Islamic state. Islamic traditions not only recognize the right of asylum but, in dire need, encourage people to avail themselves of it. It is, as already observed, a recommended course of action for Muslims to follow, not only to escape religious persecution, but also for seeking economic development and prosperity.¹⁰⁶

The warning against persecution occurs 299 times in the Holy Quran.¹⁰⁷ The Quranic verse 'La, Allah enjoineeth justice and kindness' (XVI: 90) makes just standards of behavior mandatory for all and towards all. The Arabian Muslims in their early stages had suffered gravely from the worst type of religious persecution. So, they recognized the principle of granting asylum to those who had been persecuted for their religious belief.¹⁰⁸ The Holy Quran further strengthens this view by declaring:

If one amongst the pagans
Asks thee for asylum
Grant it to him
So that he may hear the Word
Of Allah and then escort him
To where he can be secure. (al-Quran, 9: 6)

Islam asks its followers to fight against religious persecution and help the persecuted by granting them safe passage and even asylum if they demand it.¹⁰⁹ Islam also preaches universal brotherhood and fraternity irrespective of geo-political demarcations. In an Islamic state every person has the right to acquire property and freedoms indispensable for a dignified survival such as, *inter-alia*, the right to nationality.

The famous *Khilafat* Movement in the early 1920s of the Muslims of the sub-continent should be seen from the same perspective. There was no threat to the Muslims regarding their existence nor was there any fear of persecution, yet, they migrated to Afghanistan, simply as a protest against the invasion of Turkey by the Allied Forces in the aftermath of the First World War and the danger this posed to the Islamic Institution of the Caliphate.¹¹⁰

Moreover, the Universal Islamic Declaration of Human Rights adopted by the Islamic Council of Europe on 19 September 1981 declares under Article IX as to the 'Right to Asylum' in the following words

- a) Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex.
- b) Al-Masjid Al Haram (the sacred house of Allah) in Mecca is a sanctuary for all Muslims.

Thus, Islam, as a divine law or revealed law, provides a complete mechanism for the regulation of human behavior in its numerous manifestations. Islam seeks a process of universalization of human happiness and brotherhood.

¹⁰⁶ Hasan Shah, N, "Pakistan: Policies and Laws with Reference to Refugees" (1997) Seminar on Refugees in the SAARC Region: Building a Legal Framework, 34.

¹⁰⁷ *Ibid.*

¹⁰⁸ Moussa, *Islam and Humanity's Need of It*, (Cairo, 1966).

¹⁰⁹ Ali, A, "Al Quran and Human Rights" *Hamdard Islamicus*, XII (1989) No.3/Autumn, 35-36.

¹¹⁰ *Ibid.*

VIII. Conclusion

It is evident from the above discussions and deliberations that when a person does not possess the nationality of any State, he is referred to as a stateless person. Individuals may be without nationality knowingly or unknowingly, intentionally or through no fault of their own. For instance, when illegitimate children are born in a State which does not apply *jus soli* to alien mothers under whose national law the children do not acquire the father's nationality, or where a legitimate child is born in such a State to parents who themselves have no nationality the child becomes a stateless person. Statelessness may occur after birth as well. For instance, it may occur as a result of deprivation or loss of nationality by way of penalty or otherwise.

All individuals who have lost their original nationality without having acquired another are, in fact, stateless persons. A stateless person does not enjoy all rights that are conferred on a person in International Law. For instance, their interest is not protected by any State; they are refused the enjoyment of rights, which are dependent on reciprocity.

The Universal Declaration of Human Rights, after considering the gravity of the problem, provided under Article 15 that each person is entitled to have a nationality and the nationality of any person cannot be taken arbitrarily. A Conference of Plenipotentiaries convened by the Economic and Social Council to regulate and improve the status of stateless persons adopted the Convention relating to the Status of Stateless Persons on September 28, 1954. The Convention came into force on June 6, 1960. Presently, the convention has 44 States Parties. The Convention defined the term stateless person as a person who is not considered a national by any State under the operation of its law. The Convention gave such persons judicial status but no provision was made to reduce or eliminate statelessness. The General Assembly expressed its desire on December 4, 1954, that an International Conference of Plenipotentiaries be convened to adopt a convention for the reduction or elimination of future statelessness as soon as at least twenty States had communicated to the Secretary-General their willingness to cooperate in such a Conference. The Conference, which met at Geneva on March 24 to April 18, 1959, adopted provisions aimed at reducing statelessness at birth but failed to reach agreement on how to limit the freedom of States to deprive citizens of their nationality. Consequently, the conference met again in New York from August 15 to 28, 1961, and adopted a Convention on the Reduction of Statelessness. The Convention was opened for signature on August 30, 1961, and it came into force on December 13, 1975.

The convention under Article 1 stated that a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless

- a) at birth, by operation of law, or
- b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned.

Para 3 of Article 1 further stated that a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of the State, should acquire at birth that nationality if it otherwise would be stateless.

The Convention followed the idea adopted by the Convention on the Conflict of Nationality Laws of 1930 by making a provision that if the law of a Contracting State requires deprivation of nationality as a result of any difference in the personal status such as marriage, dissolution of marriage, legitimation, acknowledgment or adoption, such

deprivation shall be provisional upon possession or acquisition of another nationality. Therefore, Article 6 of the Convention stated that if the law of a Contracting State provides for loss of its nationality by a person, spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.

The above efforts to eliminate or reduce statelessness have only had limited effects in so far that the determination of nationality is still within the competence of each State. In this respect it appears unsurprising that nationality and statelessness issues have acquired crisis proportions under the scheme of contemporary international law. Respective governments including the Government of India must strive to evolve a legal structure regarding reduction of statelessness and formulating nationality laws build on humanitarian premises. Moreover, the right to the country of origin or habitual residence must be respected by the national governments. The competence of the UNHCR with regard to the matters of nationality and statelessness must be expanded, re-formulated and re-defined while taking into account state concerns and individual claims in a new World Human Order.

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Migration Control and Detention of Migrants and Asylum Seekers – Motivations, Rationale and Challenges

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Detention of migrants in Europe has become an increasingly common measure to deal with the growing number of people crossing EU borders seeking asylum. Detention is presented as a rational response to the need for 'border control' despite the growing international and European jurisprudence and campaigns calling for a more careful and restrained approach to its use. Especially in some of the EU member states, the disparity between international legal standards and the almost automatic use of detention of an irregular migrant or asylum seeker is a cause for attention. The article first offers an overview of the relevant legal standards for detention of migrants and complements this with relevant data about its practical use. Drawing on previous work in this area, the author suggests that there are various complementary motivations for the use of detention of migrants. As only the practical motive can be the one to justify detention formally and legally, the article offers an analysis of rationality of the use of detention vis-à-vis the known alternatives. The predominance of different kinds of alternatives in the EU to detention is also explored. The article concludes with the suggestion that to fulfil all state motivations for the use of detention, the introduction of a range of alternatives complemented with the change of discourse may in fact be a rational move for states.

I. Introduction

Immigration has increasingly been at the center of the political discussion in the European Union (EU) in recent years, supported by the ever-growing number of individuals crossing EU borders seeking asylum.¹ The political rhetoric securitizing migration emphasizes the need for effective migration control. In practice, this leads to the normalization of the use of detention of migrants as the primary means to achieve this goal.² At the same time, a growing number of international jurisprudence may be detected, which emphasizes that deprivation of liberty is always a serious interference

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¹ According to the Eurostat data, synthesized online at the web of European Commission, at ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics#Migration_flows (accessed 20 August 2017); according to the United Nations, Department of Economic and Social Affairs Population Division in, European migration figures have increased from an estimated 49 million in 1990 to 58 million in 2000 to 70 million in 2010. *Trends in International Migrant Stock: The 2008 Revision*. United Nations database, POP/DB/MIG/Stock/Rev.2008), at esa.un.org/migration/index.asp?panel=1 (accessed 20 August 2017).

² UNHCR Beyond detention, Global strategy to support governments to end detention of asylum seekers and refugees, 2014-2019, 5, at unhcr.org/53aa929f6.pdf (accessed 20 August 2017); Arbogast, L *et al*, *Migrant detention in the European Union: A thriving business. Outsourcing and privatization of migrant detention*. Migreurop, July 2016, at migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf (accessed 20 August 2017); Sampson, R and Mitchell, G "Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales" 1(3) *Journal of Migration and Human Security* (2013) 97.

with the human rights of an individual, and therefore must be applied only as a measure of last resort, never as a general and, almost, automatic measure.

States are seemingly unable to comply with these strict rules imposed by international standards, with reference to the competing interest of securing migration control and public security in general. The formal purpose of immigration detention is a practical one, i.e. ensuring a certain law-privileged objective, such as realization of a transfer or expulsion.³ According to some authors,⁴ however, other motives, namely certain political objectives and the symbolic nature of detention of foreigners, can be just as strong a rationale as the practical one. A discussion on the practical rationales for detention points out that this may well be the reason for the continuous widespread use of detention. This is despite the lack of practical necessity and established legal barriers. Some authors argue that in fact, immigrant detention is predominantly, notwithstanding its legally divergent purpose, used as a punishment.⁵

Naturally, the article does not aim to study and describe comprehensively the relevance of those various motivations. Rather, the author seeks to synthesize both the latest European and international legal standards relating to the use of detention of migrants, with emphasis on standards relating to vulnerable groups such as children, with the rationale that states have for continuous widespread use of detention. The author argues that from the practical perspective, insistence on detention of high numbers of migrants is not rational. This is demonstrated through the description of potential alternatives and their ability to fulfil the declared objectives.

The author will first shortly review the relevant legal standards relating to detention of migrants in the EU together with recent jurisprudence and relevant soft-law documents and recommendations. Then, a short description of the practice of detention in EU member states will be offered; both with emphasis on the theory and practice of the use of alternatives to detention. Subsequently, the author will offer an elaboration on possible motivations of the use of detention and discussion of the effectiveness of detention in comparison to the alternatives to detention, according to the available data and research. The article will conclude arguing that in light of known alternatives to detention in migration control and their effects, for practical purposes, detention is rarely necessary. Therefore, political and symbolic rationales are rather a dominant reason in its continuous widespread use.

II. Note on Terminology

The terminology in this article is used in coherence with the Odysseus network study on alternatives to immigration and asylum detention in the EU published in 2015, for its comprehensiveness and relevance to the EU legal framework and practice.⁶ Immigrant detention is understood as the confinement of a migrant (including asylum-seekers) in a particular place with deprivation of their freedom of movement (Art. 2(h) of the recast

³ Leerkes, A, Broeders, D “A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention” 50(5) *British Journal of Criminology* (2010) 830.

⁴ Sampson and Mitchell, *supra* nt 2.

⁵ Hernández, CCG, “Immigration Detention as Punishment” 61 *UCLA Law review* (2014) 1346.

⁶ Bruycker, P (ed), Bloomfield, A, Tsourdi, E, Pétin, J, *Alternatives and immigration and asylum detention in the EU* (Odyssey Network 2015) at <odyssey-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf> (accessed 20 August 2017).

Return Directive⁷). Immigrant detention in this sense is a non-punitive administrative measure with the aim to fulfil a particular purpose (e.g. realization of transfer according to the Dublin regulation⁸). As such, the use of detention is under strict legal rules; one of which is the preference of alternatives to detention, i.e. detention can only be used if the alternatives cannot fulfil the purpose aimed for.

Alternatives to detention are therefore understood in this rather narrow sense,⁹ as measures that can only be applied if the legal conditions for the use of detention are met, but which do not comprise the deprivation of liberty. In certain cases, however, alternatives to detention can constitute restriction on freedom of movement.¹⁰

III. The Law in the European Union

This section will briefly examine the most relevant legislation and jurisprudence relating to the detention of migrants and asylum seekers in the EU; keeping in mind that according to the European Union Charter on Fundamental Rights (Art. 18), the EU asylum policy must respect the 1951 Refugee Convention, and that all EU Member States are also Member States to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (herein ECHR). The legal standards will, therefore, be drawn also from the relevant UN and UNHCR documents, as well as the jurisprudence of the European Court of Human Rights (herein ECtHR).

In EU law, the detention of migrants and alternatives to it are defined in Directive 2013/33/EU of the European Parliament and Council of 26 June 2013, laying down standards for the reception of applicants for international protection (herein the recast Reception Directive); and Directive 2008/115/EC of the European Parliament and of the Council of 16th December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (herein the recast Return Directive).

According to Art. 8 of the recast Reception Directive, a person can only be detained when it proves necessary in the individual case, if other less coercive alternative measures cannot be applied effectively, and with the aim of achieving one of the purposes listed in para. 3 of the Article, which must be precisely defined in national law. According to para. 4 of the same Article, alternatives to detention must also be laid down in national law. The Article explicitly mentions regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, as possible alternatives to detention. According to Art. 11, health (including mental health) must be of primary concern to the national authorities also for the purpose of an individual assessment of the necessity of detention, whilst minors must be detained as a measure of

⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁸ Regulation No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁹ See Costello, C and Kaytas, E, *Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva* (UNHCR 2013), 10-11, at <unhcr.org/protection/globalconsult/51c1c5cf9/31-building-empirical-research-alternatives-detention-perceptions-asylum.html> (accessed 20 August 2017).

¹⁰ See also the European Commission Asylum and Migration Glossary 3.0 (2014), at <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/docs/emn-glossary-en-version.pdf> (accessed 20 August 2017).

last resort and after it has been established that other less coercive alternative measures cannot be applied effectively. The best interests of the minor must be a primary consideration in the decision-making process. Unaccompanied minors shall be detained only in exceptional circumstances.

The recast Return Directive puts standards in place that are similar to those in the recast Reception Directive. Detention for the purposes of removal of the migrant is only possible if other less coercive measures could not be applied effectively in the specific case, with the aim of achieving one of the listed purposes. The recast Return Directive particularly stresses the tight relationship between the detention and its purpose. According to Art. 4 of the recast Reception Directive, when it appears that a reasonable prospect of removal no longer exists, detention ceases to be justified and the person concerned shall be released immediately. Looking to Art. 17, unaccompanied minors and families with minors shall only be detained as a measure of last resort and the best interests of the child shall be a primary consideration in the decision-making process.

The effectiveness of such a measure, i.e. its ability to effectively lead to its declared purpose, is a precondition to its imposition; this is according to the jurisprudence of the Court of Justice of the European Union (herein CJEU) (e.g. the case of *Sélina Affum*, decision from 7th June 2016, C- 47/15, or preceding case of *Kadzoev*, decision from 30th November 2009, C-357/09). Under the directives, therefore, one should take into account the requirements of legality (must be laid down with specific aims in the national law), necessity and proportionality (only when necessary and when other less coercive measures cannot effectively be imposed), together with the requirement of effectiveness of such a measure (can only be imposed if the proclaimed aim of detention can be effectively exercised).

Under ECHR standards, such detention must, under Art. 5, para 1 (f), also follow specific requirements, among which is the requirement of prescribed grounds for detention (requirement of legality), in the case of detention of migrants, to 'prevent effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.¹¹ The close relation to the prescribed ground is necessary, otherwise the imposed measure is viewed as arbitrary, and will therefore not be in compliance with Art. 5 of the ECHR.¹² The measure can also not be imposed in bad faith¹³ and is only in compliance with Art. 5 if there is a real existing possibility of fulfilling the proclaimed aim of detention¹⁴ and the state is actively taking steps to realize this aim in the shortest possible period of time.¹⁵ The ECtHR also requires states to use alternatives to detention or to justify, why alternatives were not effective in the particular case.¹⁶

¹¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4th November 1950, ETS 5, Art. 5 (f).

¹² European Court of Human Rights, *Amuur v. France*, App no. 19776/92, 25 June 1996, para 50; *Witold Litwa v. Poland*, App no. 26629/95, 4 April 2000, para 78; *Al-Jedda v. The United Kingdom* [GC], App no. 27021/08, 7 July 2011, para 99.

¹³ European Court of Human Rights, *A. and others v. The United Kingdom*, App no. 3455/05 [GC] 19 February 2009, para 164.

¹⁴ European Court of Human Rights, *Riad and Idiab v. Belgium*, App no. 29787/03 and 29810/03, 24 January 2008.

¹⁵ European Court of Human Rights, *M. and others v. Bulgaria*, App no. 41416/08, 26 July 2011, para 75 a 76; *Popov v. France*, App no. 39472/07 and 39474/07, 19 January 2012; *Chahal v. the United Kingdom* [GC], App no. 22414/93, 15 November 1996, para 113.

¹⁶ European Court of Human Rights, *Mikolenko v. Estonia*, App no. 10664/05, 8 October 2009, *Yoh-Ekale Mwanje v. Belgium*, App no. 10486/10, 20 December 2011.

Specific conditions, however, apply to vulnerable persons¹⁷ and particularly to children. Regarding detention of families with children or unaccompanied minors, the ECtHR grew increasingly strict in its latest jurisprudence. From considering the detention of children as unlawful particularly due to the conditions in the facilities and the length of detention;¹⁸ the recent jurisprudence stresses the emotional vulnerability of children, concluding that even a few days in a materially well-equipped facility can constitute ill treatment of a child.¹⁹ Detention of families with children or unaccompanied minors is therefore, in most circumstances, unacceptable under the ECHR.

Similar conditions apply under the universal human rights mechanisms of the United Nations, namely the International Covenant on Civil and Political Rights (herein ICCPR, regulating the deprivation of liberty in general) and the 1951 Refugee Convention (regulating the detention of asylum-seekers). According to the Art. 9 para 1 of the ICCPR, detention must be lawful,²⁰ which also entails the requirement of prevention of arbitrariness, necessity, proportionality and preference alternatives.²¹ As such, immigration detention could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding.²² Detention must be an exception rather than a rule; it must be imposed as a measure of last resort, where less coercive measures are not applicable.²³ The use of alternatives is emphasized by, inter alia, General Comment No. 35 of the UN Human Rights Committee,²⁴ which also states that detention should never be mandatory and must be left for individual assessment of necessity.

Detention of asylum seekers is regulated by the 1951 Refugee Convention, which states in Art. 31, para. 1, that states must not penalize refugees (and asylum seekers) for their irregular entry or stay in the country, if they subsequently (without delay) present themselves to the authorities and explain their case for irregular entry. However, restrictions to the freedom of movement can be imposed according to the Art. 31 para. 3, provided that these measures are necessary and applied only until their status is regularized; such a measure can also be administrative detention. Therefore, status of such asylum seekers is elaborated on by the United Nations High Commissioner for

¹⁷ European Court of Human Rights, E.g. a victim of trade in humans. See *Rantsev v. Cyprus and Russia*, App no. 5965/04, 7 January 2010.

¹⁸ European Court of Human Rights, *Mubilanzila Mayeke and Kaniki Mitunga v. Belgium*, App no. 13178/03, 12 October 2006; *Muskhadzhiyeva and others v. Belgium*, App no. 41442/07, 19 January 2010; *Tarakhel v. Switzerland*, App no. 29217/12, 4 November 2014; *Popov v. France*, Apps no. 39472/07 a 39474/07, 19 January 2012.

¹⁹ European Court of Human Rights, *A. B. and others v. France*, App no. 11593/12, *A. M. and others v. France*, App no. 24587/12; *R. M. and others v. France*, App no. 33201/11, *R. K. and others v. France*, App no. 68264/14, *R. C. a V. C. and others v. France*, App no. 76491/14, from 12 July 2016.

²⁰ UN Human Rights Committee General comment no. 35 on art. 9 - Liberty and security of a person, 2014, UN doc. CCPR/C/GC/35.

²¹ Nowak, M, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd ed, N.P. Engel Verlag 2005); specifically *Hugo van Alphen versus The Netherlands*, Human Rights Committee communication no. 305/1998 para 5.8.

²² Human Rights Committee, *Danyal Shafiq v. Australia*, Human Rights Committee communication no. 1324/2004, 2006; *F.K.A.G. et Al. v. Australia*, Human Rights Committee communication no. 2094/2011, 2013; *Kwok v. Australia*, Human Rights Committee communication no. 1442/2005, 2009; *M.M.M. et Al. v. Australia*, Human Rights Committee communication no. 2136/2012, 2013.

²³ UN Human Rights Committee, *supra* nt 20.

²⁴ *Ibid.*

Refugees Guidelines on Detention (UNHCR, 2012)²⁵ and further expanded by the UNHCR Global Strategy 'Beyond Detention'.²⁶ Both documents emphasize that liberty and security of person are fundamental human rights and despite the legitimate aims states often pursue by detaining migrants, various studies show that alternatives to detention exist and are comparably effective. The action plan 'Beyond Detention' emphasizes that:

(p)utting people in detention has become a routine – rather than exceptional – response to the irregular entry or stay of asylum-seekers and migrants in a number of countries. Some governments view detention as a means to dissuade irregular migration to or applying for asylum in their territories. While acknowledging that irregular entry or stay may present many challenges to States, detention is not the answer.²⁷

A particularly strong stance against detention of children was adopted in the Human Rights Committee General Comment No. 35 on Liberty and security of a person:

(c)hildren should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.²⁸

According to the UN Committee on the Rights of the Child, children should not be subject to restrictive measures due to the immigrant status of their parents. Furthermore, if they are detained due to their irregular status, this constitutes a breach of the child's rights and is always contrary to their best interests.²⁹ The Special Rapporteur Against Torture repeated this opinion in the report from 2015, stating that detention of migrant children is always contrary to their best interests and that children who are in administrative detention with their parents should be released immediately.³⁰

IV. The Practice in the European Union

Despite clear and strict standards, data shows that the number of persons detained within the European Union due to migration reasons is increasing in the long run. According to the Migreurop data, the number of individuals in immigration detention in the United Kingdom rose from 250 people in 1993, to 2,260 in 2003 and 28,909 in 2012, while in France it increased from 28,220 in 2003 to 51,385 in 2013.³¹ In the Czech Republic,

²⁵ UNHCR Detention guidelines, 2012, at <unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html> (accessed 20 August 2017).

²⁶ UNHCR Beyond Detention, Global strategy to support governments to end detention of asylum seekers and refugees, 2014-2019, 5, at <unhcr.org/53aa929f6.pdf> (accessed 20 August 2017).

²⁷ *Ibid.*

²⁸ UN Human Rights Committee, *supra* nt 20.

²⁹ Concluding observations of the UN Committee on the Rights of the Child towards the Czech Republic, 2003, UN doc. CRC/C/15/Add.20, para 57.

³⁰ Mendez, J, The report of the UN Special Rapporteur Against Torture. 5. March 2015, UN doc. A/HRC/28/68, para 51-52.

³¹ The figure, however, reflects only detention facilities capacity. Migreurop, 2014, at <<http://en.closesthecamp.org/2014/03/03/europe-of-camps-deploys-its-web/>> (accessed 20 August 2017).

where data on detained migrants is available, the number of detainees increased from around 350 in 2013 to 4,822 in 2014; and 8,563 in 2015.³² According to the Parliamentary Assembly of the Council of Europe, the member states have ‘significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants’.³³

Potential alternatives to detention are only available in 24 member states and include reporting obligations, residence requirements, the obligation to surrender their identity or travel documents, release on bail, electronic monitoring, the provision of a guarantor, or being released to cooperate with care workers or under a care plan. Community management programmes are not available in any of the member states. In 2013, the countries, which provided the largest number of third-country nationals with an alternative to detention were France (1,258), Austria (771), Belgium (590) and Sweden (405). Sometimes, alternatives are available under the law, but never used in practice.³⁴

The most frequently used alternatives are reporting obligations (used in 23 states), residence requirements (18 states), the obligation to surrender a travel document (15 states) and releasing the individual on bail (13 states). Electronic monitoring (e.g. tagging) and guarantor requirements are used in four states, while individual states also arrange the release of the individual to a care worker under a care plan, organize voluntary return programs, accommodation in open centers and guardianship as different options. The detention of vulnerable persons (such as children) is either explicitly prohibited or possible only in exceptional circumstances.³⁵ However, under this study, the ‘placement’ of a child together with their parents in detention facilities is not considered to be detention, which is contrary to the ECtHR approach.³⁶

Overall, the practice varies significantly throughout the EU member states. According to the Odysseus Network research (2015), practical considerations significantly influence the decision whether to utilize an alternative to detention or not. For example, due to the administrative convenience, detention is much more common in Dublin transfers. Detention also often occurs if the person does not have a stable residence.³⁷ Very few external actors, such as non-governmental organizations, were, according to the Odysseus Network research,³⁸ involved in implementing alternative schemes. Community-based accommodation and services as an alternative were not implemented in any of the EU countries. Community-based accommodation and

³² European Migration Network (EMN) Czech National Contact Point (NCP) (the Department for Asylum and Migration Policies of the Ministry of the Interior), *The use of detention and alternatives to detention in the context of immigration policies*, 2014, at <ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/studies/results/index_en.htm> [hereafter, the EMN 2014] (accessed 20 August 2017); Noviny, C, *Czech police detain 8175 illegal foreigners this year*. 18 December 2015, at <ceskenoviny.cz/zpravy/czech-police-detain-8175-illegal-foreigners-this-year/1294611> (accessed 20 August 2017).

³³ Parliamentary Assembly, Council of Europe, Doc. 12105, 11 January 2010, at <assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=12435&Lang=EN> (accessed 20 August 2017).

³⁴ Such is the case of the Czech republic, where release on bail as an alternative to detention has not been used in practice. EMN, 2014, *supra* nt 32, 35.

³⁵ *Ibid*, 4.

³⁶ European Court of Human Rights, *Popov v. France*, Apps no. 39472/07 a 39474/07, 19 January 2012.

³⁷ Bruycker, *supra* nt 6.

³⁸ *Ibid*.

services involve the integration and subsequent supervision of an individual within the local community which, arguably, can be an effective migration control tool.³⁹

In general, it is obvious that while the European Union framework did motivate some states to adopt alternatives to detention, these standards have not always impacted upon the use of detention; in some states (such as Germany), detention dropped significantly due to the use of alternatives, while in others (such as the UK or the Czech Republic), there is a steady increase in the number of migrants being detained. In some states, alternatives are not even foreseen by law (Malta), whilst in others they are not applied in practice (Greece). In others, the use of alternatives is rather rare and usually only applied in asylum cases.⁴⁰

V. Motivations for Detention

According to Sampson and Mitchell,⁴¹ the motivations to detain migrants are, in principle, threefold: practical, political and symbolic. Practical motivation relates to the formal purpose of detention prescribed by law, i.e. the prevention of absconding and ensuring compliance with the procedure.⁴² Political motivations, meanwhile, take into account the current political climate rather than rational arguments, and respond to different political pressures.⁴³ Symbolic motivations⁴⁴ are those aiming to send a message of control and sovereign authority over the territory; the message can be of ensuring stability and security to the general public, or of deterrence to the migrant population. Political and symbolic motivations are not prescribed by law, and therefore cannot be the formal grounds for detention, yet they remain a strong factor influencing the ratio of the use of detention and its alternatives.⁴⁵ This section will briefly examine those three types of motivation and the potential of alternatives to detention to address them.

A. Practical/Formal Motivations

Regarding the practical and formal motivations, the use of alternatives to detention rises when they are proven to achieve the declared goal of the detention, i.e. when they meet the declared objectives. If high rates of compliance (not absconding, compliance with the process) are shown, the use of alternatives is rational.⁴⁶ At the same time, the high compliance rate can be achieved by many alternative options.⁴⁷

³⁹ Sampson and Mitchell, *supra* nt 2; Field, O and Edwards, A, *Alternatives to Detention of Asylum-Seekers and Refugees* (UNHCR, 2006), paras 126-128, at <unhcr.org/protection/globalconsult/4474140a2/11-alternatives-detention-asylum-seekers-refugees-ophelia-field.html> (accessed 20 August 2017).

⁴⁰ Bruycker, *supra* nt 6

⁴¹ Sampson and Mitchell, *supra* nt 2.

⁴² Leerkes and Broeders, *supra* nt 3.

⁴³ These can be, *inter alia*, the media and public's negative reaction to increased migration or, on the other hand, a pressure from international bodies to comply with human rights obligations.

⁴⁴ *Ibid*; also Welch, M, Schuster, L "Detention of Asylum Seekers in the UK and USA: Deciphering Noisy and Quiet Constructions" 7(4) *Punishment & Society* (2005) 397.

⁴⁵ As documented for example in *Ibid*.

⁴⁶ Sampson, R, Robyn C, Mitchell G and Bowring, L, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (International Detention Coalition 2011).

⁴⁷ *Ibid*; Costello and Kaytas, *supra* nt 9; Edwards, A, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Asylum-Seekers, Stateless Persons, and Other Migrants* (UNHCR, 2011), UN doc. PPLA/2011/01.Rev.1 (hereinafter: Edwards 2011a); Edwards, A, "Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective" 7 *The Equal Rights Review* (2011), 117 (hereinafter Edwards 2011b).

Research shows that the difference between the compliance rate for persons in detention and persons under alternative measures is rather low.⁴⁸ Edwards,⁴⁹ for example, shows the compliance rate to be between 80% and 99% in different countries, both for groups of asylum seekers and persons awaiting deportation under alternatives to detention. Compared with criminal law detention, where compliance of offenders released under non-custodial measures usually ranges from 40% to 70%, it is a rather effective tool.⁵⁰ It has also been identified that there are factors which influence the effectiveness of an alternative measure, such as:

- (a) providing legal advice; (b) ensuring that asylum seekers are not only informed of their rights and obligations but also that they understand them, including all conditions of their release and the consequences of failing to appear for a hearing;
- (c) providing adequate material support and accommodation throughout the asylum procedure; (d) screening for either family or community ties or, alternatively, using community groups to “create” guarantors/sponsors.⁵¹

Obviously, one of the most important factors is whether, and how, the alternatives are available in practice, and not only in law.⁵²

Using the model from the European Migration Network report, a reasonable balance must be struck between four factors: firstly, reaching a prompt and fair decision in the procedure; secondly, by reducing the risk of absconding; thirdly, by maximizing cost-effectiveness and finally by ensuring respect for fundamental rights.⁵³ Regarding the first factor, no significant difference was found in the length and effectiveness of the procedure to determine whether the person was to be put in detention or under an alternative measure, whilst the costs of detention were significantly higher than those of the alternatives.⁵⁴ While the additional costs in terms of energy and money may be an obstacle, the long-term cost-effectiveness of the alternatives is generally much better.⁵⁵ According to the Odysseus network research, detention is inherently more expensive than the alternatives. In Canada, detention was 93% more expensive, while in Australia, detention costs exceeded those of the alternatives by 69%. Generally, using alternatives to detention will save approximately 70% of the overall costs.⁵⁶ The research also found that individual rights are more often compromised while in detention than they are under the alternatives, and that the risk of absconding is slightly, but not considerably, higher under the alternatives.⁵⁷ Overall, the cost-benefit analysis of available data shows that using alternatives to detention is rather a rational choice from the practical motivations perspective.

⁴⁸ EMN 2014, *supra* nt 32, 37.

⁴⁹ Edwards 2011a, *supra* nt 47, 82.

⁵⁰ Field and Edwards, *supra* nt 39, 24.

⁵¹ *Ibid*, 45.

⁵² *Ibid*, 47.

⁵³ EMN, *supra* nt 32, 37.

⁵⁴ *Ibid*.

⁵⁵ Field and Edwards, *supra* nt 39, paras 166-172.

⁵⁶ Bruycker, *supra* nt 6, 23.

⁵⁷ *Ibid*, 41.

B. Political Motivations

Political motivations are, according to Sampson and Mitchell, another major factor influencing the decision to use alternatives to detention. It is argued that a number of alternatives are introduced largely due to international and national criticism of the policy of detention, either from the perspective of its impact on migrants' lives and well-being⁵⁸ or from the perspective of international law. At the same time, however, the detention of migrants has become a highly politicized issue due to the influence of the national press. Additionally, alternatives are not introduced or used in practice because the decision-makers understand that a hard stance against migrants will bring them a political advantage.⁵⁹ Sampson and Mitchell point out the risk of prioritizing some groups of migrants (e.g. children) due to political reasons at the expense of other, not frequently emphasized groups.⁶⁰

C. Symbolic Motivations

From the media and other sources, such as public statements of politicians, as well as the reasoning regarding the practical implications of the use of alternatives to detention, it remains that the dominant motivation for the continuing decision to detain migrants is probably for its symbolic nature of demonstrating control over the territory of the state, i.e. demonstrating the State's devotion to protecting the security of its nationals.⁶¹ For example, it was explicitly stated on the website of the Czech Ministry of Interior that the main purpose of the automatic detention of migrants arriving within the Czech territory in 2016 was to 'send a message' to those arriving in the Czech Republic that they should 'stay outside the Czech border'. The intentionally horrible treatment of migrants to deter their entrance to the Czech Republic was repeatedly criticized by various international bodies,⁶² yet remained in place probably as an attempt to address the afore-mentioned political pressures. It should be noted that there is no empirical evidence that the detention of migrants deters them from seeking asylum or entering the territory. Rather, the ratio between entering migrants and the use of detention remains constant, and globally, migration has been increasing despite the use of detention.⁶³

Sampson and Mitchell⁶⁴ suggest the use of The Community Assessment and Placement Model, which can address all of the previously mentioned motivations, including the symbolic one. They claim that this model can constitute an effective migration management tool and, thus, fulfil the 'symbolic' needs of the decision-makers all the more effectively when coupled with the cost-effectiveness rationale. At the same time, the 'migration management' rather than the 'border control' rhetoric can be

⁵⁸ Sampson and Mitchell, *supra* nt 2, p. 106; also Coffey, GJ, *et al*, "The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum" 70(12) *Social Science & Medicine* (2010) 2070, which references related research on the topic.

⁵⁹ See, for example, the story in New York Times on the dynamics between the public, the media and the politics in managing migration. *Spinning the migrants: How a media mogul helped turn Czechs against refugees*, *New York Times*. 13 September 2016, at <economist.com/news/europe/21707125-politics-central-and-eastern-europe-are-increasingly-driven-businesses-own-media> (accessed 20 August 2017).

⁶⁰ Sampson and Mitchell, *supra* nt 2, 106.

⁶¹ Leerkes and Broeders, *supra* nt 3; Welch and Schuster, *supra* nt 44.

⁶² Hu□ seynov, L, *Detention of irregular migrants: CPT standards*, 2011, at <fra.europa.eu/fraWebsite/frc2011/docs/Latif-Huseynov-FRA-Conference-2011.pdf> (accessed 20 August 2017).

⁶³ Edwards 2011a, *supra* nt 47, 2.

⁶⁴ Sampson and Mitchell, *supra* nt 2, 108-109.

coupled with other strategies to oversee migrants in the community with comparable effects and yet be a more visible symbol of successful management.⁶⁵

VI. Conclusion

This article argues that while there is a growing use of immigration detention in the European Union member states, the legal barriers coupled with a pragmatic rationale should lead to its reduction and preferably to the use of alternatives. The article builds on how the rhetoric for detention can be divided into three types of rationales: the pragmatic, political and symbolic, with only the pragmatic being capable of providing a formal ground for detention under international and European law. However, available data shows that introducing alternatives to detention is, in fact, more pragmatic with regards to the relationship between decisive factors such as: the length and effectiveness of procedures, the risk of the migrant absconding, cost-effectiveness and the human rights impact.

Despite the fact that detaining migrants for reasons other than formal or practical purposes is not permissible under law, it remains that more often than not it has in fact been used to send a political or symbolic message, for example as a deterrent to other potential migrants. This article, thus, argues that other models, such as focusing on the 'management of migration' in the community rather than 'border control', can be introduced to pursue the same objective.

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www.grojil.org

⁶⁵ *Ibid*, 107-109.

Strategies for the Protection of Migrants through International Law

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Abstract

Migration is a complex phenomenon: on the one hand, it encompasses economic, political, historical, sociological and legal issues, and, on the other, it entails several dichotomies and a multitude of causes. Such complexity has created a myriad of obstacles to construct a normative system that addresses all aspects of this phenomenon through the adoption of hard international norms. In the current global political scenario, it seems counterproductive to exclusively invest in a pathway that has not been able to achieve much so far and that focuses on the phenomenon of migration rather than on its subjects: the migrants. In light of this, this article proposes four strategies to enhance the architecture of International Law in dealing with migration, so as to allow for its improvement. These are: 1) assuming the protagonism of migrants in migration and, thus, shifting the focus from the regulation of the phenomenon to the protection of its subjects and enhancing a human rights' approach to migration, 2) enhancing the dialogue between existing international regimes and International Law in the governance of migration with a human rights lens, 3) using less formalistic approaches such as soft law and the participation of stakeholders in the governance of migration with a responsibility-sharing approach, and 4) using regional approaches to facilitate the development of stronger cooperation and regional norms. These strategies should be informed by the principle of complementarity both among themselves and in seeking international hard norms. They ultimately need to be part of a larger international structure for the protection of human dignity and human rights. Presenting this approach and these strategies and assessing whether they would constitute a superior manner in which International Law should engage with issues that arise from migration and enhance the protection of migrants are the aims of this article.

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I. Introduction

Migration is a complex phenomenon. On the one hand, it encompasses economic, political, historical, sociological and legal issues, and on the other, it entails several dichotomies (such as internal v international, forced v voluntary, regular v irregular) and a multitude of causes (as persecution, economic – subdivided into lack of development, the search of a better life or brain drain -, environmental, etc.). This fact can be seen both currently, and throughout history, with the international dimension affecting around 3.3% of the World's population; amounting to 250 million people who were international migrants at the end of 2015 (of which 65.3 million were forcibly displaced).¹

Such complexity has created a myriad of obstacles to construct a normative system that addresses all aspects of this phenomenon through the adoption of hard international norms. Although 2016 saw the first congregation of States comprehensively debating the creation of norms to address large movements of refugees and migrants, which culminated in the New York Declaration on Refugees and Migrants,² a global compact³ of mandatory nature was postponed to 2018,⁴ highlighting the difficulties of said construction.

In a global political scenario of exacerbated nationalisms, closed borders, security concerns, increased xenophobia, racism and discrimination, and economic crisis, it would seem counterproductive to exclusively invest in a pathway (i.e. international hard norms) that has not been able to achieve much. This paper will propose that it is, thus, necessary to create and examine more dynamic strategies to enhance the architecture of International Law in dealing with migration, so as to allow for its improvement.

One potential first strategy in this sense would be a shift of focus from the phenomenon of migration to the relevance of its subjects, the migrants. This would highlight the protagonist nature of migrants and, furthermore, would illustrate the vulnerabilities and the needs of different migrants within a complex migration scenario. This step would assist in creating protective regimes. By focusing on migrants, International Law would be dealing, albeit indirectly, with migration through its protagonists whilst incorporating a humane component to it. As migration only exists due to the acts of migrants,⁵ one could argue that this approach would allow

¹ Taylor, L, 'How many migrants are there in the world?' (Thomson Reuters Foundation, 18th December 2016) at <<http://news.trust.org/item/20161218090425-31269/>> (accessed 20 June 2017). The numbers were gathered from IOM, UNHCR, UNICEF and PEW Research Center.

² The Declaration resulted from the UN Summit on Refugees and Migrants of 2016 (United Nations, General Assembly, *New York Declaration for Refugees and Migrants*, A/71/L.1* (13 September 2016), at <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L> (accessed 20 June 2017).

³ The Global compact will be 'for safe, orderly and regular migration' and to guide migration with a 'set of common principles and approaches'. Another commitment of the UN Summit is to 'develop guidelines on the treatment of migrants in vulnerable situations'.

⁴ It seems – according to the UN website on the UN Summit, New York Declaration and the Global Compact – that in fact there will be two compacts in 2018: a global compact on migration, negotiated by states, and that will 'the first, intergovernmentally negotiated agreement, prepared under the auspices of the United Nations, to cover all dimensions of international migration in a holistic and comprehensive manner' (United Nations, *Global Compact for Migration* (UN4Refugess, 2017) at <<http://refugeesmigrants.un.org/migration-compact>> (accessed 20 June 2017) and a global compact on refugees, proposed by the UN High Commissioner for Refugees to the UN General Assembly on his 2018 report (*Ibid*).

⁵ The relationship of migration-migrants can be seen as an example of structural power, in the sense of 'co-constitutive, internal relations of structural positions', such as 'master-slave' or 'capital-labor'.

International Law to deal with migration in an enhanced manner. This approach would lead to the need of improving and increasing the dialogue between International Human Rights Law (IHRL), International Refugee Law (IRL), and International Law, which is the second strategy proposed by this paper.

The third and fourth strategies address the difficulties in creating hard law for the international protection of migrants, assessing manners to establish less formalistic processes in the governance of migration through the use of soft law instruments and the participation of other stakeholders. These would include stakeholders such as civil society and migrants themselves in the construction and implementation of the system(s); which needs to be based on responsibility sharing. These strategies would also take into account the role of regionalism as a locus for new norm-creation, with a goal to continuously increase migrants' protection. These strategies derive from a dialogue between International Law with the existing specific international regimes that focus on the protection of some categories of migrants (such as refugees and internally displaced persons (IDPs)), and also with debates held on the governance of international/global migration to learn and replicate their successes and avoid their shortcomings.

This proposed scenario of four strategies should be informed by the principle of complementarity, both among them and in communicating the pursuit of international norms and the implementation of specific protection regimes, i.e. as manners of improving what is already available in the architecture of International Law regarding migration and guiding the creation of new guidelines and international norms. The ideal scenario would, thus, combine the search for avenues for new treaties and new regimes with efforts to improve the implementation of existing ones. It would do so by combining general norms, applied to all migrants, and specific norms, taking into account individual needs. It would take into consideration all these strategies in all of its (existing or new) architecture.

This article presents the four above-mentioned strategies: 1) a focus on the main actors of the process by taking into account the centrality of migrants in dealing with migration, 2) a strengthened dialogue among International Law and its specific branches concerned with human rights, 3) the development of soft law, whose flexibility may be more attractive and appealing to sovereign States, and 4) the development of regional approaches for the protection of migrants and of migration. Moreover, it assesses whether this proposal would lead to a better manner in which International Law should engage with issues that arise from migration. In doing so, the article takes a panoramic and systemic approach in its arguments, analysis and proposals.

II. Strategies Rather Than Exclusively New Treaties or New Regimes

Migration is caused by and/or a consequential result of social, political, economic, geographic, cultural and historical changes, both in the country of origin and in the receiving country.⁶ Migration can also be determined by personal circumstances. In addition, it is a phenomenon with different triggers, sometimes induced by violations of human rights, conflicts, or environmental disasters, while at other times having as its

According to the structural power concept presented by Barnett, M and Duvall, R, *Power in International Politics* 59 International Organization (2005) 39, 52-53.

⁶ See for instance the concepts of society of arrival and of society of departure in Duvell, F "International Relations and Migration Management: the Case of Turkey" 16 *Inside Turkey* (2016) at <<https://www.questia.com/read/1G1-362274453/international-relations-and-migration-management>> (accessed 20 June 2017).

driving force the search for employment and the desire to join family members.⁷ Migration's complexity is strengthened in relation to its consequences as, on the other hand, human mobility facilitates trade in goods and services,⁸ enhances culture and cultural exchange, and allows for both the increase in the quantity and quality of populations. On the other hand, it can also promote a variety of social tensions, ranging from issues relating to the regulation of the labour market to the need for humanitarian aid.⁹

Trying to establish a didactic scheme or model to tackle the complexity of migration and establishing categories (such as forced v spontaneous migration, respectively divided into refugees and displaced persons and into economic migrants and migrant workers, and documented or undocumented migrants),¹⁰ may be tempting to facilitate the understanding and the thought process behind the creation of norms and regimes. However, these schemes or models cannot be rigidly applied as migration is a social complex phenomenon and concepts and 'categories' are fluid and in flux. Furthermore, as practice has shown, it is difficult to bundle a closed and comprehensive normative system that would contain simultaneously a general theory with general norms applicable to all cases of migration, and specific and particularized norms due to the peculiarities, needs and vulnerabilities of each kind of migrant, which demand different types of protection.¹¹ For instance, refugees lack protection by their respective States of origin or residence. Displaced people, however, due to 'environmental change, livelihood collapse, and state fragility',¹² may or may not lack such support, and do not always face the full impossibility of returning to the country of origin. This impossibility does not affect IDPs (internally displaced people) who are also forced migrants but not of an international nature, not due to the reasons behind their displacement but rather due to the fact that they have not crossed international borders.

Even when it comes to the question of voluntary migration, there are differences in the admission of low-skilled or highly-qualified migrants.¹³ Although there is a need

⁷ Inter-Parliamentary Union, 'Migration, Human Rights and Governance: Handbook for Parliamentarians' (Inter-Parliamentary Union and the International Labour Organization and the United Nations 2016 at <http://www.ohchr.org/Documents/Publications/MigrationHR_and_Governance_HR_PUB_15_3_EN.pdf> (accessed 20 June 2017), 17.

⁸ 'Being able to visit another country relatively freely has various consequences: free movement of people facilitates economic activity and growth ranging from tourism and shopping to business and trade, and helps to advance and grow regional economic, political, and cultural integration' (Duvell, *supra* nt 6). The United Nations Special Representative of the Secretary General on Migration also emphasizes that '[a]mong those migrants who remain abroad and succeed, some become investors in their countries of origin, bringing not only capital and trade, but ideas, skills and technology, thus enabling those countries to become more integrated into the global community' see United Nations, General Assembly, *Integrated and coordinated implementation of and follow-up to outcomes of the major United Nations conferences and summits in the economic, social and related fields*, Globalization and interdependence, Follow-up to the outcome of the Millennium Summit: Report of the Special Representative of the Secretary-General on Migration, A/71/728, February 2017.

⁹ Inter-Parliamentary Union *supra* nt 7, 24.

¹⁰ Jubilut, LL and Apolinário, SMOS, "Necessidade de Proteção Internacional no Âmbito da Migração" 6 *Revista de Direito GV* (2010) 275.

¹¹ Perruchoud, R and Vohra, S, "Identifying Core Rights of Concern to Migrants" IOM Regional Consultation Group on Migration Seminar on Human Rights and Migrants Background Paper (1998).

¹² Betts, A, 'Survival Migration: A New Protection Framework' 16 *Global Governance* (2010) 361.

¹³ 'Young, well-educated, healthy individuals are most likely to migrate, especially in pursuit of higher education and economic improvement' (S. Dodani, S. and R. E. La Porte, 'Brain Drain from Developing Countries: how can brain drain be converted into wisdom gain', 98 *Journal of The Royal*

for both,¹⁴ the former are more exposed to restrictive migration policies, sometimes even contradictory in the sense that, sometimes, irregular migration is tolerated to fill the labour market gaps. Whilst at the same time a public discourse of closing borders to protect this market is maintained.¹⁵ On the other hand, although industrialized countries have been competing for skilled migrants over the years, host countries' policies do not always provide full access to the labour market as a whole.¹⁶

This brief outlook could aid in explaining the difficulties both in conceptualizing migration as an institute of Law indistinctly applicable to several categories and in creating legal structures that would apply to all migrants. There is, so far, no comprehensive legal instrument at the international level that establishes a framework for the governance of migration¹⁷ or the protection of all migrants¹⁸. Nevertheless, 'the fact that no single set of standards exists does not mean that there are no standards for the protection of persons who cross an international border'.¹⁹

At the current stage of normative production by the international society, the protection of human beings finds a systematic normative support in different legal axes: International Human Rights Law (IHRL), International Refugee Law (IRL), International Humanitarian Law (IHL)²⁰, which, in turn, at least touch on migration issues.²¹ International Labour Law,²² International Criminal Law,²³ International

Society of Medicine (2005) 487, 488 at < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1275994>> (accessed 20th April 2017).

¹⁴ Triandafyllidou, A and Marchetti, S, 'Europe 2020: Addressing Low Skill Labour Migration at times of Fragile Recovery', [2014] RSCAS Policy Paper, 2014 at <http://cadmus.eui.eu/bitstream/handle/1814/31222/RSCAS_PP_2014_05.pdf?sequence=1> (accessed 20 June 2017).

¹⁵ *Ibid.*

¹⁶ The Blue Card scheme, the United Kingdom open high-skill migration policy, for example, 'does not offer access to the EU labour market as a whole and is still related to rather cumbersome bureaucratic procedures if the highly skilled worker wants to take up a job in another EU country' (Triandafyllidou, A and Isaakyan, I, "EU Management of High Skill Migration" [2014] RSCAS Global Governance Programme 2014/4, 1 at <<http://cadmus.eui.eu/handle/1814/34706>> (accessed 20 June 2017).

¹⁷ 'International Migration Law' (International Organization for Migration, 2017) at <<http://www.iom.int/international-migration-law>> (accessed 20 June 2017).

¹⁸ It is important to mention the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, a core human rights document with a committee vested with the responsibility of its supervision. However, it is limited in its scope and applicability as only 51 states (and mainly from the Global South are States parties (at <<http://indicators.ohchr.org>> (accessed on 20 August 2017)). ('The Core International Human Rights Instruments and Their Monitoring Bodies' (Office of the High Commissioner for Human Rights, 2017) at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>> (accessed 20 June 2017).

¹⁹ Perruchoud and Vohra, *supra* nt 11.

²⁰ Jubilut, LL, *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro* (Método 2007).

²¹ Inter-Parliamentary Union *supra* nt 7,41.

²² A range of ILO Conventions set the rights of regular migrant labour and the ILO oversees and advises on states' implementation of these Conventions see Betts, A, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants" 22 *International Journal of Refugee Law* (2010) 209, 217.

²³ It is interesting to recall that some aspects of smuggling and trafficking of persons are dealt with in International Criminal Law. 'The main applicable instruments of *international criminal law* pertaining to migration are the two 'Palermo Protocols' to the UN Convention against Transnational Organized Crime, adopted in 2000, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air' (Inter-Parliamentary Union, *supra* nt 7, 42).

Consular Law,²⁴ International Environmental Law,²⁵ and International Maritime Law,²⁶ all branches of International Law that can also be seen as complementing the international protection of human beings as well as containing provisions applicable to the regulation of the migratory process.²⁷

However, Law is not the single force in trying to assess and influence the migratory process and the creation of standards for the protection of international migrants. In times of nationalistic waves and anti-terrorism concerns, border closures and manifestations with racist and xenophobic contents the issues surrounding the migratory phenomenon have been addressed much more under political assumptions than under legal presuppositions.²⁸ Migratory issues have direct and indirect effects on economic power discourses and security discourses that relegate legal issues to the background.

Because States value their ability to modify their migration policies to reflect changing needs and circumstances relating to matters such as labour market conditions, local demographic profiles, local skill levels, and popular sentiment about migration and migrants, they have been generally reluctant to undertake binding commitments limiting their discretion over migration.²⁹

Regardless, it is relevant that International Law tackles migration and even more so the protection of migrants given that International Law does effect States' behaviour.³⁰ This is true given that, on the one hand, International Law is ultimately the result of commitments in which reciprocity of treatment, stability of expectations, and predictability of actions are sought,³¹ and, on the other, '*[m]igration policies and practices can only be viable and effective when they are based on a firm foundation of legal norms, and thus operate under the rule of law*'.³² Moreover, if migration issues are seen from the standpoint of the centrality of migrants, IHRL assumes a position of paramount importance and its logic, rhetoric, architecture, and grammar need to be in play in dealing with migration.

²⁴ *Ibid*, 'International consular law is enshrined in the Vienna Convention on Consular Relations 1963, its Optional Protocol concerning Acquisition of Nationality, and the Optional Protocol concerning the Compulsory Settlement of Disputes, which also include several provisions for the protection of a country's nationals abroad'.

²⁵ Although there is no legal instrument of International Environmental Law related to migration, there is a Draft Convention on the Protection of Persons in the Event of Disasters being developed by the UN International Law Commission and a Project for a Convention on the International Status of Environmentally Displaced Persons, drafted by research groups at the University of Limoges and other contributors (Jubilut, LL and Ramos, EP, "Regionalism: a strategy for dealing with crisis migration" 45 FMR (2014) 66, 66).

²⁶ '*International maritime law* is an umbrella term that refers to the UN Convention on the Law of the Sea, 1982, as well as the many instruments adopted under the auspices of the International Maritime Organization (IMO), which include a number that are of particular relevance to the rights of migrants, such as the International Convention for the Safety of Life at Sea, 1974, and the International Convention on Maritime Search and Rescue, 1979 (Inter-Parliamentary Union, *supra* nt 7, 42).

²⁷ *Ibid*, 40-46.

²⁸ Betts, *supra* nt 22, 217.

²⁹ Solomon, MK, "Focus on Regional Consultative Processes on Migration, IOM's International Dialogue on Migration and the Berne Initiative" (2005) United Nations Expert Group Meeting on International Migration and Development International Migration Management through Inter-State Consultation Mechanisms at <http://www.iom.int/sites/default/files/our_work/ICP/RCP/expert_paper_rcp.pdf> (accessed 20 June 2017).

³⁰ Guzman, AT, *How International Law Works: a rational choice theory* (Oxford University Press, 2008).

³¹ do Amaral Junior, A, *Curso de Direito Internacional Público* (Atlas, 4th Edition, 2013), 9-10.

³² Inter-Parliamentary Union, *supra* nt 7, 40.

International Law should not be the only strategy in dealing with migration but it is a relevant one, especially in guaranteeing the protection of migrants.

International Law is an appropriate place for regulation and governance of migration issues by virtue of their transnational nature,³³ and by the possibility of adding layers to internal protection.

It should not be forgotten, however, that the scope of International Law is conditioned by the political relationships among States that, although being sovereigns and legally equal,³⁴ have different levels of power,³⁵ and have the most diverse interests. Although the interdependence related to the protection of common values and interests cannot be denied, issues related to the protection of sovereignty may (and have) conditioned the effectiveness of International Law, which certainly affects the migratory phenomenon.

As in other areas, in relation to migration, International Law may be limited due to the dichotomies between sovereignty and human rights as well as Law and politics. This may lead to difficulties in developing a general legal architecture on the topic and, therefore, alternatives for developing norms need to be sought.

International Law exists in the international scenario and, therefore, needs to coexist and be in sync with international relations so as to benefit from the exchange of analytical structures and to not exist in a vacuum, jeopardizing its applicability.³⁶ The theory of international regimes is a good example of a relevant dialogue in this sense: if the concepts of international regimes arise from International Relations, it is International Law that, in practice, houses (at least the most complex ones of) them. In terms of the topic at hand it seems that the concept of international regimes can be of use in assessing International Law and migration and the protection of migrants.

International regimes such as those found within IHRL,³⁷ IRL,³⁸ and IHL³⁹ go beyond norms and are also composed of rules, principles, and decision-making procedures.⁴⁰ The duties of which are assumed by bodies set up to promote them.⁴¹ The IHRL system, for example, intended for the broad protection of all human beings has its foundation and main guideline in the Universal Declaration of Human Rights (UDHR),⁴² strengthened by two subsequent Covenants⁴³ and by various specific thematic

³³ Even when it comes to internally displaced persons, the international community's interest in the external effects of internal instability is still identified, whether related to the protection of persons or to border security.

³⁴ UN Charter, Article 2 (1).

³⁵ Jubilut, LL "Direito Internacional, Política e Relações Internacionais" in Jubilut, LL, (ed), *Direito Internacional Atual* (Elsevier, 1st Edition, 2014).

³⁶ For an assessment of the relationship between International Law and International Relations, see *Ibid.*

³⁷ Nowak, M, *Introduction to the Human Rights Regime* (Brill, 1st Edition, 2003).

³⁸ Nicholson, F and Twomey, P, *Refugee Rights and Realities: evolving International Concepts and Regimes* (Cambridge University Press, 1st Edition, 1999).

³⁹ Hammerstad, A "The International Humanitarian Regime and its Discontents: India's Challenge" 4 *The Round Table* (2014) 457.

⁴⁰ Krasner, S, "Structural Causes and Regime Consequences: Regimes as Intervening Variables" 36 *International Organization* (1982) 185.

⁴¹ '[T]he human rights movement is not simply a matter of fundamental postulates, ideologies and norms [...]. To the contrary, these basic elements are imbibed in institutions [...]', (Steiner, HJ and Alston, P *International Human Rights in context – Law, Politics and Morals* (Oxford University Press, 2nd Edition), 137.

⁴² UNGA at <[http://undocs.org/A/RES/217\(III\)](http://undocs.org/A/RES/217(III))> (accessed 20 June 2017).

⁴³ UN General Assembly, *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR) and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (ICESCR).

conventions and documents.⁴⁴ It has gained, over time, feasibility from bodies such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Human Rights Committee (HRC), and the Committee on Economic, Social and Cultural Rights (CESCR). IHRL, thus, currently combines norms, principles, rules, and decision-making procedures, therefore, allowing one to see the existence of an international regime of protection of human rights.

The core of IRL, in turn, is composed by the 1951 Convention Relating to the Status of Refugees,⁴⁵ and by the 1967 Protocol Relating to the Status of Refugees, whose implementation supervision is delegated to the United Nations High Commissioner for Refugees (UNHCR). IRL aims for the protection of persons who migrate to another State as a result of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In the case of Africa, IRL also allows for the protection of persons fleeing acts of aggression and violations to the public order,⁴⁶ and in some Latin America and Caribbean countries,⁴⁷

⁴⁴ For example: International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention on the Rights of Persons with Disabilities, Optional Protocol to the Convention on the Rights of Persons with Disabilities, International Convention for the Protection of All Persons from Enforced Disappearance, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, Durban Declaration and Programme of Action (from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance).

⁴⁵ '[T]he term 'refugee' shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'. (Convention Relating to the Status of Refugee – Article 1(A)).

⁴⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 1(A). 1. For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

⁴⁷ Cartagena Declaration on Refugees, Conclusion 3. To reiterate, that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (Article 1(2)) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

extends to persons fleeing gross and generalised violations of human rights.⁴⁸ The UNHCR is the organ with the mandate to conduct and coordinate international action to protect refugees and the search for durable solutions to their problems.⁴⁹ In light of this, a regime of protection of refugees can be identified.

In relation to IHL, there are regimes for the protection of human beings exposed to armed conflict depending on their peculiarities (such as civilians and wounded persons). They are composed of some international instruments including the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, and the Geneva Conventions as well as the coordinated activities of UN organs and agencies (such as: the World Food Program (WFP), UNHCR, United Nations International Children's Emergency Fund (UNICEF), United Nations Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Relief and Works Agency for Palestine Refugees (UNRWA), and Food and Agriculture Organization of the United Nations (FAO)),⁵⁰ and by organisations such as the Red Cross and Red Crescent Societies.

As classically designed, the legal purpose of all international regimes is clearly coloured with political content.⁵¹ If, on the one hand, the basic aspects of defining such regimes (principles and norms, i.e. legal content) may not require reformulation especially when it comes to human dignity, on the other hand, rules and decision-making procedures (political content) may be responsible for their modification and may give sufficient flexibility to the changes that might be necessary.

International regimes are relevant in the current international scenario and for International Law. The flexibility and possibility of changes in regimes reinforce the stability of Law while making enforcement practices more flexible and, thus, feasible; and does not remove or diminish the importance of hard law, which is true in questions of migration and, even more so, of the protection of migrants. In terms of migration, international regimes, and specially IHRL and IRL, provide alternative avenues for the protection of migrants while general hard international norms are lacking but also highlighting specific needs and developing norms when consensus has been possible to be achieved in the international scenario.

The notion that international regimes establish reliable and lower-cost information channels essential for consensus-building is not new and emphasizes the importance of these institutions for the promotion of cooperation.⁵² This perspective, however, does not rule out the need for the specialisation of each regime to be built on common bases of International Law.

⁴⁸ Countries that have incorporated the Cartagena Declaration: Argentina, Belize, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Uruguay, see at <<http://www.acnur.org/que-hace/proteccion/declaracion-de-cartagena-sobre-los-refugiados/paises-que-incorporan-la-definicion-de-refugiado-establecida-en-la-declaracion-de-cartagena-en-su-legislacion-nacional/>> (accessed 20 June 2017).

⁴⁹ Article 1 of the Statute of UNHCR at <<http://www.unhcr.org/protection/basic/3b66c39e1/statute-office-united-nations-high-commissioner-refugees.html>> (accessed 20 June 2017).

⁵⁰ Andrade, CSM and Madureira, AL, "A ONU e a Assistência Humanitária" in Jubilut, LL, Silva, J CJ and Ramina, L (eds), *A ONU aos 70: contribuições, desafios e perspectivas* (Editora da UFRR 2016) 902 - 925.

⁵¹ 'Principles and norms provide the basic defining characteristics of a regime. There may be many rules and decision-making procedures that are consistent with the same principles and norms. [...] Fundamental political arguments are more concerned with norms and principles than with rules and procedures', (Krasner, *supra* nt 40, 188).

⁵² Nye Junior, JS, *Cooperação e Conflito nas Relações Internacionais tradução Henrique Amat Rêgo Monteiro* (Editora Gente, São Paulo, 2009).

On the other hand, the specialised handling of issues has as a setback the fact ‘*that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law*’.⁵³ At the same time, in complex fields such as migration specialization can leave situations unaddressed for which the existing regimes were not designed. In light of this, one can argue that the diversity or fragmentation⁵⁴ of International Law needs to coexist with the search for its cohesiveness and dialogue with all relevant norms.

In this sense, despite the existence of international regimes that touch on migratory issues and the protection of migrants and despite the background of International Law, i.e. despite the relevance of both International Law and International Regimes for the topic, it is paramount that strategies that permeate all these specific regimes and promote a certain unity in International Law dealings with migration and migrants’ protection are established so that the coherence and legitimacy of International Law is preserved.⁵⁵

In so far that advancing hard norms in International Law in the topic of migration and migrants’ protection have been challenging and the limitations arising from international regimes in terms of a general architecture on the topic are clear, it seems appropriate to deal with the question of the relationship between International Law and migration rather than only through the establishment of a closed normative system but through the delimitation of protection strategies. Protection strategies that could: (i) unify the language of cooperation in the field of migrations, (ii) enlarge the protective umbrella of migrants, and (iii) solve common problems for the adequate governance of migration. After all, comprehensive and adequate protection will only be in place when the strengthen and bases of International Law are combined with the specificity of international regimes and when there is an alignment of them both with common strategies underlining all of the international architecture created to deal with migration and migrants’ protection.

For coherence, the first strategy proposed by this paper is to establish guidelines for the creation of new norms that consider: (i) the protagonist character of migrants in the understanding and the governance of migration (and as human beings whose dignity must be preserved), and (ii) a human rights-based approach to the migration phenomenon as a whole. In fact, there is no other tool better suited than human rights (and, consequently, human dignity) in tackling common ground in migration insofar as their observance is an *erga omnes* obligation as broadly recognised by the International Community.⁵⁶ From this first strategy the second one should derived: improving the dialogue of IHRL and IRL with International Law through cooperation, which, in turn, can also be favoured by the third and fourth proposed strategies. These last two strategies encompass regional approaches to migration and less formal actions that include the

⁵³ United Nations, International Law Commission, “Report on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law”, A/CN.4/L.682, 13 April 2006 at <http://legal.un.org/ilc/documentation/english/a_cn4_1682.pdf> (accessed 20 June 2017).

⁵⁴ On International Law’s fragmentation, see the works of M. Koskeniemi.

⁵⁵ As stated by Franck, T citing Dworkin: ‘Coherence demonstrates that states relate through more than random interactions; that they consciously accept responsibilities derived ‘from a more general responsibility’ that is based on a membership in a community’, Franck, T, “Legitimacy in the international system” 82 *American Journal of International Law* (1988) 748.

⁵⁶ Meron, T, *International Law in the Age of Human Rights: general course of Public International Law* (Hague Academy of International 2003), 21.

development of soft law and the participation of non-state actors in a responsibility-sharing-based migration's governance. The proposal of these four strategies will be developed in the following sections.

III. Proposed Strategies For How International Law Can Deal Better with Migration

A. Migrants: Protagonist in Movement

It is not uncommon to approach the migratory phenomenon from the perspective of States' interest rather than from the perspective of the migrant as the main actor of and in the process. Although 'it was the real or assumed intention, decision and action of people to migrate that put migration on the political agenda of the affected countries'⁵⁷, the realistic bias of security, wealth and power⁵⁸ continues to impose a link between territory and nationality that precedes any considerations about individuals or groups.⁵⁹ In this sense, migration policies are even used as instruments of political bargaining from which borders are opened or closed according to the interests at stake.⁶⁰

The contemporary international order, however, is founded on the centrality of human rights,⁶¹ which has even led to claims of a humanisation of International Law⁶² or the birth of a universal legal conscience.⁶³ This presupposes that it is 'necessary for state or non-state actors to be concerned about the treatment of the inhabitants of other states'⁶⁴ and that States are responsible for all persons within their jurisdiction⁶⁵ - expressions of the universality of human rights by which individuals are viewed without any classification of origin. It also presupposes that the study of processes and social relations – such as migration - must be carried out from the standpoint of the protection of human being and not from the protection of States' power.

States have contributed to the creation of contemporary International Law (still being the main creators of its norms, directly or through international organisations) and, thus, to the inclusion of human rights as a guiding factor in the construction of the international regimes it houses. In this sense most governments and institutions recognise that at least some human rights are obligations *erga omnes*.⁶⁶

⁵⁷ Duvell, *supra* nt 6.

⁵⁸ Stein, AA, *Why Nations Cooperate: Circumstance and Choice in International Relations* (Cornell University Press 1990), 4.

⁵⁹ The so-called *methodological nationalism*, of Ulrich Beck; Beck, U, "Toward a New Critical Theory with a Cosmopolitan Intent" 10(4) *Constellations* (2003) 453.

⁶⁰ Duvell, *supra* nt 6.

⁶¹ The centrality of human rights stems from the Kantian idea that the human being is an end in itself, and not a means to other ends; Kant, I, *Fundamentação da Metafísica dos Costumes* (Edições 70, 2007), 68. It is expressed, for instance, in '[...] *direitos humanos como paradigma e referencial ético a orientar a ordem internacional contemporânea*. *Se a 2ª Guerra significou a ruptura com os direitos humanos, o Pós-Guerra deveria significar a sua reconstrução*' ('[...] human rights as paradigms and ethical guidelines to lead the current international order. If the 2nd World War has signified the rupture with human rights, the post-war period should signify its reconstruction'); Piovesan, F, "A Universalidade e a Indivisibilidade dos Direitos Humanos desafios e perspectivas", in Baldi, CA, ed, *Direitos Humanos na Sociedade Cosmopolita* (Renovar, São Paulo, 2004), 47.

⁶² Meron, *supra* nt 56, 50.

⁶³ See the Works of Judge Cançado Trindade, AA, who brings the idea of a "*consciência jurídica universal*".

⁶⁴ Sikkink, K, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America" 47(3) *International Organization* (1993) 411, 413.

⁶⁵ UNHRC 'General Comment 31' The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) CCPR/C/21/Rev.1/Add. 1326; see paragraph 10.

⁶⁶ Meron, *supra* nt 56, 21.

Assuming that all migrants are human beings and that the first quality precedes the quality of being a migrant, human dignity and the guarantee of human rights provided by the International Order must be respected regardless of migratory status. In this sense, when it comes to migration, the misconception in assuming the realistic bias - through which persons' mobility is seen from the standpoint of the flow of capital and of labour force, but not from the point of view of human rights and vulnerabilities - seems clear. It distances non-migrant actors from the migrants' humanity.⁶⁷

A human rights-based approach highlights the better adequacy of a constructivist bias to migration, which assumes political relations as social relations that have direct effects on people and which are constructed from meanings and beliefs that determine the identities and values shared by the world community⁶⁸ among which are international obligations assumed by the States of protecting the juridical reflections of human dignity, i.e. human rights.

From the adoption of a human rights-based approach also derives the fact that it is not possible to ignore that the migratory phenomenon necessarily leads to vulnerability albeit at different levels.⁶⁹ Any migrant, whatever the cause of his/her movement, will be exposed right from the start at least to the socio-cultural⁷⁰ vulnerability of non-original membership of the host society in a clear pattern of inequality in comparison to native inhabitants. This social-cultural vulnerability may also be associated with others of temporal, spatial or socio-political purport⁷¹ that can affect human rights, in its contents of freedom (civil and political rights) and/or equality (economic, social and cultural rights), i.e. that can become juridical vulnerabilities.

The way to face and correct any of these social-cultural or juridical vulnerabilities is to adopt a human rights-based approach in dealing with the protection of migrants and with any and all treatment of migration, which only becomes effective if one considers the protagonism of the persons (i.e. the migrants), not of the State, in the migratory process.

Once the approach to migration turns its focus to the human being specific needs are taken into consideration while the purpose of justice and generalised protection is sought.⁷² The process of human rights specification allows diversity to be considered as a

⁶⁷ Kakenmaster, B, "A Liberal Overview of Causes, Types, Pros and Cons" *The Oxford Council on Good Governance* (2017) at <<http://ocgg.org/fileadmin/Publications/P002.pdf>> (accessed 20 June 2017).

⁶⁸ Hurd, I, "Constructivism" in Smith, CR and Snidal, D, eds, *The Oxford handbook of international relations* (Oxford University Press, 2008), 299.

⁶⁹ Inter-Parliamentary Union, *supra* nt 7, 144.

⁷⁰ 'Socio -cultural determinants of vulnerability for migrants reflect differences in the norms, values and customs which constitute local constructions of the 'migrant''; Sabates-Wheeler, R and Wait, M, "Migration and Social Protection: a concept paper" (2003) Development Research Centre on Migration, Globalisation and Poverty Working Paper T2/2003, 13 at <http://www.migrationdrc.org/publications/working_papers/WP-T2.pdf> (accessed 20 June 2017).

⁷¹ 'Temporal determinants of vulnerability factor largely in migrants' lives. In a static sense, the migrant faces different vulnerabilities associated with different points in the migration process (migrants in transit, migrants at destination, and the migrant's family at source). In a dynamic sense, the temporal vulnerabilities of a migrant and the family of the migrant at the source are nuanced by the length of migration (temporary, seasonal, long-term, daily, temporary, lifetime). [...] In transit, migrants may be 'remote' in terms of geography and in terms of access to basic services such as health and education. A large number of undocumented migrants are vulnerable to health problems because of inhospitable terrain on transit and isolation. They are also vulnerable to exploitation and poverty due to their spatial dis-location from economic and social opportunities. [...] Socio -political determinants of vulnerability refer to the institutional constraints facing migrants and typically reflect the lack of political commitment from the destination government/society to the migrant'; *Ibid*, 13-15.

⁷² Jubilut and Apolinário, *supra* nt 10, 276.

strategy for achieving equality,⁷³ which does not occur when one considers the phenomenon of migration as such and not the people creating and involved in it. In the latter the tendency is to value causes rather than effects, which results in attempts to prevent migration and not in protection policies for those who need to migrate or who exercise the right of movement.⁷⁴

The whole migratory process needs to be contemplated from the point of view of the main actor. Therefore, there is no more appropriate means to deal with the relationship between International Law and migration than through the protection of the human beings, which involves assuming the protagonism of migrants and the need for a human rights-based approach to migration.

B. Improving the Dialogue of IHRL and IRL with International Law

A direct result of adopting a human rights-based approach to migration is the need to improve the dialogue of IHRL and IRL with International Law.

Even though some regimes of protection of human beings and of governance of migration have been generated within International Law there is, as seen, no normative coverage for all international migrants.⁷⁵ Environmentally displaced persons, smuggled and trafficked persons, and humanitarian migrants are some of these persons that might need international protection and depend on *ad hoc* creations as they are not contemplated by specific hard international law or regimes focused on human rights. Despite this relevant lack of specific protection from a human rights standpoint, one can see that the existing regimes were built on a common background for the respect of human rights.

Both IHRL and IRL were built on the basis of the protection of human dignity⁷⁶ and consist of branches of International Law aimed at the protection of human beings.⁷⁷ Hence, in the absence of a common system convergence between these regimes and between instruments contained in them may mean greater support for persons in vulnerable conditions due to migration.

Using a traditional model of classifying migration so as to better assess one of its aspects, one sees that from the perspective of its main actor migration can be classified by the possibility of choice: a) forced migration and b) voluntary migration. The first classification covers 1) refugees; 2) stateless persons that are migrating; 3) internally displaced persons due to conflicts, disasters or human rights violations; 4) environmentally displaced persons; 4) displaced persons as a result of situations related to economic, social and cultural rights, whether due to a lack of implementation or by

⁷³ Duarte, CS, "Fundamentos Filosóficos da Proteção às Minorias" in Jubilut, LL, *et al*, eds, *Direito à Diferença* (1edn Saraiva 2013), 34.

⁷⁴ It is important to recall that freedom of movement – which includes the right to leave one's country – is consecrated as a human right; see for instance Article 13 of the Universal Declaration of Human Rights. More recently, there have been campaigns advocating the right to migrate as a human right in itself.

⁷⁵ Alexander Betts points out that '[t]hree broad categories of people stand out as having unfulfilled protection needs as a result of conditions in the country of origin: a) people who may be considered as 'neither/nor' groups, who flee desperate economic and social distress, for example, resulting from state collapse, who are in need of some form of subsidiary protection, but who are not 1951 Convention refugees; b) people who flee natural disasters, such as tsunamis, earthquakes and flooding, to whom UNHCR is increasingly providing protection but who have no clear legal status and for whom operational responses are *ad hoc*; c) people who are displaced by causes related to environmental degradation or the consequences of climate change. See Betts, *supra* nt 22, 211.

⁷⁶ See for instance the 1st paragraph of the preamble of the 1951 Convention on the Status of Refugees and the 1st paragraph of the preamble of the Universal Declaration of Humans Rights.

⁷⁷ Jubilut, *supra* nt 20.

development actions that induce migration; and 5) people seeking political asylum.⁷⁸ All those persecuted on the basis of race, religion, nationality, political opinion and membership of a social group who are unable or unwilling to return to their State of origin or residence qualify as refugees and are protected by IRL, which is the most structured scheme. In the absence of persecution, however, there is no specific (nor comprehensive) international protection for forced migrants, which, in light of the previous list, shows a huge gap in International Law.

Voluntary migration for its part finds basic protection within IHRL, albeit by separate instruments (such as the UHRD, the International Covenant on Civil and Politics Rights, the International Covenant on Social, Economic and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families) as well as diplomatic protection provided by the State to its nationals who are abroad.⁷⁹

Separating migrants into the forced and voluntary migration categories and distinguishing on basis of different triggers of migration can be a recourse to assist in highlighting the gaps in specific protection. This recourse does not, however, fix all the blurred lines in international migration. For instance, there are difficulties in sometimes assigning one 'label' to a specific migrant⁸⁰ or in separating specific regimes to be applied as they might overlap as there is no guarantee that people who move voluntarily on economic issues will not be subjected to vulnerabilities such as those attributed to forced migrants, whose condition, in turn, may also admit protection techniques similar to those available to migrant workers, for example.

While falling in principle in distinct legal categories, in practice, refugees, stateless persons, asylum seekers and migrants (including migrants in an irregular situation) often move and live in similar physical spaces and have similar human rights needs – in relation to their right to health or to freedom from arbitrary or prolonged detention, for example. Moreover, the principle of non-refoulement protects both refugees, who fear persecution in their countries of origin, and migrants, who fear torture or ill treatment upon their return, including at the hands of smugglers from whom the state will not protect them, or because of lack of access to lifesaving medical treatment.⁸¹

From the beginning of the displacement any migrant might be exposed to risk whether arising from gender or age or health issues, from contacts with coyotes, middlemen or with corrupt law enforcement agencies and traffickers⁸² or even from dangerous crossings in geographical terms. Regardless of the classification, even in the absence of restrictive policies, there is always a possible vulnerability related to cultural barriers (language, uses and customs, access to information) from which might derive social exclusion: difficulty or lack of formal access to existing institutions in the host country, such as health,

⁷⁸ Jubilut and Apolinário, *supra* nt 10.

⁷⁹ *Ibid.*

⁸⁰ This is even truer in light of mixed migration flows that are one of the characteristics of current international migration.

⁸¹ Inter-Parliamentary Union, *supra* nt 7, 144.

⁸² Sabates-Wheeler and Wait, *supra* nt 70.

education, labour market, social services and adequate housing,⁸³ which, in turn, may prevent participation in political life⁸⁴.

Additionally, when it comes to undocumented migrants, both forced and voluntary, it seems that there is still a greater willingness to allow oneself to be exploited due to fear of expulsion or deportation associated with the need for survival.⁸⁵ In some cases '[t]he rhetoric and practice in some countries of designating migrant's human beings as 'illegal' serves to justify non-recognition of fundamental rights and even denial that these rights apply'.⁸⁶ As a consequence, the universality of human rights may remain unapplied. And in light of this, the ideal of integral protection (meaning 'the combination of their rights as refugees [or migrants] and their rights under human rights law'⁸⁷) is also jeopardised.

On the other hand, the difficulties of each migrant can be diverse even when one considers migrants with the same motives for migrating (forced or voluntary) or the same legal status. Cultural barriers, for example, can be heightened for women, children, the elderly and people with disabilities, who are also likely to be more exploited⁸⁸ and are the most unprotected in the case of disasters that require immediate removal and care.⁸⁹ Differences also appear in other groups of migrants, as while '[u]nskilled or semi-skilled migrants, for instance, may be made more vulnerable in terms of health and security',⁹⁰ '[p]eople who face trafficking, trauma and violence, or who become stranded migrants'⁹¹ have specific protection needs.

In light of this, it is worthwhile to recall the perspective of international regimes to note that, although the specialisation characteristic is assumed as an advantage (in a given issue-area),⁹² such specialisation has as its background the idea that complete convergence may be impossible so that cooperation is sought in what is possible. This idea, however, does not prevent any relationship between regimes (which should not remain embedded in their own spheres, but be stretched to reach situations similar to those to which they were built to tackle and which, in many cases, did not exist when they originated)⁹³ or between regimes and International Law in general. One should then strive for general protection when common bases are in place and for specific protection when peculiarities exist and need to be addressed.

The existing regimes (in IRL or IHRL) or even the norms in International Law dealing with migration are/or should be of the same value standard (protection of human dignity), which, in constructivist terms, justifies convergence between existing systems in

⁸³ Albuquerque, J, *et al*, "O Papel do Entorno no Acolhimento e na Integração de Populações Migrantes para o Exercício da Plena Cidadania" in Gediell, JAP and Godoy, GG *Refúgio e Hospitalidade*, eds, (Kairós Edições, 2016), 361-380.

⁸⁴ Beetham, D, "What Future for Economic and Social Rights?" 43(1) *Political Studies* (1995) 41.

⁸⁵ 'Perhaps the most significant source of vulnerability for international migrants in destination countries is illegality'; Sabates-Wheeler and Wait, *supra* nt 70, 27.

⁸⁶ Inter-Parliamentary Union, *supra* nt 7.

⁸⁷ See Jubilut, LL and Madureira, AL, "Thinking Long-term: A Foundational Framework for Durable Solutions for Refugees", 7 October 2016, at <<http://ohrh.law.ox.ac.uk/thinking-long-term-afoundational-framework-for-durable-solutions-for-refugees>> (accessed 20 June 2017).

⁸⁸ Inter-Parliamentary Union, *supra* nt 7.

⁸⁹ Cavedon, FS and Vieira, RS, "Conexões entre Desastres Ecológicos, Vulnerabilidade Ambiental e Direitos Humanos: novas perspectivas" 2(1) *Revista de Direito Econômico e Socioambiental* (2011) 179.

⁹⁰ Sabates-Wheeler and Wait, *supra* nt 70, 26.

⁹¹ Betts, *supra* nt 22, 220.

⁹² Krasner, *supra* nt 40, 34.

⁹³ Betts, *supra* nt 22, 12.

a coordinated manner.⁹⁴ In addition, in practical and realistic terms the intentions are the same: reducing the costs of drafting, monitoring and applying rules - transaction costs -, which also justifies the formation of already existing regimes.⁹⁵ In these relations the same 'shadow of the future'⁹⁶ present in the migratory phenomenon - historically permanent⁹⁷ - was already identified and justifies the extension of the cooperative pattern to hypotheses reached by the same values and protective intentions.⁹⁸

Applying this to the topic of this paper, one can defend that, although IRL is designed to protect human beings in situations of existing or perceived persecution due to race, religion, nationality, social group membership or political opinion (special situations), it is informed by principles and has mechanisms that are perfectly suitable to other situations for which they were not originally designed. In this sense, some of its protective structure should be respected in other migration situations: 1) *non refoulement* – which has acquired the status of *jus cogens*⁹⁹ - should always be applied where States of origin or residence do not provide protection for dignified survival;¹⁰⁰ 2) family reunification should be applied to facilitate the granting of visas for the families of any migrant; and 3) the principle of non-discrimination -laid down in Article 3 of the Convention Relating to the Status of Refugee and also a core value of IHRL, as an expression of the principle of equality – should be respected at all times for all migrants.

It should also be noted that the treaty bodies constituted by IHRL for the feasibility of the human rights protection regimes¹⁰¹ 'have shared and complementary objectives and areas of work, both at operational and policy levels'¹⁰² and are 'able to highlight different aspects of, and contribute different perspectives on migration-related issues',¹⁰³ so that even decision-making procedures can be established in a convergent way. The idea of the universality of human rights, which makes it imperative to respect the human rights of migrants as human beings, and the seeking of integral protection for

⁹⁴ Hurd, *supra* nt 68, 62.

⁹⁵ Keohane, RO, *Power and Governance in a Partially Globalized World* (Routledge 2002).

⁹⁶ The shadow of the future presupposes long-term relationships, regularity of cooperative demands, reliability of information about the actions of the other stakeholders, and a fast feedback on changes in these actions. See Axelrod, R and Keohane, RO, "Achieving Cooperation Under Anarchy" in Oye, KA, ed, *Cooperation Under Anarchy* (Princeton University Press, 1986), 232.

⁹⁷ 'Migration is frequently labelled as a recent phenomenon. There are, however, few people in the world who need to go back further than three generations in their family tree to stumble upon a migrating ancestor'; BBC News, Schover, M, *Migration: A Historical Perspective*, 23 March 2004 at <http://news.bbc.co.uk/2/hi/in_depth/3557163.stm> (accessed 20 June 2017).

⁹⁸ It is worth resorting to the idea of issue-linkage (element of the international regimes theory) as an additional gain for parallel matters that determines the behaviour of the actors for other cooperation actions; Axelrod and Keohane *supra* nt 95, 88.

⁹⁹ Alain, J, "The *Jus Cogens* Nature of *Non – Refoulement*" 13(4) *International Journal of Refugee Law* (2001) 533.

¹⁰⁰ '[I]nsofar as the situation of irregular migrants means that their own states are unwilling or unable to provide fundamental human rights (such as the right to life), returning those migrants to a country in which there is good reason to believe that these rights would not be met would amount to a violation of those rights by the returning state. [...] In situations in which return may lead to torture, inhuman or degrading treatment or punishment, this obligation may require the state to allow an individual to remain on its territory so long as there is a risk of him or her being exposed to such treatment in his or her country of origin'; Betts, *supra* nt 22, 218.

¹⁰¹ Among these the United Nations High Commissioner for Refugees (UNHCR), the Committee on Economic, Social and Cultural Rights (CESCR), The Human Rights Committee (CCPR), the Committee Against Torture (CAT), and the Committee on the Elimination of Racial Discrimination (CERD).

¹⁰² Solomon, *supra* nt 29, 4.

¹⁰³ *Ibid.*

migrants, make the performance of these bodies perfectly adequate to the migratory situation - especially in a context where the migrant is assumed as the protagonist.

That said, two of the mechanisms that can be used for aligning the IRL and IHRL complementary application and the norms of International Law dealing with migration in general are (i) adopting less formalistic processes in the governance of migration (through the use of soft law and the participation of other stakeholders – such as civil society and migrants themselves- in a responsibility-sharing approach) and (ii) regional approaches, as will be seen below.

C. Less Formalistic Approaches to Regulating Migration

i. Developing Soft Law

Migratory issues are one of those topics directly related to the exercise of State power. At the same time that the external face of sovereignty gives States the possibility of regulating their frontiers and of electing which nationals from which States are allowed entry into their territory, the internal dimension guarantees them the election of safety, demographic and labour market regulation policies.¹⁰⁴ From a State-centric standpoint, there is room to argue for the reluctance to formal international commitments on migration issues.

Nevertheless, migration is also one of those themes that affects all countries in the world, whether as a State of origin, a host State or a transit State,¹⁰⁵ which is sufficient reason for an interest in cooperating. To which one can add the human rights commitments that need to be respected, even in a topic that is often presented as a ‘sovereignty’ matter, as the responsibility to protect both a State’s nationals who are abroad and foreigners who are in its territory remain. Furthermore, another important addition to this equation is the duty to preserve the human dignity of anyone who is a migrant from any country, as an outcome of the flexibilisation of domestic jurisdiction, brought about by the internationalization of human rights.¹⁰⁶ It seems, thus, that the regulation of migration is one topic in which the dichotomy between sovereignty and human rights is highlighted¹⁰⁷.

‘As a continuum, or spectrum, running between fully binding treaties and fully political positions’,¹⁰⁸ soft law is an appropriate mechanism for solving the dilemma between the responsibility to protect and the exercise of sovereignty¹⁰⁹ in the current international scenario that makes the adoption of hard international norms on migration difficult.

Soft law are ‘those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct’.¹¹⁰ Even if it cannot be regarded as a classic source of International

¹⁰⁴ Progressive external absolutization x Progressive internal constraint (Ferrajoli, L., *A Soberania no Mundo Moderno: nascimento e crise do Estado Nacional* (Carlo Coccioli and Mauro Lauria Filho trs Martins Fontes, 2002).

¹⁰⁵ Solomon, *supra* nt 29.

¹⁰⁶ Shaw, MN, *International Law* (Cambridge University Press, 2008), 272.

¹⁰⁷ Other topics that show this dichotomy can be found within the field of humanitarian interventions.

¹⁰⁸ Guzman, AT, and Mayer, TL, “International Soft Law” 2(1) *Journal of Legal Analysis* (2010) 171.

¹⁰⁹ Gruchalla-Wesierski, T, “A Framework for Understanding “Soft Law”” 30 *McGill Law Journal* (1984) 38.

¹¹⁰ Soft law is those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct; *Ibid*.

Law under Article 38 of the Statute of the International Court of Justice,¹¹¹ soft law cannot be denied as a mechanism of current International Law, and one that can gain importance depending on the topic it is regulating and its current context.

Despite the existence of the regimes of IHRL and IRL, which can and should be applied to the migratory context, the difficulties in creating hard international law on the matter as well as the ‘lack of clear guidance on [the] application [of said regimes]’¹¹² and the ‘lack of clear division of responsibility among international organisations for the protection of vulnerable migrants, especially on an operational level’¹¹³ may have the power of rendering ineffective the provisions of the regimes. This is so especially in view of the possibility of each State to assign the interpretation it deems appropriate to existing rules, which is contrary to the convergence of wills that guides the formation of any international regime.¹¹⁴

At the same time, the possibility of adhering to rules with less formal requirements¹¹⁵ that approach cultural similarities, rather than highlighting their differences, makes soft law more attractive to States. It constitutes a method that allows for the creation of international norms, especially in contested areas, as is the case with migration or any area in which the ‘sovereignty-human rights’ dichotomy exists.

Among the effects attributed to soft law, there are legal, political, interpretive and qualifying ones.¹¹⁶ Soft law has the direct legal effect of binding international organisations in which it was formulated,¹¹⁷ the legal effect of transforming its provisions into *opinio juris*,¹¹⁸ and the legal effect of delegitimizing an earlier rule, which is contrary to its provisions.¹¹⁹ It has the political effects of promoting its incorporation into domestic norms and of being transformed into international hard law, the political effect of encouraging non-parties to act in accordance with its provisions, the political effect of legitimising conducts not foreseen in hard law, and the political effect of serving as a guide for negotiations and disputes settlement.¹²⁰ It also has the effect of guiding the interpretation of hard law, as well as of acting as an interpretative guide to contracts and domestic rules.¹²¹ Soft law has even the effect of qualifying relationships by giving them value and, as a consequence, broadens the discussion on certain issues to the international level at the same time that it changes States’ practice.¹²²

¹¹¹ Statute of the International Court of Justice, Article 38(1): The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

¹¹² Betts, *supra* nt 22, 212.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Guzman and Mayer, *supra* nt 108, 214.

¹¹⁶ Gruchalla-Wesierski, *supra* nt 109.

¹¹⁷ *Ibid.*

¹¹⁸ ‘The *opinio juris*, or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so’; Shaw, *supra* nt 106, 84).

¹¹⁹ Gruchalla-Wesierski, *supra* nt 109.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

In this sense, ‘soft law can play an important role in consolidating existing norms into a clear and transparent understanding of the application of existing human rights norms to the situation of migrants.’¹²³ At the same time, it can broaden the interpretation of existing protective norms to achieve situations not addressed by them and, in practice, enhance protection. Examples of this are 1) the 1984 Cartagena Declaration - which enlarges the concept of refugee to achieve persecution resulting from grave and generalized human rights violations – such as conflicts, dictatorships and war-, as 2) the Guiding Principles on Internal Displacement¹²⁴, that established the main guidelines for these forced migrants, and 3) the International Migrants’ Bill of Rights (IMBR) initiative,¹²⁵ developed by ‘a transnational network of scholars, practitioners, other experts and students’, whose purpose is to associate norms and governance in a process of enlightenment, recognition and protection of the human rights of all migrants.¹²⁶

It is also noted that soft law development allow communication and exchange of expertise between specialised institutions, or by the possibility to align individual experiences in the field of human rights and in the field of migration.¹²⁷

It seems clear, therefore, that the development of soft law is an appropriate way of improving the dialogue among IHRL and IRL to International Law and of enhancing International Law dealings with migration. One is not proposing that the international community gives up on finding commitment to establish hard international laws on migration with a human rights-based approach but rather that soft law can coexist with hard law and correct – at least in parts – the negative effects that normative voids arising from the lack of hard law on the topic can have on the protection of migrants.

ii. Developing a Non-State Centric Approach to Migration Governance: Responsibility Sharing and New Actors

In parallel to soft law, another form of adopting a less formalistic approach to migration governance is to adopt approaches that, at the same time, allow for the expansion of actors involved in it and set up a logic of responsibility-sharing to replace the sense of burden-sharing in migration.

The notion of burden-sharing informs IRL since its origin,¹²⁸ in a sense that refugees ‘may place unduly heavy burdens on certain countries’.¹²⁹ This understanding

¹²³ Betts, *supra* nt 22, 215.

¹²⁴ ‘These Guiding Principles address the specific needs of internally displaced persons worldwide. They identify rights and guarantees relevant to the protection and assistance during displacements as well as during return or resettlement and reintegration’; United Nations Office for the Coordination of Human Affairs, “Guiding Principles on Internal Displacement” at <<http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>> (accessed 20 June 2017).

¹²⁵ ‘The **Purpose** of the IMBR Initiative is to advocate for the protection of migrants’ human rights by promoting the understanding and implementation of the International Migrants Bill of Rights. The **Goal** of IMBR Initiative is to pursue this vision and purpose through work at the international, regional and country levels’; Georgetown Law, “IMBR Initiative” at <<http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/>> (accessed 20 June 2017).

¹²⁶ Kysel, IM, “Promoting the Recognition and Protection of the Rights of All Migrants Using a Soft-Law International Migrants Bill of Rights” 4(2) *Journal on Migration and Human Security* (2016) 29.

¹²⁷ ‘The development of a common understanding of the application of human rights law to irregular migrants would require the input of those actors - such as UNHCR – who have experience of operationalising a rights-based framework for a particular group of people on the move, as well as actors with complementary operational experience in the area of migration’; Betts, *supra* nt 22, 226.

can be extended to all migrants and is consistent with the mentioned tendency to analyse the migratory issue under the assumption of States' interest rather than through a basis of human rights and human dignity. It is not consistent, however, with the consideration of the migrant as the main actor of the process whose vulnerabilities and needs must be taken into account. It is also not consistent with the fact that, in most cases, the migrant positively transforms societies of origin and destination:

On the whole, migration benefits receiving countries by increasing the available supply of labor, leading to a higher wage equilibrium in the long run, and not draining public expenditures. Migrant-sending countries benefit from increased access to financial capital in the form of remittances, higher wage equilibriums in the short run, and increased employment opportunities in emigrant-dominated sectors.¹³⁰

Not only the State but civil society as a whole benefits from migrants' presence both in terms of prosperity and development¹³¹ and in terms of cultural diversity.¹³²

In this sense, whether for the obligation to protect or for the social benefit, it seems that the notion of responsibility sharing - as an 'idea that the countries and communities that host large numbers of [migrants] should be supported in doing so by the international community'¹³³ - is better suited to the migration context insofar as it goes beyond the isolated action of the State to reach society as a whole. This notion allows for the inclusion of non-state actors as agents of the governance of migration in a 'whole-of-society'¹³⁴ approach that, in addition to States' authorities and organisations, involves financial institutions, civil society and academia, the private sector, and the media.¹³⁵ Furthermore, and significantly, it includes migrants themselves, holders of rights, interested in the transformation of their own history and capable of acting as agents in governing the phenomenon that not only they created and carried on but that affects their protection.

Similar to soft law, actions aimed at involving non-State actors can be qualified as less formal strategies within International Law for the governance of migration. They are important to make reception procedures less bureaucratic and faster (non-state institutions can, for example, take care of reception, accommodation, documentation, and integration) as well as make the predictions of international regimes more feasible and sustainable,¹³⁶ given the broadening of the range of actors that can contribute to them. They can also empower migrants in the protection of their own rights and in the

¹²⁸ Preamble, Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

¹²⁹ Jubilut, LL and Madureira, AL, "Os Desafios de Proteção aos Refugiados e Migrantes Forçados no Marco de Cartagena + 30" 22(43) *Revista Interdisciplinar da Mobilidade Humana* (2014) 11, 25.

¹³⁰ Kakenmaster, *supra* nt 67.

¹³¹ Open Democracy, Crepeau, F, *A New Agenda for Facilitating Human Mobility After the UM Summits on Refugees and Migrants* 24 March 2017 at <<https://www.opendemocracy.net/beyondslavery/safepassages/fran-ois-cr-peau/new-agenda-for-facilitating-human-mobility-after-un-summits-on-refuge>> (accessed 20 June 2017).

¹³² Kakenmaster, *supra* nt 67.

¹³³ United Nations High Commissioner for Refugees, *Towards a Global Compact on Refugees: a proposed roadmap* 4 April 2017 at <<http://www.unhcr.org/58e625aa7.pdf>> (accessed 20 June 2017).

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

creation of norms governing migration. In all these dimensions, a scenario of responsibility-sharing in migration would be created.

It is, therefore, not surprising that responsibility sharing is '[o]ne of the most important issues addressed by the New York Declaration [for Refugees and Migrants]',¹³⁷ in which 'the private sector and civil society, including refugee and migrant organisations, [are invited] to participate in multi-stakeholder alliances to support efforts to implement the commitments' there assumed.¹³⁸

D. Regional Approaches to Protecting Migrants

Although the migration phenomenon has currently been addressed - or at least there are attempts to do so - in global terms,¹³⁹ the effects of migration are felt more immediately at local and regional levels.¹⁴⁰ Even if the choice of destination is guided by a variety of factors (economic, cultural and political), aspects such as the cost of travel (including security) and linguistic proximity may determine the movement within the same region.¹⁴¹

In these spheres one can see a zone of interests whose convergence is more easily identified, highlighted either by cultural and value features, or by economic and security aspects that the proximity of borders usually emphasizes.¹⁴² In this sense, when it comes to cooperation 'regional solutions that are tailored to the specific scenarios may be politically more acceptable, and therefore more effective and easy to apply, than universally established formulae.'¹⁴³

A recourse to Game Theory - which presents us with mutual interests, shadows of the future and the number of actors as the three situational dimensions that affect the tendency to cooperate¹⁴⁴ - underscores the importance of regional perspectives in migration. The mutual interest in managing migratory flows in the region and in protecting people whose tendency is to migrate to nearby places, coupled with the expectation of closer contacts between States' authorities and with the reduction of the number of actors involved in decision-making - and therefore of (political) wills -, make it clear that migration issues can be effectively addressed under regional assumptions. In practice it seems that States have in fact preferred to establish international cooperation on migration issues in regional contexts,¹⁴⁵ as the above mentioned African and Latin American development of regional norms on refugees.

Although tailored to a specific region, regional approaches can favour the exchange of experiences between different regions, which despite intrinsic differences

¹³⁷ *Ibid.*

¹³⁸ Paragraph 16, UN General Assembly, New York Declaration for Refugees and Migrants, 3 October 2016, (Seventy-first session) A/RES/71/1.

¹³⁹ 'The regional dimension has been strangely muted or taken for granted in these high level debates'; Munck, R and Hyland, M, "Migration, Regional Integration and Social Transformation: a north-south comparative approach" 14(1) *Global Social Policy* (2013) 3.

¹⁴⁰ It is, for instance, estimated that 95% of refugees live in neighbouring countries and that 86% are in developing regions.

¹⁴¹ Kakenmaster, *supra* nt 67, 3-4; In the case of the Syrian conflict, for instance, the author points out that while 4.1 million Syrians fled to neighbouring Turkey, Lebanon, Iraq, and Jordan in light of a brutal civil war that left many destitute, impoverished, and facing Persecution, Europe as a whole received only 348,540 asylum applications from Syrian immigrants by the same month.

¹⁴² Anderson, R, "The Global Front Against Migration" 15 *Anthropology of This Century* (2016) at <<http://aotcpress.com/articles/global-front-migration/>> (accessed 20 June 2017).

¹⁴³ Jubilut and Ramos, *supra* nt 25.

¹⁴⁴ Axelrod and Keohane, *supra* nt 96.

¹⁴⁵ Betts, *supra* nt 22.

may present adaptive answers to similar issues,¹⁴⁶ thus, inspiring change outside of the original region. Hence, a regional point of view refines the protective look according to the needs of each region but does not mean a geographically limited solution.

As in the case of the only apparent dichotomy between soft law and hard law, regional solutions do not exclude the use of global mechanisms and should co-exist. The discussion about the antagonism between the multilateral approach and the regional one has already been overcome in order to establish a complementarity framework focusing on ascertaining the most protection possible to migrants.¹⁴⁷

In terms of protection, and contrary to what occurs at the universal level, regulatory frameworks and institutions dedicated to broad aspects of migration are already identified in regional scenarios. There is, for example, the Committee on Migration, Refugees and Displaced Persons of the Council of Europe, which has among others as one of its priorities 'strengthening the protection of rights of migrants, refugees, asylum seekers, and displaced persons',¹⁴⁸ Additionally, with the Migration Policy Framework for Africa a regional framework exists that 'urges a comprehensive approach to regulatory and administrative measures to ensure safe, orderly and productive migration'.¹⁴⁹ At the same time, there are also regional documents¹⁵⁰ and organisations¹⁵¹ dedicated to the realisation of human rights, as well as to the handling of specific aspects of migration, to which the notions of alignment, dialogue and integration apply.

In this sense, considering that common problems are more easily identified in the regional context and that dialogue is favoured by identities, the regional approach may be an effective mechanism for cooperation and, therefore, for the protection of migrants. However, and in the same sense of what has been said about soft law, the strategy being proposed is the coexistence of regional and international initiatives, organisations, and norms so as to guarantee the most protective scenario for migrants.

IV. Conclusion

Migration sets up a context of interdependence between States, which justifies the intention of establishing international regimes for the governance of common issues. Nevertheless, the complexity of the phenomenon, coupled with arguments of power and wealth, has hindered the elaboration of a general comprehensive regulation for all

¹⁴⁶ *Ibid.*

¹⁴⁷ Jubilut and Ramos, *supra* nt 25.

¹⁴⁸ Inter-Parliamentary Union, *supra* nt 7, 64.

¹⁴⁹ *Ibid.*

¹⁵⁰ The American Convention on Human Rights (ACHR), 1969, the African Charter on Human and Peoples' Rights, 1981, the League of Arab States Charter on Human Rights, 2004, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as well as their related Protocols. Among the soft law documents, Cartagena Declaration, which expanded the definition of refugee, should always be mentioned, as well as 'the MERCOSUR Declaration of Principles on International Protection of Refugees highlighted the need for strengthening the regional humanitarian space, encouraging all states to adopt the wider definition of refugees from the 1984 Cartagena Declaration'; Jubilut and Ramos, *supra* nt 25, 66.

¹⁵¹ The rights of migrants are also the concern of regional economic integration communities, such as ASEAN, the Andean Community, the Caribbean Community (CARICOM), the Central African Economic and Monetary Community (CEMAC), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the South American Common Market (MERCOSUR), which all have regional agreements on the movement of people that include provisions to enhance the legal recognition and protection of Member State nationals in other member countries; Inter-Parliamentary Union, *supra* nt 7, 63.

matters present in the field of migration or even the creation of specific regimes to all migrants in need of protection.

The multiplicity of issues associated with migration has promoted fragmented regulation, which does not always present the most protective solutions for migrants, the main actors in the process. While there are standards, rules, principles and decision-making procedures that already protect certain specific migrants' situations, there are no specific predictions for all kinds of vulnerabilities arising from migration.

International Law is the normative space for regulating the protection of human beings. It is also the setting to address the protection gaps of migration regimes. Currently there are specific regimes that, albeit fulfilling an important role in migrants' protection, due to the systematic unity of International Law and its axiological choice for the protection of human dignity, must converge to reach this common goal.

Neither International Law as it is nowadays, nor the existing international regimes are capable of dealing alone with migration in a manner that secures the ideal standard of protection. It is relevant to improve existing structures and to create new ones so as to have an adequate international architecture to deal with migration and the protection of migrants. In all of these there is a need to rethink the better way for International Law to deal with migration. In doing so four strategies arise: First, assuming the protagonism of migrants in migration and, thus, shifting the focus from the regulation of the phenomenon to the protection of its subjects as a strategy consistent with the contemporary background of International Law based on human rights and providing a common basis for normative regulation; Second, enhancing the dialogue between existing regimes – mainly with IHRL and IRL -, which extend the protective base for migrants in that a dialogue allows for the exchange of tools provided by one regime to situations encountered by other ones as well as combining International Law and international regimes in the governance of migration; Third, using less formalistic approaches such as soft law and the participation of stakeholders for the governance of migration with a responsibility-sharing approach; Fourth, using regional approaches to facilitate the development of stronger cooperation and regional norms.

Considering the current political scenario, such strategies, combined with a continuous effort to develop International Law and International regimes' tools for dealing with migration, can give coherence to the system through a common language of protection. These strategies are needed to both, foster cooperation and broaden the range of protection of migrants and as ways for International Law to better deal with migration.

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The Politics of the UN Convention on Migrant Workers' Rights

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Keywords

HUMAN RIGHTS; INTERNATIONAL MIGRATION; INTERNATIONAL LAW; UNITED NATIONS; GLOBAL MIGRATION GOVERNANCE

Abstract

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICMW) was adopted in 1990 by the United Nations, but has been ratified by 51 States only, and by no major Western migration-receiving State. This article outlines two interpretations of this low ratification record. On the one hand, it can be understood as puzzling because Western liberal democracies support human rights and because the ICMW does not call for new rights that would not already exist in domestic law or in other international human rights instruments. On the other hand, it can be understood as logical because, from a cost-benefit perspective, the rights of migrants are difficult to reconcile with market logics in destination countries and because there are structural economic forces that make it difficult to reach multilateral agreements on migrant workers' rights. This article further argues that these legal and socio-economic arguments do not exhaust the issue and that the current situation of the ICMW is to a large extent the product of political factors, particularly of the lack of political support for migrants' rights at the international and national levels.

I. Introduction

Adopted in 1990 by the United Nations (UN) General Assembly, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICMW)¹ remains one of the most neglected treaties in international human rights law. It is presented, by the Office of the UN High Commissioner for Human Rights, as one of the 'core international human rights treaties', which include better-known conventions, such as the 1966 Covenants,² the 1989 *Convention on the Rights of the Child*³ and the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*.⁴ Yet, compared to these treaties, the ICMW is under-ratified: at the time of writing (June 2017) only 51 States have ratified it and, most notably, no important Western destination country has done so. Therefore, it is arguable that the ICMW has so far struggled to achieve what it was meant

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¹ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, (69th plenary meeting) A/RES/45/158.

² UN General Assembly, *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3 (ICESCR).

³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, (61st plenary meeting) A/RES/44/25.

⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, (107th plenary meeting) A/RES/34/180.

to do, namely increase the protection of migrant workers' rights by establishing widely-accepted standards in this subfield of human rights law.

This article argues that this situation can be interpreted as both puzzling and logical. It is puzzling because Western liberal democracies traditionally support human rights and because the ICMW does not, contrary to widespread misperceptions, call for a new set of rights that would otherwise not exist in domestic law or in other international human rights instruments. Therefore, there are no legal obstacles that could justify the reluctance to ratify and implement the Convention, at least in the well-established *Etats de droit* that are home to a large share of the world's migrant population. Yet, it can also be understood as logical: from a cost-benefit perspective, the rights of migrants are difficult to reconcile with market logics in destination countries and there are structural economic forces that make it very difficult to reach multilateral agreements on migrant workers' rights. In particular, the socio-economic imbalances between origin and destination States make reciprocal arrangements almost impossible.

I will also argue, however, that this seemingly binary opposition should be challenged and that the low ratification record of the ICMW should be understood as a fundamentally political matter. It is above all for political reasons, rather than legal or socio-economic reasons, that the ICMW suffers from such a low ratification record. This is evident in the way the UN and other intergovernmental organisations address migration issues, as well as in the case of 'in-between' States, which are not clearly positioned on the origin/destination State divide; some of them have ratified, while others, which could have, ultimately did not. In other words, while there are fundamental structural forces (of a legal or socioeconomic nature) that explain why States may accept or reject the ICMW, there are also more contingent political factors which play a role in shaping the current fortunes of the Convention. Importantly, this also means that future perspectives remain, to some extent, open and that an increase in the popularity of the ICMW amongst States cannot be excluded.

II. History and Content of the ICMW

The International Labour Organisation (ILO) first addressed the rights of migrant workers at the international level. This organisation was created in 1919, at the time of the Versailles treaty and the establishment of the League of Nations, and its original Constitution already mentioned the 'protection of the interests of workers when employed in countries other than their own'. The ILO is characterised by its so-called tripartism, as it engages not only with governments but also with unions and employers. The interest in migration was thus motivated by the objective of increasing labour standards and by the ambition to lessen the downward pressure that results from competition between national and foreign workers; protecting migrant workers' rights was a strategy to protect all workers' rights.⁵ Throughout the 20th century, the ILO adopted conventions pertaining to labour migration, which have had mixed success in terms of ratification.⁶

The objectives pursued by the ICMW are very much consistent with the ILO's efforts and the corresponding UN Convention. The ICMW logically builds upon earlier treaties adopted by this specialised agency. However, this was not a smooth process as the ILO believed that the issue should remain solely within its realm and was reportedly

⁵ Hasenau, M, "ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis" 25(4) *International Migration Review* (1991), 690-692.

⁶ See in particular: ILO, *Convention concerning Migration for Employment Convention (Revised)*, (1949) No. 97; ILO, *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (1975) No 143.

reluctant to cooperate with the UN.⁷ While incorporating a labour protection mandate, the ICMW was also born out of a distinct human rights approach. As noted above, it is indeed one of the core international human rights law instruments and reflects the need to more explicitly articulate the relation between the inclusive universality of human rights and the exclusive nature of State sovereignty. While human rights are to protect 'everybody' (whether citizens or migrants), it progressively became clear that non-nationals were not systematically perceived as part of this category.⁸

This explains why the ICMW speaks of migrant *workers*. Today, this term is used less frequently: while the ILO still speaks of migrants as workers,⁹ many other actors and observers speak of *migrant rights* or of *the human rights of migrants*,¹⁰ sometimes with an emphasis on certain categories of migrants (for instance irregular migrants, trafficked migrants, migrant women). This is not just a matter of words, as this semantic change has political implications. The emphasis on migrant *workers* frames migration issues within an internationally-constructed perspective on labour protection; migrant workers' rights are understood as a labour issue of importance to all, as the rights of national workers cannot be dissociated from the rights of their foreign co-workers. This challenges the national divide between citizens and foreigners. In contrast, by omitting the word *worker*, the notion of *migrant rights* may be understood as placing more weight on the foreignness of migrants and on the almost ontological difference between them and citizens. Migrants are then portrayed as non-nationals or outsiders who should benefit from universal human rights, but whose interests may nevertheless diverge from those of nationals.

At the same time, the emphasis on *human* rights (and not solely labour rights) is crucial in terms of the protection of migrants who are not active on the labour market or whose presence is only partly related to their working capacity. The ICMW refers to this category of people as 'members of the families' of migrant workers, yet, one can think of other 'non-working' categories of migrants whose significance has increased in scholarly and policy debates since the Convention was adopted (for instance forced or trafficked migrants). Nevertheless, and as discussed below, much of the current academic and policy discussions on the ICMW focus precisely on the trade-off between the rights of nationals and non-nationals, with the former being opposed to the latter. This 'national' take on the topic militates against support for the ICMW. As this article will argue, ratification of the Convention is less likely if citizens perceive this as the mere granting of rights to outsiders; this may easily generate hostile reactions along an 'us and them' divide. If, by contrast, the ICMW is framed in an international labour perspective and as an issue that benefits all workers by lessening the competition between them, ratification may appear as beneficial not only for foreigners but also for citizens. Yet, this second internationalist perspective is, arguably, decreasingly popular, which does not favour the ICMW.

This feature of the ICMW, at the crossroads between labour protection and human rights, is important to understand the current situation. These different frameworks indeed

⁷ Battistella, G, "Migration and human rights: the uneasy but essential relationship" in Cholewinski, R, de Guchteneire, P, and Pécoud, A, eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009), 53-54. The special role of the ILO in the protection of migrant workers' rights was recognized in the ICMW, which foresees that this agency be consulted by the UN on these matters (see Article 74).

⁸ Groenendijk, K, "Introduction" in Bohusz, B, Cholewinsky, R, Cygan, A and Szyszczak, T, eds, *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* (Leiden, Martinus Nijhoff, 2004), xix.

⁹ ILO, *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (ILO, Geneva, 2006).

¹⁰ Amnesty International, *Living in the Shadows: A primer on the human rights of migrants* (Amnesty International, London, 2006).

mobilise different actors. Labour protection is an issue mainly for unions, whereas human rights are predominantly supported by civil society organisations and NGOs. Grange and d'Auchamp report that human rights NGOs, which traditionally play a key role in the drafting of human rights conventions, were largely absent in the case of the ICMW. The human rights of migrants were not a priority at the time, as the emphasis was on civil and political rights (rather than on social and economic rights, which is the focus of the ICMW); even the rights of refugees were perceived as a humanitarian (and not a human rights) topic.¹¹ This resulted in a lack of civil society support for the Convention. Grange and d'Auchamp further noted that this also led to the strong presence of faith-based organisations, which were among the few to be interested in migration and remain, even today, at the forefront of the campaign for the ICMW and for migrants' rights in general.

Another key feature of the history of the ICMW is the leading role of non-Western States, to the extent that it is sometimes known as a 'G-77 treaty'.¹² At the diplomatic level, the governments of Mexico and Morocco were very active throughout the drafting process. This is unusual as international and diplomatic debates over human rights tend to be mostly pushed forward by Western developed countries. Indeed, migrants' rights is probably one of the only fields of human rights that enjoy greater support from the 'South' than from the 'North'. One of the reasons for this is that some key origin countries saw the ICMW as a useful standard to protect their citizens abroad.¹³ This nevertheless raises the question of the universality of human rights, as it appears that those rights that are not backed by the North tend to be contested and not viewed as truly 'universal'. That being said, initial proposals by sending countries were strongly resisted, which gave a central role to a number of Western States in searching for more consensual formulations in the elaboration of the ICMW.¹⁴

Content-wise, the ICMW provides a more precise and specific interpretation of the way human rights should be applied to migrant workers. This corresponds to other treaties, which also target other potentially vulnerable groups (women, children and, more recently, disabled people, for example). While it codifies some new rights specific to the condition of migrants (such as the right to transfer remittances or to have access to information on the migration process), it mostly relies upon already-existing rights, which were formulated in earlier international human rights instruments but whose application to migrant workers had not been detailed in a specific way. Of particular relevance here is the ICMW's explicit inclusion of undocumented migrants within its scope of application. This is one of the most controversial issues. Logically, undocumented migrants are human beings and, as such, are protected by international human rights law; the ICMW puts this on paper, in a way that earlier treaties did not.¹⁵ However, this remains problematic as

¹¹ Grange, M, and d'Auchamp, M, "Role of civil society in campaigning for and using the ICRMW" in Cholewinski, R, de Guchteneire, P, and Pécoud, A, eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009), p. 72.

¹² LaViolette, N, "The Principal International Human Rights Instruments to which Canada has not yet adhered", 24, *Windsor Yearbook of Access to Justice* (2006), 303-305.

¹³ On Mexico, for example, see Diaz, G, and Kuhner, G, "Mexico's role in promoting an implementing the ICRMW" in Cholewinski, R, de Guchteneire, P, and Pécoud, A, eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009); on the Philippines, see Piper, N, "Obstacles to, and opportunities for, ratification of the ICRMW in Asia" in Cholewinski, R, de Guchteneire, P, and Pécoud, A, eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009).

¹⁴ These were in particular the so-called MESCA countries: Finland, Greece, Italy, Norway, Portugal, Spain and Sweden.

¹⁵ Bosniak, L, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention" 25(4) *International Migration Review* (1991), 738-739.

destination States are required to guarantee the rights of people they may not have wanted to admit in the first place and whom they may want to remove, if necessary through coercive measures like detention or expulsion. States tend to find it very difficult to respect migrants' rights when trying to remove undocumented migrants and, in practice, these measures regularly lead to human rights violations.¹⁶

After adoption by the UN General Assembly on 18 December 1990, the Convention was open to ratification by States. Twenty ratifications were necessary in order for the ICMW to enter into force; this threshold was not reached until 2003. This low ratification record was not entirely expected. Immediately after adoption it was believed within the UN that the ICMW would enter into force in 1991 or 1992. Even less optimistic observers believed that the MESA-countries would ratify; other countries – Canada, Venezuela and Argentina – were also expected to do so.¹⁷

Overall, there has not been much research on the ICMW. This means that any understanding as to why States do not ratify it is, at best, only partial. Nevertheless, debates among researchers, policymakers and civil society actors tend to be polarised around two diverging interpretations of this situation, which in turn correspond to two different views of what should be done. In the first interpretation, the ICMW's low ratification record is viewed as a puzzling mistake that can and should be corrected. It results from an array of factors of differing nature, which somehow prevent the full recognition of the usefulness of the ICMW and of the legitimacy of migrants' rights. By contrast, the second interpretation considers that States' refusal to ratify is logical given the structural economic and political forces that shape immigration policy. On this view, the ICMW is a deeply flawed treaty, which is unable to increase or guarantee migrants' access to their rights. In what follows, I examine in greater details these two interpretations.

III. The 'Puzzling' Legal/Technical Interpretation

It has often been observed that the ICMW is overall close to existing legal standards, especially in Western democracies. If States were to become interested in ratifying, they would find this relatively easy, because their own legislation already contains most of the rights foreseen by the ICMW.¹⁸ This is documented by several case studies, which assess the compatibility of the ICMW with the legal provisions that exist in other (already ratified) international treaties, as well as in domestic law. One of the most detailed analyses found that 'Belgian national law is (in practice) highly compatible with the provisions of the Convention'.¹⁹ Oger²⁰ and Touzenis²¹ reach more or less the same

¹⁶ See for example Vohra, S, "Detention of Irregular Migrants and Asylum Seekers" in Cholewinski, R, Perruchoud, R, and MacDonald, E, eds, *International Migration Law: Developing Paradigms and Key Challenges*, (T.M.C. Asser Press, The Hague, 2007).

¹⁷ For an early perspective on the ICMW by observers closely associated to its elaboration, see Hune, S, and Niessen, J, "The First UN Convention on Migrant Workers" 9 *Netherlands Quarterly of Human Rights* (1991) 2.

¹⁸ MacDonald, E and Cholewinski, R, "The ICRMW and the European Union" in Cholewinski, R, de Guchteneire, P, and Pécoud, A, eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009), 364.

¹⁹ Vanheule, D, Foblets, MC, Loones, S and Bouckaert, S, "The Significance of the UN Migrant Workers' Convention of 18 December 1990 in The Event of Ratification by Belgium" 6(4) *European Journal of Migration and Law* (2004) 285, 320.

²⁰ Oger, H, "The French Political Refusal on Europe' behalf" in Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009).

²¹ Touzenis, K, "Migration and Human Rights in Italy: Prospects for the ICRMW" in Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009).

conclusions for France and Italy. These conclusions are in line with the commitment to human rights that characterise Western countries, and with their good ratification record of other international human rights law treaties. Why, then, would Western advanced democracies prove so unwilling to ratify the ICMW? How can we understand the low ratification record of the ICMW in this context? According to the ‘puzzling’ interpretation, the answer lies in the misperceptions that surround the Convention, the technical difficulties it raises, and in the fact that States have only recently come to recognise that migration is an issue for multilateral cooperation that requires international standards.

It is widely reported that the actual content of the ICMW is the object of many misunderstandings. Governments would for instance often wrongly believe that ratification of the ICMW would force them to change their legislation.²² According to MacDonald and Cholewinski²³, this is the case in Europe, where States claim that they have legal objections to the ICMW; but the same authors show that this argument does not hold up under closer examination, as ratification would not bring major changes in their immigration policies. In Asia, Piper writes that the ICMW is viewed as ‘an instrument for liberal immigration policy’, and that it would interfere with States’ sovereign right to control and regulate migration.²⁴ From an advocacy perspective, the key issue then lies in correcting these mistaken beliefs. These misunderstandings can also be linked to the complexity of the ICMW: arguably a long and detailed treaty, it addresses a wide range of issues, which encompass not only labour protection, but also health policy and the educational system for example. This raises technical obstacles, as ratification would require a high level of coordination among a broad range of State and non-State actors. As Cholewinski noted almost twenty years ago, ‘technical questions alone ... may prevent many states from speedily accepting [the ICMW’s] provisions’²⁵. This complexity comes with a high level of ignorance surrounding the ICMW. Even among unions, NGOs and other migration-related actors and institutions, few people are familiar with the Convention and even fewer are capable of mastering its complexity and assessing the issues raised by a potential ratification.

Time would constitute an important factor in this respect. In many countries, migration is - or is perceived as - a relatively new phenomenon, to the extent that governments still find it difficult to apprehend all its implications and to evaluate the consequences of ratifying a UN convention in this field. For example, despite important migration flows, many Asian States still view themselves as non-migration countries, and hardly see the need for designing a comprehensive immigration policy²⁶. To some extent, this also applies to certain European countries, including *inter alia* Germany²⁷, Poland and Norway²⁸. This may however be changing as more and more States are confronted with migration-related problems. States may be encouraged to recognise the key role played by immigration, and the need to think about a political strategy in this field - a process in which the ICMW may prove useful.

²² De Guchteneire, P, and Pécoud, A, “Introduction: the UN Convention on Migrant Workers’ Rights” in Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers’ Rights* (Cambridge University Press, Cambridge, 2009).

²³ MacDonald, E and Cholewinski, R, *supra* nt 18.

²⁴ Piper, N, *supra* nt 13, 176.

²⁵ Cholewinski, R, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Clarendon Press, Oxford, 1997), 201.

²⁶ Piper, N, *supra* nt 13.

²⁷ Hillman, F and Klekowski von Koppenfels, A, “Migration and Human Rights in Germany” in Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers’ Rights* (Cambridge University Press, Cambridge, 2009).

²⁸ MacDonald, E and Cholewinski, R, *supra* nt 18.

There are a few indications that this may already be taking place, at least to a small extent. Even if not ratified, the ICMW can indeed play a potentially useful role, either in inspiring policy reforms or in catalysing forces among migration-related actors. In the UK, for example, Bernard Ryan reports that the Convention enjoys the support of a range of non-State actors (unions, civil society), which use it as a standard in their input to policymaking processes; as a result, the ICMW has indirectly influenced recent political debates and policy reforms.²⁹ Other authors call for this process to start: in the United States, Beth Lyon argues that, while ratification itself is unlikely, at least opening a debate on the ICMW could help push forward political debates on migration.³⁰ This points to the often-neglected catalysing function of the Convention. Given its wide-ranging scope and international nature, it has the potential to unite different actors in different countries, and serve as a rallying point³¹. Debates on the ICMW tend to focus on its ratification record, and conclude that, if few States have ratified it, then it has failed to make a difference. While this assessment is correct in many respects, it nevertheless underestimates its role in shaping the way migration is discussed by State and non-State actors. In a world in which migration is increasingly debated, and by an increasing range of actors, this function of the ICMW may be expected to become increasingly relevant.

Patrick Taran elaborates on this further by arguing that migration has long constituted a black hole in global governance.³² The mobility of labour is directly linked to economic globalisation, but lacks an international political framework that would make sure labour mobility takes place in a way that is both economically beneficial and respectful of States' commitments to human rights and moral values. Over the past decades, States have tried to establish so-called global governance mechanisms to address transnational issues, such as trade or climate change. Migration has not been a priority even if, again, this may be changing: the interest in 'global migration governance' has increased since approximately 2000 with many international and multilateral initiatives.³³ The UN Special Rapporteur on the human rights of migrants, François Crépeau, thus, calls for a human-rights-based 'regime' for international migration:

Migration is a complex phenomenon, which affects most, if not all, States in the world and is closely linked to other global issues, such as development, health, environment and trade. States have created international frameworks for such other global issues, recognizing the advantages of regulation at the international level, but despite the existence of legal frameworks on migration issues, a comprehensive framework for migration governance is still lacking. Certain aspects of migration are more frequently discussed at the bilateral and multilateral levels, such as the connections between migration and development. However, given that migration is

²⁹ Ryan, B, "Policy on the ICRMW in the United Kingdom" in Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009).

³⁰ Lyon, B, "The Unsigned United Nations Migrant Workers Convention: An Overlooked Opportunity to Change the Brown Collar Migration Paradigm" 42 *New York University Journal of International Law and Politics* (2010) 389.

³¹ Grange, M and d'Auchamp, M, *supra* nt 11.

³² Taran, P, "The Need for a Rights-Based Approach to Migration in the Age of Globalization" in Cholewinski, R, de Guchteneire, P & Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009).

³³ One can for example mention the organisation of high-level international conferences on migration, like the UN High-Level Dialogue (in 2006, 2013 and most likely 2019 as well) or the Global Forum on Migration and Development (which has taken place every year since 2007), see Pécoud, A, *Depoliticising Migration. Global Governance and International Migration Narratives* (Palgrave, Basingstoke, 2015).

in essence a fundamentally human phenomenon, the Special Rapporteur notes the need for an international migration governance regime strongly focused on human rights.³⁴

The possible emergence of an ‘international migration governance regime’ could be favourable to the ICMW, as cooperation requires shared norms and standards – precisely what the Convention has to offer.

In sum, according to this first interpretation of the low ICMW ratification record, the core problems lie in the unpreparedness of States, which are unaware of its provisions and unable to implement it properly because of their lack of experience with migration. This, however, is bound to change and the compatibility of the Convention with existing laws could eventually make it quite easy to ratify– thereby correcting the odd difference between the ICMW and other human rights conventions.

IV. The ‘Logical’ Cost-Benefit Interpretation

If one looks at the ICMW from another angle, namely from a cost-benefit perspective, its low ratification record looks very different. It is no longer a strange mistake that can be corrected by time or awareness-raising efforts, but rather the consequence of fundamental imbalances in migration dynamics, which are deeply unsupportive of migrants’ access to human rights and, unfortunately, unlikely to change in the near future.

The central assumption behind this cost-benefit perspective is that rights have a cost, and that States are unlikely to commit to migrants’ rights if this does not yield benefits. The problem is that, in the current migration situation, ratification would entail high costs and bring minimal benefits to destination countries. This is mainly due to the asymmetry between destination and origin States: migrants move predominantly from relatively poor to relatively richer regions (whether at the regional or global level), which means that the ICMW has unequal implications for the two sides of the migration process. Even if it foresees obligations for the origin countries (such as providing pre-migration information), it is mostly destination countries that have to implement the Convention’s provisions. This imbalance leads to a lack of reciprocity: if both origin and destination States were to ratify, this would be beneficial for the former (whose citizens living abroad would enjoy more rights), but much less for the latter (which does not have many emigrants in need of protection abroad). If all States were both origin and destination countries, they would be equally concerned and ratification could support a mutual guarantee that would be of interest to all; but the nature of migration flows makes this unlikely.

This is a well-known problem when it comes to any kind of cooperation over migration issues, especially when compared to other fields of international cooperation such as trade; as Timothy J. Hatton writes:

Migration is much more of a one-way street than is trade. While, in a multilateral context, trade balances have to add up roughly to zero, net migration balances do not. If rich and poor countries were gathered around the negotiating table, it is difficult to see how improved terms of access to the labour markets of the poor(er) countries could be of equal value to similar conditions of access granted by rich(er) countries in return. Indeed, even the poorer countries may have little incentive to

³⁴ UN General Assembly, *Report of the Special Rapporteur on the human rights of migrants*, 5 August 2013 (68th Session) A/68/283, 2013, 3-4.

come to the bargaining table. Those in poor countries who have the greatest incentive to support such negotiations are precisely those who wish to leave.³⁵

There is empirical evidence that supports this analysis. South Africa, for example, sees no reason to ratify a Convention that would benefit migrants from its poorer neighbours.³⁶ Nicola Piper also notes that, in Asia, this leads to a competition between origin States: poor countries are reluctant to ratify because this would signal a rights-consciousness that would jeopardise their relationships with rich destination countries (particularly the Gulf States).³⁷ In other words, the two sides of the migration process are not on an equal footing and, given the socioeconomic and political imbalances between them, destination countries can afford to impose conditions on origin regions, which have very little bargaining power to impose respect for the ICMW's provisions.

Another implication of this imbalance is that, from a supply and demand perspective, destination countries have access to an almost unlimited pool of potential migrants from poorer regions. They have therefore no incentive to offer rights, as migrants are likely to come anyway, no matter the level of protection they are afforded. This makes for an unfavourable context, which will change only in case of a shortage of migrants. Indeed, this is what happens with skilled migrants, who are much less numerous and hence much more sought-after. Destination States are therefore obliged to grant rights if they want to attract them. Another difference between unskilled and skilled migrants is the unequal economic benefits they are expected to bring to the destination country: unskilled migrants are typically thought to generate low profits, which makes an investment in granting them rights illogical; by contrast, skilled workers boost the economy, which justifies a generous rights policy.

This leads Martin Ruhs to argue that migrant rights cannot be apprehended as a matter of universal legal standards; they should rather be understood as an economic variable in immigration policy.³⁸ States would then decide how many rights to grant to the foreigners they welcome, depending upon their overall strategy. For example, a State can decide to welcome many migrants, but is then unlikely to grant them extended rights (as this would be too costly). Opening the doors to skilled and economically profitable migrants could, on the contrary, be accompanied by a generous rights policy. In this political economy logic, the Convention is bound to fail: it foresees a horizontal distribution of rights to *all* migrants, whatever their skill level or numbers, whereas access to rights would on the contrary depend upon market mechanisms – leading to vertical hierarchy between migrants and between the range of rights they enjoy. As Srdjan Vucetic writes, the ICMW is unpopular because it 'stipulates too many rights for too many people'.³⁹

This argument is both scientific and normative. Ruhs claims that this trade-off between numbers and rights is empirically verifiable; for instance, European States are generous in terms of rights and therefore opt for tight immigration policy, whereas the opposite holds true for the Gulf States. Measuring such variables as 'rights' and 'openness'

³⁵ Hatton, TJ, "Should We Have a WTO for International Migration?" 22(50) *Economic Policy* (2007), 339, 364.

³⁶ Crush, J, Williams, V and Nicholson, P, "Migrants' Rights after Apartheid: South African Responses to the ICRMW" in Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009).

³⁷ Piper, N, *supra* nt 13.

³⁸ Ruhs, M, *The Price of Rights. Regulating International Labor Migration* (Princeton University Press, Princeton, 2013).

³⁹ Vucetic, S, "Democracies and International Human Rights: Why is There No Place for Migrant Workers?" 11(4) *International Journal of Human Rights* (2007), 403.

is uneasy however and, inevitably, such empirical findings can be contested, as changes in variables will lead to different outcomes.⁴⁰ Politically, the normative implication of this trade-off is that States should design temporary labour migration programmes, which would enable more migration, but with less rights than what a treaty like the ICMW foresees. This would be in the interest of all, including of migrants, because more of them could then have access to employment opportunities abroad.⁴¹

This discussion amounts, in many respects, to the standard opposition between pragmatics (or realists) and idealists. While generous, those who support the ICMW would actually harm migrants' interests by asking for standards that are too high, which States are bound to resist. Real-world efforts in favour of migrants should then give up the Convention and limit migrants' rights to a core set of fundamental rights. The problem, of course, is that pragmatics' arguments tend to boil down to a vibrant plea for the status quo. Indeed, this political economy framework is useful to understand why migrants fail to enjoy rights. It is much less useful as a normative and programmatic agenda, because the very idea behind the ICMW - and behind the entire human rights philosophy - is precisely to go beyond the distribution of rights on the sole basis of wealth and power.

V. The Politics of the ICMW

Both the 'puzzling' legal/technical and the 'logical' cost-benefit interpretations display weaknesses. The first one is a little optimistic: indeed, evidence shows that even States such as France or Canada, with both a well-established *Etat de droit* and with a long-standing migration history, are reluctant to ratify the Convention.⁴² While arguments on the need for time and awareness-raising efforts were relevant at the time when the ICMW was drafted and adopted they prove less convincing today, as the deep resistance of States to this treaty becomes clearer. The second interpretation is based on the questionable assumption that ratification of the ICMW is costly because it would entail more rights for migrants. This makes sense in some destination States with a traditionally lower standard of human rights protection (such as in Asia or in the Gulf). However, it is less relevant in Western countries, in which – as noted above – existing laws already grant migrants the rights that are contained in the Convention. If the ICMW does not entail a rights-expansiveness then the cost-benefit argument no longer holds true and the whole political economy argument regarding why States do not ratify collapses. Moreover, the cost-benefit interpretation assumes that the ICMW improves the rights of migrants only; as suggested in the first section of this article, this is not the only way to frame the issue. One can posit that, by lessening the competition between foreign and national workers, the Convention may be beneficial for a majority of workers, whether migrant or otherwise.

This calls for recognising the political nature of the ICMW and its function as a symbol in the global politics of migration. Ratification is not only a legal or an economic issue, it is a political decision based on a rights-consciousness and embedded in the power relations between the different actors involved as well as in the worldviews that inspire migration policymaking. Technical arguments over the legal obligations contained in the

⁴⁰ Cummins, M and Rodriguez, F, "Is There a Numbers versus Rights Trade-off in Immigration Policy? What the Data Say" 11(2) *Journal of Human Development and Capabilities* (2010) 281.

⁴¹ Such a recommendation fits into a broader and renewed interest in so-called guest worker systems, which were very popular in both the US and Western Europe until the early 70s. As Castles notes, however, it is unclear why such programmes are more successful today than in the past. A key lesson from recent history is that they inevitably lead some migrants to overstay, in which case the issue of their status and rights become quite complex, see Castles, S, "Guestworkers in Europe: A Resurrection?" 40(4) *International Migration Review* (2006), 741.

⁴² This is the case of France or Canada for example.

ICMW or the additional costs it would entail for receiving States are certainly important, however, they tend to miss the point in this respect. In legal terms, the Convention may well not constitute an additional set of rights, particularly for those migrants who lawfully live in Northern countries with well-established *Etats de droit*; neither would it lead to an increase in the costs of labour migration. Yet, these legal and political considerations do not exhaust the issue: indeed, the ICMW is also (and, perhaps, above all) contested for political reasons, both at the domestic and at the international level.

Inside destination States, it constitutes a symbol for the recognition of migrants' rights, which is bound to encounter resistance given the widespread anti-immigration feelings that exist almost everywhere. Non-ratification of the ICMW can also be interpreted as a purely political (or electoral) problem. As foreigners, migrants are not citizens and (usually) cannot vote; ratification would then happen only if migrants' interests are understood as close to citizens', or if electorates were to express a solidarity with migrants and to call upon their governments to grant them rights. However, as long as this is not the case there is no reason to expect destination States to ratify. By contrast, in origin countries, ratification is a strategy to protect citizens, especially those who live abroad, but also those who are left behind or who may emigrate at some point in the future. It follows that, as the ratification record of the ICMW indicates, only origin States are likely to ratify.

However, the politics of the ICMW also work at the international level: by definition, migration is a phenomenon that concerns more than one country. Even if destination States see it as an issue closely associated with their sovereignty and address migration mostly in a unilateral way, it is difficult not to address this issue at the international level. Yet, it is equally difficult for States not to disagree over this issue and the ICMW thus constitutes a battleground between the North and the South, between origin and destination countries. As noted above, it was strongly backed by origin countries. Many Western and European countries, by contrast, were reluctant to engage in normative standards regarding migrants' rights.⁴³ At the time, in the seventies, less-developed countries were hoping to push for a new economic order, especially after the 1973 oil crisis, and migrants' rights were understood as an issue that origin countries could try to impose upon destination States. It follows that, from the beginning, the ICMW was the object of North-South disagreements. This divide is still visible: the fact that State parties are almost exclusively from the South shows that, more than forty years after the idea of an international convention on migrants' rights was first proposed, the issue remains highly contested.

This is exemplified by the question of irregular migration. Initial drafts of the Convention were rejected because they were seen as almost encouraging irregular migration in a way that would benefit origin countries' economies exclusively.⁴⁴ The final draft is more consensual but nevertheless grants rights to irregular migrants in a way that is much more explicit than in other human rights instruments. While the Convention establishes a distinction between regular and irregular migrants, with more rights for the former than the latter, it does not permit reservations that would exclude irregular migrants from the scope of the Convention (Article 88). From a labour protection or human rights perspective this makes a lot of sense. However, from the perspective of destination States, this can be interpreted as challenging their right to control and regulate migrants' movements and as an indication that the ICMW is predominantly based on

⁴³ Battistella, G, *supra* nt 7.

⁴⁴ Böhning, R, "The ILO and the New UN Convention on Migrant Workers: The Past and Future" 25(4) *International Migration Review* (1991) 698.

origin countries' interests.⁴⁵ Even if, legally speaking, the ICMW does not contain many new rights its spirit would be biased in favour of one side of the migration process, leading to an automatic rejection by the other side.

This section further addresses the international politics of the ICMW by looking at two issues: the work of the UN on migration and the recommendations by intergovernmental organisations; and the situation of 'in-between' countries that cut across the North-South divide and shed a particular light on the ICMW.

A. The ambivalent role of the UN system

The attitude of the UN system towards the ICMW is a clear indication of its political nature. On the one hand, the UN system has been crucial in making its adoption possible. Even if the Convention lacked the support of influential States from the beginning of the drafting process, it is very difficult for such a process to actually stop. Somehow, once it has started, it goes on. For governments, and especially for those in developed countries that find themselves in a minority in a setting like the UN General Assembly, it is not easy to justify why the drafting of a human rights treaty should be interrupted. As Battistella recalls, Western governments opted for letting the process go to its end, while at the same time making quite clear that they would not feel bound by the Convention after adoption.⁴⁶ This attitude makes it possible for such a treaty to be adopted (even if not subsequently ratified). After adoption, the UN system helps the ICMW to continue to exist by routinely producing reports or statements that keep the topic alive in international discussions.

On the other hand, the UN has arguably failed to fully support the ICMW. UN agencies, including the ILO, have historically done little to promote their respective conventions on migrant workers. The text of the ICMW was reportedly not available publicly until 1996, six years after it was adopted.⁴⁷ Several observers also noted the unpreparedness of the UN after 1990 and its inability to back the ICMW in the early ratification years.⁴⁸ Part of the problem lies in internal disagreements. As noted above, the ILO was initially in charge of migrant workers' issues but it then proved reluctant to let the UN take over and to put its expertise and resources at the disposal of the ICMW. However, the UN also faced more fundamental difficulties: the leading role played by origin States in the drafting process limited the support from powerful (and wealthy) governments, resulting in a lack of political support and financial resources.

This is quite visible in the evolution of intergovernmental debates over migration. Over the past two decades, the dominant approach among the UN and other intergovernmental organisations (such as the International Organization for Migration [IOM]) has become increasingly centred on the economic benefits of migration, as well as on the crime and security implications of unauthorised migration. This has resulted in an emphasis on the so-called 'migration and development' nexus, as well as on phenomena such as human trafficking. The ICMW is hardly mentioned in these discussions and sometimes even viewed with explicit scepticism as it would be at odds with this 'managerial' logic.⁴⁹ Moreover, many of today's international initiatives on migration (for

⁴⁵ Van Krieken, P, "Migrants' Rights and the Law of the Sea: Further Efforts to Ensure Universal Participation" 45(1) *International Migration* (2007) 209.

⁴⁶ Battistella, G, *supra* nt 7.

⁴⁷ Taran, P, *supra* nt 32, 164.

⁴⁸ See Taran, *supra* nt 32, 164-165; Grange, M and d'Auchamp, M, *supra* nt 11, 76-77.

⁴⁹ Goodwin-Gill, GS, "Migrant Rights and Managed Migration" in Chetail, V, ed, *Mondialisation, Migration et Droits de L'homme: Le Droit International en Question / Globalisation, Migration and Human Rights: International Law under Review* (Bruylant, Brussels, 2007).

instance the Global Forum on Migration and Development) are State-owned, reflecting governments' reluctance to give the UN too important a role therein. This also goes along with an emphasis on soft law instruments to regulate migration, rather than on hard international law treaties.⁵⁰ Finally, States have displayed a clear preference for bilateral or regional approaches to migration governance, rather than for genuinely multilateral initiatives.⁵¹

The picture is therefore ambivalent: without the ILO or the UN there would be no international standards pertaining to migrant workers. However, even among the organisations that are tasked with promoting and monitoring these legal instruments there are deep political disagreements on how to apprehend migration and on the emphasis that should be put on human rights. This lack of political support is a major obstacle to increased acceptance of the ICMW and cannot be addressed without a better recognition of the political dimension of the Convention. Overall, the UN and other international organisations tend to downplay the political sensitivity of migration-related issues by, for example, arguing that it can be addressed in a way that is beneficial for all or that helping migrants is merely a humanitarian issue disconnected from economic and labour market forces. This has of course to do with the intergovernmental setting in which international organisations work, which makes it difficult to openly address political and sensitive topics. Furthermore, such depoliticisation makes it impossible to recognise that migration policy is marked by core political (or even moral) issues that cannot be left unaddressed.⁵²

This points to the need for renewed political coalitions around the Convention. While advocates of migrants' rights (origin States, unions or NGOs) traditionally have limited bargaining power, they may nevertheless find it possible to promote the ICMW, particularly by relying on the legitimacy of human rights in Western democratic culture and in supranational or international institutions (such as the European Union, see below). As this discussion highlights, there are few obstacles to the ICMW and in developed countries the refusal to ratify a human rights treaty is potentially difficult to justify. As long as the issue is not raised or raised with little insistency it is possible to ignore it. This has been the case as the Convention has long suffered from very low levels of awareness and visibility. However, this situation is changing and while the very topic of migrants' rights will remain politically contested and sensitive there might be room for envisaging a brighter future for the ICMW.⁵³

On a different note, this political approach to the ICMW points to the fact that rights rarely exist in an abstract and absolute manner; they are always the object of bargains over the extent to which they are to be implemented and therefore subject to ongoing political negotiations. It follows that, as Alba writes, 'much of the discussion of migrant abuse concerns rights not being enforced, rather than their absence on paper'.⁵⁴

⁵⁰ Grant, S, "GCIM Report: Defining an "Ethical Compass" for International Migration Policy" 44(1) *International Migration* (2006) 13-19; Pécoud, A, "The UN Convention on Migrant Workers' Rights and International Migration Management" 23(3) *Global Society: Journal of Interdisciplinary International Relations* (2009) 333-350.

⁵¹ UN General Assembly, *Human Rights of Migrants: Notes by the Secretary General*, 7 August 2013, (Committee 5) A/68/283.

⁵² Pécoud, A, *supra* nt 33.

⁵³ Desmond, A, "The Triangle that Could Square the Circle? The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the EU and the Universal Periodic Review" 17(1) *European Journal of Migration and Law* (2015) 36; Piper, N and Rother, S, "Let's Argue about Migration: Advancing a Right(s) Discourse via Communicative Opportunities" 33(9) *Third World Quarterly* (2012) 1735.

⁵⁴ Alba, F, "Martin Ruhs' The Price of Rights: Flexible accommodation vs. all-encompassing norms?" 3(2) *Migration Studies* (2015) 295.

Measuring rights is therefore difficult as the real issue lies less in their formal existence rather than in their translation into practice, especially when it comes to undocumented migrants. In this respect, the Convention may not change the content of the rights available to migrants (at least not in Western developed countries); but it can have an impact on the context in which different actors (government, migrants, employers, unions, civil society) interact and negotiate over the way rights are made available. This makes clear that migrants' access to rights is a political issue, which depends upon the power relations between the actors that play a role therein.

B. In-between States

Another observation that can be made concerns the grey zone in which certain States find (or have found) themselves with respect to ratifying the ICMW. While the Convention has been the object of disagreements between the North and the South, the composition of these two blocks is sometimes unclear and has changed over time. It follows that some States are not clearly on one side only and are characterised by an in-between nature that makes their relationship to the ICMW more complex. This is not to say that the divide between origin and destination countries, or between developed and less-developed States, has disappeared; there are still very real diverging interests among countries when it comes to the global politics of migration. Rather, it is to suggest that those States that find themselves in this grey zone can shed light on situations of non-ratification that are complex and not attributable to a single factor.

One can first mention States that, while traditionally on the sending side of the migration process, have gradually become destination countries. The best example is probably Mexico, which was one of the chief advocates of the ICMW from the very beginning and ratified it in 1999. As Diaz and Kuhner recall, this was part of a strategy to protect Mexican migrants in the United States. Yet, Mexico is now also a destination and a transit country. This raises major challenges, however, as these authors further note, 'Mexico is in a position to show the international community that a state which both receives and sends migrants can ratify and comply with the Convention'.⁵⁵ More or less similar observations could be made in relation to other non-Western countries, such as Morocco or Argentina.

What is perhaps less known is that several European countries used to be in a relatively similar situation. Southern European countries, in particular, were predominantly States of origin when the ICMW was first conceived; when it was eventually adopted, they had moved to the destination side. Portugal and Italy, for example, had ratified both ILO Conventions by the early eighties. Yet, in the nineties, their concerns were no longer centred on the protection of their emigrants; they had started to experience immigration, which changed their attitude towards the Convention.⁵⁶ It is even reported that they used their own experience to warn other countries that were considering ratification, especially in North Africa, arguing that sooner or later they would have to apply the ICMW to their own immigrants – and that they should be cautious when committing to such standards.⁵⁷ According to several observers, Italy considered ratification quite seriously and did not see major obstacles; the main problem, rather, seems to have arisen from its political instability, specifically frequent changes of governments and the difficulty of ensuring consistency in policy orientations.⁵⁸

⁵⁵ Diaz, G and Kuhner, G, *supra* nt 13, 241.

⁵⁶ Touzenis, K, *supra* nt 21.

⁵⁷ Interview with Graziano Battistella, Scalabrini Migration Centre, Quezon, Philippines, June 2015.

⁵⁸ Interview with Mariette Grange, human rights practitioner, Geneva, Switzerland, March 2015.

In Portugal, the situation appears to have been quite different, as the country was reportedly discouraged from ratifying in the context of its accession to the EU (which took place in 1986). This is extremely difficult to document: in principle, there is no conflict between EU membership and ratification of an international human rights treaty and EU discussions on this matter are highly unlikely to be formal or public. It remains, however, that several observers noted the unsupportive role played by the EU: from the authors' personal experience, it appears that most of the people interested in the ICRMW heard rumours that the EU instructed new Member States, or potential candidates to EU-membership, not to ratify. Given the absence of in-depth research on this sensitive topic, it is difficult to determine the extent to which this assessment is correct. What is clear is that EU States function as a kind of benchmark: countries in the EU periphery attempt to change their policies and legislation according to European and EU standards and are actively encouraged to do so through EU support or by intergovernmental bodies (like the International Centre for Migration Policy Development [ICMPD]).⁵⁹ As a result, governments that have recently joined the EU, or that aim at doing so, will not consider the ICMW as a priority and will prefer copying what other EU States do. Whether this means that some of these States genuinely wanted to ratify but were kept from doing so because of EU pressures is uncertain.

What is certain, however, is that the process of European integration did not contribute to broader acceptance of the ICMW. Migration became an issue for Europe at more or less the same time as the ICRMW was finalised and adopted. The 1985 Schengen treaty, in particular, paved the way for a borderless zone in the EU, while the 1999 Amsterdam treaty formally established migration as a matter of competence for the EU. While this did not create an EU immigration policy (which, to a large extent, still does not exist), it nevertheless made clear that the growing interdependencies between European States were inevitably going to impact migration dynamics. As MacDonald and Cholewinski observe, this made for a convenient 'EU alibi' as Member States could justify the non-ratification of the ICMW by pointing to the need of a European strategy on that matter.⁶⁰

VI. Conclusion

The ICMW has, from the start, been the object of heated debate. Of the ten core international human rights instruments, it is clearly the most controversial and contested. While it would be erroneous to consider that other human rights treaties are fully consensual,⁶¹ the unease with the ICMW reflects a broader unease with migration at large and with the role migrants should play in destination societies. It also reflects a kind of 'sedentary' assumption according to which people should 'normally' remain in their own State,⁶² as well as the often implicit assumption that nationals are somehow more deserving than foreigners and should have priority access to human rights. These

⁵⁹ European influence can even be felt far away from its neighborhood. Piper documents that Japan and the Republic of Korea, for example, tend to look at the attitude of European countries before developing their own strategy in terms of human rights and of the ratification of international standards. Piper, N, *supra* nt 13, 177.

⁶⁰ MacDonald, E and Cholewinski, R, *supra* nt 18.

⁶¹ Taran recalls that acceptance of the ICMW was made even more difficult by the fact that it was adopted at a time when human rights became more openly contested, particularly during the 1993 Vienna World Conference on Human Rights. Taran, P, *supra* nt 32, 157-160.

⁶² Bakewell, O, "Keeping Them in Their Place: The Ambivalent Relationship between Development and Migration in Africa" 29(7) *Third World Quarterly* (2008) 1341.

controversies over migrants' rights have, as argued in this article, done much harm to the ICMW – to the extent that it remains, up until today, a much under-used legal instrument.

Despite this, the controversial nature of the ICMW could also be viewed as a good thing. It clearly indicates that migration and the rights that should be granted to migrant workers are political matters. One can argue at length about the legal and economic implications of ratifying the Convention, but as this article tried to show, the core disagreement is of a political nature. Human rights are sometimes characterised by a kind of depoliticisation process, whereby everybody seems to mildly agree on their relevance while not necessarily translating this into practice. This is not the case with the ICMW, which represents one of the very few international codifications of human rights to be openly contested by even the most human rights-friendly countries. This has often remained implicit and unnoticed, as the low visibility of the Convention has meant that governments in Destination States could avoid clearly positioning themselves.

As this changes, the rights of migrant workers may become the new frontier for human rights and for social and political progress at large. In a world in which many countries in the global South face persistent economic disadvantage and socio-political instability, migration is likely to remain a global trend, with a lasting impact on destination societies. The existing political responses to mobility, such as the neat distinction between 'economic' migrants and 'political' refugees, will prove growingly inadequate and more obviously so. This is, of course, not new. However, this 'age of migration'⁶³ will make the key questions raised by the ICMW growingly acute: issues such as the rights of non-nationals, their role in the labour market, the recognition of their presence and needs, the responsibility of States and employers and the need for international cooperation will become increasingly difficult to ignore. Importantly, and as early 20th-century efforts by the ILO already made clear, these do not only concern foreigners or migrants but all workers and members of both origin and destination societies. To a very large extent, the appropriate political framework to address these questions remains to be invented. There is no guarantee that it will emerge soon, nor is it certain that the Convention will play a role therein. However, by envisaging a world in which migrants and foreign workers have full access to human rights, the ICMW at least raises the right questions and could eventually emerge as what it is, namely a symbol for less unfair and imbalanced approaches to international migration and global affairs.

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⁶³ Castles, S, de Haas, H and Miller, M, *The Age of Migration. International Population Movements in the Modern World* (Palgrave, Basingstoke, 2013).

Colombian Development-Induced Displacement – Considering the Impact of International Law on Domestic Policy

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Keywords

COLOMBIAN INTERNAL DISPLACEMENT; DEVELOPMENT-INDUCED DISPLACEMENT; GUIDELINE PRINCIPLES ON INTERNAL DISPLACEMENT

Abstract

It is well known that Colombia is the country with the highest number of internally displaced people (IDP) in the world. Almost 7.5 million people have been forced to leave their homes for reasons related to the internal armed conflict, which lasted for over fifty years. In order to meet the level of assistance required and protect the population, the Colombian State has developed a complex public policy, structured around the Deng Principles. Now, along with the involuntary displacement caused by the armed conflict, which is well known and studied, there is also another process of displacement that has remained completely hidden and is linked to the implementation of the development model.

To this day the only forced displacement whose existence has been officially recognized in Colombia is that linked to the internal armed conflict. Exoduses caused by mining, the production of biofuels or any other kind of development project, face not only the absence of programmes to repair their rights and meet their basic needs, but also the denial of their status as IDPs. Indeed, authorities responsible for designing and implementing plans and projects on these industries have not recognized even the faintest possibility of them triggering an involuntary exodus.

What prevents Colombian policy makers from expanding the definition of IDP in order to include those displaced by development projects? Domestic factors, such as multinational companies' and Colombian government's interests in protecting an economic model based on the exploitation of natural resources, provide just part of the answer. It is needed to look into the interaction among the Colombian public policy on internal displacement and the global regimes of forced displacement and foreign investment to understand the complete picture.

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I. Introduction

According to the UNHCR, Colombia had the world's largest number of internally displaced persons (IDPs) in 2016. More than 7.4 million people have been forced to leave their homes,¹ most of them due to the internal armed conflict, which lasted for over fifty years.² The sheer magnitude of this phenomenon, coupled with the fact that national authorities have developed a sophisticated policy based on the guidelines developed by the United Nations, has triggered scholarly interest both domestically and internationally.

Several approaches have been developed to explain and formulate possible solutions to this issue. Despite their diversity, all of them agree on the extreme complexity of this phenomenon, which interlinks rural conflict, the struggle of various armed actors, gross and systematic violations of human rights, a traditionally weak State apparatus with consequently limited control over vast areas of the country, a development model that favours large rural property and, last but not least, the illicit drug trade. The latter has permeated all instances of national life through corruption and has provided considerable resources to existing social conflicts, thus, triggering unusual brutality.

Despite the complexity of the situation, public policy designed to address its outcomes builds on the premise that the humanitarian challenge is solely the product of the armed conflict that took place in the country. Those who are violently expelled from their places of habitual residence as a consequence of any of the other factors described above cannot expect to receive the protection and assistance of the authorities. This is in sharp contrast with IDPs who have fled the armed conflict and who are entitled to a (admittedly limited) set of benefits. Moreover, those who have been forced to leave their homes due to the implementation of development projects related to mining or the production of biofuels face not only the absence of programmes to repair their rights and meet their basic needs, but also the denial of their status as IDPs. Indeed, authorities responsible for designing and implementing plans and projects regulating these industries have excluded even the faintest possibility of them triggering an involuntary exodus.

The position of the Colombian authorities is shocking, especially if one considers that, today, the link between development projects and forced displacement is widely accepted. In fact, most international institutions that promote such projects (for example the World Bank) have been busy designing courses of action to address population transfers and manage their proper resettlement.

What prevents Colombian policy makers from expanding the definition of IDP to include those displaced by development projects? To be sure, there is the sheer pressure of multinational corporations with interests in mining or bio-fuels, as well as the interests of the government in the exploitation of natural resources. Moreover, there are funding and budgetary issues, as the government seems reluctant to expand expensive IDP benefits to a whole new group of the population.

However, such explanations seem unsatisfactory. For one, not only the government, but also the courts have excluded this kind of forced migrants from the definition of IDPs. The bureaucratic/budgetary explanation, therefore, seems less likely,

¹ UNHCR, *Population statistics*, at <http://popstats.unhcr.org/en/persons_of_concern> (accessed 3 August 2017).

² After a complex process the Colombian government and the guerrilla group Fuerzas Armadas Revolucionarias de Colombia (FARC-EP), signed a peace agreement on 24 November 2016. This has been considered the start of the end of the internal armed conflict. But, it is important to highlight that the conflict is not over yet. There is still an important guerrilla group active: Ejército de Liberación Nacional (ELN). Also the criminal gangs, heirs of paramilitary groups are quite active in the country.

as it was the judiciary who decided on these entitlements in the first place. Moreover, other policies that hinder unrestrained exploitation of such interests have in fact been adopted: for example, environmental concerns have frozen off-shore drilling in the Colombian Caribbean, social mobilization has blocked gold mining by the Canadian corporation Greystar, and Colombia has been a forerunner in the application of voluntary standards of security and human rights in extractive industries. Why is it then that the very notion of development-induced displacement is such an anathema in this country?

While we believe that there is much arm-twisting from powerful interests involved in this process, this paper suggests a different line of thinking. We argue that this approach is oblivious to the fact that most decisions connected with development-induced displacement are not taken on a merely domestic basis, but rather are the consequence of global interaction among agents in different States. In this sense, Colombia's refusal to include people displaced by development or economic projects within the category of IDPs can be better understood in reference to global regimes regulating IDPs, on one hand, and foreign investment, on the other. The first regime puts forward a broad definition of internally displaced population, which could arguably cover forced displacement induced by economic development projects. However, its provisions are mostly soft law and their enforcement depends on decisions taken at the national level. The second, by contrast, is backed by legally binding provisions, which are deeply distrustful of the national legal systems. In this sense, the investment regime bestows the international level with important decision-making powers, including the power to assess and decide on the adverse effects caused by foreign investments. Thus, while one of these legal regimes leaves the framing of the concept of displaced population to the national authorities, the other places severe constraints on its expansion, as the definition of IDPs would be an undue intervention of domestic authorities in matters that fall under the jurisdiction of international bodies.

The influence of these two regimes in Colombia, as discussed throughout this paper, can explain some of the voids in the country's IDP policy. This article explores, first, the context of forced exodus in Colombia. Then, the text analyses the solutions to the challenge of forced displacement, both at the international and national levels, and argues that this policy has focused solely on exodus caused by the armed conflict. This approach obscures the plight of those who have been expelled from their place of residence due to the implementation of development projects. This is despite the fact that, as discussed below, such population is increasing in the country as a result of the economic model adopted in recent years. Many of the companies associated with this type of exodus are multinationals, protected by the foreign investment regime. The investment regime, and its influence on the regulation of forced displacement, is studied in the sixth part of the text, which ends with brief conclusions.

II. Internal Displacement in Colombia and Its Complexities

Armed conflict has been identified as the main cause of internal displacement in Colombia. However, internal displacement in this country differs from the situation in other States, where a single, large-scale armed action has resulted in massive displacement. In Colombia, displacement often occurs on a lesser scale, as the head of the household is threatened or killed by armed actors in targeted actions. As a

consequence, he or she (or their relatives) is forced to move.³ The result of this situation is that the displaced population has increased marginally year by year and, thus, the magnitude of the problem has only become apparent to society after years of silent exodus. Moreover, this led to the IDP originally being considered as homeless individuals in the main cities; that is, as a symptom of the general economic problem of urban poverty, and not as the specific by-product of a political armed conflict in the rural areas. While data is controversial, general awareness of the human tragedy suffered by a multitude of Colombians only became a matter of mainstream concern in the late 1990s. From then on, this phenomenon became evident and acquired a life of its own.

Although it remained unnoticed by the government and society for decades, forced displacement in Colombia can be considered a constant throughout the history of the country. Ultimately, it has been instrumental in the process of nation building, 'an engine of the country's history, a kind of vicious axis of destruction-reconstruction-destruction of economic, political, technical, ecological and cultural Colombian society'⁴. Its endurance is better explained not by the phenomenon itself but by its use as an instrument by different actors for various purposes. Displacement has been a weapon of war used by all parties to the conflict: an instrument that landowners have resorted to in order to expand their domains and a mechanism for the development of infrastructure projects such as dams, roads and hydropower plants. At the same time, it has become an indirect consequence of coca and poppy cultivation.

In essence, diverse actors used forced displacement as an instrument throughout the country's history to gain control over land, resources and human beings, either for strategic or purely economic purposes. That is, it has been a tool in various types of conflicts occurring since the beginning of the Republic, which remain unresolved to this day. To this instrumental exodus one should add displacements of another nature, which are not expected but accepted as possible consequences of actions taken in the internal armed conflict, of public policies to combat drug trafficking and of the implementation of plans for economic growth; particularly the extraction of raw materials and the development of infrastructure.⁵

Among the various instrumental uses of forced displacement, two have a particularly long historical tradition in the country: its use as a device of economic accumulation and expansion of large estates and as a combat strategy. These functions are directly related to two of the conflicts that have developed throughout Colombia's history, which have evolved as the country transformed itself to include new elements and dynamics, and still remain unsolved: conflict over land, and conflict for territorial control.⁶

³ See Ibañez AM, *El Desplazamiento Forzoso en Colombia: Un Camino Sin Retorno Hacia a Pobreza*, (Bogotá, Ediciones Uniandes, 2008). It should be noted that as violence increased in the areas of Antioquia, Chocó and Cesar in 2001, cases of mass displacement became more common.

⁴ CODHES, *Un país que huye. Desplazamiento y violencia en una nación fragmentada* (Bogotá, Editora Guadalupe, 1999), 75.

⁵ Molano Bravo, A, "Desterrados" *Papeles de Cuestiones Internacionales*, Centro de Estudios para la Paz, N° 70, Spring, 2000, p. 35, CODHES, *Boletín informativo de la Consultoría para los Derechos Humanos y el Desplazamiento*, N° 77, Bogotá, February 201, p. 3. Lemaitre, J (ed.) *Derechos enterrados. Comunidades étnicas y campesinas en Colombia, nueve casos de estudio*. (Bogotá, CIJUS-Uniandes, 2011), 15. Celis, R and Plaza, B, "Empresas transnacionales y desplazamiento forzado. Una mirada crítica" *Pueblos. Revista de información y debate* (2016) at <<http://www.revistapueblos.org/?p=20741>> (accessed 15 September 2017).

⁶ CODHES, *supra* nt 4, 76.

The first refers to one of the oldest social problems in the country: land distribution. The concentration of land ownership is extremely unbalanced in Colombia, where it is estimated that 1.4% of landowners own 65.4% of the surface area.⁷ There are several reasons for this over-concentration of land. The first is the implementation of an economic model that favours the production of raw materials for foreign trade which require large areas of land for certain crops, such as African palm, at the expense of peasant economies based on smallholding and polyculture.⁸ Secondly, Colombia has not implemented veritable rural reform.⁹ Furthermore, the State has not attempted to balance the situation of farmers.¹⁰ Thirdly, the rise of drug trafficking, particularly the ‘laundering’ of the financial assets involved, has influenced land concentration as traffickers have invested in the purchase of large areas and the exploitation of livestock, appropriating much of the most fertile areas.¹¹

The second conflict, similarly unresolved, refers to the strategic territorial control of political and economic realms in the context of internal armed conflict. Armed actors attempt to capture governmental structures in certain areas of the country to control strategic corridors or assets. This is by no means a recent conflict, either. Its origins date back almost to the independence of Nueva Granada from the kingdom of Spain, in 1819. Since then the struggle between the various factions has become permanent. At this point, it is important to note that although the armed conflict has been a constant in the history of the country, one should avoid conceiving it as a single conflict, which manifests differently over time. Throughout the years, conflicts have been varied: both the actors and the idea of the struggle have changed in each phase. Experts refer to ‘violences’ in the plural, as a way of analysing the conflict, because each stage has brought different types of confrontations.¹²

The armed conflict currently unfolding has different characteristics from those in the two previous centuries. It is now a low-intensity struggle involving guerrilla groups, State armed forces, and criminal gangs. The latter are heirs of the paramilitary groups, which were formally demobilised in a process that took place between 2003 and 2006.¹³ Additionally, it features an extra ingredient that makes it even more complex: drug trafficking. Beginning in the sixties with the cultivation and trafficking of marijuana, this phenomenon has adapted very effectively to market requirements, as well as to the control strategies deployed against them by the State. The groups involved in this activity have allied themselves with the different actors in the conflict in order to protect their

⁷ Comisión de seguimiento a la política pública sobre desplazamiento forzado, *VI Informe a la Corte Constitucional*, (Bogotá, June 2008), 22, at <http://viva.org.co/documentos/cat_view/1-comision-de-seguimiento> (accessed 9 August 2017).

⁸ Lemaitre, *supra* nt 5.

⁹ Failed efforts of rural reforms were undertaken in 1930, 1960 and 1980.

¹⁰ UNPD, *Colombia rural. Razones para la esperanza. Informe nacional de desarrollo humano*. (Bogotá, UNDP, 2011), 215ff.

¹¹ Reyes, A "Compra de tierras por narcotraficantes" in Thoumi, F (ed), *Drogas ilícitas en Colombia: su impacto económico, político y social*, (Bogotá, Ariel-UNPD, 1994).

¹² Sánchez, G and Peñaranda, R, (eds) *Pasado y presente de la violencia en Colombia*, (Bogotá, CEREC, 1995).

¹³ The demobilization process had the legal framework within Law 418 of 1997 (amended by Act 548 of 2002, 199 and 782). Also, Law 975 of 2005, known as the Justice and Peace law, regularly addressed the responsibilities of former combatants for acts committed ‘during and at the time of membership’ in the paramilitary groups, and the rights of their victims. For a critical view of the paramilitary demobilization process see Alonso, M and Valencia, G, “Balance del proceso de Desmovilización, Desarme y Reinserción (DDR) de los bloques Cacique Nutibara y Héroes de Granada en la ciudad de Medellín” 33 *Estudios Políticos* (2008).

interests. So while certain regions have real armies to fight the guerrillas, others have come to an agreement with insurgent groups to pay for some type of revolutionary tax in exchange for the protection of their crops. On the other hand, though formally pursued by the State, which has received the support of the United States of America in developing an ambitious and aggressive programme in order to combat drug trafficking,¹⁴ corruption has allowed these groups to embed themselves at all levels of the State and society.¹⁵

In this new chapter of the Colombian armed conflict, forced displacement is sometimes the result of panic among the civilian population, caused by the fighting taking place near their villages and fields. However, this type of exodus, which might be called accidental, is secondary and occurs on a lesser scale than planned displacement, which has been used as a combat strategy by all sides. This has been done either for military purposes, for example, to control strategic corridors and areas of arms trafficking and other illegal products or for political goals such as the destruction of the social foundations of the adversary.¹⁶

These two conflicts (agrarian and armed) overlap and complement each other. In most areas it is a combination of the two factors which brings about displacement. For example, the Sierra Nevada de Santa Marta has become a battleground in which armed actors struggle for strategic control and various drug cartels fight for control of trafficking routes. At the same time, the Sierra has also become the backdrop of a dispute between indigenous communities and government officials over the implementation of several infrastructure projects.¹⁷

III. IDP Policy as Global Governance

Despite its particularities, the Colombian IDP crisis is part of a wider global picture. Though the phenomenon of individuals and populations fleeing their homes as a result of threats to their lives or physical integrity is almost as old as humanity itself, only in the twentieth century did the perception arise that there is a need for international protection and the development of a system that would manage the flow of communities and individuals fleeing from wars, internal conflicts or persecution. Several factors contributed to this transformation, which has brought this issue to the forefront of the attention of international institutions today.¹⁸

¹⁴ So far, two programs have been developed to combat drug trafficking with the strong support of the United States, which has provided material and financial resources for its development. This is the 'Plan Colombia', designed during the Clinton administration and 'Patriot Plan' promoted by the Bush administration, which is controversial given its poor results.

¹⁵ Reyes, *supra* nt 11; Garay, JL and Salcedo-Albarán, E *Narcotráfico, corrupción y estados. Como las redes ilícitas han reconfigurado las instituciones en Colombia, Guatemala y México*, (Bogotá, Debate, 2012).

¹⁶ According to the Third National Verification Survey, conducted by the National University in 2010, the main trail of displacements are direct threats. This was reported by 53.4% of households displaced recognized as such by the STATE. The second case, reported by 16.7%, was the murder of a close relative. Such data supports the conclusion that the exodus is an end sought by the armed actors and not just collateral damage. See Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado, *Tercer informe de verificación sobre el cumplimiento de derechos de la población en situación de desplazamiento*, (2010), 33-34, at <http://viva.org.co/cajavirtual/svc0236/articulo1175_236.pdf> (accessed 9 August 2017).

¹⁷ Lemaitre, *supra* nt 5.

¹⁸ Holborn, L. W. "The League of Nations and the Refugee Problem" *Annals of the American Academy of Political and Social Science*, Vol. 203, (1939), 124. Barnett L, "Global Governance and the Evolution of the International Refugee Regime" *International Journal of Refugee Law* Vol. 14, issues 2 and 3, (2012), 238-242.

The first step was taken after the First World War. The League of Nations had a High Commission for Refugees, created in 1921 under the direction of Fridtjof Nansen (who had before led the repatriation of prisoners of war from Siberia, acting as High Commissioner for the League of Nations).¹⁹ Seeking to address the problem of the exiled population fleeing the Bolshevik regime after 1917, Nansen proposed and implemented the so-called ‘Nansen Passport’, an identity document (yet not a passport, *strictu sensu*) issued by adherent States, that was valid for a year, and allowed the bearer to return to the country issuing it.²⁰ The ‘passport’ was first issued to Russians, but subsequently extended to Republican Spaniards fleeing the Civil War, Armenians in 1924, and then to Kurds, Turks, Assyrians and Syrians in 1928, who had been expelled following the collapse of the Ottoman Empire. Later, German Jews fleeing the Third Reich were also given a ‘passport’.²¹

The Nansen initiative was an early example of what would come to be the default approach to the problem of displaced populations in most of the twentieth century. In essence, the prevailing notion was that forced displacement became a problem as populations or individuals crossed borders; thus becoming, for example, ‘refugees’, or asylum seekers. Displacement was an intergovernmental problem, which concerned the relationship between States.²² This premise was confirmed by the effects of World War II, which resulted in the displacement of millions of people who sought refuge in a country different from their own. The Allies undertook to give these people some protection in 1944, through the United Nations Relief and Reconstruction Agency (UNRRA). UNRRA existed until 1947, when its mandate ended. In 1948, a temporary International Refugee Organization was set up as an agency of the United Nations (UN). Soon after, though, it became evident that the refugee problem was not of a temporary nature and a permanent UN High Commissioner for Refugees (UNHCR) was created in 1950.

Like its predecessors, and due to the demands of that particular period in history, the UNHCR was unconcerned with persons displaced within a country. In fact, the agency lacked a specific mandate to deal with such populations under its Statute.²³ Article 9 of the Statute, however, did allow for the High Commissioner to ‘engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal’. As the tragedy of internally displaced people became evident, mainly outside Europe, the alternative offered by Article 9 proved useful. Thus, in the context of the Sudanese crisis of the early 1970’s the UNGA ‘urged the organizations associated with the United Nations and all Government to render the maximum possible assistance to the Government of Sudan in the relief, rehabilitation of Sudanese refugees coming from abroad *and other displaced persons*.’²⁴ Since then the UNHCR has seen its mandate with

¹⁹ Holborn, *Ibid*, 124.

²⁰ *Ibid*, 680-684.

²¹ Barnett, *supra* nt 18, 238-242.

²² See Holborn, “The Legal Status of Political Refugees 1920 – 1939” *Annals of the American Academy of Political and Social Science*, Vol. 203, (1939) 387. For a useful historical review, see Barnett, *supra* nt 18, 239-245.

²³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, (325th plenary meeting) A/RES/428/(V).

²⁴ UN General Assembly, *Assistance to Sudanese refugees returning from abroad*, 12 December 1972, (2107th plenary meeting) A/RES/2958(XXVII), para 3 (emphasis added).

regard to IDPs become broader and broader culminating in 1992 when the UNHCR was granted the competence to deal with this issue, which is now the default position.²⁵

The expansion of UNHCR's mandate was not the only action taken by the United Nations to address forced migration within States. In 1992, the UN established the position of Special Representative of the Secretary-General on internally displaced persons.²⁶ This unconventional mechanism, whose mandate was originally intended to last for a year, has survived until today but under the name of Special Rapporteur. His work has been essential in the creation of an international regulation of forced displacement. Indeed, in 1998 the then Representative, Francis M. Deng, submitted to the Human Rights Commission the Guiding Principles on Internal Displacement (hereinafter Guiding Principles),²⁷ which are currently the backbone of this regime. These principles provide a comprehensive set of rights that must be guaranteed to persons in situations of internal forced exodus and proposes a model for care. National authorities are responsible for implementing this scheme and ensuring these rights. According to some commentators, if such duties are not met, the international community has standing to intervene to ensure the protection of IDPs.²⁸ Others, in turn, see in this responsibility to protect an ill-defined notion that may justify neocolonial international interventions under the cloak of humanitarianism.²⁹

Despite the involvement of the UNHCR, the organ of an international organization, IDPs are also (and perhaps predominantly so) a domestic problem: IDPs are protected by domestic laws and human rights instruments, as well as humanitarian treaties that apply at the national level.³⁰ IDPs affect distribution of wealth, land ownership as well as gender and ethnic victimization; all within a single State. Ultimately, IDPs are first and foremost the responsibility of the State in which the displacement occurs. However, as we have seen, the UNHCR and other international institutions have much to do and say about the problem both, through regulating the problematic and providing aid to victims of displacement. Reaction to the IDP challenge is, therefore, a place where the agenda of an organ of a traditional intergovernmental organization (the UNHCR) and the agenda of national governments—their interests, and those of other national power structures—coincide. However, the two often clash as internal displacement becomes a delicate part of domestic politics or is even caused by the very government primarily responsible for the victims. It is a highly sensitive issue, as it affects not only the exercise of sovereignty, but also reveals the failure of domestic authorities in protecting their very own population and, in some cases, the State's interests in triggering displacement.

²⁵ UN General Assembly, *Office of the United Nations High Commissioner for Refugees*, 20 December 1993 (85th plenary meeting) A/RES/48/116.

²⁶ UN Economic and Social Council, *Internally displaced persons*, 20 July 1992, 1992/243.

²⁷ UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, E/CN.4/1998/53/Add.

²⁸ The Guiding Principles are based on the theory of sovereignty as responsibility, according to which if a state fails to protect the human rights of its citizens, it is creating a void that the international community is required to fill. See Deng, FM, Kimaro, S, Lyons, T, Rothchild, D and Zartman, W, *Sovereignty as Responsibility. Conflict Management in Africa*, (Washington, Brookings Institution Press, 2010).

²⁹ For a summary of the different views, see Focarelli, C, "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine" 13(2) *Journal of Conflict and Security Law* (2008) 191.

³⁰ 1948 Geneva Conventions and their Protocols provide some protection for IDPs, both during internal and international conflicts.

The role of international law in IDP policy is a reflection of this circumstance. It has become common to argue that soft law plays an important role in the context of IDPs.³¹ This all-important role of soft instruments can be explained by the middle ground between international and domestic politics where IDPs stand. Consider the central normative piece to be found in IDP policy: the Guiding Principles, issued by the UN's Secretary-General's Special Representative on IDPs. The legal status of the Principles is rather ambivalent considering that it is neither a UN declaration nor is it an attempt at codifying customary international law. Rather, it is a study of domestic legislation and analogous regulation (for example refugee law), which is, in the words of the Representative of the UN Secretary General for Internal Displacement, 'consistent with international law'.³²

At the heart of these principles is the realization that several matters affecting IDPs are indeed covered by traditional (hard) international instruments: say, the right to life in human rights treaties, or the principle of distinction in international humanitarian law. This is the international aspect of the problem. However, there are other matters affecting IDPs that concern mainly domestic jurisdictions such as the compensation for property or land lost during the displacement or the possibility of finding a safe place within one's own State. Faced with such situations, norm entrepreneurs (for example activist and academic networks and the UN Representative of the Secretary-General for IDPs) quickly rose to support the drafting and adoption of some sort of normative framework that would address the limitations of the international aspect of the problem.³³ The answer was the Guiding Principles.³⁴ Although no hard international instrument was available, and any challenges fell to each State to address, some degree of governance could still be exercised through the Principles. IDP governance, then, is not strictly national or international but seems to include several layers of domestic governance complemented by the international actions of the UN and several networks of activists. This struck a certain balance: while the primary responsibility still fell on States, international involvement remained possible.

Francis M. Deng, Representative of the UN Secretary-General on IDPs, clearly portrays this dynamic in his description of his work at the UN:

In my dialogue with governments – one of the requirements of my mandate – the first five minutes with the head of state is [sic] crucial to assure them of my recognition of the problem as internal and therefore under state responsibility. Having emphasized my respect for their sovereignty, I quickly move on to present the positive interpretation of sovereignty and the supportive role of international cooperation. Once I establish a cordial climate, candid and constructive dialogue can follow with little or no constraint in the name of sovereignty.³⁵

³¹ For a recent example, see Orchard, P, "Protection of internally displaced persons: soft law as a norm-generating mechanism" 36 *Review of International Studies* (2010) 281.

³² Kälén, W, *Guiding Principles on Internal Displacement. Annotations*, The American Society of International Law, The Brookings Institution – University of Bern Project on Internal Displacement Studies in Transnational Legal Policy No. 38, (2008), 6.

³³ Orchard, *supra* nt 31.

³⁴ On the role of international norm entrepreneurs in the IDP context, see Cohen, R and Deng, FM, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, Brookings Institution Press, 1998), 283-285.

³⁵ Deng, FM, "The Global Challenge of Internal Displacement" 5 *Washington University Journal of Law and Policy* (2001) 145.

And then Deng concludes: ‘the critical issue becomes how the international community can intercede to overcome the obstacles of negative sovereignty and ensure access for the needy population.’³⁶

The Guiding Principles are the basis on which the dialogue mentioned by Deng is developed. Even though the global IDP regime is a combination of hard and soft law, it merely presents a non-binding proposal to the State authorities. They are free to pick and choose which aspects to adopt as long as they respect the basic human rights deemed essential by the international community. This generates a special dynamic between global and local IDP government authorities. There is an ongoing dialogue in which the former tries to seduce the latter to adopt the entire proposal or, at least, its main elements. Analysis of this dialogue in different contexts such as the Colombian, Peruvian, Burundian or Turkish, reveals that at its core, protection for displaced populations has focused on armed conflict or generalized violence. In contrast, displacement caused by natural catastrophes or triggered by human action,³⁷ as well as displacement caused by a certain model of development have been left behind. It could be argued, therefore, that failure to include such situations in domestic policies is the price that global institutions of government have been willing to pay to facilitate the acceptance of the rest of the (global) development deal.

IV. Colombian IDP Policy as a Species of Global Governance

Although internal displacement in Colombia has a long history,³⁸ it was only in the late 1990s that it became part of the public agenda as a specific problem that required a specialised response. Up to that moment, displacement was considered merely one effect, and not necessarily the most relevant one, of the ‘real’ threats: environmental disasters, terrorist activities and, especially, the internal armed conflict. This perception began to change in 1994 due to two factors. First, the conflict saw a surge of violence, which triggered an exponential growth of internal displacement. In 1995, the internally displaced population was close to half a million people, a fact that gave the issue visibility in domestic debates.³⁹ Moreover, the UN Representative for IDPs visited Colombia in 1994 and, after meeting with officials and victims, published a report proposing the development of a policy specifically targeting the IDP crisis.⁴⁰

As early as 1995, the administration recognized its deficiency in dealing with the IDP issue.⁴¹ In that year, the first system of aid for IDPs was developed under CONPES

³⁶ *Ibid.*

³⁷ The international community’s interest in environmental displacement is quite recent and the Guiding Principles have played a secondary role in the search of solutions for this issue. See The Nansen Initiative, *Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change*, (Geneva, The Nansen Initiative 2015), at <<https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>> (accessed 9 August 2017).

³⁸ Roldán, M, *A Sangre y Fuego: La Violencia en Antioquia, Colombia, 1946-1953*, (Bogotá, Instituto Colombiano de Antropología, 2003).

³⁹ Conferencia Episcopal Colombiana, *Derechos Humanos y desplazamiento interno en Colombia*, (Bogotá, Kimpres, 1995) 33.

⁴⁰ Commission on Human Rights, *Internally displaced persons: Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95: Addendum: Profiles in displacement: Colombia*, 3 October 1994, (51st Session) E/CN.4/1995/50/Add.1.

⁴¹ República de Colombia: Departamento Nacional de Planeación, *Programa Nacional de Atención Integral a la Población Desplazada por la Violencia*, 13 September 1995, Conpes 2804; The Conpes (the National Council for Economic and Social Policy) is a legally established entity which serves as a consulting agency for the government in all of its aspects of economic and social policy. It produces several position papers named ‘Conpes documents’, which embody the decisions and recommendations taken by the national government regarding the areas of its jurisdiction.

document 2805. While this first experiment failed to materialize in practice, it did set the basis for further policy and, most importantly, established the need for a straightforward policy to deal with the IDP crisis in Colombia. However, the document lacked a general view of the problem and seemed unaware of its magnitude. Two years later, Congress enacted Law 387 of 1997 (the ‘Internal Displacement Attention Act’), which served as the legal framework for the integral aid that should be offered to IDPs and was the first legal recognition of their rights.⁴² The Act was drawn up with the collaboration of instances of global governance and arguably had some impact on the drafting of Deng’s Guiding Principles on Internal Displacement which were adopted only a few months later in February 1998.⁴³

Law 387 of 1997 laid the foundation for the creation of public policy dealing with IDPs. This public policy has been built on two pillars; both of them have been deeply influenced by the United Nations model dealing with this phenomenon, which is reflected in the Guiding Principles on Internal Displacement.⁴⁴ The first one was established by the enactment of several Laws of Congress, beginning with Law 387 of 1997, which was then supplemented in 2008 by Law 1190 and Law 1448 of 2011.⁴⁵ It was then developed by multiple executive decrees that established the institutional framework for the comprehensive care of people in forced exodus through prevention, humanitarian relief, economic stabilization and durable solutions. In spite of the amount of legislation, regulation and executive measures dealing with IDPs, the population was still not enjoying their rights, as they were still perceived as subjects of welfare (and private charity), not as rights holders. It was necessary, therefore, to adopt a human rights approach, which would ensure the full protection of IDPs. This was achieved through the extensive work of the Constitutional Court, which constitutes the second pillar of Colombian IDP public policy. The central piece of this column is the judgment T-025 of 2004, but there are many other relevant decisions. Through its judgments and writs the constitutional court has incorporate the rights contained in the Deng Principles into the domestic legislation in spite of their soft-law nature. In doing so the international proposal for managing IDPs has become the parameter to be utilized by domestic authorities in the context of national regulation.⁴⁶

The combination of these two aspects has resulted in the most complex and ambitious Colombian social policy ever.⁴⁷ This complex policy, however, only deals with

⁴² Law 387, Reglamentada Parcialmente por los Decretos Nacionales 951, 2562 y 2569 de 2001 por la cual se adoptan medidas para la prevención del desplazamiento forzado; la atención, protección, consolidación y esta estabilización socioeconómica de los desplazados internos por la violencia en la República de Colombia (24 July 1997).

⁴³ This argument has been suggested before in Rodríguez, C and Rodríguez, D, “El contexto: El desplazamiento forzado y la intervención de la Corte Constitucional (1995-2009)” in Rodríguez C (ed.) *Más allá del desplazamiento. Políticas, derechos y superación del desplazamiento forzado en Colombia* (Bogotá, Ediciones Uniandes, 2010), 21.

⁴⁴ Sánchez, BE, “Cuando los derechos son la jaula. Trasplante rígido del soft law para la gestión del desplazamiento forzado” 35 *Estudios Políticos* (2009).

⁴⁵ Law 1448, Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones (10 June 2011); Law 1448 creates a mechanism that will facilitate the restitution of millions of hectares of lands abandoned or stolen as a result of human rights abuses and violations during the internal armed conflict. According to Article 60, Law 387/97 complements its norms in IDPs issues. In decision C-280 of 2103, the Constitutional Court held that the obligations put forward by the prior norm were still in force.

⁴⁶ Corte Constitucional, judgments SU-1150 of 2000; T-327 of 2001; T-098 of 2002; T-268 of 2003 and T-025 of 2004.

⁴⁷ Only the policy of reparation for victims of the armed conflict and land restitution, developed by Law 1448 of 2011 (*supra* nt 45) can be compared in terms of scope and ambition.

internal displacement produced by the armed conflict. Even the Constitutional Court has ignored other kinds of forced migration. Development induced displacement is one of these.

V. Development based on Extractive Industries and Forced Displacement in Colombia

Development projects, beneficial as they may be in general, often trigger unwanted migration in communities whose lands are affected. This is well established, and numerous commentators have noted the disproportionate burden imposed on communities expelled from their place of habitual residence as a result. The issue is how to address this imbalance and restore the rights of the displaced.⁴⁸ This has been taken up by international financial institutions, such as the World Bank⁴⁹ and the Inter-American Bank for Development,⁵⁰ who have established policies to minimize exoduses and, where displacement is unavoidable, to minimize its negative effects by restoring the rights of those affected. However, the Colombian authorities have not adopted this course of action.

Even though forced migration resulting from the development of infrastructure and economic projects is not a new problem in Colombia, it has only been since the beginning of this century that this phenomenon has gone from having a marginal effect on specific projects, such as the construction of a hydropower dam,⁵¹ to becoming a systemic concern linked to the authorities' choice of an economic model for the country. Indeed, in the early 2000s, government officials chose to design and implement a development model based on extractive industries, with special emphasis on mining and power generation, so as to enter the international biofuels and feedstock markets. The adoption of this decision was possible because the country had already significantly adapted the rules and structure of economic production to suit the demands of the global economy. In the nineties, Colombia began a process of transforming the economy, through legal reforms and fiscal incentives to adopt neoliberal policies of structural adjustment imposed by international financial institutions.⁵² The economy was

⁴⁸ Cernea, M, "Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement" in Cernea, M and McDowell, C, (eds) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington, The World Bank, 2000); Cernea, M and Kanbur, R, *An Exchange on the Compensation Principle in Resettlement*, Working Paper: Department of Applied Economics and Management Cornell University (October 2002); Robinson WC, "Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement" Occasional Paper, The Brookings Institution-SAIS Project on Internal Displacement (2003); Rajagopal, B, (2000), *Human Rights and Development*, World Commission on Dams, Thematic Review V.4, Working Paper, at <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.7417&rep=rep1&type=pdf>> (accessed 8 August 2017).

⁴⁹ World Bank, *Operational Manual O.P. 4.12 "Involuntary resettlement"*, April 2013, at <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>> (accessed 1 June 2017).

⁵⁰ Banco Interamericano de Desarrollo, *Política Operativa OP-710 "Reasentamiento involuntario"*, Octubre, 1998, at <<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=822554>> (accessed 1 June 2017).

⁵¹ For example, during the nineties emberá and zenú communities were forced to leave their ancestral lands in order to build the hydroelectric project Urrá. Their case was studied by the Constitutional Court. See decision T-652 of 1998. It is important to note that the court did not recognize this people as IDPs.

⁵² Sebastian, E and Steiner, R, *La Revolución Incompleta: las reformas de Gaviria* (Bogotá, Norma, 2008).

deregulated, public utilities were privatized, the labour market was made more ‘flexible’, and property rights were strengthened.⁵³

The adoption of the mining and agroindustry model of development in Colombia was complemented by a firm commitment to foreign investment. The government of President Álvaro Uribe Vélez (2002-2010) made ‘investor confidence’ one of its flagship programmes through linking the inflow of foreign capital into the country with the growth and development of the national economy. The government, thus, developed a series of measures to attract this type of investment, which have been maintained by the current administration of President Juan Manuel Santos (2010-2018).⁵⁴ The development plan of the last government also notes that the growth of the energy and mining sectors, intended to become the engine for short-term development in the country, is subject to increased foreign capital inflows, which makes the development of new measures inevitable to facilitate their entry and stay in the country. As part of this openness to foreign investment, the country has embarked on a process of negotiating and signing free trade agreements in which foreign investment protection is a central concern.

The combination of these factors, that is, the Colombian bet on a development model based on extractive industries paired with the aggressive protection of foreign investments, has triggered the rapid growth of this sector with large areas of the country designated for such productive projects. Thus, between 2006 and 2016, the land area devoted to the growth of oil palm trees increased considerably to the point that by 2016 it was estimated that the crop occupied more than 466,000 hectares.⁵⁵ As the total cultivated area of the country in 2014 amounted to 7.1 million hectares⁵⁶, this means that slightly more than 6.5% of cultivated land is engaged in this agribusiness. More dramatic still has been the growth of mining, which is reflected in the mines licensing process. Between 2000 and 2010, the Ministry of Mining processed 17,479 requests and granted 7,264 mining titles throughout the country. This has affected 5.8 million hectares, which means that Colombia has almost as much land surface used or potentially being used for mining as for food production.⁵⁷ It should be noted that currently this sector of the economy is the most attractive to direct foreign investment, to the point that most of the incoming investments have been made in this industry.⁵⁸

Such an extensive growth of the biofuels industry and mining occurred in a country mired in armed conflict, facing complex problems of land distribution, and where State management of the rural areas has been characterized by privileging interests of large landholders. The government extensively supported projects that are not

⁵³ Lemaitre, *supra* nt 5.

⁵⁴ See generally: In the National Development Plan 2002-2006 ‘Towards a Communitarian State’ the government set as one of its goals to develop a policy to attract such investment. The next plan, developed in Uribe’s second term ‘Community State: Development for All’ restates this relationship, pledging to deepen and broaden this policy. The national plan for the period 2010-2014, ‘Prosperity for All’ prepared by the government of President Santos, remains on the same line, proposing actions and mechanisms to increase it, as well as the National Plan 2014-2018 ‘All for a New Country’.

⁵⁵ FEDEPALMA, Federación Nacional de Cultivadores de Palma de Aceite *Desempeño del sector palmero colombiano* (2016), 8, at <http://web.fedepalma.org/sites/default/files/files/18072016_Desempen%CC%83o_sector_2015_2016.pdf> (accessed 10 August 2017).

⁵⁶ Departamento Nacional de Estadística (DANE) *Censo Nacional Agropecuario* (2014) at <<https://www.dane.gov.co/index.php/estadisticas-por-tema/agropecuario/censo-nacional-agropecuario-2014#entrega-de-resultados-del-3er-censo-nacional-agropecuario-preliminar>> (accessed 8 August 2017).

⁵⁷ UNDP, *supra* nt 10, 97.

⁵⁸ According to the 2010-2014 National Development Plan, almost 90% of foreign direct investment in 2009 targeted this sector.

sustainable in environmental terms, without providing opportunities for most rural residents to participate in decision-making processes.⁵⁹ In this context, it is not surprising that the development of these two economic sectors exacerbated existing tensions, deepened conflicts for land and territory, and led to the violent methods of dispossession and displacement.

It should be further noted that the areas where the resources for the development of extractive industries are located are, as a rule, located on the outskirts of the country. This is, in areas where the authorities have weaker control and where armed actors impose their law. Often, these areas also coincide with territories of indigenous and afro-Colombian people. These two ethnic communities have special fundamental rights to the lands they have traditionally occupied, as a result of the recognition of ethnic and cultural diversity in the Colombian Constitution. These rights are reflected in the recognition of collective property and the obligation of the authorities to consult with these communities when attempting to develop or exploit natural resources in their territory.⁶⁰ Despite these special rights, such ethnic groups remain particularly vulnerable. Living in poverty,⁶¹ they are excluded from processes of development and are victims of constant violence. This is evidenced by the fact that Afro-descendants account for 10.6% of the population, yet constitute 22% of households displaced by force. Indigenous populations make up 3.4% of the Colombian population and account for 6.1% of the population living in involuntary displacement.⁶²

The effect on these groups reflects the failure of the authorities to guarantee their rights and the violent pressures they are subjected to by various armed actors interested in gaining control of the land, both for its strategic position and for the wealth of the soil and subsoil. However, not only ethnic minorities are affected by displacement linked to the development model promoted by governmental bodies. Mestizo peasants living in these lands are also victims of dispossession and displacement.

Forced migration in this context occurs in three different ways. The first and most common, is when illegal armed groups force communities to sell their land cheaply, or simply to give it up. Once they gain control over the territory, title is acquired, allowing them to act as the legal owners and negotiate with the authorities and private investors the conditions for agricultural or extractive projects on these lands. The second is when mining and biofuel companies directly employ armed groups to expel the local population, thus, gaining control of the territories. Finally, the third way, affecting mainly indigenous people, is when environmental pollution and destruction of resources in their territories caused by the implementation of development projects forces people to leave their land. It is important to point out, though, that displacement is usually not directly caused by extractive industries, but rather by the illegal actors who strive to take over land and take advantage of an absent State.

Armed actors who undertake these tasks have often been identified as part of the paramilitary groups that participated in the armed conflict, as well as, more recently, the

⁵⁹ UNDP, *supra* nt 10, 25-42.

⁶⁰ Indigenous populations and afro-Colombians are beneficiaries of a mechanism of prior consultation, established as fundamental rights under Article 350 of the Colombian Constitution. The outcome of such consultation, though, is not binding – the state has the last word on the development of such projects; Sánchez, BE, “Estado multiétnico y entidad territorial indígena” in *Estudios sobre descentralización territorial: El caso particular de Colombia* (Cádiz, Universidad de Cádiz, 2006); Viana, A, *El derecho a la consulta previa. Echando un pulso a la nación homogénea*, (Bogotá, Pontificia Universidad Javeriana, 2016).

⁶¹ 63% of the indigenous population is below the line of poverty, and 47.6% below the line of misery; UNDP, *supra* nt 10, 148.

⁶² Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado, *supra* nt 16, 57.

criminal gangs ('bandas criminales') that appeared after the demobilization of the paramilitaries.⁶³ Moreover, the lack of a proper system of land registry in the country, coupled with the informality of land possession in most rural areas has undoubtedly contributed to this dynamic, facilitating the appropriation of land and the legalisation of its holding once transfers have been accomplished by forceful means.⁶⁴

This type of forced migration has been completely ignored by the State, which refuses to acknowledge even the possibility that the economic model it enforces triggers this effect. There is neither an official record of the number of people affected by this phenomenon, nor statistics to provide an approximate figure. Nevertheless, displacement linked to the development of biofuel projects has been reported by international and national NGOs.⁶⁵ It has also been analysed through multiple case studies.⁶⁶ The situation faced by the black communities of Jiguamiando and Curvarado, in the department of Chocó, is probably one of the most studied. It is worthwhile to briefly outline the facts of this case as it illustrates the dynamics of this type of non-voluntary migration.

These communities consist of over a thousand families who live in an area where paramilitary presence has been common since the mid-nineties. While attacks on civilians were, from the beginning, a constant in the activity of these groups, they intensified after 1998 when several domestic and foreign companies initiated the development of a major project to produce biofuels from oil palm trees. As a result of these actions the two communities were forcibly evicted and their land used for the cultivation of this crop.

While these communities had been recognised as the owners of the land on which they lived, their titles failed to provide them protection. Rather, the titling process seems to have intensified the violence used to expel them. The response of the Colombian Ombudsman who reported the serious human rights violations faced by these people and urged the authorities to take action was ineffective, as it did not result in any actions designed to stop the violations and bring about reparation.⁶⁷ The intervention of the Inter-American human rights system through provisional protective measures ordered by the Inter-American Court proved ineffective in guaranteeing the right of these people to

⁶³ Vidal, R, Salcedo, J and Medina, A *Desplazamiento forzado y construcción de paz en Colombia 2009-2010* (Bogotá, CODHES – Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Embajada de Suiza, 2011); Rojas, G, "Post-demobilisation groups and forced displacement in Colombia: a quantitative approach" in Canor, D and Rodríguez, N, (Eds.), *The new refugees. Crime and Forced Displacement in Latin America* (London, Institute of Latin American Studies-London University, 2016).

⁶⁴ UNDP, *supra* nt 10, 192; Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado (2009) *El reto ante la tragedia humanitaria del desplazamiento forzado: Reparar de manera integral el despojo de tierras y bienes*, Bogotá, CODHES, 53 at <<http://www.codhes.org/~codhes/images/Encuestas/Vol%205%20Reparar%20de%20manera%20integral%20Tierras.pdf>> (accessed 9 August 2017).

⁶⁵ UNDP, *supra* nt 10, 91; CODHES, *Boletín informativo de la Consultoría para los Derechos Humanos y el Desplazamiento*, Número 77 (15 February 2011).

⁶⁶ See Celis and Plaza, *supra* nt 5; Valencia, J, *et al*, *Cambio climático y desplazamiento ambiental forzado: Estudio de caso en la ecoregión Eje Cafetero en Colombia*, (Armenia, Universidad La Gran Colombia-Editorial Universitaria, 2014), 114, 123-125; Correa, G and Hoyos, Y (Coords.) *Impactos en los Derechos Humanos de la implementación del Tratado de Libre Comercio entre Colombia y Canadá. Línea base*. Project Accompagnement Solidarité Colombie, June 2012, at <<http://www.pasc.ca/es/article/impactos-en-los-derechos-humanos-de-la-implementacio%CC%81n-del-tratado-de-libre-comercio-entre>> (accessed 15 September 2107).

⁶⁷ Defensoría del Pueblo, Resolution 025/2002 (2002); Defensoría del Pueblo, Resolution 39/2005 (2005).

return to their territories and restore land tenure.⁶⁸ Today most of the members of these communities remain displaced and oil palms cover their properties.⁶⁹

Although there are enough elements to establish a connection between paramilitary groups and at least one of the oil palm companies, these Afro-Colombian communities are officially considered displaced by the armed conflict. The authorities deny any relationship between the biofuel program and the forced exodus. In their minds, this is just another sad case of internal displacement caused by the war.

The development of mining has also created situations of involuntary displacement. Once again, authorities do not recognize the new engine of the economy as a trigger of this type of forced migration. However, in a 2011 report, Peace Brigades International notes that while only 35% of municipalities in the country have mining sites and energy resources, they represent 87% of the locations where forced exoduses have occurred, indicating a link official agencies are bent on denying.⁷⁰ CODHES, in its report for the same year, also points to the relationship between displacement and mining and oil.⁷¹ Similarly, the shadow report on the implementation of the FTA between Colombia and Canada,⁷² provides evidence of the way in which mining projects funded by Canadian companies have contributed to the expulsion of local populations.⁷³

Before concluding this section, one should note that this type of forced migration, generated by the implementation of a particular economic model, is strongly linked to traditional dynamics, in particular the struggle for land. This is, however, a different phenomenon since it involves foreign investment. This means these exoduses not only responds to the logic of the local or national economy but must also be analysed as part of the global deployment of a development model. Such a model has been adopted voluntarily by Colombia, or at least by its authorities, through public policy designed to benefit the public interest. Involuntary migration is, in this context, a price to be paid for the country's development. Thus, unlike the displacement generated by armed conflict or expansion of large estates, this type of involuntary migration could be managed in less harmful ways. This option, however, was never considered as official discourse insists on denying its existence.

⁶⁸ The Inter American Court of Human Rights ordered provisional protection for this community on 6 March 2003. Since then, the Court has produced twelve more provisional measures. The last one was decided on 27 February 2012.

⁶⁹ Lemaitre, *supra* nt 5, 47-66; Vidal, Salcedo and Medina, *supra* nt 63, 59-76; Radio Macondo, *Curvaradó y Jiguamandó. Paramilitares continúan movilidad en predios colectivos*, 17 January 2017, at <<http://radiomacondo.fm/2017/01/17/curvarado-jiguamiando-paramilitares-continuan-movilidad-predios-colectivos>> (accessed 30 April 2017).

⁷⁰ Peace Brigades International, "Minería en Colombia: ¿A qué precio" 18 *Boletín informativo* (2011), 6, at <http://www.peacebrigades.org/fileadmin/user_files/projects/colombia/files/colomPBIa/111122_boletín_final_web.pdf> (accessed 10 August 2017).

⁷¹ CODHES, *Boletín informativo de la Consultoría para los Derechos Humanos y el Desplazamiento*, Número 77 (15 February 2011), 3.

⁷² This treaty, which entered into force on 14 August 2011, establishes the obligation of the parties to submit an annual report to the national parliaments, on the effects of the treaty on human rights. In the absence of this report by the Colombian government, the group Solidarité Colombie Accompagnement Project has prepared its own report.

⁷³ Correa and Hoyos *supra* nt 66.

VI. Development-Induced Displacement: Coincidences and Divergences between the Global and Colombian Models

It is possible to speak of a consensus on the relevance of development-induced displacement and on the dramatic consequences involved for people who are affected. There is no such consensus, however, on the global reaction to this situation. This stands in sharp contrast to the standards that are applicable to displacement induced by armed conflict.

The Guiding Principles are not conclusive as to the prohibition of moving populations in order to implement a particular economic model, to develop infrastructure or for development projects. It is assumed that these are carried out for the benefit of the whole population. The Principles merely establish standards of necessity and proportionality and prohibit discrimination.⁷⁴ Thus, only people who are displaced due to projects that fail to meet these conditions can expect to benefit from the special protection of their rights as established by the international instrument.

This is a very limited recognition. Nevertheless, it can still be considered a victory as much controversy preceded this development. The *travaux préparatoires* of the Guiding Principles show an important debate as to whether development-induced displacement should be included.⁷⁵ While inclusion finally prevailed, the fact is that this population has received little attention from UN bodies responsible for IDPs under the Guiding Principles. The successive mandates of the UN special Representatives and Rapporteur for IDPs⁷⁶ have focused their attention on the exodus caused by armed conflict and massive violations of human rights. Environment-induced displacement has gathered traction recently.⁷⁷ Development-induced displacement, however, has been almost entirely ignored.⁷⁸ In fact, global statistics of displacement fail to even register development-induced displacement.⁷⁹

⁷⁴ Walter, K, *Guiding Principles on Internal Displacement: Annotations* (Washington, The American Society of International Law, 2008) 32-33.

⁷⁵ Mooney, E “The concept of internal displacement and the case for internally displaced persons as a category of concern” 24(3) *Refugee Survey Quarterly* (2005) 11.

⁷⁶ Francis M. Deng was the first UN RSG for IDPs from 1992 to 2004. He was succeeded by Walter Kälin, who remained in office until 2010. Currently, Chaloka Beyani is the Special Rapporteur on the human rights of internally displaced persons.

⁷⁷ See *supra* nt 37. Kälin showed special interest for this kind of displacement. He created and promoted the Operational Guidelines on Human Rights in Situations of Natural Disasters; United Nations Human Rights Council, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin - Addendum Operational Guidelines on the Protection of Persons in Situation of Natural Disasters, UN Doc. A/HRC/16/43/Add.5, 31 Jan. 2011, 43. He also wrote several papers on this matter and promoted research about it. See Kälin, W, “Conceptualising Climate-Induced Displacement” in McAdam J. (dir.), *Climate Change and Displacement. Multidisciplinary Perspectives*, (Oxford, Hart Publishing, 2010).

⁷⁸ In the 2010 report, Kälin mentioned that displaced by development-induced reasons should be protected under the same conditions as other displaced individuals; United Nations Human Rights Council, Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin UN Doc. A/HRC/13/21, paras 45-46.

⁷⁹ Since the beginning of the mandate of the Representative of the Secretary General for Internal Displacement, the need to create an information system on internal displacement was recognized. Given the lack of will and resources by the United Nations, the organization established a partnership with the NGO Norwegian Refugee Council and the Norwegian government, which allowed the creation in 1998 of the Internal Displacement Monitoring Centre (IDMC). Statistics published by this body reflect internal forced migrations generated by armed conflict and massive violence. Since 2009, it has included the report of the displacements generated by environmental disasters, has not made the same effort with those caused by the implementation of development projects; Internal Displacement Monitoring Centre, at <<http://www.internal-displacement.org/>>.

The explanation for the lack of interest in this category of forced exodus can be found in the origins of the global regime. The regime was designed with a dual purpose: on the one hand, controlling forced population flows so that they do not become transnational and constitute a threat to international peace and security, and, second, to protect the rights of victims. Consequently, a policy and institutional framework has been developed, geared towards offering assistance and protection to refugees before crossing an international border, discouraging them from seeking attention beyond the national border.⁸⁰ Displacement caused by the implementation of a specific economic model or by the implementation of development projects occurs often within the border of a given State, as the victims of this kind of exodus are not eligible for (international) refugee status. That is, if they leave their home State they will not be recognized as victims entitled to international protection but merely as irregular migrants.⁸¹ Therefore, this kind of mobility is not usually considered a threat to international peace and security and, hence, fails to trigger the attention of international institutions.

Nevertheless, limited as the international definition may be, the Colombian implementation of the global standard managed to limit it even further. Indeed, while the key elements of the international model have been adopted a more restrictive definition of IDP is used. Law 387 of 1997 includes in its definition of IDPs individuals who have been expelled from their homes as a result of armed conflict, generalized violence, and massive human rights violations.⁸² There is neither mention of development projects nor are environmental disasters recognised as the cause of an exodus. Years later, Law 1448 of 2011 made this definition even stricter, stating that IDPs are only persons who have left their place of usual residence due to events directly related to the internal armed conflict.⁸³

Despite constant criticism from civil society, the Constitutional Court endorsed this narrow definition of IDPs for a long time.⁸⁴ In decision SU-1150 of 2000, the Court defines forced displacement as ‘a social phenomenon that gives rise to multiple, massive and continuous fundamental rights violations of Colombians forced to migrate internally’. To be sure, these violations originate in the armed conflict affecting the country. The Court, thus, strictly interprets the causes of involuntary movements by the population set out in the first article of Law 387 of 1997, excluding displacement caused by conflict over land or by fumigations of illegal crops.⁸⁵ Subsequent decisions confirm this interpretation, the clearest example being Decision T-025 of 2004, which cites the struggle for control by the State as the sole accepted cause of forced population movements in Colombia.

In 2013, the Constitutional Court departed somewhat from its earlier jurisprudence, acknowledging that two different situations in the country cause forced displacement: the armed conflict and clashes by criminal gangs.⁸⁶ This decision has had a significant impact on the scope of the public policy designed for the protection of IDP

⁸⁰ Sánchez, BE, *supra* nt 44; Peral, L, *Éxodos masivos, supervivencia y mantenimiento de la paz*, (Madrid, Trotta, 2001).

⁸¹ For more information on refugee status see: Goodwin-Gill, G, *The Refugee in International Law*, (Oxford, Clarendon Paperbacks, 1996).

⁸² Article 1, Law 387, (1997).

⁸³ Article 3 and Article 60(2), Law 1448 (2011).

⁸⁴ Vidal, R, *Derecho global y desplazamiento interno. La creación, uso y desaparición del desplazamiento forzado por la violencia en Colombia* (Bogotá, Pontificia Universidad Javeriana, 2007) 216-217.

⁸⁵ Constitutional Court. Decision SU-1150 of 2000, para 42.

⁸⁶ Constitutional Court. Writs 119 and 206 of 2013. These writs (autos) as well as all the judgments are available at Constitutional Court website: <http://www.corteconstitucional.gov.co/relatoria/>

rights.⁸⁷ However, it did not take into account the impact of the economic model on the population expulsion. In fact, there is only one decision where this issue has been a subject of consideration.

Writ 005 of 2009, which addresses the special protection required for communities of African descent acknowledges that such populations may be subjected to displacement derived from ‘the existence of mining and agricultural processes in certain regions that impose severe strains on their ancestral lands and facilitated their taking’.⁸⁸ This factor, combined with the structural marginalization to which these communities have been subjected, makes them particularly vulnerable to displacement by armed actors. This Writ could have opened the door for full recognition of a category of IDPs who were driven away from their homes as a result of economic development plans. However, it has had no impact on the design and implementation of IDP policy. So far, the main achievement has been the inclusion of the Afro-descendant communities in the protection and assistance programmes developed within the framework of Laws 387 of 1997 and 1448 of 2011. Beyond promoting such inclusion it has triggered few developments on the policy level. Moreover, as noted above, the norms dealing with the two core economic activities promoted by the Government fail to consider involuntary exodus as a possible cause. Consequently, they provide no regulation to prevent displacement, or to restore the rights of those affected.

Consider African palm cultivation. Aimed at producing biofuels, this crop has led to a sophisticated policy where the main instrument is the CONPES 3510 of 2008, ‘Guidelines for policies to promote sustainable production of biofuels in Colombia’. Its key elements were developed in Law 939 of 2004 ‘Stimulus biofuel production’. The first document provides a detailed analysis of the advantages and disadvantages of introducing this crop on a large scale in the country. Clearly, this agribusiness development does not, *per se*, cause exoduses. However, in a context like the Colombian, the large-scale introduction of a crop that must occupy a wide area to be profitable can give rise to land dispossession. However, this effect was not anticipated. In fact, the CONPES document only refers to environmental risks such as loss of biodiversity, increased water pollution, and soil erosion, as well as a hike in food prices.⁸⁹

Similarly, the basis for promoting the mining sector as the cornerstone of the Colombian development model is to be found in the National Development Plan for 2010-2014, which was approved by Law 1450 of 2011. This document highlights, once again, the environmental risks that the proposal entails and outlines steps to tackle such risks. It also identifies the need to establish channels of communication with the communities affected by the development of mining projects.⁹⁰ The displacement of the population living in the areas that are to be exploited is not considered a possible risk. The National Development Plan for 2014-2018, approved by Law 1753 of 2015, develops and deepens this economic model and, unsurprisingly, does not recognize mining as a potential cause of forced displacement either.⁹¹

⁸⁷ Due to the lack of a specific policy to address the IDPs produced by the activities of criminal gangs, the Constitutional Court ordered these people to be included in the existing protection framework.

⁸⁸ Constitutional Court Writ 005 of 2009, para 67.

⁸⁹ Departamento Nacional de Planeación (DNP), *Programa Nacional de Atención Integral a la Población Desplazada por la Violencia*, 13 September 1995, Conpes 2804, para 23-24 and 33.

⁹⁰ Departamento Nacional de Planeación (DNP), *Plan Nacional de Desarrollo 2010-2014. Prosperidad para todos*, (Bogotá, DNP, 2010), Vol II, 231-232.

⁹¹ Departamento Nacional de Planeación (DNP), *Plan Nacional de Desarrollo 2014-2018. Todos por un nuevo país*, (Bogotá, DNP, 2014), Vol. I, 238-242.

VII. Development-Induced Displacement and Foreign Investment Protection

Foreign investment, as noted above, plays a crucial role in the adoption of the Colombian economic model, which is based on extractive industries. This source of income is essential for the development of oil and mining projects and, to a lesser extent, to agribusiness. It is not surprising that the government's efforts to facilitate initial and continuous investments have been pushed forward through the negotiation of numerous agreements on the protection of foreign investment, both as independent instruments, or integrated into FTAs.⁹²

Given the undeniable link between foreign capital and a development model that, as we have seen, may generate displacement, this section explores the role played by foreign investment law in the evolution of the definition of IDP in Colombian policy. In order to address this, it is necessary to delve into the global regime dealing with the issue and its interaction with domestic law. Thus, we turn now to International Investment Agreements (IIAs), the centrepiece of this regime.

International Investment Agreements may be the single most important factor in transforming the global economic landscape today. A tight network of approximately 3300 IIAs covers the planet,⁹³ crucially influencing decisions that may potentially impact sustainable development. However, despite their immense importance, governments, and the general public, appear not to grasp their specific scope and associated risks. One reason for this is the decentralized nature of the current IIA wave. Unlike similar agreements put together by institutions such as the WTO or the World Bank, investment deals are generally drawn up on a bilateral basis.⁹⁴ There is no single decision-making centre that must be adhered to. Moreover, a considerable part of international investment regulation is developed through arbitration awards. Consequently, important legal principles have to be inferred from a patchwork of awards that are, in any case, guarded by a veil of secrecy.

Given their significance, it is important to explore these agreements in some detail. As hinted by their name, an IIA is an agreement between two or more States which sets out rules governing investments made by their respective nationals in the other state's territory. IIAs are not overseen by a single treaty organ, and come in different forms and shapes. The most common type is the Bilateral Investment Treaty (BIT), a self-standing instrument dealing mainly with investment. Furthermore, IIAs are also included as 'investment chapters' in free trade agreements – NAFTA's Chapter 11 being the most well-known example.

Substantively, the standard IIA provides investors with protection, among others, in four areas: market access, non-discriminatory treatment, a ban on expropriation and dispute settlement. The first three provide investors with fair conditions for participating in the new market. The last one ensures compliance through exceptional mechanisms of adjudication. Investment agreements usually grant arbitration tribunals jurisdiction over disputes between private investors and the Host State, providing private parties the right to stand before such international tribunals.⁹⁵

⁹² Currently Colombia is part of free trade agreements with Mexico, Chile, MERCOSUR, Salvador, Guatemala, Honduras, the United States and Canada. It has also signed two FTAs with the European Union and South Korea, and has been involved in negotiations with Turkey, Panama, Costa Rica, Japan and Israel.

⁹³ UNCTAD, *World Investment Report, 2017: Investment and the Digital Economy* (UN Publishing, 2017), 111.

⁹⁴ The vast majority of all IIA's are bilateral investment treaties (BITs), *Ibid.*

⁹⁵ Schreuer, C, "Calvo's Children: The Return of Local Remedies in Investment Arbitration" 4(1) *The Law and Practice of International Courts and Tribunals* (2005) 1; UNCTAD, *Taking of Property: UNCTAD*

The combination of these four pillars makes investment arbitration a controversial element of global governance.⁹⁶ Through IIAs, investment arbitration tribunals have jurisdiction to decide on projects of great importance to local communities, normally deciding between a government and a private actor in the midst of starkly opposed interests. One specific technique of convergence has emerged in the form of investment arbitration awards. Arbitration tribunals interpret the open-ended clauses included in the agreements, and their interpretation is then followed by other tribunals as the applicable law. These decisions are considered by arbitrators as hierarchically superior to any domestic law. As a consequence, foreign investment law can be read as a global constitution. For instance, David Schneiderman, in *'Constitutionalizing Economic Globalization'*, argues that investment arbitration is constitutional as it limits State power, yet it does so by carving out norms that give special protection to investors over citizens. Moreover, the regime 'freezes existing distributions of wealth and privileges the 'status quo neutrality''⁹⁷; enshrines neoliberal principles of governmental self-restraint as law; and is fundamentally 'out of balance' in democratic terms.⁹⁸

Now, the basic premise of investment law is its distrust of the domestic legal systems of States that accept foreign direct investment. Investment arbitration features an underlying narrative that portrays domestic law as *failing* (or about to fail), and therefore in need of correction or reinforcement by the international investment tribunal. This corrective process is not formal: it is well known that investment tribunals have no formal power to strike down domestic law. However, the underlying notion is that investors need to be protected from arbitrary treatment by the host State and that domestic law is not up to that task. Hence, there is a need for international standards of protection, adjudicated by international judges instead of the domestic judiciary. The very existence of the investment regime is built upon the presumption that domestic law fails to adequately protect foreign investors.

This idea that domestic law fails to protect foreign investors is a powerful aspect of investment law. If we generalize the specific failures of the domestic law of host States and create the presumption that it is a failed system, the need for investment arbitration becomes logical and is deemed necessary to right the wrongs of domestic legal systems. Thus, the failed law premise is ideologically self-prophesying, as it results in the preservation of the distribution of powers between host States and investment tribunals.⁹⁹ Ultimately, the presumption of failure of domestic law is hardly rebutted, and almost becomes a prejudice.

This issue is intimately connected to development-induced displacement. Displacement can be read, simultaneously, as a problem of IDP policy or as a negative externality of the investment law regime. This is a classical International Law fragmentation problem whereby the structural bias of each specialized system is

series on Issues in International Investment Agreements, 2000, UNCTAD/ITE/IIT/15, 12; Vasciannie, S, "The Fair and Equitable Treatment Standard in International Investment Law and Practice" 70(1) *British Yearbook of International Law* (2000) 99.

⁹⁶ Van Harte, G and Loughlin, M, "Investment Arbitration as a Species of Global Administrative Law" (2006) 17 *European Journal of International Law* (2006) 121; Kingsbury, B and Schill, S, "Investor-State Arbitration, Fair and Equitable Treatment, Proportionality, and the Emerging Administrative Law of Global Governance" 9(46) *NYU School of Law, Public Law Research Paper* (2008).

⁹⁷ Schneiderman, D, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, (Cambridge University Press, 2008), 37.

⁹⁸ *Ibid*, 2, 9, 180 and 191.

⁹⁹ Esquirol, J, "The Failed Law of Latin America" 56 *American Journal of Comparative Law* (2008) 75.

deployed.¹⁰⁰ Development-induced displacement is both an IDP and an investment law issue. Each provide somewhat different answers that complement each other. The IDP regime places the issue of IDPs squarely on the domestic level. Lacking legitimacy to intervene, global governance institutions rely on the domestic interpretation and implementation of global standards such as the Guiding Principles. In doing so, they rely on domestic politics to do the heavy lifting with regards to the question whether development-induced displacement should be considered as part of the global IDP agenda. As we have seen, this is not the case in Colombia. Instead, domestic IDP policy has closely followed global IDP principles but has specifically rejected the possibility of including development-induced displacement in its policy.

This decision becomes intertwined with the global investment regime. From the perspective of this regime, displacement could arguably be read as a potential risk that ought to be considered; as much as any other human rights which have found their way into the investment regime rationale. For example, environmental standards, the right to water, labour rights, all of which have in one way or another been considered (however marginally) by investment arbitration tribunals and instruments.¹⁰¹ Why should development-induced displacement not be considered? Perhaps the answer lies in the failed law premise discussed above. The investment regime presumes that domestic laws are fundamentally unreliable. Decision-making remains on the international level with other human rights, which is controversial but still reliable. However, the IDP regime places the responsibility of considering development-induced displacement on domestic authorities. In this sense, whatever decision is made in the domestic setting will be subject to suspicion from the foreign investment regime, as it is derived from a failed legal system.

The consequence of this move is not that the neo-liberal ideology of the investment regime prevents development-induced displacement from being considered. Nor is it that foreign investors, the protected subjects of the investment regime, press for a regime that excludes the legal protection of development-induced displacement. If asked, most would probably accept some level of protection. The point is that the structure of the international investment regime has no way of registering the issue of development induced displacement, which is left by default to domestic decision-makers.

The issue then becomes a never-ending circle of delegating responsibilities from the domestic to the global level and then back. Domestic IDP policy in Colombia has traditionally relied on global standards to justify its approach (hence, the Court's reliance on the Guiding Principles). But reliance on global governance implies that the decisions are made at the domestic level, which is in turn dependent on global policy, which further places decision-making on the domestic level. Faced with this, the investment regime cannot but shrug and classify development-induced displacement as a non-issue.

The end result is that the uncomfortable question of forced migration caused by an economic model based on extractive industries in which foreign investment is central is ignored both nationally and internationally.

¹⁰⁰ Urueña, R, *No Citizens Here: Global Subjects and Participation in International Law* (Leiden and Boston, Martinus Nijhoff Publishers, 2012).

¹⁰¹ Wheeler, D, "Racing to the Bottom? Foreign Investment, D and Air Pollution in Developing Countries" 10(3) *The Journal of Environment & Development* (2001) 225-245; Bernasconi-Osterwalder, N and Brown Weiss, E, "International Investment Rules and Water: Learning from the NAFTA Experience" in Boisson de Chazournes, L, Bernasconi-Osterwalder, N and Brown Weiss, N, eds, *Fresh Water and International Economic Law* (Oxford, Oxford University Press, 2005); Sornarajah, M, *The International Law on Foreign Investment*, (Cambridge, Cambridge University Press, 2010); Waibel, M, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen Aan Den Rijn, Kluwer Law International, 2010).

VIII. Conclusion

The absence of development-induced displacement in Colombian IDP policy is the result of a combination of factors at both the local and international levels. At the domestic level, pressure from national and multinational corporations on local authorities to exclude this type of migration from the agenda seems to be crucial. Likewise, budgetary concerns are relevant as the expansion of health care programs for development-induced displaced populations requires a significant increase in the allocated resources. At the international level, on the other hand, it is possible to identify two major elements. The first is the lack of a real commitment of the international regime of internal displacement with respect to this kind of exodus. Since those who suffer from such displacement are unlikely to become transnational forced migrants who endanger international stability, they are not prioritized. The UN has not made any real effort to persuade States of the need to include this population in their IDP policies. The second is international law's focus on international investment, based on a perceived weakness of the investor, which allows it to avoid regulating issues such as forced displacement.

All of these factors explain, but do not justify, the exclusion of development induced displacement from Colombian public policy. Extensive palm oil cultivation has produced an unknown number of IDPs that have, to date, not received protection or assistance. With respect to large-scale mining it seems very likely that a similar effect can be observed in the future. Now is the time to recognize the dark effects of these kinds of projects and start developing laws and effective policies in order to avoid them. Displacement must not be the price of development.

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Criminal Liability for Environmental Damage – National Courts Versus the International Tribunal for the Law of the Sea

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Abstract

This article argues to abolish Criminal Liability for Environmental Damage in order to consider legislative amendments, which comply with the rulings of ITLOS. There is a discrepancy between plaintiffs who are able to present their cases to ITLOS and those who are unable to do so. In most fishery cases, plaintiffs are unable to resort to ITLOS and national courts deal with these cases based on their own understanding, not that of ITLOS. The article differentiates between Criminal Liability for Environmental Damage (RLED) and Civil Liability for Environmental Damage (CLED). It also provides examples and explanations for the difference between them. This article is divided into four main sections. The first tackles the theoretical difference between CLED and RLED. The second section presents six cases in which the ITLOS has dealt with the question of national RLED. The cases show how ITLOS transforms RLED to CLED. The third section highlights discrepancies in the practice of both international and national courts with regard to two issues: confiscation and bond determination in fishery cases. The fourth and last part recommends a solution to overcome discrepancies between national and international courts.

I. Introduction

The United Nations Convention on the Law of the Seas (UNCLOS) adopts Civil Liability for Environmental Damage (CLED) to settle international environmental disputes.¹ When both, national and international courts adopt CLED the issue of complementarity does not arise.² Discrepancies arise when national courts adopt Criminal Liability for Environmental Damage (RLED) and international courts adopt

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¹ Many States, such as the US and Canada, adopt Civil Liability for Environmental Damage (CLED) as a method of tackling environmental violations. For the United States, United States Environmental Protection Agency, *Clean Air Act, Stationary Source Civil Penalty Policy* (25 October 1991) at <epa.gov/sites/production/files/documents/penpol.pdf> (accessed 11 July 2017). See also, Willis, J, “On Environmental Services Group” (2005) at <aon.com/risk-services/environmental-articles/article_ins-civil-finespen.jsp> (accessed 11 July 2017). For Canada, Environment and Climate Change Canada, “Administrative Monetary Penalty System - Consultation Document” (27 July 2013) at <ec.gc.ca/alef-ewe/default.asp?lang=En&n=465314E0-1&offset=2&toc=show> (accessed 11 July 2017).

² Other countries, such as France, Russia, and Brazil, still adopt Criminal Liability for Environmental Damage (RLED). Whereas many countries strive to lower their environmental standards to facilitate trade and maximise economic benefits. As for France and Russia, the research details the environmental cases include criminal liability. As for Brazil, see Gonçalves, ED, Garcia, LP, *et al*, “Environmental Law and Practice in Brazil: Overview” (1 October 2012) at <us.practicallaw.com/2-508-8459> (accessed 11 July 2017).

CLED. UNCLOS Member States resort to the International Tribunal for the Law of the Seas (ITLOS) to overcome consequences arising from the adoption of RLED. As a result, States, especially UNCLOS Member States, should abolish RLED, as this research argues, in order to fully comply with the decisions of ITLOS, in relation to CLED.

When the nature of the dispute escalates, from a matter of RLED on the national level, to CLED, on the international level, this will not only raise challenges regarding its outcome but will also violate both the national and international litigants' right to legal prediction of risk in the dispute.³ For example, fishermen can more often than not predict the outcome of their illegal behavior. If the law imposes fines as a punishment for a certain violation, adopting detention as a new legal policy violates the defendant's right to predict the consequences of his behavior. Also, it is considered a great waste of resources if prosecutors or judges are unable to foresee the decisions of the highest courts, whether national or international.⁴

On the international level, litigants have the right to predict the litigation risk, which includes the right to predict the outcome of the dispute. The change in the nature of the dispute from RLED to CLED affects the right of parties to predict tribunal proceedings.⁵ ITLOS adopts a CLED approach to settling disputes.⁶ This research aims, above all, to provide direction and vision to states and lawyers who deal with fishery cases on the international level. This research is especially relevant for countries that adopt RLED in their national legislation.⁷ Highlighting two major issues, bond determination and confiscation, can help lawyers avoid long and costly litigation processes on both national and international levels.⁸

The article is dedicated to study the difference between RLED and CLED as well as the difference in rulings between national and international courts. Two legal questions showcase the discrepancies: bond determination, and confiscation in fishery cases.⁹ Regarding bond determination, while CLED and RLED ensure the right of a state to impose their directions, they differ in the way bonds are determined. As for confiscation, both CLED and RLED have different methods in determining the subject of confiscation.¹⁰

This article verifies its claim through two legal approaches: the positive law approach, and the comparative law approach. Firstly, the positive law approach is based on the rule of law applied in international conventions, proceedings, principles as well as customs. Article 38 of the Statute of the International Court of Justice denotes that the ITLOS is allowed to use treaties, customs or general principles of international law in its

³ Kaye, T, "Risk and Predictability in English Common Law" in Woodman, G and Klippel, D, eds, *Risk and The Law* (Routledge-Cavendish 2009), 108.

⁴ *Ibid.*

⁵ Manning, P, "Reflections on Risk Analysis, Screening and Contested Rationalities" 48(3) *Canadian Journal of Criminology and Criminal Justice* (2006) 453, 460.

⁶ Escher, A-K "Release of Vessels and Crew Before the International Tribunal for the Law of the Sea" 3(2) *The Law and Practice of International Courts and Tribunals* (2004) 205, 205. See also, Ratliff, D, "Dispute Resolution and Environmental Security" 20 *Hague Yearbook of International Law* (2007) 65.

⁷ Oxman, BH, "Complementary Agreements and Compulsory Jurisdiction" 95(2) *The American Journal of International Law* (2001) 277, 278- 283.

⁸ *Ibid.*, 284.

⁹ McDorman, TL, "An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea" 40 *Canadian Yearbook of International Law* (2003) 119, 120-121.

¹⁰ *Ibid.*, 124.

judicial processes.¹¹ ITLOS uses UNCLOS and its case law as primary sources for its judgments.

The second methodology is that of a comparative law approach. The scope of this research lies in striking a comparison between CLED and RLED within national and international courts. The relationship between international law and national law is depicted in the principle of complementarity. This principle gives priority and preference to national courts over international courts in disputes.¹² Moreover, RLED is applied exclusively on the national level, while CLED is used on both levels.¹³ This study urges countries that adopt RLED to restructure and reform their national laws in the hope of complying with international standards.¹⁴ The inclusion of countries' practices and an understanding of RLED can to a great degree help avoid discrepancies in environmental disputes between national and international courts.

This article is divided into four main sections. The first section examines the theoretical difference between CLED and RLED. It compares States interests' with their corresponding goals, bond determination guidelines and confiscation methods followed by both CLED and RLED. The aim of the contrast is to present the different understanding of both concepts in theory. The second section presents six cases, where the ITLOS has dealt with the question of national RLED. The cases show how ITLOS converts RLED to CLED. The third section showcases inconsistencies in the practice of both international and national courts in relation to two issues: confiscation and bond determination in fishery cases. The article reveals differences between proceedings in international courts and judgments in national courts for the same set of facts. The fourth and last part of the article recommends a key to overcome discrepancies that exist between national and international courts.

II. Comparison between Civil and Criminal Liability for Environmental Damage

The environment is a communal good, which makes it difficult to assign a monetary value to violations committed against it.¹⁵ Countries adopt either RLED or CLED when faced with such infringements. The key here will be the form that can more effectively restore the situation to its previous state.¹⁶ Yet, the difference between RLED and CLED is not unimportant. This depends on two major factors that characterize environmental liability as RLED or CLED.¹⁷ The first entails the state's interest in the environmental dispute and highlight its objectives. The second is related to the application of RLED and CLED in fishery cases, which involves bond determination and confiscation.

Firstly, the State and the defendant have different takes in CLED and RLED countries regarding environmental disputes.¹⁸ In RLED systems, the governmental status

¹¹ Article 38(1), United Nations, *Statute of the International Court of Justice* (18 April 1946).

¹² Brown, B "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals" 23 *Yale Journal of International Law* (1998) 383, 389. See also Oxman, BH, "Complementary Agreements and Compulsory Jurisdiction" 95(2) *The American Journal of International Law* (2001) 277, 278- 283.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Siebert, H, *Economics of the Environment: Theory and Policy*, (7th ed, Springer 2008), 19.

¹⁶ *Ibid.*, 850.

¹⁷ Brickey, KF, "Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory" 71 *Tulane Law Review* (1996) 487, 507-511.

¹⁸ Carlsson, L, "Mark Wilde, Civil Liability for Environmental Damage - A Comparative Analysis of Law and Policy in Europe and in the United States, The Hague, Kluwer Law International, 2002" 15(1) *Revue Québécoise de Droit International* (2002) 247-248.

supersedes that of the defendant. This is based on the government's prerogative to guard its own environment.¹⁹ Even though countries have separate environmental codes, they use criminal law tools to stand against environmental damage, and criminalize certain acts.²⁰ Governments punish both individual and corporate actions in an attempt to enforce and achieve the purposes and aims of criminal justice.²¹ In CLED systems, the State holds an equal position to the defendant.²² In fishery-related cases with CLED, the government tolerates a certain level of harm, whereas defendants reserve a certain right to harm the environment. The court tries to strike a balance between social profit and social harm.²³

Secondly, CLED and RLED have different rules of application. In CLED countries, only curative and remedial action is obtainable for excessive harm to the environment.²⁴ International Environmental Law deals with the protection of the environment, and aims to increase multi-lateral cooperation among the international community.²⁵ It deals with environmental defilements as CLED. For RLED, it is not only restorative and remedial actions that are available; but also disciplinary action is taken.²⁶ Governments play a major role in minimizing environmental harm through RLED, while preventing the defendant from gaining any potential economic profit.²⁷

Thirdly, RLED and CLED are not different in bond determination. However, CLED and RLED differ when it comes to the objective of the bond. In CLED systems, the only aim of the bond is ensuring that the plaintiff will comply with any financial obligations that result from the judgment. For RLED, the aim of the bond is to safeguard not only the presence of the defendant in court, but also the protection of others within the community.²⁸ As a result, a bond determination in RLED countries, based on various factors, governs whether the court grants bail or not. These factors include:

1. The defendant's social upbringing, and past bail record;²⁹
2. The strength of the evidence, the nature and circumstances of the offence, as well as the weight of the evidence;³⁰
3. The history and characteristics of the person, and the gravity of the danger to the community;³¹
4. Any other consideration that may be relevant to the present case.³²

¹⁹ Stroup, RL, *Economics: What Everyone Should Know About Economics and the Environment* (Cato Institute 2003), 39.

²⁰ *Ibid.*, 40.

²¹ Posner, RA, "Henry Hart's "Aims of the Criminal Law": A Reconsideration" in Lynch, T (ed), *In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law"* (Cato Institute 2009), 96-97.

²² *Ibid.*

²³ Krugman, P, *et al*, *Economics in Modules* (3rd ed, Worth Publishers 2015), 115.

²⁴ *Ibid.*

²⁵ Bodansky, D, *The Art and Craft of International Environmental Law* (Harvard University Press 2010), 21.

²⁶ *Ibid.*, 22.

²⁷ *Ibid.*, 23.

²⁸ § 18 U.S.C. 3142 (g)

²⁹ Corre, N and Wolchover, D, *Bail in Criminal Proceedings* (2nd ed, Blackstone Press 1999), 26.

³⁰ Cal. Pen. Cod § 1275.

³¹ 9 Cal. 3d 345, 405 (1973).

³² § 18 U.S.C. 3142 (g).

Finally, the issue of confiscation has been scrutinized for both CLED and RLED. In CLED systems, only civil confiscation is permissible. For RLED, there are two types of confiscation: civil and criminal. The US Supreme Court does not count civil forfeiture as a punishment.³³ It maintains that civil and criminal confiscation/forfeiture can take place simultaneously in certain cases.³⁴ It entails that *in rem* civil forfeiture neither calls for disciplinary, nor punishable acts.³⁵ The court asserts that Congress has authorized the government to 'seek parallel *in rem* civil actions and criminal prosecutions based on the same underlying events.'³⁶ The discrepancy between criminal and civil confiscation lies in their direct connection to the gain obtained from the unlawful behavior. Criminal confiscation is concerned with crime materials and substance, whereas civil seizure applies to any product that can be traced back to these materials or substance, including illegal fish catch. In an attempt to initiate the procedure of confiscation, the court has to establish that the defendant has received financial gain from his criminal act. In the UK, courts take into consideration the least amount of economic gain that defendants have gained from their activity.³⁷ The determination of the amount of profit gained by the defendant from the crime is calculated based on 'the provisions governing the submission of a statement, or statements, about the defendant's economic dealing and realizable property.'³⁸

III. ITLOS Cases Dealing with National RLED

A. The 'Tomimaru' Case: Japan versus the Russian Federation, 2007

A Japanese company owns and operates the fishing ship.³⁹ The vessel was licensed to fish for walleye Pollock and herring between 1 October and 31 December 2006.⁴⁰ The vessel was only given permission to fish in the Western Bering Sea, which is located in the exclusive economic zone (EEZ) of the Russian Federation (RF). The vessel was allowed a maximum load of 1,163 tons of walleye Pollock, as well as 18 tons of herring.⁴¹

On the last day of the license's validity, Russian inspectors were conducting random inspection rounds and boarded the fishing vessel while it was in the Russian EEZ. Reviewing the license and the maximum allowed catch, inspectors found on board the vessel an extra load of 5.5 tons of walleye Pollock, exceeding the granted load, and the limit of the fishing license.⁴² They also found another '20 tonnes of gutted walleye Pollock, that was not listed in the logbook'.⁴³ They also came to find various 'kinds of fish products which are forbidden to catch [sic]'. This catch ranged from large quantities of different types of halibut and ray to cod. The amount of illegal catch was 'estimated to be 62,186.9 kg and the damage to the living resources in the RF amounted to 8,800,000 rubles (\$345,000)'.⁴⁴

³³ Pratt, GC, and Petersen, WB, "Civil Forfeiture in the Second Circuit" 65(3) *St John's Law Review* (1991) 653, 668.

³⁴ Sweeny, JC, "The Silver Oar and Other Maces of Admiralty: Admiralty Jurisdiction in America and the British Empire" 38(2) *Journal of Maritime Law and Commerce* (2007) 159.

³⁵ 518 U.S. 267 (1996).

³⁶ Kaye, *supra* nt 35.

³⁷ McCutcheon, JP, and Walsh, D, *The Confiscation of Criminal Assets: Law and Procedure* (Round Hall Ltd 1999), 64.

³⁸ *Ibid*, 65.

³⁹ The *Tomimaru* Case, Japan v. Russian Federation, (2007) 22.

⁴⁰ *Ibid*, 23.

⁴¹ *Ibid*, 23.

⁴² *Ibid*, 24.

⁴³ *Ibid*, 25.

⁴⁴ *Ibid*, 25.

On 8 November 2006, a criminal case was constituted against the vessel and its master. The master was given restraining orders not to leave the country till the end of the investigation.⁴⁵ He was charged with ‘exploitation without permission of the natural resources in the EEZ of the Russian Federation, causing enormous environmental harm to the living marine life, equivalent to 8,500,000 rubles.’⁴⁶ The fishing vessel *Tomimaru* was confiscated on basis of Article 82 of the Code of Criminal Procedure as a piece of evidence. Part of the illegal catch was confiscated, whereas the rest was sold and the returns were paid to the owner.⁴⁷

On 1 December 2006, the owner of the vessel had failed to pay the bond set by the Russian government to release the ship. In communication with the Consulate General of Japan, the prosecutor’s office asserted that the bond was set, not only to release the ship, but also to guarantee payment of the judicial cost.⁴⁸ On 8 December 2006, the owner of the vessel had pleaded in a petition to the prosecutor’s office to set a separate bond to release the ship, rather than paying the full sum of the damage incurred. This request was denied until the full sum of the damage was paid.⁴⁹

On 14 December, the vessel owner petitioned once more the Northeast Border Coast Guard Directorate.⁵⁰ The case was sent to the City Tribunal of Petropavlovsk-Kamchatskii, and again the petition was denied.⁵¹ On 28 December 2006, the Petropavlovsk-Kamchatskii City Tribunal found the owner accountable for the harm incurred by the ship. ITLOS condemned the owner with a total fine of ‘double the cost of biological (living) aquatic resources ... and [ruled] to seize the 53rd Tomimaru vessel.’⁵² On 24 January 2007, another appeal was filed to annul the District Tribunal’s decision⁵³ which was still pending at the time of filing the case in front of ITLOS.⁵⁴

On 26 March 2007, an action was taken in the Supreme Tribunal of the RF, under the supervisory review process against the District Tribunal pronouncement.⁵⁵ On 26 July 2007, the Supreme Tribunal of the RF dismissed the case for failing to identify any legal grounds for review of the complaint.⁵⁶ On 9 April, 2008 the Federal Agency on Management of Federal Property ordered the seizure of the vessel for the benefit of the RF.⁵⁷

B. The ‘Hoshinmaru’ Case: Japan versus Russian Federation, 2007

Hoshinmaru is a Japanese fishing vessel.⁵⁸ On 14 May 2007, the RF has granted the owner a fishing license for salmon, tuna and trout within its EEZ within the period from 15 May to 31 July 2007. The amount granted to the vessel was 101.8 tonnes of sockeye salmon, 161.8 tonnes of chum salmon, 7 tonnes of sakhalin trout, 1.7 tonnes of silver salmon, and 2.7 tonnes of spring salmon.⁵⁹

⁴⁵ *Ibid*, 26.

⁴⁶ *Ibid*, 24.

⁴⁷ *Ibid*, 28-29.

⁴⁸ *Ibid*, 34.

⁴⁹ *Ibid*, 35.

⁵⁰ *Ibid*, 37.

⁵¹ *Ibid*, 39.

⁵² *Ibid*, 42.

⁵³ *Ibid*, 43.

⁵⁴ *Ibid*, 45.

⁵⁵ *Ibid*, 43.

⁵⁶ *Ibid*, 46.

⁵⁷ *Ibid*, 44.

⁵⁸ The *Hoshinmaru* case (Japan vs. Russian Federation) 2007, 27.

⁵⁹ *Ibid*, 28.

On 1 June 2007, a Russian patrol boat stopped the *Hoshinmaru* on its course within the RF's EEZ off the eastern coast of the Kamchatka peninsula. A squad of state sea inspectors of the northeast border coast guard directorate, part of the Federal Security Service of the RF (hereinafter State Sea Inspection), found that 'under the upper layer of chum salmon, sockeye salmon were found [sic].' The inspectors considered such an act to be a falsification of data recorded in the fishing log and the daily vessel report. On 2 June 2007, a protocol of detention stated the reason for the vessel's seizure was 'holding untrue and falsified operational accounts in the daily vessel report, creating a discrepancy between the amount permitted of fish, and the actual catch on board.'⁶⁰

On 4 June 2007, the Military Prosecutor's Office initiated administrative proceedings against the owner of the *Hoshinmaru* for violating the rules of catching (fishing) of aquatic biological (living) resources.⁶¹ On 26 June 2007, a criminal case was filed against the master of the *Hoshinmaru* for illegitimate fishing. On 11 July 2007, communication transpired between the inter-district prosecutor's office and the Consulate General of Japan to identify the damage incurred to be equivalent to 7,927,500 rubles for harm against living aquatic resources by the illegal catch.⁶²

On 13 July 2007, the Ministry of Foreign Affairs of the RF communicated with the Embassy of Japan to set the bond at 25 million rubles, including the aforementioned amount of damages. The RF affirmed that once the bond was paid the seventeen-member crew, and the ship would be released. During the hearings of the trial the RF agreed to reduce the bond from 25 to 22 million rubles.⁶³

C. The 'Volga' Case: Russian Federation versus Australia, 2002

The *Volga* is an RF fishing vessel.⁶⁴ Both the ship's flag and owner were Russian.⁶⁵ The vessel was granted a license for commercial fishing from the RF.⁶⁶ On 7 February 2002, Australian military personnel came on board of the shipping vessel for their regular rounds of inspection. The vessel was located at a point 'beyond the limits of the EEZ of the Australian Territory of Heard Island, and the McDonald Islands.'⁶⁷

The officers of the Royal Australian Navy, and the Australian Fisheries Management Authority issued a notice of seizure. The report stated that the vessel was illegally fishing in the EEZ, in violation of the Australian Fisheries Management Act of 1991.⁶⁸ On 19 February 2002, the vessel was escorted to the Western Australian port of Fremantle. The ship's master and crew were 'detained following a notice of confinement issued under the Fisheries Management Act 1991.'⁶⁹ The purpose of the detention was to evaluate the incident and determine charges against them in agreement with the law.⁷⁰

On 27 February 2002, the Australian authority issued a report that set a bond of AU\$147,460 against the ship.⁷¹ On 6 March 2002, the master and the crew were charged with engaging in illegal commercial fishing in the absence of a license or permission from the competent authorities. The three crew members were released on bail set at

⁶⁰ *Ibid*, 30.

⁶¹ *Ibid*, 36.

⁶² *Ibid*, 40.

⁶³ *Ibid*, 50.

⁶⁴ The *Volga* case (Russian Federation v Australia) (2002) 30.

⁶⁵ *Ibid*, 30.

⁶⁶ *Ibid*, 31.

⁶⁷ *Ibid*, 32.

⁶⁸ *Ibid*, 33.

⁶⁹ *Ibid*, 35.

⁷⁰ *Ibid*, 33.

⁷¹ *Ibid*, 37.

AU\$75,000 each. The bail was determined on three conditions: (1) the crew members had to reside at a place that is known and can be located by the supervising fisheries officer with the Australian Fisheries Management Authority; (2) the passports of the three crew members were given to the authorities, and (3) the crew members were confined to Perth, Western Australia.⁷² On 16 March 2002, the master of the ship died in a hospital before charges were pressed against him.⁷³ On 30 May 2002, the crew members successfully obtained ‘a variation of the bail conditions.’⁷⁴ They were able to return to their homeland, under certain conditions, awaiting criminal proceedings against them. The Australian authority sold the entire amount of fish found on board the vessel, based on the ruling of the Fisheries Management Act 1991. The amount of the catch was estimated at 131.422 tonnes of Patagonian toothfish and 21.494 tonnes of bait. The price for the sold catch was AU\$1,932,579.28.⁷⁵

On 21 May 2002, proceedings were issued to stop the ‘forfeiture of the vessel, fish, nets and equipment.’⁷⁶ On 26 July 2002, the Australian Fisheries Management Authority required a bond of AU\$3,332,500 for the release of the vessel. The bond amount was set based on three factors: (1) the value of the vessel, fuel, lubricants and fishing equipment, (2) the potential fines, and (3) the cost of the ‘conservation measures until the conclusion of legal proceedings.’⁷⁷ On 23 August 2002, further charges were brought against the master of the ship. On 16 December 2002, a new bail of AU\$20,000 was set for the master of the ship, who was by then dead, and the bail paid by the owner of the ship.⁷⁸ Hence, the bail for the master was AU\$95,000 and AU\$75,000 for each of the three crew members.⁷⁹

D. The ‘Grand Prince’ Case: Belize versus France, 2001

The *Grand Prince* is a Belizean fishing vessel with an owner of the same nationality.⁸⁰ The vessel was on its way to change its flag to the Brazilian flag.⁸¹ The master of the vessel was Spanish, while its 37 crew members were citizens of Spain and Chile.⁸² On 26 December 2000 the vessel departed from the French surveillance frigate *Nivose*. It was in the EEZ of the Kerguelen Islands in the French Southern and Antarctic Territories. A report was issued against the master of the vessel for committing two violations. The first was unauthorized fishing in the EEZ of the Kerguelen Islands under French jurisdiction. The second was the failure to announce its entry into the EEZ and the amount of fish on board the vessel.⁸³

On 9 January 2001, the vessel was escorted to the town of Port-des-Galets, Réunion.⁸⁴ Two days later, the Regional and Departmental Director of Maritime Affairs of Réunion seized the vessel. This decision was based on three factors: 1) the vessel was fishing in the French EEZ; 2) the entry into such zone was not declared to the competent

⁷² *Ibid*, 38-41.

⁷³ *Ibid*, 42.

⁷⁴ *Ibid*, 43.

⁷⁵ *Ibid*, 51.

⁷⁶ *Ibid*, 52.

⁷⁷ *Ibid*, 53.

⁷⁸ *Ibid*, 45.

⁷⁹ *Ibid*, 46.

⁸⁰ The *Grand Prince* case (Belize v France) (2001).

⁸¹ *Ibid*, 30.

⁸² *Ibid*, 34.

⁸³ *Ibid*, 35-36.

⁸⁴ *Ibid*, 38.

authority; 3) the French authorities saw evidence that commercial fishing had taken place.⁸⁵ The Deputy Public Prosecutor summoned and informed the master of the charges, which he admitted. The master of the vessel indicated that he started the illegal fishing in December 2000.⁸⁶

On 12 January 2001, the court of first instance ruled against the vessel based on the charges of the prosecution. The court found that the vessel entered the EEZ without authorization. The vessel additionally had not declared the amount of fish on board; this raised the suspicion that 18 tonnes of toothfish had been illegally caught within the French EEZ.⁸⁷ The court then fixed a bond of 11,400,000 French Francs (FF).⁸⁸ The court based the bond on the value of the ship, the potential fines that the law imposes on the vessel's master, and the average compensation in such cases.⁸⁹ It also took other factors into consideration, such as a bond to ensure that the master would be represented at trial, a bond to ensure payment of the damages, and a bond to grant the payment of the confiscation of the vessel.⁹⁰ Furthermore, the court ordered, in accordance with both the French Penal Code and the Code of Penal Procedure, the confiscation of the vessel without waiting for an appeal to be lodged. It also sentenced the master of the vessel to a fine of FF200,000. The court took into consideration that he was cooperative with the competent authorities.⁹¹

E. The 'Camouco' Case: Panama versus France, 2000

The *Camouco* is a Panamanian fishing vessel owned by a company registered in the same country.⁹² The vessel had a fishing license for 'longline fishing of Patagonian toothfish in international waters in the South Atlantic Ocean.'⁹³ On 16 September 1999, the vessel engaged in longline fishing after leaving Walvis Bay in Namibia.⁹⁴ A French surveillance frigate boarded the vessel while it was in the EEZ of the Crozet Islands.⁹⁵ The ship had been observed for two hours before moving away from the EEZ. When the French officials boarded the vessel, they found six tonnes of frozen toothfish, as well as 48 jettisoned bags, of which they were able to retrieve only one.⁹⁶ The master of the *Camouco* was charged with breaking the law for unlawful fishing in the EEZ, failure to declare its presence in the EEZ while having fish on board, concealment of the vessel's markings, as well as attempts to avoid verification.⁹⁷

On 29 September 1999, the French authorities escorted the vessel and issued an order to seize the vessel, the fish catch, the navigation and communication equipment and documents of the vessel and the crew.⁹⁸ On 5 October 1999, the *Camouco* arrived at Port-des-Galets, Réunion.⁹⁹ On 7 October 1999, the Regional and Departmental Directorate of Maritime Affairs (RDDMA) reiterated the charges against the master. The

⁸⁵ *Ibid*, 39.

⁸⁶ *Ibid*, 42.

⁸⁷ *Ibid*, 43.

⁸⁸ *Ibid*, 45.

⁸⁹ *Ibid*, 44.

⁹⁰ *Ibid*, 45.

⁹¹ *Ibid*, 50.

⁹² The *Camouco* case (Panama v France) (2000) 25.

⁹³ *Ibid*, 26.

⁹⁴ *Ibid*, 27.

⁹⁵ *Ibid*, 28.

⁹⁶ *Ibid*, 29.

⁹⁷ *Ibid*, 29.

⁹⁸ *Ibid*, 31.

⁹⁹ *Ibid*, 30.

order seized the toothfish, estimated at 7,600 kg, at a value of FF380,000, as well as the vessel, the value of which was estimated at FF20,000,000.¹⁰⁰ Furthermore, the vessel's master was placed under court supervision.

On 8 October 1999, the court of first instance confirmed the procedures taken by the RDDMA.¹⁰¹ It also set a bond at FF20,000,000.¹⁰² The court based its decision on Article 3 of its national law concerning the regime of seizure and supplementing the list of agents authorized to establish offenses in matters of sea fishing, in addition to Article 142 of its Code of Criminal Procedure. On 22 October 1999, the vessel master filed a summons for urgent proceedings to secure the release of the vessel and to reduce the amount of the bond.¹⁰³ The court of first instance rejected the request. At the time of the trial at ITLOS, an appeal against this order was still pending before the court of appeal.

F. The 'Monte Confurco' Case: Seychelles versus France, 2000

The vessel *Monte Confurco* is a shipping vessel flying the Seychelles flag, with the owner company located in the Seychelles.¹⁰⁴ The license of the vessel is limited to fishing in international waters. In August 2000, the vessel left Port Louis (Mauritius) for longline fishing, its master a Spanish national.¹⁰⁵

On 8 November 2000, the French surveillance frigate *Floréal* boarded the vessel while it was in the EEZ of the Seychelles.¹⁰⁶ A procès-verbal was issued against the master of the vessel for: failure to announce his presence, the quantity of fish aboard the vessel, fishing without prior authorization, and the attempt to evade investigation by the 'agents responsible for policing fishing activities.'¹⁰⁷ A further order was issued to seize the vessel, the cargo, the catch, the navigation and communication equipment, computer equipment, and documents of the vessel and its crew.¹⁰⁸ The vessel was then escorted to Port-des-Galets, Réunion.¹⁰⁹

On 20 November 2000, the Regional and Departmental Director of Maritime Affairs of Réunion (RDDMA) based his charges against the master of the vessel for being in the French EEZ, and for having varied quantities of fish on board without declaring the amount or source of the catch.¹¹⁰ The estimated amount of fish found on the vessel was 158 tonnes with a value of FF9 million. This amount was sold and its revenue credited to the public treasury upon the conclusion of the case. The value of the ship, its equipment and documents was estimated at FF15 million by the French authorities.¹¹¹ The RDDMA argued the court of first instance should set a bond at FF95,400,000 to release the vessel.¹¹²

On 21 November 2000, the master of the vessel was charged and placed under court supervision. He was additionally ordered not to leave Réunion.¹¹³ On 22 November 2000, the court of first instance laid charges against the master of the vessel for

¹⁰⁰ *Ibid*, 33.

¹⁰¹ *Ibid*, 35-36.

¹⁰² *Ibid*, 36.

¹⁰³ *Ibid*, 41.

¹⁰⁴ *The Monte Confurco*, (Seychelles v France) (2000), 27.

¹⁰⁵ *Ibid*, 28.

¹⁰⁶ *Ibid*, 29.

¹⁰⁷ *Ibid*, 30.

¹⁰⁸ *Ibid*, 31.

¹⁰⁹ *Ibid*, 32.

¹¹⁰ *Ibid*, 33.

¹¹¹ *Ibid*, 34.

¹¹² *Ibid*, 35.

¹¹³ *Ibid*, 36.

unauthorized entrance into the French EEZ, for not declaring the amount of fish on board, as well as for not giving notice before entering the EEZ. The court found that this lack of declaration of the catch on board was a sign of unlawful fishing.¹¹⁴

The court of first instance at Saint-Paul took into consideration certain factors to determine the amount of the bond. They included the value of the ship at FF15 million, the fines incurred by the master of the vessel, based on the value of 158 tonnes of illegal catch, at FF79 million, in addition to the average compensation in such cases at FF100,000.¹¹⁵ However, when the court of first instance set the final bond, it was based on securing the appearance of the defendants at FF1 million, on securing payment of the damage at FF400,000, and on securing the payment of fines and confiscation of the vessel at FF55,000,000.¹¹⁶ The court declared that the release of the vessel would be subject to the payment of the total bond amount of FF56,400,000.¹¹⁷

IV. Domestic Courts versus the International Tribunal for the Law of the Sea

This section illustrates the gap between CLED and RLED in applying confiscation and bond determination rules.¹¹⁸ Earlier, the research presented theoretical differences between CLED and RLED in applying their rules. The aim of this comparison, between the International Court (represented by the ITLOS) and national legislation and proceedings, is to prove that there is a wide disparity between the two levels of adjudication (national and international).

A. Confiscation of Vessels

International application of CLED prohibits the confiscation of vessels, whilst confiscation is permissible in the national application of RLED.¹¹⁹ On an international level, UNCLOS does not clearly prohibit states from confiscating criminal gains. However, the interpretation of Articles 73 and 292 of the UNCLOS implicitly prohibit vessel confiscation.¹²⁰ Article 73(2) states that '[a]rrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security.'¹²¹ Article 292 of the UNCLOS states:

Where the authorities of a state party have detained a vessel flying the flag of another State and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree...

¹¹⁴ *Ibid*, 37.

¹¹⁵ *Ibid*, 38.

¹¹⁶ *Ibid*, 39.

¹¹⁷ *Ibid*, 39-40.

¹¹⁸ Blakely, L, "The End of the Varsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in its Exclusive Economic Zone" 17(3) *Pacific Rim Law and Policy Journal* (2008) 678; see also Bing, J "The Notion of Natural Prolongation in the Current Regime of the Continental Shelf: An Afterlife" 12(1) *Chinese Journal of International Law* (2013) 79.

¹¹⁹ *Ibid*.

¹²⁰ Escher, K-A, "Release of Vessels and Crews before the International Tribunal for the Law of the Sea" 3(3) *The Law and Practice of International Courts and Tribunals* (2004) 411.

¹²¹ UNCLOS, Art. 73(2).

Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.¹²²

ITLOS deals with the consequences of confiscation.¹²³ These consequences are the confiscation of the ship by national authorities, confiscation of the catch found on board at the time of seizure, confiscation of any materials or documents used by the crewmembers of the ship.¹²⁴ In that sense, there is a conflict between the national understanding and that of ITLOS in the confiscation of ‘criminal’ materials.¹²⁵ On the one hand, national courts consider such materials as criminal gain. On the other hand, however, UNCLOS maintains the right of the flag state to demand the prompt release of the ship and the crew. Coastal states have the right to require the posting of a reasonable bond when adjudicating on offense committed on the high seas.¹²⁶ The value of the vessel, which is subject to confiscation in national law, is a contentious issue in the proceedings of ITLOS.¹²⁷ ITLOS compromises the right of the coastal state to monetary damages, which is represented in the price of the vessel as part of the bond paid by the plaintiff.¹²⁸ Hence, there is inconsistency between national and ITLOS in regard to the consequences of the confiscation of crime materials.

In the *Grand Prince* case (Belize versus France), ITLOS found that the confiscation of the ship was a violation of UNCLOS.¹²⁹ The French authorities failed to comply with Article 73(2) of the Convention; they ‘evaded the requirement of prompt release under this article by not allowing the release of the vessel upon the posting of a reasonable, or any kind of guarantee alleging that the vessel is confiscated and that the decision of confiscation has been provisionally executed.’¹³⁰ In the *Juno Trader* case (Saint Vincent and the Grenadines versus Guinea-Bissau), ITLOS found that the objective of Article 292 of the Convention was to ‘reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the [m]aster and the payment of penalties.’¹³¹

In the *Tomimaru* case (Japan versus Russian Federation), ITLOS addressed the question regarding whether the confiscation of a vessel renders an application for its prompt release without object under Article 292 of the Convention.¹³² It recognized the State’s right in adopting confiscation measures in domestic legislation.¹³³ However, it was

¹²² UNCLOS, Art. 292(1).

¹²³ Seymour, J, “The International Tribunal for the Law of the Seas; A Great Mistake” 13(1) *Indiana Journal of Global Legal Studies* (2006) 1, 21.

¹²⁴ McDorman, T, “An overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea” 40 *The Canadian Council of International Law* (2002) 119, 131.

¹²⁵ *Ibid*, 132.

¹²⁶ UNCLOS, Art 73(2).

¹²⁷ Baird, R, “Illegal Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to Its Development and Persistence” 5 *Melbourne Journal of International Law* (2004) 319.

¹²⁸ International Tribunal for the Law of the Sea, *Volga Case (Russian Federation v Australia)*, Case No. 11, order 2002/1 of Dec. 2, 2002, 53.

¹²⁹ International Tribunal for the Law of the Sea, *The Grand Prince case (Belize v France)* [Case no. 8, 2001].

¹³⁰ *Ibid*, 8.

¹³¹ International Tribunal for the Law of the Sea, *The Juno Trader Case, (Saint Vincent and the Grenadines v. Guinea-Bissau)*, [Case no. 13, 2004], 2.

¹³² International Tribunal for the Law of the Sea, *The Tomimaru Case, (Japan v. Russian Federation)*, [Case no. 15, 2007], 22.

¹³³ *Ibid*, 70.

maintained that these measures should not violate the balance of the interests of the flag state and of the coastal state established in the Convention.¹³⁴ As a result, it concluded:

A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the ship owner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardise the operation of article 292 of the Convention.¹³⁵

At the national level, RLED permits all forms of confiscation, including that of the vessel and criminal gains. In the US, the distinction between civil and criminal forfeiture has changed over time.¹³⁶ The important distinguishing factor between civil and criminal forfeiture in American law is the fact that courts do not consider civil forfeiture a punishment.¹³⁷ Governments resort to civil forfeiture for various other reasons, such as whether it is easier to assert probable cause of the assets, availability of the discovery to all parties in the case and prompt transfer of ownership of the property to the government.¹³⁸ In *U.S. v. Ursery*, the Supreme Court maintained that ‘*in rem* civil forfeitures are neither ‘punishment’ nor criminal for purposes of the Double Jeopardy Clause.’¹³⁹ The Double Jeopardy Clause states ‘[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.’¹⁴⁰ The Court asserts that since the early days of the nation, Congress has authorized the Government to ‘seek parallel *in rem* civil forfeiture actions and criminal prosecutions based on the same underlying events.’¹⁴¹ Thus, civil forfeiture occurs concurrently with criminal forfeiture.¹⁴² As for criminal forfeiture, it is in the court’s authority to seize the property of the defendant in certain cases.¹⁴³ The Court of Appeal *in re Forfeiture Hearing as to Caplin & Drysdale, Chartered* (Petitioner v. United States), asserts the need for criminal forfeiture provisions in common law.¹⁴⁴ A unique feature of forfeiture in the American legal system is that prosecutors do not have to prove that ‘a particular asset of the defendant is forfeitable,’ they merely have to prove its existence.

In France, confiscation is temporary in nature¹⁴⁵ and has two aims. The first is to prevent tampering with evidence; authorized bodies take possession of the property under judicial supervision, especially when it is considered part of the evidence.

¹³⁴ *Ibid*, 75.

¹³⁵ *Ibid*, 76.

¹³⁶ Steiker, C, “Punishment and Procedure: Punishment Theory and the Criminal – Civil Procedural Divide” 26 *Georgetown Law Journal* (1997) 782.

¹³⁷ Pratt, CG and Peterson, W, “Civil Forfeiture in the Second Circuit” 65(3) *St. John’s Law Review* (1991) 653.

¹³⁸ McCutcheon and Walsh, *supra* nt 40, 70.

¹³⁹ 518 U.S. 267 (1996).

¹⁴⁰ US Constitution, amend. IV, section 1.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*.

¹⁴³ *Ibid*, 73 (1999).

¹⁴⁴ 837 F.2d 637, 649 (1988), Court states that ‘[c]ongress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent.’

¹⁴⁵ Sheehan, VA, *Criminal Procedure in Scotland and France: Comparative Study with Particular Emphasis on the Role of the Public Prosecutor* (Her Majesty’s Stationary Office, 1975), 24.

Secondly, confiscation acts as a guarantee in case of the defendant's conviction. The judiciary then enforces the confiscation of the seized property.¹⁴⁶ Likewise, the confiscation is made to ensure that the defendant pays all the fines incurred.¹⁴⁷

In Germany, the general rule is to forfeit all tools and gains from the crime. German jurists distinguish between two types of forfeiture. The first involves that which affects the defendant directly; forfeiture can be punitive, retributive, compensatory, or preventative.¹⁴⁸ The second type involves a forfeiture provision that not only affects the defendant's personal capacity, but also targets the defendant's property, gain, or money incurred from the crime.¹⁴⁹ The German Criminal Code makes a clear distinction between confiscation and forfeiture.¹⁵⁰ The German court may order forfeiture of any gain acquired from a crime.¹⁵¹

Confiscation on the other hand is permissible only if: '1) the perpetrator or inciter or accessory owns, or has a claim to, the objects at the time of the decision; or 2) the objects, due to their nature and the circumstances, endanger the general public, or there exists a danger that they will be used for the commission of unlawful acts.'¹⁵² Some crimes involve mandatory confiscation: treason and endangering external security,¹⁵³ crimes against national defense,¹⁵⁴ counterfeiting of money and stamps,¹⁵⁵ falsification of documents,¹⁵⁶ crimes endangering the public¹⁵⁷ and crimes against the environment.¹⁵⁸ Similarly, there are some crimes that involve forfeiture only. These include crimes against sexual self-determination,¹⁵⁹ robbery and extortion,¹⁶⁰ crimes against competition¹⁶¹ and crimes in public office.¹⁶² Additionally, a third type of crime involves both confiscation and forfeiture. These crimes are falsification of documents¹⁶³ and punishable greed (unauthorized organization of a game of change).¹⁶⁴

¹⁴⁶ Fran. Crim. Pro. C. section 706-30.

¹⁴⁷ Fran. Crim. Pro. C. section 706-36-1.

¹⁴⁸ Benseler, J, "Forfeiture legislation in Germany: Legal Basis and Prosecution Practice" 5(3) *European Journal of Crime, Criminal Law and Criminal Justice* (1997) 203, 204.

¹⁴⁹ *Ibid*, 204.

¹⁵⁰ Kilchling, M, "Tracing, Seizing and Confiscating Proceeds from Corruption Within or Outside the Criminal Justice System" 9 *European Journal of Crime, Criminal Law and Criminal Justice* (2001) 264, 273.

¹⁵¹ *StGB* section 73(1).

¹⁵² *StGB* section 74(2).

¹⁵³ *StGB* section 101(a).

¹⁵⁴ *StGB* section 109(k).

¹⁵⁵ *StGB* section 150.

¹⁵⁶ *StGB* section 282.

¹⁵⁷ *StGB* section 322.

¹⁵⁸ *StGB* section 330(c).

¹⁵⁹ *StGB* section 181(c).

¹⁶⁰ *StGB* section 256.

¹⁶¹ *StGB* section 302.

¹⁶² *StGB* section 338.

¹⁶³ *StGB* section 282.

¹⁶⁴ *StGB* section 295.

B. Bond Determination

Bond determination is a challenging question.¹⁶⁵ In general, a bond is an amount of security with monetary value that the defendant has to pay to the public authority. A bond requirement fulfills several objectives. Firstly, it aims to ensure that the defendant will appear in court. In the event of defendants failing to do so, they forfeit the bond amount in the interest of the public treasury. Secondly, the safety of the victim and the victim's family is considered within the bail amount and the release conditions for the defendant.¹⁶⁶ Thirdly, the bond is taken to ensure that the defendant pays all his monetary sanctions. If the defendant is convicted, the bond amount is used to pay any fines or compensation incurred. Otherwise, the amount of bond is returned to the defendant. In fishery cases, the international application of CLED requires a reasonable bond to be set, based on exhaustive list of criteria.¹⁶⁷ The national RLED is, in most cases, left to the discretion of judges and prosecutors. A bond is also a requirement on the international level. On a national level, the competent authorities are not required to issue a bond, or release a defendant on bail. It is left to the discretion of such authorities.¹⁶⁸ The following paragraph tackles the differences in detail.

On the international level, UNCLOS associates the idea of prompt release with the payment of a 'reasonable bond'.¹⁶⁹ The question of what a reasonable bond amounts to is left unanswered by both national and international courts.¹⁷⁰ Article 292(1) of UNCLOS States that where

[i]t is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release may be submitted to any court or tribunal agreed upon by the parties.¹⁷¹

It then requires that the bond shall be reciprocated by the prompt release of the vessel and its crew. Article 292(4) states that 'upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining state shall comply with the decision of the court or tribunal concerning the release of the vessel or its crew.' As a result, a dispute between national and international courts is raised regarding the level of a reasonable bond.

¹⁶⁵ Corre and Wolchover, *supra* nt 32, 2: The importance of the bail decision can hardly be exaggerated. It involves balancing the liberty of the individual who (in case of remand before conviction) has been found guilty of no offence against the need to ensure that accused persons are fully brought to trial and the public protected. Quite apart from depriving him of his liberty, a remand in custody may often have other harmful effects... on the other hand, it is rightly a matter of serious concern if a person granted bail absconds or commits offences while on bail.

¹⁶⁶ California Constitution, 28 section 8, para 3.

¹⁶⁷ Franck, E, "Reasonable Bond in the Practice of the International Tribunal for the Law of the Seas" 32(2) *California Western International Law Journal* (2001-2002) 303, 331.

¹⁶⁸ Damner, HR and Albanese, JS, *Comparative Criminal Justice System*, (5th ed, Wadsworth Cengage Learning, 2013), 136.

¹⁶⁹ Devine, DJ, "Relevant Factors in establishing a reasonable bond for prompt release of vessel under article 292(1) of the United Nations Convention on the Law of the Sea 1982" 27 *South African Yearbook of International Law* (2002) 140; *see*, Larkin, J, "UNCLOS and the balance of Environmental and Economic Resources in the Arctic" 22 *Georgetown Environmental Law Review* (2009) 307.

¹⁷⁰ Devine, *Ibid*, 142.

¹⁷¹ Song, HY, "Prompt Release of Fishing Vessels: The Hoshinmaru and Tomimaru Cases (Japan v. Russian Federation) and the Implications for Taiwan" 25 *Chinese (Taiwan) Yearbook of International Law* (2007) 21.

The question of bond determination is a common issue in ITLOS proceedings. In the *Volga* case, ITLOS found that the bond sought by the Australian authorities was ‘not reasonable within the meaning of article 292 [of UNCLOS].’¹⁷² ITLOS determined the reasonable amount of the bond to be AU\$1,920,000.¹⁷³ Based on Australian jurisprudence, this amount was deemed reasonable.¹⁷⁴ However, ITLOS found that setting a bond in respect of three crew members did not serve any practical purpose.¹⁷⁵ In the *Hoshinmaru* case, ITLOS considered the reasonableness of the bond (set by the Russian Federation with respect to the Japanese vessel) on the basis of two points.¹⁷⁶ Firstly, ITLOS found that the Japanese vessel did hold a valid fishing license.¹⁷⁷ Secondly, there is strong bilateral cooperation between Russia and Japan in the field of conservation and reproduction of salmon and trout. ITLOS stated ‘a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offenses, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized.’¹⁷⁸ As a result, ITLOS lowered the bond from 22 to 10 million rubles.¹⁷⁹

In the *M/V SAIGA* case, ITLOS stated ‘the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.’¹⁸⁰ ITLOS lists the factors that must be considered as a basis for setting the bond;¹⁸¹ it states that these factors include ‘the gravity of the alleged offenses, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.’¹⁸² It takes both the gravity of the alleged offenses and the penalties imposed by the coastal authority into consideration.¹⁸³ ITLOS found the amount set for the detained vessel not reasonable and took the appropriate measures to release the master of the vessel.¹⁸⁴

¹⁷² *Volga* case (2002) 88.

¹⁷³ *Ibid*, 90.

¹⁷⁴ *Ibid*, 73.

¹⁷⁵ *Ibid*, 64.

¹⁷⁶ International Tribunal for the Law of the Sea, *Hoshinmaru case (Japan v Russian Federation)* (Case no. 14 2007), 59.

¹⁷⁷ *Ibid*, 50.

¹⁷⁸ *Ibid*, 65.

¹⁷⁹ *Ibid*, 100.

¹⁸⁰ International tribunal for the Law of the Sea, *M/V Saiga Case no. No. 2 (St. Vincent v. Guinea)*, (Order of Jan. 20, 1998, Rep. 30), 2.

¹⁸¹ Assonitis, G, *M/V SAIGA Case*, 50 RHDI (1997) 590; see Kwiatkowska, B, “Inauguration of the ITLOS Jurisprudence: The Saint Vincent and the Grenadines v. Guinea M/V Saiga Cases” 30 *Ocean Development and International Law* (1999) 44; see also, Bantz, CB, International Tribunal for the Law of the Sea, “M/V Virginia G Case (Panama. Guinea- Bissau)” 53 *International Legal Materials* (2014) 1163; White, M, “ITLOS and the Volga Case: The Russian Federation v. Australia” 17 *Australia and New Zealand Maritime Law Journal* (2003) 41.

¹⁸² Lowe, V, “Advocating Judicial Activism: The ITLOS opinions of Judge Ivan Shearer” 24 *Australian Yearbook of International Law* (2005) 145. See also, McDorman, T, “Overview of International Fisheries Disputes and the International Tribunal of the Law of the Sea” 40 *Chinese Yearbook of International Law* (2002) 135.

¹⁸³ *M/V SAIGA*, 68.

¹⁸⁴ *Ibid*, 72.

In the *Monte Confurco* case,¹⁸⁵ ITLOS considered the conflict between the flag and the coastal States in relation to Articles 73 and 292 of UNCLOS.¹⁸⁶ The interest of the coastal State was to protect its waters from damage,¹⁸⁷ while that of the flag State was to promptly release the vessels (Article 73).¹⁸⁸ These compromises gave ITLOS the ability to set a reasonable amount of bond.¹⁸⁹ Among the factors determining the amount of the bond, ITLOS placed special emphasis on the gravity of the offenses, as well as the value of the fish and the fishing gear seized. ITLOS asserted that the gravity of the offenses has always been taken into consideration.¹⁹⁰

In the *Camouco* case, the ITLOS once again identified the factors relevant in an assessment of the reasonableness of bonds. It referred to legal precedents,¹⁹¹ offenses committed by the master of the vessel were considered grave under French law.¹⁹² It stated that the value of the fish found on board the vessel was taken into consideration when determining the reasonableness of the bond.¹⁹³ As for the detention of the crew members, ITLOS found that it was appropriate to release them based on the circumstances of the case once the master of the vessel had paid the new bond.¹⁹⁴

On a national level, in most developed countries, bond determination is left to the discretion of the investigating authority. The 'Excessive Bail Clause' of the US Constitution maintains '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'¹⁹⁵ The Eighth Amendment does not define 'excessive bail'.¹⁹⁶ The US Supreme Court maintains that 'individualized findings, procedural protections, and the discretionary nature of the denial of bail are important factors in upholding detention without bail.'¹⁹⁷ In *Carlson v. London*, the US Supreme Court held that the Eighth Amendment does not grant the right to bail in all cases; it only maintains that the bail shall not be excessive.¹⁹⁸ The California Constitution entitles every defendant to be released on bail,¹⁹⁹ unless the crime is punishable by death.²⁰⁰ Even though the judge has the right to set a bond, it is rarely used to detain the defendant.²⁰¹

In France, the system is based on the 'speedy trial' principle. A defendant cannot be detained for more than 48 hours and does not have a right to be released on bail. There is nothing in the French Criminal Procedure Code that refers to the bailing of a

¹⁸⁵ International Tribunal for the Law of the Sea, *Monte Confurco*, (No. 6) (*Seychelles v. France*), (Case No. 6, Order 2000/2 of November 27 2000), 27; the shipping vessel carried the Seychelles flag.

¹⁸⁶ UNCLOS, Art. 72 and 292.

¹⁸⁷ *Ibid*, Art. 292.

¹⁸⁸ Mensah, T, "The Tribunal and the Prompt Release of Vessels" 22 *International Journal of Marine and Coastal Law* (2007) 430.

¹⁸⁹ Chandrasekhar Rao, P, "ITLOS: The First Six Years" 6 *Max Plank Institute* (2002) 233; See also, Franck, E, "Reasonable Bon in the Practice of the International Tribunal for the Law of the Sea" 32 *California Western International Law Journal* (2001) 308.

¹⁹⁰ International Tribunal for the Law of the Sea *Camouco* (No. 5) (*Panama v. France*), (Case No. 5, Order 2000/1 of January 17, 2000), 73.

¹⁹¹ *Ibid*, 76.

¹⁹² *Ibid*, 79.

¹⁹³ *Ibid*, 86.

¹⁹⁴ *Ibid*, 90.

¹⁹⁵ US Constitution. Amend XIV section 2.

¹⁹⁶ Gassman, K, "Unjustified Detention: The Excessive Bail Clause in Removal Proceedings" 1 *American University Criminal Law Brief* (2009) 39.

¹⁹⁷ Gassman, K, "The Excessive Bail Clause in Removal Proceedings" 4 *Criminal Law Brief* (2009) 35.

¹⁹⁸ Section 342 US 524, 537 (1952).

¹⁹⁹ California Constitution, 28 section 8, para 3.

²⁰⁰ Gustafson, R, "Bail in California" 44 *California Law Review* (1956) 816.

²⁰¹ Cal. Pen. Cod section 1271.

defendant as an option for release. The Judge of Liberties and Detention rarely grants it. Nonetheless, certain defendants falling under certain categories specified in the Criminal Procedure Code will be detained until trial. Pre-trial detention in France occurs in only two cases: (1) when the person under judicial examination risks incurring a sentence for a felony;²⁰² and (2) when the person under judicial examination risks incurring a sentence for a misdemeanor of at least three years imprisonment.²⁰³ The purposes of pre-trial detention are: (1) to preserve material evidence or clues or to prevent either witnesses or victims or their families being pressurized or fraudulent conspiracy between persons under judicial examination and their accomplices; (2) to protect the person under judicial examination, to guarantee that he remains at the disposal of the law, to put an end to the offense or to prevent its renewal; (3) to put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offense, the circumstances in which it was committed or the gravity of the harm that it has caused.²⁰⁴

In Germany, the legislation delegates the power of determining the bond and addressing the issue of excessive bond to the judge. The general rule in the German criminal system is that the defendant is not necessarily detained before trial. Even though the judge has the right to set a bond, this right is rarely exercised.²⁰⁵ One study found that only 12% of defendants were released on bail.²⁰⁶ The general rule is that the prosecutor processes the case without arresting the defendant, unless there is major ‘concern that the defendant would foil the process by absconding.’²⁰⁷

V. Conclusion and Recommendations

Accurate predictions may save lawyers from lengthy and costly litigation processes. Countries, lawyers and law enforcement officers have the right to predict judgments. This right reduces the cost of resorting to national and international adjudication.²⁰⁸ If lawyers and law enforcement officers were aware of the ITLOS precedents, they would likely adhere to it. The existence of two different sets of systems, CLED and RLED that govern the same behavior violates litigation rights in legal prediction. This article aims to provide guidance to countries and lawyers on the judicial behavior and approach of ITLOS. While some countries adopt RLED, ITLOS changes RLED to CLED.

Even though this study focuses on fishery cases, it urges countries to abolish their RLED and to reform their domestic environmental laws in order to abolish the uncertainty in fishery cases.²⁰⁹ It calls for them to comply with the international adjudication that differs from their understanding and practice.²¹⁰ It helps avoid any discrepancies that may arise between national and international courts. Parties have the right to predict ITLOS proceedings. The change in nature of the dispute from RLED to

²⁰² French CCP, Art. 143.

²⁰³ French CCP, Art. 143.

²⁰⁴ French CCP, Art. 144.

²⁰⁵ St OP, Section 116.

²⁰⁶ Frase, SR and Weigend, T, “German Criminal Justice as a Guide to American Law Reform: Similar Problems, better Solutions?” 18 *Boston College of International and Comparative Law Review* (1995) 329.

²⁰⁷ *Ibid*, 327.

²⁰⁸ Charnovitz, S, “A World Environment Organization” 27 *Columbia Journal of Environmental Law* (2002) 323.

²⁰⁹ Guttel, E and Harel, A, “Uncertainty Revisited: Legal Prediction and Legal Post diction” 107 *Michigan Law Review* (2008-2009) 468.

²¹⁰ *Ibid*, 468.

CLED prejudices the right of parties to predict ITLOS proceedings.²¹¹ ITLOS adopts the CLED approach in settling disputes, while national courts adopt the RLED approach.²¹²

In its jurisdiction, ITLOS often considerably changes the nature of the original dispute from RLED to CLED. ITLOS is not likely to change its understanding of the nature of the dispute, as illustrated in the cases presented earlier. It is now the role of national legislatures to adopt this understanding of CLED, especially in fishery cases. This change will not only help countries in the event that plaintiffs resort to ITLOS, but will also ensure the equality principle between those who can resort to the tribunal and those who cannot.²¹³ It is seemingly evident that should a case involve RLED, this likely involves a waste of resources or instances of injustice to parties concerned.

Once ITLOS exercises its jurisdiction, the nature of the conflict changes from a criminal to a civil one. It has the legal tools and the desire of the disputing parties to change its role. It makes a considerable change to the nature of the dispute. As mentioned above, this change helps the court balance the interests of the coastal State and those of the flag State. Whenever a case involves criminal liability, the coastal State has to be aware that such liability, as well as its gain from such liability, is subject to re-examination by ITLOS.

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²¹¹ Manning, P, "Reflections on Risk Analysis, Screening and Contested Rationalities" 48 *Canadian Journal of Criminology and Criminal Justice* (2006) 460.

²¹² Escher K-A, "Release of vessels and Crew Before the International Tribunal for the Law of the Seas" 3 *Law and Practice of International Courts and Tribunals* (2004) 205 and Ratiliff, D, "Dispute Resolution and Environmental Security" 20 *Hague Yearbook of International Law* (2007) 65.

²¹³ Seymour, J, "International Tribunal for the Law of the Sea: A Great Mistake?" 13 *Indiana Journal of Global Legal Studies* (2006) 1.

Closing the ‘Remedy Gap’ - The Limits and Promise of Diplomatic Protection for Victims of the Cholera Epidemic in Haiti

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‘[T]he Haitian people are all too familiar with courts expressing sympathy for their plight but ultimately closing the courtroom doors to them. In Sale v. Haitian Centers Council, the Supreme Court concluded its opinion denying relief by quoting the approval from Judge Edwards: ‘Although the human crisis is compelling, there is no solution to be found in a judicial remedy.’ That need not be the case here.’

- Muneer Ahmad, Clinical Professor of Law & Supervising Attorney, Yale Law School¹

Abstract

In October 2010, United Nations (UN) peacekeepers from Nepal arrived in Haiti. The peacekeepers had been exposed to cholera in their country and, as a result of a poor water and sanitation system at their base, contaminated the Artibonite River with the cholera bacterium. A cholera outbreak ensued, killing almost 9,500 Haitians and infecting another 806,000. After failed efforts at dialogue with the UN, Haitian and Haitian-American victims sued the organization in United States (US) federal courts. However, the federal court in the Southern District of New York dismissed the case for lack of subject matter jurisdiction under the Convention on the Privileges and Immunities of the UN. The Court of Appeal for the Second Circuit affirmed this decision. These judgments were based on a finding that the UN has absolute immunity from suit.

This paper considers the role of international law in ensuring justice for the victims of the cholera epidemic. Although the US court decisions highlight a ‘remedy gap’, the paper suggests that the time-honored practice of diplomatic protection may offer a solution that allows for UN accountability even within international law. Although traditional diplomatic protection would likely only offer a remedy to Haitian-Americans, if at all, the paper argues

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¹ Transcript of Oral Argument at 44, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. Oct. 23, 2014), at <ijdh.org/2014/10/topics/health/transcript-of-cholera-litigation-oral-arguments/> (accessed on 20 June 2017).

that the cholera epidemic and the UN's refusal to accept the victims' claims demonstrate both the limits and the potential of diplomatic protection.

I. Introduction

As the world worries about the Zika virus and other outbreaks, Haiti, a Caribbean country with a population of approximately 11 million has been battling a cholera epidemic,² which scientific evidence confirms was brought to the island by United Nations (UN) peacekeepers. Though celebrated as the world's first black republic, the country is perhaps more recognized globally for the 2010 earthquake, the subsequent influx of international aid and ongoing efforts to rebuild. Indeed, the mention of 'Haiti' is often accompanied with the tag line 'the poorest country in the Western Hemisphere'; only the rare speaker attempts to situate this poverty in a broader historical and geopolitical context. The cholera epidemic is, arguably and unfortunately, just the latest in a string of externally-imposed challenges that the Haitian government and its people have faced since independence.³

Over the last six years, hundreds of thousands of Haitians and Haitian-Americans have been affected by what is now recognized as the worst cholera epidemic in recent history.⁴ Data from the UN indicates that at least 9,496 people have died and another 806,000 have been infected⁵ since UN peacekeepers from Nepal recklessly dumped fecal waste contaminated with the *Vibrio cholerae* bacteria into a tributary of Haiti's most important river, the Artibonite, in October 2010.⁶

Despite the international dimensions of this catastrophe, the decentralized system of international law with its 'paradox of objectives',⁷ seems to offer cholera victims⁸ no avenue for redress. There is no international court to which they could bring their claims and their efforts to file a claim with the claims unit of the UN Stabilisation Mission in Haiti

² *Haiti Population 2017*, World Population Review (Oct. 6, 2016), at <worldpopulationreview.com/countries/haiti-population/> (accessed on 20 June 2017).

³ See, e.g., Katz, JM, *The Big Truck that Went By: How the World Came to Save Haiti and Left Behind A Disaster*, (2013). See also Dalembert, L-P, *Haiti, la dette originelle*, Liberation (Mar. 25, 2010, 00:00 AM), at <liberation.fr/monde/2010/03/25/haitila-dette-originelle_617159> (accessed 20 June 2017) (describing the debilitating impact of France's imposition of an 'independence debt' ['dette de l'indépendance'] on Haiti in the early 1800s); Lindstrom, B, *Law in the Time of Cholera: Violations of the Right to Water in Haiti*, Huffington Post, Jan. 24, 2011, at <huffingtonpost.com/beatrice-lindstrom/law-in-the-time-of-cholera_b_812170.html> (accessed on 20 June 2017) (on the way in which foreign interventions have interfered with Haitian water rights).

⁴ Watts, J, "Haiti making good progress in health but challenges remain" 384 *The Lancet* (2014) 1413, 1413.

⁵ UN Office for the Coordinator of Humanitarian Affairs, *Haiti: Cholera figures* (28 February 2017), Relief Web, (10 April 2017) at <reliefweb.int/sites/reliefweb.int/files/resources/hti_cholera_figures_feb_2017_en_0.pdf> (accessed on 20 June 2017).

⁶ Lantagne, D, et al, "The Cholera Epidemic in Haiti: Where and How Did It Begin?" 379 *Current Topics in Microbiology and Immunology* (2014) 145, para 5.

⁷ Koskeniemi, M, "What is International Law For?" in D. Evans, M, ed, *International Law* (Oxford University Press 2014).

⁸ I refer to them as 'victims' throughout this paper because this is the language used in Haiti. However, it is important to recognise their agency, particularly as they continue to use various strategies as they seek redress.

(MINUSTAH) and the UN Secretary-General were unsuccessful.⁹ Victims have since filed law suits against the UN in the United States (US), but US courts have dismissed the claims for lack of jurisdiction because of the UN's immunity from suit.

Reflecting on this troubling situation, Professor Ian Hurd suggests that it demonstrates 'what Scott Veitch calls the production of "irresponsibility", through law'.¹⁰ Similarly, Katarina Lundahl has written about the conflict between victims' lack of access to dispute resolution mechanisms and the UN's immunity from suit, arguing that this has resulted in a 'remedy gap' which only 'political action' can resolve.¹¹ Even Bruce C Rashkow, Former Director of the General Legal Division of the UN's Office of Legal Affairs characterises the situation as one that raises significant questions about UN immunity.¹² Although it seems like the hard law principle of immunity trumps the much softer human rights issue, is the victims' quest for justice really futile?

This paper argues that the time-honored practice of diplomatic protection may offer a solution that allows for UN accountability even within international law. Although traditional diplomatic protection would likely only offer a remedy to Haitian-Americans, if at all, this paper argues that the cholera epidemic and the UN's refusal to accept the victims' claims demonstrates both the limits and the potential of diplomatic protection.

II. Background

Haitians experienced cholera—an acute diarrheal disease caused by food and water contaminated with the *Vibrio cholera* bacterium—for the first time in October 2010.¹³ This was just a few months after a devastating 7.0 magnitude earthquake left at least 316,000 people dead, 300,000 injured and 1.3 million displaced, in addition to destroying 97,294 houses and damaging another 188,383 in the capital, Port-au-Prince, and surrounding areas.¹⁴ The first cholera cases were reported in mid-October along the Artibonite River in

⁹ Petition for Relief to MINUSTAH Claims Unit (filed Nov. 3, 2011), at <ijdh.org/?p=22916> (accessed on 20 June 2017).

¹⁰ Abstract, *American Bar Foundation Research Seminar, The Politics of Legal Responsibility: Haiti, Cholera, and International Law* (2014), at <americanbarfoundation.org/events/440> (accessed on 20 June 2017). See generally Hurd, I, "Enchanted and Disenchanted International Law" 7.1 *Global Policy* (2016) 96.

¹¹ Lundahl, K, "The United Nations and the Remedy Gap: The Haiti Cholera Dispute" 88 *Friedens-Warte: Journal of International Peace and Organization* (2013) 77, 78.

¹² Rashkow, B. "Immunity of the United Nations: Practice and Challenges" 10 *International Organization Law Review* (2013) 332, 345 (suggesting that '[i]f the United Nations continues to refuse to review the claims of the Haitian cholera victims, and does not offer a convincing rationale for doing so, the options open to the claimants are few').

¹³ Orata, FD, *et al*, *The 2010 Cholera Outbreak in Haiti: How Science Solved a Controversy*, 14 *PLOS Pathogens* 1 (2014), at <plospathogens.org/article/fetchObject.action?uri= info%3Adoi%2F10.1371%2Fjournal.ppat.1003967&representation=PDF> (accessed on 20 June 2017) (according to which '[p]rior to 2010, there was no reported history of cholera in Haiti, despite devastating outbreaks in the Caribbean region in the 19th century').

¹⁴ US Geological Survey, *Earthquake Information for 2010*, (Dec. 12, 2011 5:52:04 PM), at <earthquake.usgs.gov/earthquakes/eqarchives/year/2010/> (accessed on 20 June 2017).

Mirebalais, a commune in central Haiti where the MINUSTAH base was located.¹⁵ Peacekeeping troops from Nepal had arrived at this base between October 8th and 24th.¹⁶ Although they were coming from regions of Nepal that were experiencing a cholera outbreak,¹⁷ they were not tested immediately prior to their departure.¹⁸ In addition, the base's water and sanitation system was poorly maintained, leaving waste from the showers and toilets to drain into the Meye, a tributary of the Artibonite River.¹⁹ To make matters worse, MINUSTAH contracted a company which would dump untreated waste containing human feces into an open septic pit nearby, from which it could flow into the tributary when it rained.²⁰

Initially, an independent panel of experts appointed by UN Secretary-General Ban Ki-moon in 2011 claimed that the MINUSTAH peacekeepers were not at fault. In their final report, the experts suggested that the outbreak resulted from contamination of the Meye Tributary of the Artibonite River with a South Asian strain of *Vibrio cholerae*.²¹ The experts concluded that 'the Haiti cholera outbreak was caused by the confluence of circumstances as described above, and was not the fault of, or deliberate action of, a group or individual'.²² However, in a more recent report supported by more extensive research, the members of the panel suggest that 'the preponderance of the evidence and the weight of the circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti'.²³ The panel references research by other experts to support their findings.²⁴ Taken together, the

¹⁵ Cravioto, A, *et al*, Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti, at 13-17, at <un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf> (accessed on 20 June 2017) [hereinafter Independent Panel Report].

¹⁶ Transnational Development Clinic, Yale Law School, Global Health Justice Partnership of the Yale School of Public Health and Association Haitienne de Droit de L'Environnement, Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic, 14 (2013), at <law.yale.edu/documents/pdf/Clinics/Haiti_TDC_Final_Report.pdf> (accessed on 20 June 2017) [hereinafter Peacekeeping Without Accountability].

¹⁷ *See id.* at 21 (indicating that 1,400 cholera cases had been reported in Nepal between around July 28th and mid-August).

¹⁸ *Haiti cholera outbreak: Nepal troops not tested*, BBC News South Asia (Dec. 8, 2010, 3:48 PM), at <bbc.co.uk/news/world-south-asia-11949181> (accessed on 20 June 2017).

¹⁹ Lantagne, *supra* nt 6, para 2.2.

²⁰ *Ibid.*

²¹ Independent Panel Report, *supra* nt 15, 4.

²² *Ibid.*

²³ Lantagne, *supra*, nt 6, para 5. The experts, nevertheless, attempt to minimise potential blame, writing: 'We would like to highlight here that we do not feel that this was a deliberate introduction of cholera into Haiti; based on the evidence we feel that the introduction of cholera was an accidental and unfortunate confluence of events. Action should be taken in the future to prevent such introduction of cholera into non-endemic countries in the future'.

²⁴ *Ibid.*, para 4. *See also* Piarroux, R, *et al*, "Understanding the Cholera Epidemic, Haiti" 17 *Emerging Infectious Diseases* (2011) 1161 (the report by a French and Haitian team of researchers who conducted a November 2010 study commissioned by both of their governments).

sources reveal that the Haiti cholera strain was found to be a 'perfect match' to a Nepal strain isolated in 2010.²⁵

In November 2011, over 5,000 cholera victims attempted to file a claim with the MINUSTAH claims unit and the UN Secretary-General.²⁶ They sought relief in the form of: (1) the establishment of a standings claims commission; (2) measures by the UN to improve the water and sanitation system and to provide adequate health services in order to prevent the further spread of cholera; (3) compensation; and (4) a public apology.²⁷ When it finally responded in February 2013, the UN asserted that the claims were 'not receivable' because they 'would necessarily include a review of political and policy matters'.²⁸

Following unsuccessful efforts to dialogue with UN representatives, the Bureau des Avocats Internationaux (BAI) (Bureau of International Lawyers) in Haiti and its US partner organisation, the Institute for Justice & Democracy in Haiti (IJDH), filed a lawsuit in federal court in the Southern District of New York (SDNY) in October 2013 against MINUSTAH, Secretary-General Ban Ki-moon and the former Under-Secretary-General for MINUSTAH, Edmond Mulet.²⁹ They filed this lawsuit on behalf of Haitian and Haitian-American plaintiffs seeking remedies in the form of installation of an adequate water and sanitation system and compensation.³⁰ Soon after, other cases were filed in the same jurisdiction and in the Eastern District of New York.³¹ Although the IJDH/BAI case is the most advanced, the UN did not appear in the case and instead requested that the US government intervene and seek dismissal, taking the position that the UN has absolute immunity from suit.³²

²⁵ Frerichs, R, *et al*, "Nepalese origin of cholera epidemic in Haiti" 18.6 *Clinical Microbiology and Infection* (2012) E162.

²⁶ Petition for Relief to MINUSTAH Claims Unit, *supra* nt 9.

²⁷ *Ibid*, para VII.

²⁸ Letter from the Under-Secretary for Legal Affairs of United Nations to the Director of the Institute for Justice and Democracy in Haiti (July 5, 2013), at 1, at <ijdh.org/wpcontent/uploads/2013/07/20130705164515.pdf> (accessed on 20 June 2017).

²⁹ Inst. for Justice and Democracy in Haiti, *Cholera Litigation*, available at <ijdh.org/cholera/cholera-litigation/> (accessed on 20 June 2017).

³⁰ Class Action Complaint and Demand for Jury Trial at 65, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 9 Oct 2013), at <ijdh.org/wp-content/uploads/2013/10/Georges-v.-United-Nations-Complaint.pdf> (accessed on 20 June 2017) [hereinafter Complaint].

³¹ Complaint, *La Venture v United Nations*, No. 1:14-cv-01611 (E.D.N.Y. Mar. 11, 2014); Complaint, *Jean-Robert v United Nations*, No. 1:14-cv-01545 (S.D.N.Y. Mar. 06, 2014).

³² United States Government Statement of Interest, *Georges v United Nations*, at 6, No. 1:13-cv-07146-JPO (S.D.N.Y. Mar. 7, 2014), at <ijdh.org/wp-content/uploads/2011/11/Georges-v.-UN-13-Civ.-7146-SDNY-Statement-of-Interest.pdf> (accessed on 20 June 2017) (informing the court that '[o]n December 20, 2013, Miguel de Serpa Soares, the United Nations Legal Counsel, wrote to Samantha Power, Permanent Representative of the United States to the United Nations, stating, 'I hereby respectfully wish to inform you that the United Nations has not waived and is expressly maintaining its immunity with respect to the claims in [the instant] Complaint'.... [and] requesting 'the competent United States authorities to take appropriate action to ensure full respect for the privileges and immunities of the United Nations and its officials'').

In late September 2014, the judge granted the plaintiff's request for oral arguments to address jurisdictional issues, including this question of immunity.³³ The Court heard the arguments on October 23, 2014,³⁴ and in January 2015 the court 'conclude[d] that all Defendants are immune. Accordingly, the case [was] dismissed for lack of subject matter jurisdiction, and Plaintiffs' motion [was] denied as moot'.³⁵ On appeal, the US Court of Appeal for the Second Circuit upheld the lower court's decision.³⁶ Like the lower court, the appellate court rejected the plaintiffs-appellants' argument that the UN's obligations under Section 29 were a condition precedent to its enjoyment of immunity.³⁷ As such, the judgments reinforce the notion that unless the Secretary-General waives immunity, the UN enjoys absolute immunity from suit. The period for the plaintiff-appellants to appeal the Second Circuit decision has lapsed.³⁸

III. The Arguments About UN Immunity From Suit

The US Government, which filed a Statement of Interest in the case and appeared in court for the oral arguments in both the lower court and Second Circuit, asserted that the UN has absolute immunity to suit.³⁹ The Government informed the court that its Statement of Interest was made 'pursuant to 28 U.S.C. § 517, consistent with the United States' obligations as host nation to the UN and as a party to treaties governing the privileges and immunities of the UN'.⁴⁰

A. Sources of UN Immunity

In the District Court, the US government based its argument on immunity primarily on two treaties, namely, the UN Charter and the Convention on the Privileges and Immunities of the UN (commonly referred to as 'the General Convention'). It also referenced an agreement signed between the UN and the Haitian government following the Security Council's passage of Resolution 1542 creating MINUSTAH in April 2004.⁴¹ However, the plaintiffs argued that the government selectively read out a provision of the General Convention which conditions this immunity on the provision of avenues for redress.⁴²

³³ Press Release, Bureau des Avocats Internationaux & Inst. for Justice & Democracy in Haiti, Hearing Set for UN Cholera Case (Oct. 8, 2014), at <ijdh.org/2014/10/topics/health/hearing-set-for-un-cholera-case/> (accessed on 20 June 2017).

³⁴ Press Release, Bureau des Avocats Internationaux & Inst. for Justice & Democracy in Haiti, Hearing Held in UN Cholera Case (Oct. 23, 2014), at <ijdh.org/2014/10/topics/health/hearing-held-in-un-cholera-case/> (accessed on 20 June 2017).

³⁵ *Georges v UN*, 84 F. Supp.3d 246 (S.D.N.Y. 2015).

³⁶ *Georges v UN*, 834 F.3d 88, 90 (2016).

³⁷ *Ibid.*

³⁸ The plaintiffs-appellants had 90 days from the entry of the Second Circuit judgment on August 18, 2016, to appeal. See 28 U.S.C. para 2101(c).

³⁹ United States Government Statement of Interest, *supra* nt 32, 3-6; *Georges v UN*, 834 F.3d 88, 90 (2016).

⁴⁰ United States Government Statement of Interest, *supra* nt 32, 3.

⁴¹ S.C. Res. 1542 (Apr. 30, 2004).

⁴² Plaintiffs' Memorandum of Law in Further Opposition to the Government's Statement of Interest, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 2014), at 6, at <ijdh.org/wp-content/uploads/2014/09/Surreply-Final.pdf> (accessed on 20 June 2017) [hereinafter Plaintiffs' Sur-reply]

Article 105(1) of the UN Charter, a multilateral treaty that is the most authoritative source of international law,⁴³ states that '[t]he Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes'. This is echoed in Section 2 of the General Convention whereby, '[t]he 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'.⁴⁴ The July 2004 Status of Forces Agreement (SOFA) signed by the UN and the government of Haiti also stipulates that 'MINUSTAH, its property, funds and assets, and its members, including the Special Representative, shall enjoy the privileges and immunities specified in the present Agreement as well as those provided for in the Convention'.⁴⁵

The plaintiffs argued that the UN's immunity is conditioned on the provision of alternative modes of redress and, in their situation, on the establishment of a standing claims commission as stipulated in the SOFA, which reads as follows:

'Except as provided in paragraph 57,⁴⁶ any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement shall be settled by a standing claims commission to be established for that purpose'.⁴⁷

The plaintiffs asserted that rather than granting absolute immunity, Section 2 of the General Convention is conditioned by Section 29 according to which, '[t]he 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'.⁴⁸

Brief] ('By focusing solely on Section 2 and ignoring Section 29, the Government offers an unreasonably fragmented reading of the CPIUN.')

⁴³ Charter of the United Nations, 1945, 1 UNTS XVI Art. 103 ('In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail').

⁴⁴ Convention on the Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, 1 UNTS 16 [hereinafter General Convention].

⁴⁵ Haiti-United Nations, *Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti*, July 9, 2004, para 3, 2271 UNTS 235 [hereinafter SOFA].

⁴⁶ This paragraph stipulates that '[d]isputes between MINUSTAH and the Government concerning the interpretation or application of the present Agreement shall, unless otherwise agreed by the parties, be submitted to a tribunal of three arbitrators.' *Ibid.*

⁴⁷ *Ibid.*, para 55.

⁴⁸ General Convention, *supra* nt 44; Plaintiffs' Sur-reply Brief, *supra* nt 42, 1 ('Section 29's condition that the UN 'shall' provide modes of settlement of private law claims is mandatory and without exception under the plain text of the [General Convention], and constitutes a material term that cannot simply be ignored. It is well established that a party that breaches or fails to satisfy a condition precedent of a contract cannot then enjoy the benefits of its bargain. Here, Defendants may not selectively choose among the [General Convention]'s benefits and obligations to evade accountability for private law torts').

The plaintiffs reiterated these arguments on appeal to the Second Circuit.⁴⁹ Although the UN did not appear, the US government asserted the UN's immunity by appearing as *amicus curiae*.⁵⁰

B. Significance of Lack of a Remedy for Plaintiffs-appellants

Thus, the plaintiffs-appellants and the US government had radically different views on the significance of access to a remedy. On the one hand, for the government, whether or not the plaintiffs-appellants had access to a remedy was immaterial because the only exception to UN immunity is an 'express' waiver of immunity by the organisation itself.⁵¹ On the other hand, the plaintiffs-appellants claimed that access to a remedy was crucial to a finding of UN immunity—that is, 'compliance with Section 29 must be interpreted as a condition precedent to UN immunity'.⁵²

The plaintiffs-appellants' lawyers' views were shared by a group of European amici who suggested that not only does the UN's immunity solely flow from functional necessity,⁵³ but that the US court should draw on the practice of the European Court of Human Rights⁵⁴ and many European courts which have adopted a 'reasonable alternative means' test in such cases, 'review[ing] the balance between the right to an effective remedy and the immunity of [international organisations]'.⁵⁵ Moreover, another group of international law amici highlighted the provisions of Section 20 of the General Convention,⁵⁶ suggesting that '[t]his general duty imposed on the Secretary-General, and the more explicit duties imposed by Article VII, Section 29, together constitute an acknowledgement of the right of an injured or aggrieved person to access a process by which she can seek remedy'.⁵⁷ The subsequent

⁴⁹ Reply Brief for Appellants, No. 15-455-cv (2nd Cir. 2015), at 6-7, at <ijdh.org/wp-content/uploads/2011/11/Appellants-Reply-Brief.pdf> (accessed on 20 June 2017).

⁵⁰ Brief for the United States of America as *Amicus Curiae* in Support of Affirmance, No. 15-455 (2nd Cir. 2015), at <ijdh.org/wp-content/uploads/2011/11/Georges-v.-UN-Amicus-Brief.pdf> (accessed on 20 June 2017).

⁵¹ United States Government Statement of Interest, *supra* nt 32, 6.

⁵² Plaintiffs' Sur-reply Brief, *supra* nt 42, 6.

⁵³ Motion of European Law Scholars and Practitioners for Leave to File a Brief as *Amici Curiae* in Support of Plaintiffs-Appellants, *Georges v United Nations*, No. 14-455 (2nd Cir. 2015), at 11, at <ijdh.org/wp-content/uploads/2015/06/Dkt.-242.pdf> (accessed on 20 June 2017), 'Many courts have held that I[n]ternational O[rganisation] immunity follows from the idea of functional necessity, and, thus not all IO acts must be shielded from national court jurisdiction'.

⁵⁴ *Ibid*, at 5-7.

⁵⁵ Memorandum of Law of Amici Curiae European Law Scholars and Practitioners of Plaintiffs' Opposition to the Government's Statement of Interest, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 2014), at 3, at <ijdh.org/wp-content/uploads/2014/05/Dkt32-2-Amicus-Brief-European-Scholars.pdf> (accessed on 20 June 2017).

⁵⁶ General Convention, *supra* nt 44 ('The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity').

⁵⁷ Memorandum of Law of Amici Curiae International Law Scholars and Practitioners in Support of Plaintiffs' Opposition to the Government's Statement of Interest, *Georges v United Nations*, No. 1:13-cv-07146-JPO (S.D.N.Y. 2014), at 3, at <ijdh.org/wp-content/uploads/2014/05/Dkt31-1_Amicus-Brief-Intl-

sections of this paper consider whether diplomatic protection might provide an alternative avenue for such a remedy.

IV. Diplomatic Protection: A 'Precursor'⁵⁸ to International Human Rights Law

In 1924, Greece brought proceedings to the Permanent Court of International Justice (PCIJ), seeking reparations from Great Britain for its alleged failure to recognise the concessions granted to its national, Mr. Mavrommatis, by the Ottoman authorities.⁵⁹ In its decision, the PCIJ stated: 'It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels'.⁶⁰ Although diplomatic protection dates back to the late 18th and early 19th century,⁶¹ this significant pronouncement by the PCIJ marks the beginning of the recognition of diplomatic protection in international law.

The practice arose in a colonial context and was largely used by European States seeking to protect their citizens from alleged mistreatment in foreign States. At times, this 'protection' included armed intervention that undoubtedly served additional ends.⁶² As a result of the dubious uses of diplomatic protection, many Latin American countries, who were subjected to constant complaints concerning injury to Europeans inhabiting their territories, came to view it as a tool used by stronger countries against weaker ones, leading many Latin American theorists and practitioners, like the Argentinian scholar and diplomat Carlos Calvo, to strongly oppose it.⁶³ This vehement and reasoned objection led to various Latin American countries inserting what became known as 'Calvo Clauses' in their constitutions and other instruments.⁶⁴ Through these clauses, States rejected the imposition of preferential treatment of foreigners, asserting that they should be entitled only to the same treatment as nationals, thereby ensuring that European States related to their Latin American counterparts in the same way that they did with each other.⁶⁵ Over time,

Law-Scholars.pdf> (accessed on 20 June 2017) [hereinafter International Law Scholars Amicus Brief].
Accord Chanaka Wickremasinghe, Immunities Enjoyed by Officials of States and International Organizations, INTERNATIONAL LAW 379, 400 (Malcolm D. Evans ed., 2014) ('The Convention makes clear that the immunities of officials and experts are granted not for their personal benefit, but for the benefit of the Organization. The Secretary-General thus has the right *and the duty* to waive immunity of any official where the immunity would in his or her opinion impede the course of justice and can be waived without prejudice to the interests of the Organization (Article V, s 20)').

⁵⁸ Vermeer-Künzli, A, "Diplomatic Protection as a Source of Human Rights Law", in Shelton, D, ed, *Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 250.

⁵⁹ Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30).

⁶⁰ *Ibid*, 7.

⁶¹ Amerasinghe, CF, *Diplomatic Protection* (Oxford University Press, 2008), 8.

⁶² *Ibid*, 15 (Examples of this 'gunboat diplomacy' include: French intervention in Mexico in 1838 and 1861; intervention by Germany; Great Britain; Italy in Venezuela in 1902-03; interventions by the US in Santo Domingo in 1904 and Haiti in 1915). Another example is the (Second) Anglo-Boer War (1899-1902).

⁶³ *Ibid*, 14-15.

⁶⁴ Shan, W, "Is Calvo Dead?" 55 *American Journal of Comparative Law* (2007) 123, 124-26.

⁶⁵ Amerasinghe, *supra* nt 61, 15.

diplomatic protection came to be more commonly used even by countries in the Global South⁶⁶ and now it is recognised as forming part of customary international law.

The International Law Commission (ILC) began to codify the doctrine in the 1990s, leading to the current *Draft Articles of Diplomatic Protection*.⁶⁷ Article 1 defines diplomatic protection as

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.⁶⁸

In addition to the requirement of the commission of an ‘internationally wrongful act’, the draft articles and previous practice establish the fundamental requirements to exercising this ‘diplomatic action’ or related procedures, which includes: (1) the establishment of a legal interest; and (2) the exhaustion of local remedies by the injured national.⁶⁹

A. Establishing a State Interest

In keeping with the State-centric nature of international law, States can only establish a legal interest in the injury of an individual based on nationality, with the only exception being that they can choose to exercise this protection for a stateless person or refugee residing in the State at the time of the injury.⁷⁰ Concerned by the possibility of people changing their nationality for convenience, the International Court of Justice (ICJ) established the requirement of a ‘genuine connection’ between the person and the State.⁷¹ Prior to World War II, Friedrich Nottebohm, a German national, had briefly left Guatemala, his residence of more than 30 years, and had established a business with his brothers.⁷² After the war broke out, he wanted to return and, in order to do so, sought a neutral nationality.⁷³ Despite not having spent much time in the country, Lichtenstein approved his application for

⁶⁶ *Ibid*, *But see* Shan, *supra* nt 64, 163 (‘Calvo has been significantly changed, or substantially “disfigured”, or generally “deactivated”, but [is] not yet completely “dead”. When political and economic climates are “right”, it could be re-activated again and “resurge”, as what seems to be happening’). Shan indicates that several countries, including Bolivia, Mexico, Peru and Venezuela still deny diplomatic protection in their constitutions.

⁶⁷ *Draft Articles on Diplomatic Protection, Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No. 10, U.N. Doc. 1/61/10 (2006).

⁶⁸ *Ibid*.

⁶⁹ *Ibid*, Arts. 1, 3-9, 14. *See also* Borchard, EM, Harvard Research International Law, “The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners” 23 *American Journal of International Law* 131 (Supp. 1929); Special Rapporteur on the topic of diplomatic protection, *Preliminary Rep. on Diplomatic Protection*, Int’l Law Comm’n, paras 16-18, U.N. Doc. A/CN.4/484 (Feb. 4, 1998) (by Bennouna, M).

⁷⁰ *Draft Articles on Diplomatic Protection, supra* nt 67, Art. 8. Chapter III of the *Draft Articles* provides that this is also true of corporations whose nationality is determined based on the State of incorporation.

⁷¹ Nottebohm (Liech. v Guat.) (second phase), Judgment, 1955 I.C.J. 4, 23 (Apr. 6).

⁷² *Ibid*, 13.

⁷³ *Ibid*, 26.

naturalisation.⁷⁴ However, the State's effort to compel Guatemala to recognise this citizenship was unsuccessful because the ICJ found that the requisite connection between Nottebohm and Liechtenstein was missing.⁷⁵

Thus, the case highlighted the fact that despite diplomatic protection developing as a tool to protect individuals, the State, and not the individual, remained the subject of international law. Only a State with which Nottebohm had a 'genuine connection' could exercise this protection. Emmerich de Vattel, a Swiss jurist among the first scholars to write about this practice, commented in 1758: 'Whoever ill-treats a citizen injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him'.⁷⁶ At the heart of diplomatic protection is the fiction that the State has been injured and, as a consequence, is asserting its own rights.⁷⁷

B. Exhaustion of Local Remedies

Article 14 of the *Draft Articles on Diplomatic Protection* elaborates on the requirement that an individual exhaust local remedies before a State exercises diplomatic protection on his or her behalf.⁷⁸ According to Article 14(2) local remedies are 'legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing injury'. Although there is some

⁷⁴ *Ibid*, 16.

⁷⁵ *Ibid*, 23 ('A State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States').

⁷⁶ Amerasinghe, *supra* nt 61, 10.

⁷⁷ *E.g.*, Mavrommatis Palestine Concessions, at 12 ('By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law'). See also *Preliminary Rep. on Diplomatic Protection*, *supra* nt 67, paras 21-26; Vermeer-Künzli, A, "As If: The Legal Fiction in Diplomatic Protection" 18(1) *European Journal of International Law* (2007) 37. This is markedly different from the view held by renowned jurist, Hersch Lauterpacht, who suggested that: 'The position of the individual as a subject of international law has often been obscured by the failure to observe the distinction between the recognition, in an international instrument, of rights to the benefit of the individual and the enforceability of these rights at his instance. The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them. Thus in relation to the current view that the rights of the alien within foreign territory are the rights of his State and not his own, the correct way of stating the legal position is not that the State asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere'. INTERNATIONAL LAW 27 (1950).

⁷⁸ See also Borchard, *supra* nt 69, 149 ('The question must always be answered, therefore, whether the claimant State has been injured and ordinarily, though not necessarily always, it is a condition precedent to establishing such injury that it should be shown that the national of the claimant State has exhausted the local remedies which were made available to him by the law of the State from which he is alleged to have suffered injury').

disagreement as to whether this constitutes a procedural or substantive requirement⁷⁹ and about when exhaustion is required,⁸⁰ Article 15 is clear about the exceptions to the requirement, namely:

- (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;
- (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) the injured person is manifestly precluded from pursuing local remedies; or
- (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

This requirement of the exhaustion of local remedies is an effort to protect State sovereignty.⁸¹ As suggested in the *Interhandel* case, the defendant State must be given a chance to attempt to remedy the situation before another State invokes its responsibility for violating international law.⁸² However, as US Secretary of State Hamilton Fish is reported to have said, '[a] claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust'.⁸³

C. The Diplomatic Protection and Human Rights Nexus

Many scholars agree that diplomatic protection and international human rights law pursue similar ends. Diplomatic protection was developed largely as a means of ensuring that States adhered to international minimum standards, but it has now evolved to include a broader scope of rights guaranteed in international human rights law.⁸⁴ According to Vermeer-Künzli,

⁷⁹ See, e.g., Special Rapporteur on Diplomatic Protection, *Second Rep. on Diplomatic Protection*, Int'l Law Comm'n, paras 53-66, U.N. Doc. A/CN.4/514 (Feb. 28, 2001) (by Dugard, JR) (on the debate between the proceduralists, substantivists, and what Professor Dugard calls the 'third school').

⁸⁰ Amerasinghe, *supra* nt 61, 38-41.

⁸¹ Borchard, *supra* nt 69, 176.

⁸² *Interhandel* (Switz. v U.S.), Preliminary Objections, 1959 I.C.J. 6, 27 (Mar. 21) (The rule that local remedies must be exhausted before international proceedings may be instituted is a well established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system')

⁸³ Borchard, *supra* nt 69, 154.

⁸⁴ Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, 599 (May 24) ('Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'); Amerasinghe, *supra* nt 61, 73-74.

[it] was an instrument for the protection of human rights *avant la lettre*, because the rights that diplomatic protection protected were not always classified as *human* rights, and because individuals were not considered holders of rights. Nevertheless, diplomatic protection proved an effective means to protect individuals against abuses at the hands of States.⁸⁵

In fact, in contexts where human rights protections for foreigners are ineffective, diplomatic protection may offer the only means of protection. Professor John Dugard has suggested that '[m]ost States will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body'.⁸⁶

The potential effectiveness of this procedure coupled with the growing recognition of international human rights law raises the question of whether States in fact have a duty to protect their nationals in this way. The exercise of diplomatic protection by States has largely been left to the discretion of individual States.⁸⁷ Rather than creating an obligation, the *Draft Articles on Diplomatic Protection* recommend that States 'give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.⁸⁸ Although both the Supreme Court of Canada and the Constitutional Court of South Africa have also grappled with this question, both courts ultimately decided to leave decisions regarding diplomatic protection to the discretion of the Executive.⁸⁹ The majority in the Constitutional Court rejected the argument that diplomatic protection is a human right.⁹⁰ Nevertheless, it is worth noting that in his concurring opinion, Justice Sandile Ngcobo wrote the following:

there is in my view, a compelling argument for the proposition that States have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights. Those States that have ratified international human rights instruments and are committed to the promotion and protection of international human rights have a special duty in this regard.⁹¹

In a dissenting opinion, Justice Catherine O'Regan, joined by Justice Yvonne Mokgoro, emphasised that there was, in fact, a duty, based on the South African Constitution, for the State to provide diplomatic protection to its citizens.⁹² However, this view does not seem to be shared not only in individual States, but in the broader international community.

⁸⁵ Vermeer-Künzli, *Supra* nt 58, 252.

⁸⁶ Special Rapporteur on diplomatic protection, *First Rep. on Diplomatic Protection*, Int'l Law Comm'n, U.N. Doc. A/CN.4/506 and Add. 1 (Mar. 7, 2000 & Apr. 20, 2000) (by Dugard, JR).

⁸⁷ *Preliminary Rep. on Diplomatic Protection*, *supra* nt 67, para 19.

⁸⁸ Art. 19(a).

⁸⁹ *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para 39 (Can.); *Kaunda v President of the RSA* 2004 (1) BCLR 1009 (CC) at 1019 (S. Afr.).

⁹⁰ *Kaunda*, at 1019.

⁹¹ *Ibid*, 1053.

⁹² *Ibid*, 1071.

V. The Exercise of Diplomatic Protection for Cholera Victims

Clearly, the introduction of cholera into Haiti is a wrongful act that violates international human rights law. It constitutes a violation of several rights guaranteed in the International Bill of Human Rights and other instruments, including the rights to water, health, life and, thus far, the right to an effective remedy.⁹³ Furthermore, scientific data suggests that it is an act that can be attributed to Nepalese peacekeepers who were, arguably, under the 'effective control' of the UN. The peacekeepers' conduct also violated international humanitarian relief standards, including the core 'do no harm' principle.⁹⁴ All of these factors suggest that the UN's action⁹⁵ meet the requirements for 'an internationally wrongful act of an international organization', as described in Articles 4 and 7 of the *Draft Articles on the Responsibility of International Organizations*.⁹⁶ Yet, why is the UN not being held accountable?

While the *Draft Articles on Diplomatic Protection* lay out a clear framework for the exercise of diplomatic protection by one State against another, they are silent about its assertion by a State against an international organisation. Judge Krylor feared that this possibility would arise, inversely, after the ICJ found that the UN could make claims on behalf of its agents.⁹⁷ The judge was right, but so far the instances have been few and far between.⁹⁸ Zwanenberg suggests that while many of the requirements and modalities may be the same in both cases of diplomatic protection, some, like the requirement of the exhaustion of local remedies, cannot be easily applied when the responsibility of international organisations is being invoked.⁹⁹ Here, perhaps such exhaustion should entail the exhaustion of the organisations' own claims settlement procedures.¹⁰⁰

Despite these gaps, the cholera epidemic in Haiti seems to exemplify a grave injury to Haitian and Haitian-Americans for which States should, as the *Draft Articles* suggest, 'give due consideration to the possibility of exercising diplomatic protection'.¹⁰¹ Thus, it is not surprising that, in an article about UN responsibility for cholera in Haiti, Professor Frédéric Mégret briefly alludes to the possibility that Haiti could exercise diplomatic protection on

⁹³ United Nations, *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR 3d Sess., U.N. Doc. A/810 (1948); United Nations, *International Covenant on Economic, Social, and Cultural Rights, opened for signature* Dec. 19, 1966, 993 UNTS 3 (1978); United Nations, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171 (1978); Committee on Economic, Social and Cultural Rights, *International Covenant on Economic, Social and Cultural Rights: The Right to Water*, 29th sess., gen. cmt. 15, para 12, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

⁹⁴ See generally *Peacekeeping Without Accountability*, *supra* nt 16.

⁹⁵ The plaintiffs-appellants also emphasized the responsibility of the UN as a whole, rather than Nepal for the following reasons: (1) the UN had primary responsibility to the Haitian people; (2) MINSUTAH had responsibility to ensure that its water and sanitation system were functioning properly; (3) Nepal had no real interest in Haiti; (4) Nepal experienced cholera because it is a victim of the same structural injustices as Haiti; and (5) Nepal lacked the money to remedy the harm.

⁹⁶ United Nations, *Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. 10, U.N. Doc. A/66/10 (2011).

⁹⁷ International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 I.C.J. 174, 219 (Apr. 11) (dissenting opinion of Judge Krylor).

⁹⁸ Zwanenberg, M, *Accountability of Peace Support Operations* 252, 2005.

⁹⁹ *Ibid*, 253.

¹⁰⁰ *Ibid*, 254.

¹⁰¹ *Draft Articles on Diplomatic Protection*, *supra* nt 67, Art. 19(1).

behalf of its nationals.¹⁰² The allusion is likely brief given the low probability of such an event.

The SOFA provides various avenues for Haiti. For example, it could submit any disputes arising from the agreement or its performance to an arbitration tribunal¹⁰³ or, as stipulated in Section 30 of the General Convention, to the ICJ. However, Section 30 only provides that a party that has a disagreement regarding the interpretation of the General Convention may request an advisory opinion from the ICJ, rather than bring a contentious case.¹⁰⁴ There is currently no evidence that the government has taken either of these measures.

Alternatively, according to the SOFA, Haiti would also be responsible for appointing one commissioner separately and a second jointly with the UN Secretary-General¹⁰⁵ to preside over a standing claims commission established to hear 'any dispute or claim of a private-law character, not resulting from the operational necessity of MINUSTAH, to which MINUSTAH or any member thereof is a party and over which the courts of Haiti do not have jurisdiction because of any provision of the present Agreement'.¹⁰⁶ Although the cholera claims fit this description, there is no suggestion that the government will take such action. The country's dependence on aid which, ironically, has often bypassed the State,¹⁰⁷ precludes such a possibility. You cannot bite the hand that feeds you. Moreover, although the provision regarding the establishment of a standing claims commission is in every SOFA, it has never been invoked.¹⁰⁸ Countries hosting peacekeepers are generally too weak to enforce the provision.

Yet this leaves the cholera victims unable to seek the settlement of their claims through the 'internal procedures of the United Nations'¹⁰⁹ or the non-existent standing claims commission, but equally unable to file suit in local courts in Haiti which lack jurisdiction because of the SOFA's provisions regarding UN immunity. Even if Haitian courts somehow agreed to hear the cases, concerns about the independence of the

¹⁰² Mégret, F, *La Responsabilité des Nations Unies aux temps du cholera*, Social Science Research Network, para 19 (Apr. 1, 2013), at <ssrn.com/abstract=224290> (accessed on 20 June 2017).

¹⁰³ SOFA, *supra* nt 45, para 57.

¹⁰⁴ General Convention, *supra* nt 44, para 30 ('If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties').

¹⁰⁵ The agreement stipulates that the UN Secretary-General would appoint the third commissioner. SOFA, *supra* nt 45, para 55.

¹⁰⁶ *Ibid*, para 55.

¹⁰⁷ Ramachandran, V and Walz, J, Center for Global Development, "*Haiti: Where Has All The Money Gone?*" at <cgdev.org/content/publications/detail/1426185> (accessed on 20 June 2017), The report indicates, for example, that between 2010 and 2012, less than 1% of the \$5.63 billion in humanitarian and recovery aid disbursed in Haiti went to the Haitian government.

¹⁰⁸ Rashkow, B, *Remedies for Harm Caused by UN Peacekeepers*, AJIL Unbound, (Apr. 2, 2014, 3:55 PM), at <asil.org/blogs/remedies-harm-caused-un-peacekeepers> (accessed on 20 June 2017).

¹⁰⁹ SOFA, *supra* nt 45, para 54 ('Third-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH, except for those arising from operational necessity, which cannot be settled through the internal procedures of the United Nations, shall be settled by the United Nations in the manner provided for in paragraph 55 of the present Agreement').

judiciary¹¹⁰ suggest that attempts at legal redress would be futile. Does this not exemplify a denial of justice that should hasten diplomatic protection? Returning to Secretary Fish, there seems to be ‘no justice to exhaust’.¹¹¹

The US could also potentially exercise protection of its citizens who have been affected by the cholera epidemic, some of whom have already filed suit in the US. But, as considered above, does the US have any duty to do so? The Commentary to Article 2 of the *Draft Articles on Diplomatic Protection* suggests that ‘[a] State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation’.¹¹² US jurisprudence and the US Constitution imply such an obligation. In *Marbury v. Madison*, the Court suggested that

[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.¹¹³

Some years later, the Court emphasised that this right was not simply reserved for citizens, stating:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.¹¹⁴

This right of access to courts can be located in the Due Process Clauses (Fifth and Fourteenth Amendments), the Privileges and Immunities Clause (Article Four) and the Petition Clause (First Amendment).¹¹⁵ It is also recognised in at least 40 State constitutions.¹¹⁶ This suggests that the US has a responsibility to protect at least its citizens,

¹¹⁰ U.N. Human Rights Committee, *Observations finales concernant le rapport initial d’Haïti*, U.N. Doc. CCPR/C/HTI/CO/1 (2014), at <[tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fHTI%2fCO%2f1&Lang=en](http://internet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fHTI%2fCO%2f1&Lang=en)> (accessed on 20 June 2017).

¹¹¹ Borchard, *supra* nt 69, 154.

¹¹² *Draft Articles on Diplomatic Protection*, *supra* nt 67, 28.

¹¹³ 5 U.S. 137, 163 (1803).

¹¹⁴ *Chambers v Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

¹¹⁵ Kim, UA, Note, “Government Corruption and the Right of Access to Courts” 103 *Michigan Law Review* (2004) 554, 559-560.

¹¹⁶ Phillips, TR, Chief Justice, Supreme Court of Texas, *Speech at the Annual Justice William J. Brennan Lecture on State Courts and Social Justice*, *The Constitutional Right to a Remedy*, 78 *New York University Law Review* (1977) 1309, 1310.

but also possibly its neighbours' fundamental right of access by, at a minimum, ceasing to intervene on the UN's behalf.

VI. Overcoming UN Immunity

As a world power with significant political and economic resources at its disposal, the US could likely effectively exercise diplomatic protection in one or more of the ways suggested by 'diplomatic action or other means of peaceful settlement' in Article 1 of the *Draft Articles*.¹¹⁷ It could probably bring the UN to the negotiating table in a way that Haiti would be unable to. However, if the US opted to use judicial dispute settlement, it would still be confronted with the challenge posed by UN immunity.

In *Jurisdictional Immunities of the State*, the ICJ grappled with the issues raised by Italian courts allowing Italian citizens to bring civil claims against Germany for the German Reich's violations of international humanitarian law during World War II.¹¹⁸ Italy alleged that the war crimes and crimes against humanity committed by the German government violated *jus cogens* and that the claimants lacked any other avenue for redress. Therefore, it argued, Germany was no longer entitled to State immunity.¹¹⁹ The court rejected Italy's argument, stating:

This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.¹²⁰

The court distinguished this procedural aspect from the determination of the merits.¹²¹ Ultimately, it rejected the notion that State immunity might be conditioned on the provision of alternate remedies.¹²² The court's finding that even *jus cogens* violations could not trump State immunity does not bode well for the cholera plaintiffs.

¹¹⁷ See Amerasinghe, *supra* nt 61, 27 ("Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry, or for negotiations aimed at the settlement of disputes. 'Other means of peaceful settlement' embraces all forms of lawful dispute settlement, from negotiation, mediation, and conciliation, to arbitral and judicial dispute settlement').

¹¹⁸ *Jurisdictional Immunities of the State* (Ger. v It.; Greece), 2012 I.C.J. 99 (Feb. 3).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, para 93.

¹²¹ *Ibid.*, para 106.

¹²² *Ibid.*, para 101 ("The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in

However, in an interesting twist on October 22, 2014, the Italian Constitutional Court¹²³ rendered a decision deeming that effect cannot be given to the ICJ decision because it violates the country's fundamental constitutional principles, including the right of access to justice.¹²⁴ This means that Italian national courts can proceed to hear the merits of the dispute. Thus, ironically, although it facilitates access to the courts, the Italian Constitutional Court decision violates international law in light of the ICJ ruling.

As the plaintiffs-appellants and amici in *Georges v. United Nations* argue, the US's assertions about absolute immunity seem to counter the organisation's own principles and the values that it is promoting around the world. A 1954 ICJ advisory opinion provides an apt example. The General Assembly had requested an opinion regarding whether the General Assembly had the right to decline to effectuate a compensation award from the UN Administrative Tribunal to an employee terminated without his assent and, if so, it sought clarification on the main legal basis for this right.¹²⁵ In response, the ICJ opined that

‘[t]he Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them’.¹²⁶

It would not be too much of a stretch to argue that this obligation to ensure a remedy for staff members, which reflects the ideals expressed in the UN Charter,¹²⁷ equally applies to

the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition’). *Contra* Reinisch A and Weber UA, “In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, the Individual Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement” 1 *International Organization Law Review* (2004) 59, 72 (outlining the ‘clearly discernible trend in recent immunity decisions, both concerning foreign States and international organizations, to consider the availability of alternative fora when deciding whether to grant or deny immunity’).

¹²³ Corte Costituzionale, 22 October 2014, n. 238/2014, at <cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238> (accessed on 20 June 2017).

¹²⁴ See Barakatt, M, “Italian Court Rules Certain International Community Laws Inapplicable to Italian Legal Order” (October 22, 2014), *American Society of International Law* (Oct. 31, 2014, 4:15 PM), at <asil.org/blogs/italian-court-rules-certain-international-immunity-laws-inapplicable-italian-legal-order> (accessed on 20 June 2017) (providing a summary and an unofficial English translation).

¹²⁵ G.A. Res. 785 A (VIII) (Dec. 9, 1953).

¹²⁶ International Court of Justice, *Effect of awards of compensation made by the U. N. Administrative Tribunal*, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13).

¹²⁷ UN Charter Art. 1, para 3 (States that one of the purposes of the organization is ‘[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’).

non-staff members. In fact, the UN itself has said as much. In an *amicus* brief submitted in *Broadbent v. Organization of American States*, the organisation indicated that

[i]ntergovernmental organizations may not use their immunity from involuntary suit in national courts to escape liability or to refuse to settle disputes. They are required to and do make appropriate provisions for the impartial settlement of disputes with States, with private individuals and with the members of their own staffs.¹²⁸

Thus, the right to a remedy need not necessarily be secured within a court room. In the *Barcelona Traction* case, the ICJ suggested that 'within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit'.¹²⁹ Several European States have successfully invoked UN responsibility for injuries to their citizens without resorting to judicial action. Between 1965 and 1967, the UN responded to claims filed by the governments of Belgium, Greece, Italy, Luxembourg and Switzerland, and compensated their citizens for injuries and deaths resulting from UN peacekeeping operations in the Congo.¹³⁰ The UN paid out \$1.5 million to the Belgian government alone¹³¹ for disbursement to 581 Belgian citizens.¹³² In a 1965 letter regarding this compensation, the then Secretary-General wrote: 'It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable'.¹³³ One has to wonder if the policy has been changed, without notice.

VII. Concluding Reflections on the Limits and Promise of Diplomatic Protection

Despite its troubling origins and early usage, diplomatic protection remains relevant and continues to play an important role in the protection of human rights. The *Diallo* case, among others, suggests that no longer is it simply a tool brandished by powerful States against weaker ones in an effort to promote dubious self-interests. Rather, it is increasingly becoming focused on the rights of individuals, to the extent that various courts are considering whether States have an obligation to provide them with protection, particularly in cases of gross human rights violations.

This is indeed promising, but victims' efforts to ensure UN accountability for the cholera epidemic in Haiti suggest that the doctrine needs further development. While the

¹²⁸ Brief for United Nations as Amicus Curiae, *Broadbent v Organization of American States*, 628 F.2d (1980) (No. 78-1465) *reprinted in* [1980] 3 Y.B. Int'l L. Comm'n 228, U.N. Doc. A/CN.4/SER.A/1980.

¹²⁹ *Barcelona Traction, Light and Power Company, Limited, (Belg. v Spain) (Second Phase)*, Judgment, 1970 I.C.J. 3, 44 (Feb. 5).

¹³⁰ *Peacekeeping Without Accountability*, *supra* nt 16, 30.

¹³¹ *Letter dated 2 August 1965 from the Acting Permanent Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General*, Document S/6589, *reprinted in* [1965] 1 Y.B. Int'l L. Comm'n 40, U.N. Doc. ST/LEG/SER.C/3, U.N. Sales No. 67. V. 3.

¹³² *Letter dated 6 August 1965 from the Secretary-General addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republics*, Documents S/6597, *reprinted in* [1965] 1 Y.B. Int'l L. Comm'n 41, U.N. Doc. ST/LEG/SER.C/3, U.N. Sales No. 67. V. 3.

¹³³ *Ibid.*

Draft Articles on Diplomatic Protection recognise the legal personality of corporations,¹³⁴ they are yet to recognise the invocation of responsibility of international organisations for breaches of international law. Perhaps it is too early, given the continued predominance of the State within the international system, to suggest that the scope of diplomatic protection be expanded beyond nationality. However, at a minimum, in light of the power dynamics at play in Haiti, where the international organisation in question is also involved in state-building, reconstruction and fundraising, diplomatic protection should be re-imagined to not only recognise the different stakes involved in its exercise against international organisations, but to ensure, as Latin American countries sought to do years ago, that there is a level playing field for States desiring to protect their nationals. While political action might, as Lundahl suggests, provide an avenue for redress, the *lex lata* must evolve to enhance the conditions of possibility for justice for individuals and families, like the named plaintiff, Delama Georges, whose lives have been devastated by the cholera epidemic.

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www.grojil.org

¹³⁴ See *Draft Articles on Diplomatic Protection*, *supra* nt 67, Chapter III.

The International Convention on Elimination of All Forms of Racial Discrimination – Reviewing Special Measures Under Contemporary International Law

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Abstract

Racial discrimination is a controversial subject in society and in contemporary international law. Nonetheless, the prohibition of racial discrimination has been universally accepted and States should do everything to prevent racial discrimination. Although protection therefrom cannot be explicitly found in fundamental human rights instruments such as the Universal Declaration of Human Rights, the International Social and Cultural Rights, these documents do, however, include the broader concept of equality and non-discrimination. Nevertheless, a more specific binding legal document exists that addresses racial discrimination, namely the International Convention on the Elimination of All Forms of Racial Discrimination. This document sets out the legal framework of racial discrimination and special measures (measures that eliminate racial discrimination). Racial discrimination concerns a certain act under certain conditions that nullifies or impairs the exercise or enjoyment of human rights and fundamental freedoms. Special measures are also known as affirmative action or positive discrimination and include a wide span of instruments, but need to be legitimate, necessary, appropriate, temporary, and respect the principles of fairness and proportionality. Although special measures do not constitute racial discrimination, they are no exception to racial discrimination. Instead, they are an integral part of the concept of eliminating discrimination and achieving equality. Thus, before one can consider a measure as a special measure, there needs to be racial discrimination. If that is the case, then the State is obliged to take special measures to protect those who need protection from racial discrimination. The Convention is very clear about the legal framework of racial discrimination and special measures. This article applies this legal framework to the current situation in Yogyakarta, Indonesia – where non-native Indonesian citizens cannot own land due to local government rules. When doing this, one can conclude that there is racial discrimination towards non-native Indonesian citizens. Therefore, this article recommends to the local government in Yogyakarta and the central government in Indonesia that they revoke this Governor Instruction. Moreover, the international community can take initiative and invoke responsibility from the political organs in Indonesia. A Special Rapporteur may make the difference and determine the presence of racial discrimination in Yogyakarta.

I. Introduction

In 1975, the Sultan of Yogyakarta issued a remarkable Governor Instruction. This Instruction contained rules differentiating the rights to land ownership between citizens of Indonesian descent and citizens who are not of Indonesian descent. For example, an

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Indonesian citizen whose parents are of Javanese descent can own land in Yogyakarta. However, an Indonesian citizen whose parents are of Chinese descent would not be able to own land under this rule. The reason for the enactment of this measure was the disparity of wealth between native and non-native citizens. On the one hand, the Instruction limited the rights of non-native citizens. On the other hand, it attempted to provide the opportunity for native citizens to achieve personal wealth. While non-native citizens have been deprived of their right to own land until this day, the current Sultan, Hamengkubuwono X, insists that the policy is necessary as a safeguard to prevent property from being controlled by financially mighty non-native Indonesian citizens.¹

Some argue that the controversial rule from 1975 is outdated and in violation of the Indonesian Constitution. After all, the Indonesian Constitution no longer recognises a distinction between native and non-native citizens. However, it seems that many do not know what international law says about the effect of this Instruction. Thus, the purpose of this article is to deliver an analysis of the legal framework of racial discrimination and special measures under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)² – a treaty to which Indonesia has been a State Party since 1999.³

First, this article will examine the concept of equality and non-discrimination. Before the ICERD was adopted, international law hardly employed the term ‘racial discrimination’. On the contrary, most documents refer to equality and non-discrimination. The birth of human rights brought this idea to life and due to its importance, eventually resulted in the adoption of a treaty in order to eliminate racial discrimination. The second section will concentrate on the definition and the nature of racial discrimination. There exists an obligation on States to protect their individuals from racial discrimination, the importance of which can be illustrated by the fact that it has been recognised as a peremptory norm of international law. The ICERD seems very clear about the definition of racial discrimination. However, this did not prevent the Committee on the Elimination of Racial Discrimination, the ICERD’s treaty-body, from providing a general recommendation on this topic. Subsequently, the next section will address the legal framework of special measures under the ICERD. Special measures do not constitute racial discrimination. However, they are considered an integral part of the concept of eliminating racial discrimination and achieving equality.

Finally, by looking at the situation in Yogyakarta the last section will illustrate how the legal framework of racial discrimination and special measures is to be applied. Here, the article will examine whether the Governor Instruction constitutes racial discrimination or a special measure. Furthermore, this article will provide recommendations with regards to what the local government in Yogyakarta, the central government in Jakarta and the international community need to do. In the end, one should be able to understand the difficulties of truly eliminating all forms of racial discrimination and whether Indonesia can be held responsible for violating the ICERD.

¹ Editorial, ‘In Yogya, some are more equal than others’ *Jakarta Post* (Jakarta 31 January 2017) at <<https://www.pressreader.com/indonesia/the-jakarta-post/20170131/281505045943316>> (accessed 23 August 2017).

² International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

³ Ratification status by country or by treaty, at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Treaty.aspx?CountryID=80&Lang=en> (accessed 23 August 2017).

II. Equality and Non-discrimination

Racial discrimination, as a concept with its own legal framework, was not introduced until the early 1960s. The first fundamental legal instrument that addressed human rights, the Universal Declaration of Human Rights (UDHR)⁴, did not expressly address racial discrimination. However, the UDHR does include footholds with regards to the concept of equality and non-discrimination. First, the preamble talks about “the equal and inalienable rights of all members of the human family” and “the equal rights of men and women”.⁵ Secondly, Article 1 states that “[a]ll human beings are born free and equal in dignity and rights”⁶ and Article 2 declares that “[e]veryone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind.”⁷ Thirdly, Article 7 reiterates the principle of non-discrimination by instructing that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”⁸

The UDHR— although a non-binding instrument – provided the inspiration for many subsequent human rights treaties that the international community acknowledges as part of modern-day human rights law. Hence, it has been fundamental for the so-called Bill of Human Rights, which consist of the UDHR together with the International Covenant on Civil and Political Rights (ICCPR)⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰ Both covenants were adopted by the United Nations General Assembly (UNGA) in 1966 and entered into force ten years later.

The ICESCR particularly addresses social, economic and cultural rights. The provision of the ICESCR that primarily lays emphasis on the legal concept of equality and non-discrimination is Article 2 (2) which provides that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.¹¹ According to the *Committee on Economic, Social and Cultural Rights* (CESCR)¹² Article 2 (2) prohibits direct and indirect discrimination. Furthermore, the Committee expressed the relevance of the requirement of States to ensure formal and substantive equality. This means that States are permitted to take positive action and may be required to do so in order to prevent discrimination.¹³

An equally worded provision has been adopted in the ICCPR, namely Article 2.¹⁴ Yet, an even more important provision on non-discrimination can be found in the

⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

⁵ *Ibid*, Preamble.

⁶ *Ibid*, Art 1.

⁷ *Ibid*, Art 2.

⁸ *Ibid*, Art 7.

⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹⁰ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹¹ *Ibid*, Art 2(2).

¹² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117; The CESCR has been established on the basis of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, with 22 States as State Parties to this Optional Protocol.

¹³ UN Committee on Economic and Cultural Rights (CESCR) ‘General Comment No 20: Non-discrimination in economic, social and cultural rights (Article 2(2) of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) UN Doc E/C.12/GC/20 paras 9-10.

¹⁴ ICCPR, Art 2.

ICCPR, namely Article 26. Contrary to Article 2, Article 26 needs to be considered as a more comprehensive provision that deals with non-discrimination:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁵

Whereas Article 2 is a 'dependent' provision, Article 26 is 'free standing', i.e. it prohibits discrimination concerning all rights and benefits recognised by law – and not only those provided for in the ICCPR.¹⁶ This was explained in *Broeks v the Netherlands*.¹⁷ Here, the Human Rights Committee (HRC) declared that the ICCPR requires that any right or benefit must be provided without discrimination when legislation provides so - even if there is no international obligation on the State to provide such rights or benefits in the first place.¹⁸

Nevertheless, States may derogate from their obligations set out in the ICCPR. According to its Article 4(1), measures derogating from the obligations set out in the covenant may be taken in times of public emergency which threatens the life of the nation.¹⁹ In addition, paragraph 2 sets out explicit non-derogable provisions in the ICCPR.²⁰ Interestingly, Article 4, paragraph 2 does not name Article 26 as an explicit non-derogable provision. However, the perception that one may simply derogate from Article 26 is incorrect. After all, there are certain elements of non-discrimination that cannot be derogated from under any circumstances. It is for that reason that paragraph 1 provides conditions²¹ – one of those being that the actions do not encompass discrimination just on the ground of race, colour, sex, language, religion or social origin. This shows the essence of the prohibition of non-discrimination and, hence, such an explicit notification with regards to the prohibition to derogate from article 26 is unnecessary.²²

¹⁵ ICCPR, Art 26.

¹⁶ Hughes, P and Murphy, R, *Non-Discrimination in International Law. A handbook for practitioners* (Interights 2011) 27; To the contrary, Article 2 guarantees non-discrimination only with respect to the rights guaranteed by the ICCPR.

¹⁷ *S. W. M. Broeks v. The Netherlands*, Communication No 172/1984, UN Doc CCPR/C/OP/2 at 196 (1990).

¹⁸ *Ibid*; The HRC declared that "article 26 requires that legislation should prohibit discrimination". However, "it does not of itself contain any obligation with respect to the matter that may be provided for by the legislation". To the contrary, it stated that "when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant". This view was also used in the case *Danning v the Netherlands*; *L.G. Danning v. the Netherlands*, Communication No 180/1984, UN Doc CCPR/C/OP 2 at 2015 (1990).

¹⁹ ICCPR, Art 4(1).

²⁰ ICCPR, Art 4(2); Paragraph 2 acknowledges that "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision."

²¹ Measures derogating from a state's obligation in the covenant may only occur when: (1) "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed", (2) "to the extent strictly required by the exigencies of the situation", (3) "provided that such measures are not inconsistent with their other obligations under international law" and (4) "do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

²² UN Human Rights Committee (HRC) 'CCPR General Comment No 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add/11 para 8.

Evidently, the concept of equality has been one of the most important human rights since its introduction after World War II. Whereas the idea of equality and non-discrimination has been set out in the UDHR, ICESCR and ICCPR, the UNGA adopted a resolution that specifically addressed the prohibition of racial discrimination, namely the Declaration on the Elimination of All Forms of Racial Discrimination (UNDERD).²³ This was introduced to condemn all varieties of racial, religious and national hatred as a violation of the United Nations Charter²⁴ and the UDHR. However, as this was merely a ‘declaration’ adopted by the UNGA, the document is not formally binding. Nevertheless, it did not take too long until the UN adopted a formally binding treaty.

III. The Definition and Nature of Racial Discrimination

The ICERD is the principal UN treaty that aims for equality²⁵ and the elimination of racial discrimination, with the *Committee on Elimination of Racial Discrimination* (CERD)²⁶ as its treaty body. According to the ICERD the term “racial discrimination” means:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁷

Based on its first article, four acts can be considered as discriminatory in the light of the ICERD, namely a ‘distinction’, ‘exclusion’, ‘restriction’ or ‘preference’.²⁸ However, two conditions need to be met to declare such an act as discriminatory. First, the act should be based on race, colour, descent, national origin or ethnic origin.²⁹ The drafters’ intention was to cover all kinds of acts of discrimination among persons in its first paragraph, but only when they were based on motivations of a racial nature in the broader sense. The words ‘colour’, ‘descent’ and ‘ethnic origin’ did not bring major difficulties with them. However, a genuine problem arose with regards to ‘national origin’.³⁰ On the one hand, some argued to include the term ‘national origin’ because it meant something different from ‘ethnic origin’. On the other hand, it was argued that a

²³ United Nations Declaration on the Elimination of All Forms of Racial Discrimination (adopted 20 November 1963 UNGA Res 1904 (XVIII) (UNDERD)).

²⁴ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

²⁵ UN Committee on the Elimination of Racial Discrimination (CERD) ‘General Recommendation No 32 The Meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination’ (24 September 2009) UN Doc CERD/C/GC/32 para 6; The principle of equality governed by the ICERD combines both formal equality before the law and *de facto* equality in the enjoyment and exercise of human rights.

²⁶ ICERD, Art 8; P Thornberry, ‘Confronting Racial Discrimination: A CERD Perspective’ (2005) 5 (2) *Human Rights Review* 239, 242-247; The CERD supervises the implementation of the ICERD. In that light, it gives general recommendations and gives specific recommendations based on annual reports. Moreover, the CERD can receive individual complaints, but this can only happen if the State Party has recognized the competence of the Committee to do so. Nonetheless, sending individual complaints to the CERD is not the only way. An example of another mechanism is the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance.

²⁷ ICERD, Art 1(1).

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Lerner, N, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination. Reprint Revised by Natan Lerner* (Brill Leiden 2015) 33.

State might be made up of different nationalities but that all citizens acquired the same nationality.³¹ Although this discussion showed confusion between ‘national origin’ and ‘nationality’, an agreement was reached by adding paragraphs 2 and 3.³² The latter determines that distinctions, exclusions, restrictions or preferences between citizens and non-citizens could not be considered as discriminatory acts, but that the ICERD does not interfere in the domestic legislation that distinguishes citizens from non-citizens. Neither does it mean that the ICERD modifies ‘citizenship’ and ‘naturalization’ as substantive and procedural norms. Therefore, the ICERD only upholds the principle that any nationality should not be discriminated against.³³

The second condition for racial discrimination is that the act should have ‘the purpose or the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any field of public life’.³⁴ The *purpose* concerns the subjective consideration that will define the discriminatory nature of the act, whereas the *effect* addresses the objective consequences. This means that it is not necessary that both the ‘*purpose*’ and ‘*effect*’ are present. One is enough to define the act as discriminatory.³⁵ This is also confirmed by Article 2(1)(c), which was intended to prohibit any law or practice, which has the effect of creating, prolonged racial discrimination. In addition, particular actions may have varied purposes. Thus, a violation of the ICERD can be identified without any difficulty when the subjective consideration will define the discriminatory nature of the act. However, in light of finding an actual purpose, objective consequences can be useful. The intention of the drafters was to prohibit only racially motivated discrimination, so the word ‘effect’ may bring actions within the scope of the Convention despite the fact that a discriminatory purpose could not be established. An example is when the discriminatory purpose is hard to identify in statutes, policies or programs, but the effect of it reveals a discriminatory purpose.³⁶

However, the effect or consequence of actions undertaken for non-discriminatory reasons requires more information about the context and circumstances. Furthermore, in seeking to determine whether an action has an effect contrary to the ICERD, it is important that such action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin. This understanding was addressed by the CERD in its *General Recommendation No. 14*.³⁷ Here, the CERD clarified the definition of Article 1(1). In addition to the understanding that either the ‘effect’ or ‘purpose’ is necessary, it explained that the words ‘based on’ do not bear any different meaning from ‘on the grounds of’ in preambular paragraph 7. Furthermore, the Committee stated that a differentiation of treatment does not constitute discrimination if the criteria for such differentiation are legitimate or fall within the scope of Article 1(4) – which addresses affirmative actions. Hence, a ‘preference’ constitutes no discrimination when it is an affirmative action.³⁸

The codification of racial discrimination in the ICERD illustrates the importance of its legal framework. Additionally, its significance is also reflected by its nature of being

³¹ *Ibid*, 34.

³² *Ibid*, 35.

³³ *Ibid*; Here the term ‘nationality’ is used as an equivalent to ‘national origin’ as in Article 1(1) ICERD.

³⁴ ICERD, Art. 1(1).

³⁵ Lerner, *supra* nt 30, 35.

³⁶ Meron, T, ‘The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1985) 79 (2) *American Society of International Law* 283, 288.

³⁷ UN Committee on the Elimination of Racial Discrimination (CERD) ‘General Recommendation XIV on Article 1, paragraph 1, of the Convention’ (12 May 2003) UN Doc HRI/GEN/1/Rev/6.

³⁸ Lerner, *supra* nt 33.

a *jus cogens* norm. It was only one decade after the adoption of the ICERD that the International Court (ICJ), first declared that racial discrimination is an obligation *erga omnes*.³⁹ According to the Court, *erga omnes* norms are norms that concern an obligation owed to the international community as a whole.⁴⁰ In other words, obligations *erga omnes* are of a nature whereby all States have a legal interest in their performance. More than thirty years later, the International Law Commission (ILC) went one step further, and declared that the prohibition of racial discrimination is a *jus cogens* norm.⁴¹ Those are norms that are of such importance that they need to be considered as higher law from which no exception can be made.

Evidently there exists an obligation on States to protect individuals from racial discrimination. Its essence can be illustrated, first, by the adoption of the ICERD and, secondly, by its nature of being *jus cogens* and *erga omnes*. At first sight, the definition of racial discrimination under the ICERD seems deceptively straightforward. There needs to be a certain act by any actor that only under two conditions can constitute racial discrimination. However, according to its treaty body the scope of racial discrimination extends further to affirmative actions. It was for that reason that the CERD explained the scope and the definition of affirmative actions in its *General Recommendation No. 32*.⁴²

IV. Special Measures under the ICERD

Although affirmative actions have a long tradition on both the national and international level, there is no universally accepted terminology. Usually, a two-word term is employed that includes either the adjective ‘positive’ or ‘affirmative’ and the noun ‘action’ or ‘discrimination’. In the US, the widely accepted term is *affirmative action*, whereas in Europe most authorities use the language of “discrimination”. In France the most common term is *discrimination positive*, while in the UK it is *positive discrimination* and in Germany *positive Diskriminierung* or *zulässige Diskriminierung*.⁴³ According to Bodduyt, affirmative action is both an international and a national legal concept that concerns a clear package of temporary measures. These measures have a specific object, namely to correct the position of members of a target group in one or more aspects in their social life. Respectively, this has the aim to obtain effective equality.⁴⁴ The ICERD mentions neither *affirmative action* nor *positive discrimination*. Instead it refers to *special measures* in Article 1(4) and Article 2(2):

³⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962) (Judgement)* [1970] ICJ Rep 3 para 34.

⁴⁰ *Ibid*, para 33.

⁴¹ ILC, ‘Draft Articles on the Responsibility of States for Wrongful Acts, with commentaries’ (2001) 2(2) *Yearbook of the International Law Commission* 31, 85 para 5; In its commentary regarding Article 26, the ILC made a list concerning *jus cogens* norms under contemporary international law. According to the Commission, “the peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”

⁴² General Recommendation No 32, *supra* nt 25.

⁴³ Gerapetritis, G, *Affirmative Action Policies and Judicial Review Worldwide* (Springer 2016) 2.

⁴⁴ UNCHR (Sub-Commission) ‘Comprehensive Examination of Thematic Issues Relating To Racial Discrimination. The Concept of Practice of Affirmative Action. Preliminary Report Submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5’ (19 June 2000) UN Doc E/CN.4/Sub.2/2000/11; C De la Vega, ‘The Special Measures Mandate of The International Convention on the Elimination of All Forms of Racial Discrimination: Lessons From the United States and South Africa’ (2010) 16 (3) 627, 640-641.

Article 1 (4)

‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.’

Article 2 (2)

‘States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.’

While Article 1(4) clarifies the meaning of discrimination when applied to special measures, Article 2(2) actually obliges State Parties to take special measures when the circumstances so warrant, for example, in the case of persistent disparities.⁴⁵ One may think that the words ‘when the circumstances so warrant’ suggest that discretion is left to the State in deciding when remedial steps must be taken.⁴⁶ However, the CERD holds a different view: ‘[t]he mandatory nature of the obligation is not weakened by the addition of the phrase “when the circumstances so warrant”, a phrase that should be read as providing context for the application of the measures.’⁴⁷ In addition, the wording of Article 2 (2) may slightly differ from Article 1(4), but these differences do not affect their important unity of concept and purposes.⁴⁸ Consequently, the requirements and limitations are in essence the same.⁴⁹

The CERD takes the view that special measures are ‘integral to the meaning and essential to the Convention’s project of eliminating racial discrimination and advancing human dignity and effective equality’.⁵⁰ Hence, a special measure is not an exception to racial discrimination. On the contrary, it is part of the concept of equality and non-discrimination and it does not constitute discrimination under certain requirements. First, the measure needs to be legitimate. According to the CERD, a special measure is a measure that includes the full span of legislative, executive, administrative, budgetary and regulatory instruments and State Parties should include provisions on special measures in their legal systems.⁵¹ Secondly, the measure needs have the object of eliminating racial discrimination and achieving equality. According to the CERD, the concepts of equality and non-discrimination in the Convention extend to special

⁴⁵ UN Committee on the Elimination of Racial Discrimination (CERD), ‘Report of the Committee on the Elimination of Racial Discrimination (2001) UN Doc A/56/18 para 399.

⁴⁶ Meron (n36) 306.

⁴⁷ General Recommendation No 32, *supra* nt 25, para 30.

⁴⁸ *Ibid*, para 29.

⁴⁹ *Ibid*, para 35.

⁵⁰ *Ibid*, para 20.

⁵¹ *Ibid*, para 13.

measures. In other words, the objective of special measures is to establish equality, i.e. to secure the full and equal enjoyment of human rights and fundamental freedoms for disadvantaged groups.⁵² Thirdly, the measure needs to have a subject or target. According to the CERD, any group or person covered by Article 1 of the ICERD shall be considered as a beneficiary, hence, making the measures in principle available to them. This is clearly evidenced by the *travaux préparatoires* of the ICERD, the practice of State Parties, and relevant concluding observations of the CERD.⁵³ In addition, the span of potential beneficiaries of special measures should be understood in light of the general object of the ICERD, namely achieving equality and eliminating all forms of racial discrimination.⁵⁴ Fourthly, the measure needs to have a specific function – which is preventive and corrective.⁵⁵ After all, in light of the ICERD the beneficiaries need ‘protection’ from violations of human rights. Here, the term ‘human rights’ is not limited to a closed list of fundamental freedoms. In principle, special measures can affect the denial of all types of human rights, including enjoyment of any of the rights listed in Article 5 of the ICERD.⁵⁶ Moreover, the violation of human rights can originate from any source. This also includes discriminatory activities of private persons.

Finally, the measure needs to have the ‘sole purpose of securing adequate advancement’.⁵⁷ This means that under the ICERD, the acceptable motivations for special measures are limited to securing adequate advancement.⁵⁸ To determine what constitutes adequate advancement, it is extremely important to prioritise the wishes of the beneficiaries over what the person who takes the measure interprets as advancement. After all, having unwanted material benefits imposed upon them does not advance the beneficiaries.⁵⁹ Besides that, the wishes of the beneficiaries need to be measured in a realistic review of the current situation of the individuals and communities concerned. Thus, concluding that the measure is necessary needs to be based on accurate data.⁶⁰

Consequently, the disadvantaged position of one group compared to other groups in society, implies the need for certain goal-directed programmes that protect the beneficiaries from racial discrimination and have the objective of improving and remedying the disparities.⁶¹ These disparities include, but are not restricted to, consistent or systematic disparities and *de facto* inequalities resulting from history. So, it is not necessary to prove historic discrimination to employ special measures when these disparities continuously keep denying vulnerable groups the advantage of developing their human personality. Instead, emphasis needs to be placed on the correction of *present* disparities and the prevention of *future* inequality. A corresponding understanding would be more in conformity with the ICERD. At the end of the day, the focus of the Convention is the upholding of *current* responsibilities of State Parties.⁶²

⁵² *Ibid*, paras 10-11.

⁵³ *Ibid*, para 24.

⁵⁴ *Ibid*, para 25.

⁵⁵ *Ibid*, para 23.

⁵⁶ *Ibid*, para 33.

⁵⁷ ICERD, Art 1(4).

⁵⁸ In other words, the measure is only appropriate when it secures adequate advancement.

⁵⁹ *Gerhardy v Brown* [1985], 159 CLR 70, 135; P Thornberry, *The International Convention On The Elimination Of All Forms Of Racial Discrimination. A Commentary* (Oxford University Press 2016) 226; Thornberry uses *Gerhardy v Brown* as an example of the understanding of ‘advancement’.

⁶⁰ General Recommendation No 32, *supra* nt 25, para 17.

⁶¹ *Ibid*, para 22; the ICERD uses the words “adequate advancement”. This implies these goal-directed programmes.

⁶² *Ibid*; Thornberry, *supra* nt 59, 225.

Yet, even if all the requirements for a legitimate special measure have been fulfilled, one cannot conclude that special measures have a never-ending scope. To the contrary, they are subject to limitations. First, the measure ‘should not lead to the maintenance of separate rights for different racial groups’. This calls to mind the practice of Apartheid as mentioned in Article 3 ICERD. Secondly, the special measure ‘shall not be continued after the objectives for which they have been taken have been achieved’.⁶³ According to the CERD, this limitation is primarily functional and goal-related. The application of measures should cease when the objectives for which they were created have been sustainably achieved. Therefore, special measures need to be cautiously tailored to satisfy the exact needs of the potential beneficiaries.⁶⁴ However, a State should thoughtfully determine – especially when the special measure has been established for a long time – whether negative human rights consequences may arise for the beneficiaries as a result of its rapid withdrawal.⁶⁵ The rationale behind this is the significance of special measures. After all, States are obliged to use special measures when racial discrimination occurs.⁶⁶

Special measures need to be understood as part of the concept of eliminating discrimination and, hence, achieving equality. Thus, even though, the ICERD mentions special measures in a slightly different way in two articles, this does not disrupt their complementary nature. The first provision basically declares that special measures do not constitute racial discrimination, while the second provision sets out the obligation for States to apply special measures when there is racial discrimination. The CERD seems to be very clear in its understanding of special measures being part of the elimination of racial discrimination and achieving equality. However, interpretations may diverge from reality. Consequently, the interesting question arises as to whether the present application of the Governor Instruction in Yogyakarta can be regarded as a special measure.

V. A Critical Analysis of the Case in Yogyakarta: Special Measure or Racial Discrimination?

When appropriate, special measures are persuasive tools to eliminate racial discrimination and achieve equality. Thus, in order to determine whether the Governor Instruction concerns a special measure, there needs to be racial discrimination first. One may argue that emphasis should be put on the circumstances in 1975 – the year that the Instruction was issued. So, in that case the question would be whether there was racial discrimination towards native citizens in 1975. However, this is an incorrect interpretation. To the contrary, concentrating on disparities in society in 2017 would be the most appropriate approach. After all, the CERD is very clear: emphasis should be put on *present-day* and *future disparities*. In other words, it is not necessary to prove historic discrimination to use special measures. Consequently, the question whether there is racial discrimination in 2017 needs to be answered.

When applying the legal framework of racial discrimination to the situation in 2017 one can observe that the Instruction prefers native Indonesian citizens to non-native citizens when it comes to land ownership. Thus, there is evidently a *distinction*, as the Instruction distinguishes groups of people based on descent that has the effect of

⁶³ ICERD, Art 1(4).

⁶⁴ General Recommendation No 32, *supra* nt 25, para 27; UN Committee on Economic, Social and Cultural Rights (CESCR) ‘General Comment No 20 Non-discrimination in economic, social and cultural rights (Article 2 (2) of the International Covenant on Economic Social and Cultural Rights) para 9.

⁶⁵ General Recommendation No 32, *supra* nt 25, para 35.

⁶⁶ ICERD, Art 2(2).

nullifying the exercise and enjoyment of human rights and fundamental freedoms, namely the right to property.⁶⁷ Secondly, the Instruction clearly *excludes* non-natives based on their descent that consequently leads to the situation whereby non-natives cannot own property. However, the Instruction does concern a *preference*. Nevertheless, this regards a preference towards natives based on their descent that has not the purpose or effect of nullifying their exercise and enjoyment of owning land. Instead, it has improved their position and worsened the position for non-natives with regards to having land rights. All in all, the Instruction obviously illustrates racial discrimination towards non-native citizens.

The argument that the Governor Instruction concerns a special measure has no sufficient legal basis under the ICERD. Special measures have the objective of eliminating racial discrimination and achieving equality. These measures are necessary and the acceptable motivations are limited to only goal-directed programmes that protect the beneficiaries from racial discrimination. Their function is preventive and corrective, and racial discrimination in the present day needs to be proven to employ special measures. Currently, this is not the case for native citizens in Yogyakarta. Evidently, they are not suffering discrimination. Yet, one may argue that the Instruction had to be considered as a special measure but that it has lost its status of being 'special'. However, this line of argument is irrelevant as the only question that matters is whether the measure constitutes a special measure at the present time. This would be an interpretation more in line with the ICERD.

As the local government in Yogyakarta discriminates against non-native citizens, the State has the obligation to nullify laws that have the effect of racial discrimination⁶⁸ and to take special measures.⁶⁹ Therefore, this article puts forward two recommendations. First, the local government of Yogyakarta should revoke the Instruction as it clearly discriminates against non-native citizens. The role of the central government of Indonesia is crucial here. Yogyakarta is a 'special region' in Indonesia and, hence, it possesses an enormous amount of autonomy where culture and tradition are highlighted. For that reason, the region of Yogyakarta is considered as a monarchy within the unitary State of Indonesia with the Sultan as the Governor. So, the central government should negotiate with the local government of Yogyakarta and recommend that the Sultan revoke the Instruction.

Secondly, the international community needs to step up. Combatting racial discrimination from only within the domestic legal system is inadequate. The fight against racial discrimination requires a multi-level approach. Thus, pressure from an external dimension in the form of lobbying on the international level and letting other States invoke the responsibility of Indonesia through the UN human rights system is vital. Within the UN System, the United Nations Human Rights Council (UNHRC) is the subsidiary body of the UNGA that is responsible for promoting and protecting human rights.⁷⁰ It is this human rights body that has given a mandate to the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to focus on a number of issues that relate to racial discrimination.⁷¹

⁶⁷ ICERD, Article 5(d)(v).

⁶⁸ ICERD, Art 2(1).

⁶⁹ ICERD, Art 2(2); The ICERD clearly distinguishes two types of obligations. The first paragraph deals with obligations of States to adopt measures to eliminate racial discrimination, whereas the second paragraph deals with the problem of special measures for 'under-developed or under-privileged groups'. For a more extensive analysis see Lerner, *supra* nt 30, 40-44.

⁷⁰ MN Shaw, *International Law* (Cambridge University Press 2014) 221-222 and 881.

⁷¹ UNHRC Res 7/34 (28 March 2008) UN Doc A/HRC/RES/7/34.

In accordance with his mandate he undertakes *inter alia* fact-finding country visits⁷² and can declare the presence of racial discrimination where present. It is for that reason that the international community should urge the Special Rapporteur to review the situation in Yogyakarta. The results of his findings can be used as an instrument to put, subsequently, more pressure on the central government in Jakarta and the local government in Yogyakarta to revoke this Governor Instruction.

VI. Conclusion

The concept of equality and non-discrimination constitutes a fundamental principle in international law. In the aftermath of World War II, this principle has developed by means of the adoption of the UDHR. Although the UDHR was not binding and only set out the idea of equality, the stepping stones for the concept of equality and non-discrimination were the introductions of the ICESCR, ICCPR and, most importantly, the treaty that aims for equality and the elimination of discrimination: the ICERD.

In conclusion, Indonesia can be held responsible for violating a norm of international law that constitutes a rule of *jus cogens* and an *erga omnes* obligation and has been codified in the ICERD. The Governor Instruction in Yogyakarta clearly discriminates against non-native Indonesian citizens with regards to the full and equal exercise and enjoyment of the right to property. Therefore, the local government of Yogyakarta should revoke the Instruction. However, combatting racial discrimination should not only happen on the domestic level. The international community adopted the ICERD for a reason. For that same reason, the international community as a whole should take initiative. Human rights organizations should lobby on the case of Yogyakarta and States should invoke responsibility in political organs. Hence, pressure can be put on Indonesia to agree to invite the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance to review the situation. The road towards elimination of discrimination seems long, but a report by the Special Rapporteur may constitute light at the end of the tunnel, as it would ensure increasing pressure on the local and central governments to revoke the Instruction.

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⁷² *Ibid*, para 6; Though, important to note is that the Special Rapporteur can only come to Yogyakarta if Indonesia agrees to invite him.

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