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PRESIDENT'S NOTE

Dear reader,

This second issue in Volume 5 of the *Groningen Journal of International Law* provides another exciting new step in the development of the Journal. Some may have already caught a few glimpses here and there, but it is still an honour to properly announce our co-operation with University of Groningen Press (UGP)! Without getting too technical, UGP has provided us with an Open Journal System and taken on the backend work needed to export our publications to academic databases. Concretely this means that starting from this issue all articles will be published not on our own website, but on <https://ugp.rug.nl/grojil> instead. References to previous issues and articles on our website will gradually be redirected to the relevant external webpage on our UGP site. It goes without saying that all articles will still be made available on SSRN and other outlets. This is an incredible opportunity for the Journal to increase the discoverability of the work that the authors have entrusted us with and by extension increase the Journal's exposure.

As another first for the Journal, this issue does not focus on a specific topic or central theme, but is rather a compilation of submissions on various topics of international law. It is a culmination of sorts of our efforts to include rolling and unsolicited submissions as introduced in the previous issue of this volume. This would of course not have been possible without earlier efforts to develop the Journal into a consistent and dependable outlet for academic legal writing.

Our Publishing Director and Managing Editor have also reintroduced the concept of 'social editing' for this issue. In short, this means that in the weekend of 18 and 19 November our Editing Committee gathered in a room at the University of Groningen (with some attending digitally) to edit their assigned articles and rely on the knowledge of their collective hive mind. This was a great experience for all involved and will hopefully contribute to a stronger sense of community and a more engaging experience overall for editors at the Journal.

Other branches of the Journal have also increased their efforts during this period. The editorial team in charge of 'International Law Under Construction', the Journal's international law blog, has attracted regular new content on topical issues. While still relatively new, much of their efforts are now starting to pay off and the project remains a promising area for future growth for the Journal.

The PR Committee organised an admission-free screening of 'Syria's Disappeared - The Case Against Assad' last November which was attended by guest speakers dr. Antenor Hallo de Wolf, Benjamin Dürr, and, one of the subjects of the documentary, Mazen Alhummada. The Q&A session afterwards was as informative as it was inspiring, and I would once again like to thank our guest speakers and attendees for their participation. I am proud of the work the Committee has done under the guidance of our Promotional Director to organise this event and I look forward to seeing what happens next!

Returning to the issue at hand, the first article was written by Aristi Volou and examines the extent of protection of socio-economic rights by the civil and political legal orders of the European Court of Human Rights (ECtHR) and the European Convention on Human Rights (ECHR); and the UN Human Rights Committee (HRC) and the International Covenant on Civil and Political Rights (ICCPR). The author focuses in particular on various techniques grounded in protection through the right to life.

In the following article, Douglas de Castro exposes imperialistic narratives in international environmental law, and thus a disconnect between developed and developing countries, by building a theoretical framework based on feminist theory tested by analysis of text, subtext, and context of environmental treaties.

Amrita Chakravorty analyses present issues surrounding nuclear disarmament efforts and looks to the future of nuclear disarmament considering the current chasm between nuclear weapon states and non-nuclear weapon states in their response to these issues in the third article.

In the fourth article, Ivan Mark Ladores examines the potency of analogous application of the legal framework developed in *Leghari v Federation of Pakistan* to hold the Philippine government accountable in climate change litigation for failing to protect the right to life.

This is followed by a submission from Natalia M. Luterstein on the flexibility of the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT). The rules appear to accommodate the different approaches developed in the determination of individual responsibility under international criminal law and that adopted for the determination of state responsibility under the Genocide Convention.

Sean Shun Ming Yau argues in the sixth article that the classification of an intra-State situation as 'terrorism' by said State bears little legal implication for the judicial assessment of the nature of the conflict and the applicability question of international humanitarian law.

The next submission from Jean Pierre Mujyambere analyses the obstacles victims of human rights violations committed by multinational corporations face in their access to effective remedies in African Union Member States by studying three relevant cases and pointing out the difficulties in providing 'African solutions to Africa's problems' in this context.

Empire Hechime Nyekwere sets out to review the Global Environmental Facility (GEF) in the next article and in particular its role within existing structures of international environmental financing, and in turn provides some recommendations to reposition the GEF as a more central figure in that field.

In the penultimate article, Ravindra Pratap comments on the evolution of jurisprudence of the International Court of Justice (ICJ) concerning provisional measures in the *Jadhav* Case and the perceived shift in India's attitude towards international adjudication in the case.

The issue concludes with a submission from Tineke Strik on the European Union's (EU) Global Approach to Migration and Mobility (GAMM) and its potential impact on policies in third countries and on the human rights of migrants. The article touches on the viability of the EU-Turkey deal to serve as a blueprint for future readmission agreements.

In closing, I want to thank everyone at the Journal for their involvement during the past year and the Departments of International Law, European and Economic Law, and Criminal Law and Criminology at the University of Groningen for their financial support.

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.

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Open Submissions

The Protection of Socio-Economic Rights through the Canon of Civil and Political Rights: A Comparative Perspective

Aristi Volou*

Keywords
SOCIO-ECONOMIC RIGHTS; INDIRECT PROTECTION; ECHR; ICCPR; RIGHT TO LIFE

Abstract

Socio-economic rights have been largely neglected in international human rights law. Misconceptions about the nature of these rights have resulted in their marginalisation and their relegation to second-class rights. Effective enforcement mechanisms in respect of socio-economic rights are still lacking in international human rights law. In the context of the ICESCR, an individual complaint mechanism for socio-economic rights was only introduced in 2009. In contrast, civil and political rights have long been recognised in international human rights law and have always been subjected to effective enforcement mechanisms, in particular, individual complaint mechanisms. The distinction between the two sets of rights - civil and political rights on the one hand, and socio-economic rights on the other hand - has begun to fade. The international human rights community has now recognised the interdependence, indivisibility and interrelatedness of all human rights. Supervisory organs tasked with the interpretation and enforcement of civil and political rights treaties, most notably the ECtHR and the HRC, have played a crucial role in this process. They have recognised in their jurisprudence the interrelatedness of both sets of rights and have allowed socio-economic interests to be enforced indirectly through the canon of traditional, civil and political rights. This article specifically considers the ECtHR's and the HRC's jurisprudence on the right to life which demonstrates the extent to which these organs have protected social and economic interests. By using a variety of techniques, which are examined in this article, both organs have permeated the right to life with significant socio-economic dimensions. The analysis of the jurisprudence of the ECtHR shows that the right to life applies to cases concerning health interests in the broad sense as well as environmental interests. For its part, the HRC has not only recognised health and environmental interests as coming within Article 6 of the ICCPR, but also subsistence interests. The article concludes that, despite the conceptual developments, it is difficult for victims of such violations to succeed before the ECtHR and the HRC. The high standards imposed make it difficult for victims to bring successful claims based on the right to life.

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Introduction

The aim of this article is to investigate the extent to which socio-economic interests are protected under legal orders, which are primarily concerned with the protection of traditional, civil and political rights. The legal orders in question are the following: the European Court of Human Rights (ECtHR) and the European Convention on Human Rights (ECHR); as well as the UN Human Rights Committee (HRC) and the International Covenant on Civil and Political Rights (ICCPR). The two supervisory organs in question, the ECtHR and the HRC, have interpreted a number of civil and political rights as encompassing socio-economic elements. This article focuses on the dynamic interpretation of the right to life, which has come to cover a broad range of socio-economic interests. This article further examines the three techniques by which the ECtHR and the HRC have permeated civil and political rights with socio-economic interests. These include the interpretation of civil and political rights in the light of human dignity, the reading of positive obligations into civil and political rights, and the use of the 'integrated approach to interpretation'.

I. The Three Techniques

Although the ECHR was primarily intended to exclusively protect civil and political rights, the ECtHR has used two techniques to allow for some room for the protection of socio-economic interests under the ECHR.[1] The ECtHR has interpreted civil and political rights in light of human dignity and, moreover, has read positive obligations into civil and political rights.[2] The same techniques have been used by the HRC as demonstrated from the HRC's Concluding Observations and General Comments.[3] The two bodies in question have also taken an integrated approach to the interpretation of civil and political rights. Although not mentioned explicitly in their judgments, General Comments or Concluding Observations, they have relied on this technique, which has enabled the two bodies to permeate civil and political rights with socio-economic elements. This section explores these techniques in more depth and illustrates their impact.

A. The Interpretation of Civil and Political Rights in Light of Human Dignity

The foundational value of human dignity began to enter the legal discourse in the first half of the 20th century in a particularly sustained way.[4] Nowadays, the value of human dignity has become commonplace in international human rights discourse.[5] Human dignity, 'in the sense of referring to human dignity as inherent in Man',[6] plays a crucial role in the protection of civil and political rights. It plays an equally crucial role in the protection of economic and social rights. The development of economic and social rights

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1 O'Cinneide, O, "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights" 5 *European Human Rights Law Review* (2008) 583, 587.

2 *Ibid*.

3 See, for instance, UNHRC 'Comment on Israel's Third Periodic Report on Implementation of the ICCPR' (3 September 2010) UN Doc CCPR/C/ISR/CO/3, para 8; UNHRC 'Comment on Israel's Fourth Periodic Report on Implementation of the ICCPR' (21 November 2014) UN Doc CCPR/C/ISR/CO/4, para 12; UNHRC 'General Comment No.6' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1982) UN Doc HRI/GEN/1/Rev.9, para 5.

4 McCrudden, C, "Human Dignity and Judicial Interpretation of Human Rights" 19 *European Journal of International Law* (2008) 655, 664.

5 *Ibid,* 668.

6 *Ibid,* 664.

is seen as a key component of an equitable society and respect for human dignity.[7] The development and protection of socio-economic rights is therefore largely attributed to the core value of respect for human dignity.

The use of the core value of human dignity is evident in the two systems of human rights protection in question.[8] In relation to the ICCPR, its Preamble expressly refers to human dignity.[9] It proclaims that: 'recognition of the inherent dignity… of all members of the human family is the foundation of freedom, justice and peace in the world', and the contention that 'rights derive from the inherent dignity of the human person'.[10] In contrast, the ECHR does not make any reference to human dignity. Albeit not mentioned in the normative part of the ECHR, human dignity plays an important role in the ECHR system.[11] As the ECtHR has repeatedly affirmed, 'the very essence of the Convention is respect for human dignity'.[12]

As has been made clear, therefore, the ICCPR and the ECHR require an interpretation of their respective provisions, which upholds the core value of respect for human dignity. By interpreting the ICCPR's provisions in light of human dignity, the HRC has started to read a number of civil and political human rights provisions as imposing on States socio-economic obligations.[13] Similarly, drawing on the core value of respect for human dignity, the ECtHR has identified socio-economic obligations in a number of ECHR provisions.[14]

B. The Reading of Positive Obligations into Civil and Political Rights

The obligations of States under international human rights law were traditionally negative in nature in the sense that States had an obligation not to interfere with the enjoyment of rights.[15] 'Duties of restraint', as have been characterised by Fredman, are said to be 'determinate, immediately realisable, and resource free.'[16] The obligations of States under international human rights law were mainly obligations of restraint (negative obligations) rather than positive obligations, as the realisation of the latter was regarded as more difficult in several respects. First, positive obligations require States to proactively engage in activities. Second, they require the commitment of resources. Third, positive obligations are indeterminate in the sense that it is impossible to precisely define what a State has to do to fulfil the obligation.[17] Due to the difficulties inherent in

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7 Fredman, S, "Transformation or Dilution? Fundamental Rights in the EU Social Space" 12 *European Law Journal* (2006) 41, 44.

8 Perrone, R, "Public Morals and the European Convention on Human Rights" 47 *Israel Law Review* (2014) 361, 372.

9 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Preamble.

10 *Ibid*.

11 Perrone, *supra* nt 8, 372-373.

12 See, for instance: *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), para 65; *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 90.

13 See, for instance, UNHRC 'Comment on Israel's Third Periodic Report on Implementation of the ICCPR', *supra* nt 3, para 8; UNHRC 'Comment on Israel's Fourth Periodic Report on Implementation of the ICCPR', *supra* nt 3, para 12.

14 Palmer, E, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart Publishing 2007), 51. See, for instance, *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), para 263.

15 Mègret, F, "Nature of Obligations" in Moeckli, D, *et al.,*(eds), *International Human Rights Law* (Oxford University Press 2010), 130.

16 Fredman, S, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), 70.

17 *Ibid,* ch 3.

the realisation of positive obligations, the orthodoxy prevailed in international human rights law that the obligations of States were mainly obligations of restraint (negative obligations).[18]

However, certain international tribunals and monitoring bodies have long emphasised that States have also positive obligations.[19] That the States have both negative and positive obligations has also been recognised by the ECtHR[20] and the HRC. In relation to the ECHR system, the concept of positive obligations is derived from the text of the ECHR and in particular from Article 1,[21] which provides that: '[t]he High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.'[22] This concept, however, did not make its appearance in the jurisprudence of the ECtHR until the late 1960s[23], when the ECtHR endorsed the view in the *Belgian Linguistic* case that the right to education as enshrined in Article 2 of Protocol 1 ECHR places a positive obligation on the Contracting States to ensure respect for the right in question.[24] From the time of that remarkable decision, the ECtHR has constantly broadened this category with the addition of new elements 'to the point where virtually all the standard-setting provisions of the Convention now have a dual aspect in terms of their requirements, one negative and the other positive.'[25]

Similarly, Article 2(1) ICCPR, the direct equivalent of Article 1 ECHR, imposes on States an obligation to *respect* and *ensure* the rights guaranteed by the ICCPR to all individuals within their territories and subject to their jurisdiction.[26] When broken down, Article 2(1) ICCPR has both negative and positive components, 'in that it requires the [S]tate to respect the substantive provisions by refraining from unnecessary interference with them and ensure the rights by taking active steps domestically.'[27] The HRC expressly recognised in 2004 in its General Comment 31 that the legal obligation of States under Article 2(1) ICCPR is both negative and positive in nature.[28] It has

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18 White, R, and Ovey, C, *The European Convention on Human Rights* (5th ed, Oxford University Press 2010), 100.

19 Mègret, *supra* nt 15, 131.

20 For an extensive overview of the concept of positive obligations under the ECHR, see Mowbray, A, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004); Xenos, D, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2012).

21 Singh, R, "Using Positive Obligations in Enforcing Convention Rights" 13 *Judicial Review* (2008) 94, 94-95.

22 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR), art 1 (emphasis added).

23 Akandji-Kombe, JF, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe 2007), 5.

24 *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* App no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECtHR, 23 July 1968) (*Belgian Linguistic Case*), 28.

25 Akandji-Kombe, *supra* nt 23, 5-6.

26 ICCPR, art 2(1).

27 Fottrell, D, "Reinforcing the Human Rights Act – The Role of the International Covenant on Civil and Political Rights" [2002] *Public Law* 485, 491.

28 UNHRC 'General Comment No.31' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev.9, para 6.

consistently reaffirmed the view that States have both negative and positive obligations in respect of all of the ICCPR's provisions.[29]

Given that positive obligations were traditionally associated with socio-economic rights, in contrast to negative obligations, which were associated with civil and political rights,[30] the reading of positive obligations into civil and political rights can explain why the latter now have socio-economic dimensions. Indeed, as Joseph and Castan have observed, '[l]inked to the HRC's uncovering of positive aspects to civil and political rights has been its willingness to "permeate" ICCPR rights with significant economic, social, and cultural elements.'[31] In relation to the ECHR, this technique – to read positive obligations into civil and political rights – has opened up some room for the protection of socio-economic interests under the ECHR, as O'Cinneide has observed.[32]

C. The Use of the 'Integrated Approach to Interpretation'

The 'integrated approach to interpretation' is a technique, which has been used by various international tribunals and monitoring bodies, including the ECtHR and the HRC, in order to give practical effect to the doctrine of interdependence of human rights. This technique has been used in order to relegate the dichotomy between civil and political rights on the one hand and socio-economic rights on the other, which is prominent in human rights law. The distinction between the two sets of rights is reflected in both systems of human rights protection. On the Council of Europe level, there are two distinct instruments of human rights protection: the ECHR, which is primarily concerned with civil and political rights, and the European Social Charter (ESC), which protects socio-economic rights.[33] On the universal, United Nations (UN) level, the distinction between the two sets of rights is equally prominent. The ICCPR mainly protects civil and political rights whereas the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects socio-economic rights.[34] In their attempt to relegate this distinction, both bodies (the ECtHR and the HRC) have permeated civil and political rights with socio-economic elements. In other words, they have interpreted traditional civil and political rights in such a way so as to encompass socio-economic interests.[35]

This technique, the 'integrated approach to interpretation', is based on the 'permeability thesis'.[36] The permeability thesis was developed on a theoretical or

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[29] Joseph, S and Castan, S, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press 2013), 41.

[30] Wiles, E, "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law" 22 *American University International Law Review* (2006) 35, 45.

[31] Joseph and Castan, *supra* nt 29, 40. See also Scott, C, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" 27 *Osgoode Hall Law Journal* (1989) 769, 876.

[32] O'Cinneide, *supra* nt 1, 587.

[33] European Social Charter (signed 18 October 1961, entered into force 26 February 1965) 529 UNTS 89 (ESC); European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) 2151 UNTS 277 (RESC).

[34] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[35] See Mantouvalou, V, "Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integarated Approach to Interpretation" 13 *Human Rights Law Review* (2013) 529, 555; Scott, *supra* nt 31.

[36] Mantouvalou, *Ibid*, 545.

philosophical level by Scott in 1989.[37] In his seminal piece 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', Scott emphasised the interdependence of human rights and proposed permeability as a means to give practical effect to the abstract doctrine of interdependence of human rights.[38] Referring to the ICCPR and the ICESCR, Scott urged the HRC to 'break down the artificial separation of the two leading universal human rights instruments by means of a permeability presumption.'[39] Permeability was more specifically described as the 'openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights.'[40]

More recently, the permeability thesis has been put into practice by international human rights tribunals and monitoring bodies as they have interpreted traditional protections in the form of civil and political rights in a manner that encompasses violations traditionally considered to be of an economic and social nature.[41] Scott's permeability thesis has more recently come to be known as the 'integrated approach to interpretation'.[42] It is an *integrated* approach, as Mantouvalou has observed, 'because it integrates certain socio-economic rights into a civil and political rights document.'[43] The integrated approach to interpretation is now commonplace in human rights law.

Although the ECHR and the ICCPR set forth mainly civil and political rights, their respective bodies have declared that the two categories of rights are interdependent and interrelated. In this way, they have clarified that there is scope for the protection of socio-economic rights under the two instruments. As long ago as *Airey v Ireland*, the ECtHR recognised that there is no 'water-tight division' separating civil and political rights from economic and social rights, and the fact that ECHR rights have a social dimension should not of itself be a barrier to justiciability.[44] Similarly, the HRC has made clear in a number of General Comments and Concluding Observations that certain ICCPR provisions have socio-economic dimensions.[45]

The use of the integrated approach to the interpretation of civil and political rights has significant implications. This interpretative technique, as Mantouvalou has observed, has made socio-economic rights indirectly effective in jurisdictions and systems that do

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[37] Scott, *supra* nt 31. See, also, Scott, C, "Reaching Beyond (Without Abandoning) the Category of Economic, Social and Cultural Rights" 21 *Human Rights Quarterly* (1999) 633, 660.

[38] *Ibid,* 778.

[39] *Ibid,* 771.

[40] *Ibid,* 771.

[41] Foster, M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007), 181.

[42] Mantouvalou, V, "Work and Private Life: *Sidabras and Dziautas v Lithuania*" 30 *European Law Review* (2005) 573, 574. It has been also called 'holistic approach', see, Leary, VA, "Lessons from the Experience of the International Labour Organisation" in Alston, P, (ed), *The United Nations and Human Rights: A Critical Reappraisal* (Oxford University Press 1992), 590.

[43] Mantouvalou, *supra* nt 35, 536.

[44] *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), para 26.

[45] See, for instance, UNHRC 'General Comment No.6', *supra* nt 3, para 5; UNHRC 'General Comment No.14' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1984) UN Doc HRI/GEN/1/Rev.9, para 3; UNHRC 'General Comment No.28' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2000) UN Doc HRI/GEN/1/Rev.9, paras 10, 28; UNHRC 'General Comment No. 31', *supra* nt 28, para 6; UNHRC 'Comment on Canada's Fourth Periodic Report on Implementation of the ICCPR' (7 April 1999) UN Doc CCPR/C/79/Add.105, para 12.

not grant them direct legal effect, like the two systems in question.[46] This is certainly a significant development regarding the fate of socio-economic rights. Socio-economic rights are now protected, albeit indirectly and only to a certain extent, through the ECHR and the ICCPR. However, we should not deduce from this that the ECHR or the ICCPR can now stand-in for an effective set of socio-economic rights. In other words, this does not mean that all socio-economic rights are fully protected under the legal orders in question. What it does mean, however, is that some avenues have now opened up for the protection of certain socio-economic interests under the legal orders in question. To determine the extent to which socio-economic interests are protected under the legal orders in question, a deep analysis and examination of the jurisprudence of the ECtHR and the HRC on the right to life is carried out in the following section.

II. The Protection of Socio-Economic Interests Through the Right to Life

By using the three techniques discussed above, both the ECtHR and the HRC have extended the protection of their respective instruments to cover socio-economic interests. This section examines the extent to which such interests are protected under the legal orders in question, and more specifically under the right to life, by analysing the relevant jurisprudence of the ECtHR and the HRC. It will begin with an analysis of the jurisprudence of the ECtHR, illustrating which socio-economic interests have been protected through the right to life, along with the level of protection accorded in these cases. The same approach will be adopted with respect to the HRC's approach to the ICCPR in the subsequent section.

A. The ECHR

The right to life is guaranteed under Article 2 of the ECHR.[47] The Strasbourg organs (the ECtHR and the European Commission of Human Rights) have read positive obligations into Article 2 ECHR and this has been decisive regarding the protection of socio-economic interests under the provision in question. In other words, it is for that reason that Article 2 ECHR encompasses social and economic interests. The first technique discussed in this article – the interpretation of civil and political rights in the light of human dignity – has been of no use in this context. The ECtHR has not been willing to interpret Article 2 ECHR in this manner, as illustrated below. This has had significant implications regarding the protection of socio-economic interests under Article 2 ECHR. Given that Article 2 ECHR has been permeated with socio-economic elements, as demonstrated in this subsection, it follows that the integrated approach to interpretation has been used in this context.

The possibility that the Strasbourg organs might be prepared to fashion a positive social right from Article 2 ECHR flourished between 1976 and 1978 as a result of the European Commission of Human Rights' decisions on two public health cases.[48] In the first case, *X v Ireland*, which concerned a claim that the applicants' daughter had not been allowed free medical treatment by the State, the European Commission of Human Rights accepted that Article 2 ECHR was engaged.[49] It declared the application inadmissible, however, on grounds that she had in fact received some medical care, and her life had

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[46] Gearty, C, and Mantouvalou, V, *Debating Social Rights* (Hart Publishing 2011), 114.

[47] ECHR, art 2.

[48] Palmer, *supra* nt 14, 67. *X v Ireland* (1976) 7 DR 78 (*X*); *Association X v the United Kingdom* (1978) 14 DR 31 (*Association X)*.

[49] *X v Ireland, Ibid*.

not been put at risk.[50] In the second case, *Association X v the United Kingdom*, which involved the administration of a voluntary vaccination scheme in which many children died, the European Commission of Human Rights declared the application inadmissible on the ground that appropriate steps had been taken for the safe administration of the scheme in question.[51]

These decisions are significant because the European Commission of Human Rights accepted that Article 2 ECHR was engaged in this context. More importantly, it declared that Article 2(1) ECHR enjoins a Contracting State not only to refrain from taking life intentionally but also to safeguard life.[52] By reading positive obligations into Article 2 ECHR, the European Commission of Human Rights opened up some room for the protection of socio-economic interests, and in particular health interests, under the provision in question. In other words, the European Commission of Human Rights clarified that Article 2 ECHR might be applicable in cases which concern health interests.

In 1998, in their concurring opinions in the case of *Guerra and others v Italy*, which concerned a claim that the State authorities had not taken appropriate action to reduce the risk of pollution by a chemical factory and to avoid the risk of major accidents, Judges Walsh and Jambrek expressed the view that the protection of health and physical integrity was closely associated with Article 2 ECHR.[53] This encouraged further expectations that the right to life might be furnished in such a way so as to apply in scenarios, which concern socio-economic interests, and in particular health interests.[54] Given that the ECtHR in the case of *Guerra* concluded that there had been a violation of Article 8 ECHR, it found it unnecessary to also consider the case under Article 2 ECHR.[55]

The ECtHR unanimously accepted that Article 2 ECHR might protect social interests in the case of *LCB v the United Kingdom*, which involved a claim that the failure of the State to warn the applicant's parents of the possible risk to her health caused by her father's exposure to environmental hazards, and the State's failure to monitor her health in light of those hazards, constituted a breach of Article 2 ECHR.[56] The ECtHR unanimously agreed that Article 2 ECHR was engaged,[57] therefore expressing the view that Article 2 ECHR might protect social interests and in particular environmental and health interests. It confirmed that States have an obligation under Article 2(1) ECHR to safeguard the lives of those within their jurisdiction. However, in this case it was concluded that there had been no violation of Article 2 ECHR due to the limited information about the risks to the applicant's health available to the State at the relevant time.[58] This case is of particular importance as it demonstrates that the ECtHR has permeated Article 2 ECHR with socio-economic components. In addition, this case is

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50 *Ibid.*

51 *Association X v the United Kingdom*, *supra* nt 48.

52 *X*, *supra* nt 48, para 32. For a discussion of the case *X v Ireland*, see, O'Sullivan, D, "The Allocation of Scarce Resources and the Right to Life under the European Convention on Human Rights" [1998] *Public Law* 389, 391-393.

53 *Guerra and others v Italy* App no 116/1996/735/932 (ECtHR, 19 February 1998), concurring opinions of Judges Walsh and Jambrek. See, also, *Vilnes and others v Norway* Apps nos 52806/09 and 22703/10 (ECtHR, 5 December 2013), para 245.

54 See, for instance, Edwards, RA, and Billings, P, "Safeguarding Asylum Seekers' Dignity: Clarifying the Interface between Convention Rights and Asylum Law" 11 *Journal of Social Security Law* (2004) 83, 102.

55 *Guerra and others v Italy, supra* nt 53, para 62.

56 *LCB v the United Kingdom* App no 14/1997/798/1001 (ECtHR, 9 June 1998).

57 *Ibid*, para 36.

58 *Ibid,* paras 36, 41.

significant because it demonstrates that the protection of socio-economic interests under Article 2 ECHR largely results from the ECtHR's use of the second technique – the reading of positive obligations into civil and political rights.

Following *LCB*, in the case of *Osman v the United Kingdom*, the ECtHR established the far-reaching principle that 'it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.'[59] The ECtHR, however, emphasised that the positive obligations flowing from Article 2 ECHR should be interpreted 'in a way which does not impose an impossible or disproportionate burden on the authorities'.[60] Even though *Osman* case was not raising socio-economic rights, the reasoning of the ECtHR in this case has been applied in cases, which did concern socio-economic interests. The ECtHR's ruling in *Osman*, as Palmer has observed, 'raised further expectations that the positive aspect of Article 2 might be used to hold public authorities to account for failure to provide *appropriate* health services.'[61]

In *Erikson v Italy* and in *Calvelli and Ciglio v Italy*, the ECtHR laid down two important principles, which guide its current approach to Article 2 ECHR.[62] The former case, which was decided in 1999, concerned a complaint that the right to life of the applicant's mother was violated on account of the failure of the Italian authorities to exercise their best efforts to identify those responsible for her death. In this case, the ECtHR read into Article 2 ECHR 'the requirement for hospitals to have regulations for the protection of their patients' lives'.[63] The latter case, which was decided in 2002, concerned a complaint under Article 2 ECHR that, owing to procedural delays, a time-bar had arisen making it impossible to prosecute the doctor responsible for the delivery of the applicants' child, who had died shortly after birth. In *Calvelli*, the ECtHR held that the positive obligations of States under Article 2 ECHR 'require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives.'[64] Through this decision, the ECtHR extended the obligation of States under Article 2 ECHR to the regulation of private sector medical treatment providers.

Despite the promise of *Erikson v Italy* and *Calvelli and Ciglio v Italy*, as well as the cases discussed above, applicants have only in rare occasions succeeded in invoking Article 2 ECHR or in convincing the ECtHR that there had been a violation of the provision in question. By examining a wide range of cases, it will be demonstrated that this is the case in relation to Article 2 ECHR. The cases that will be examined below are those, which demonstrate the range of socio-economic interests that have been protected through the right to life. For clarity purposes, they are categorised in terms of themes: medical negligence or malpractice (a.), funding for treatment (b.), health treatment and level of health-care (c.), destitution (d.), subsistence provision (e.), and environmental interests (f.).

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59 *Osman v the United Kingdom* App no 87/1997/871/1083 (ECtHR, 28 October 1998), para 116.

60 *Ibid*.

61 Palmer, *supra* nt 14, 68.

62 *Erikson v Italy* (dec) App no 37900/97 (ECtHR, 26 October 1999); *Calvelli and Ciglio v Italy* App no 32967/96 (ECtHR, 17 January 2002).

63 *Erikson v Italy*, *Ibid*.

64 *Calvelli and Ciglio v Italy*, *supra* nt 62, para 49. See, also, *Vo v France* App no 53924/00 (ECtHR, 8 July 2004), para 89.

i. Medical Negligence or Malpractice

In the case of *Powell v the United Kingdom*, which concerned a boy who died due to failure to diagnose his curable disease in time, the ECtHR recalled that States have an obligation under Article 2 ECHR to take appropriate steps to safeguard life.[65] Even though the ECtHR did not exclude that 'the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2', it declared the claim inadmissible.[66] The ECtHR emphasised that:

> 'where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 ECHR to protect life.'[67]

This decision makes it undoubtedly more difficult for individual applicants to succeed as it confirms that mere negligence on the part of the health authorities in an individual case will not be sufficient to call a Contracting State to account from the standpoint of its positive obligations under Article 2 ECHR. However, this decision is justified. The ECtHR could reach no other conclusion as 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.'[68]

In a series of more recent cases, the ECtHR found violations of Article 2 ECHR, with the exception of *GN and others v Italy*.[69] This case concerned the infection of the applicants and their relatives with HIV or hepatitis C following blood transfusions carried out by the health authorities of the State. The ECtHR held that there had been no breach of Article 2 ECHR regarding the obligation to protect the lives of the applicants and their relatives.[70] The ECtHR observed in particular that it had not been established that at the material time, the Ministry of Health had known or should have known about the risk of transmission of HIV or hepatitis C via blood transfusion, and that it could not determine from what dates onward the Ministry had been or should have been aware of the risk.[71]

The case of *Oyal v Turkey* involved the State's failure to provide a patient with full and free medical cover for life, following his infection with the HIV virus due to the failure of the national authorities to sufficiently train, supervise and inspect the work of the medical staff involved in the applicant's blood transfusions.[72] In this case, the ECtHR held that there had been a violation of Article 2 ECHR.[73] It noted that the redress offered to the applicant and his parents had been far from satisfactory for the purposes of the

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65 *Powell v the United Kingdom* (dec) App no 45305/99 (ECtHR, 4 May 2000).
66 *Ibid.*
67 *Powell v the United Kingdom*, *supra* nt 65.
68 *Osman v the United Kingdom, supra* nt 59, para 116.
69 *GN and others v Italy* App no 43134/05 (ECtHR, 1 December 2009).
70 *Ibid*, paras 93, 95.
71 *GN*, *supra* nt 69, paras 92, 94.
72 *Oyal v Turkey* App no 4864/05 (ECtHR, 23 March 2010).
73 *Ibid*, para 77.

positive obligation under Article 2 ECHR.[74] The State could have discharged its positive obligation under Article 2 ECHR by paying for the applicant's treatment and medication expenses during his lifetime.[75]

In *Mehmet Şentürk and Bekir Şentürk v Turkey*, the negligence of the medical staff caused the death of the applicants' pregnant mother and wife.[76] The ECtHR held that the State had failed in its obligation to protect the physical integrity of the deceased.[77] The ECtHR found, in particular, that the deceased had been a victim of a 'flagrant malfunctioning of the hospital departments', and that she had been denied the possibility of access to appropriate emergency treatment.[78] In *Asiye Genç v Turkey*, the ECtHR was called upon to ascertain whether the national authorities had done what could have been reasonably expected of them to prevent a baby's death and, in particular, whether they had satisfied their obligation to adopt measures to ensure the protection of the baby's life.[79] This case concerned a prematurely born baby's death in an ambulance, a few hours after birth, following the baby's transfer between hospitals without being admitted for treatment. The ECtHR found a breach of Article 2 ECHR.[80] It found, in particular, that the State had not sufficiently ensured the functioning and proper organisation of the public hospital service or its health protection system.[81] It noted that the baby died because it had not been offered any treatment and the ECtHR observed that such a situation constituted a denial of medical care such as to put a person's life at risk.[82]

These decisions demonstrate that in cases of medical negligence or malpractice, the positive limb of Article 2 ECHR will be violated in particular circumstances. As evidenced by its case law, the ECtHR will find a violation of the right to life in such cases only if the person concerned was a victim of a malfunctioning of the health-care system resulting in the endangerment of his or her life. This distinguishes these cases from the case of *Powell*. In contrast to these cases, no issue arose as to the functioning of the health-care system in *Powell*. Instead, the ECtHR highlighted that the event in question (the death of the child) had been the result of an error in an individual case. What should be proved, therefore, is that the person concerned was a victim of a more general situation, which had resulted in his or her life being put at risk. Thus, a mere negligence on the part of the health authorities in a single case will not be sufficient for a finding of a breach of Article 2 ECHR.

ii. Funding for Treatment

In the case of *Nitecki v Poland*, the applicant complained that the refusal of the State to refund the full price of a life-saving drug violated his right to life under Article 2 ECHR.[83] The ECtHR emphasised that '[i]t cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their

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74 *Oyal v Turkey*, *supra* nt 72, para 72.
75 *Ibid*.
76 *Mehmet Şentürk and Bekir Şentürk v Turkey App no* 13423/09 (ECtHR, 9 April 2013).
77 *Ibid*, para 97.
78 *Şentürk*, *supra* nt 76, para 97.
79 *Asiye Genç v Turkey* App no 24109/07 (ECtHR, 27 January 2015), para 75.
80 *Ibid*, para 87.
81 *Asiye Genç v Turkey*, *supra* nt 79, para 82.
82 *Ibid*.
83 *Nitecki v Poland* (dec) App no 65653/01 (ECtHR, 21 March 2002). For an analysis of the cases on public-funded treatment under Article 2 ECHR, see, Brems, E, "Indirect Protection of Social Rights by the European Court of Human Rights" in Barak-Erez, D, and Gross, AM, (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007), 146-147.

responsibility under Article 2'.[84] As Koch has observed, the ECtHR would not entirely rule out that the right to a life-saving drug might be protected under Article 2 ECHR.[85] The ECtHR, however, declared the application inadmissible.[86] According to the ECtHR, the State discharged its positive obligations under Article 2 ECHR by refunding 70% of the cost of the drug.[87] Similarly, in *Wiater v Poland*, the applicant complained that the refusal of the authorities to reimburse the cost of a drug amounted to a violation of Article 2 ECHR.[88] The ECtHR declared the application inadmissible.[89] The State's refusal to refund the cost of the drugs in the cases of *Nitecki* and *Wiater* resulted in the applicants' inability to follow a prescribed pharmaceutical treatment.[90]

In another example, *Pentiacova and others v Moldova*, the applicants complained about the failure of the State to cover the cost of all the medication necessary for their haemodialysis, and about the poor financing of the haemodialysis section of the hospital.[91] The ECtHR stated that the applicants had failed to adduce evidence that their lives had been put at risk, arguing,

> '[w]hile it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment.'[92]

Accordingly, the ECtHR declared the application inadmissible.[93]

What emerges from the ECtHR's approach in these cases is that States do not have a positive obligation under Article 2 ECHR to pay for a particular form of treatment. In addition, as McBride has explained, '[a]lthough it is clear that there is a very substantial duty to protect life, it is also evident that this is not one that is to be fulfilled regardless of all other considerations.'[94] As it is clear from these cases, budgetary considerations do play a role in the ECtHR's decisions. Article 2 ECHR might protect the right to treatment but the case law of the ECtHR reflects the crucial reality that, 'when imposing positive obligations upon state authorities, there must be recognition of the need to balance conflicting demands upon the public purse.'[95] In *Wiater*, the ECtHR emphasised that an applicant cannot lay claim to public funds in order to be treated with a particular drug and that it is for the competent authorities of the Contracting States to consider and decide how their limited resources should be allocated in the field of health-

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84 *Nitecki v Poland*, *Ibid*, para 1.
85 Koch, EI, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff 2009), 63.
86 *Nitecki v Poland*, *supra* nt 83, para 1.
87 *Ibid*.
88 *Wiater v Poland* (dec) App no 42290/08 (ECtHR, 15 May 2012).
89 *Ibid*, para 39.
90 *Nitecki v Poland*, *supra* nt 83; *Wiater v Poland*, *supra* nt 88, para 39.
91 *Pentiacova and others v Moldova* (dec) App no 14462/03 (ECtHR, 4 January 2005).
92 *Ibid*.
93 *Ibid*.
94 McBride, J, "Protecting Life: A Positive Obligation to Help" 24 *European Law Review* (1999) 43, 52.
95 Wicks, E, *Human Rights and Healthcare* (Hart Publishing 2007), 18.

care.[96] It does not, however, follow that lack of resources can always be used as a defence to such claims[97] or that budgetary considerations will always be decisive.

In *Oyal*, for instance, the ECtHR held that the State should have provided the applicant with full and free medical cover for life. This decision demonstrates that the right to treatment, including the right to publicly funded treatment, might be protected under Article 2 ECHR. The ECtHR's conclusion in *Oyal* was different in comparison with the cases of *Nitecki*, *Wiater* and *Pentiacova* on the ground that in the former case, the applicant's life had been endangered (through infection with the HIV virus) as a result of the State's inaction (due to the failure of the national authorities to sufficiently train, supervise and inspect the work of the medical staff involved in the applicant's blood transfusions). Since the respective States were not responsible for the applicants' illness in the *Nitecki*, *Wiater* and *Pentiacova* cases, the States had no obligation to fund their treatment. In cases that concern funding for treatment from the State, applicants will succeed before the ECtHR only if the State is responsible for their situation. Once again, therefore, State responsibility becomes decisive.

iii. Health Treatment – Level of Health-Care

In the inter-State case of *Cyprus v Turkey*, the applicant Government claimed that Greek Cypriots and Maronites residing in the northern part of Cyprus were denied the right to avail themselves of health-care services in the southern part of Cyprus, and that the health-care facilities in the north were inadequate.[98] The ECtHR emphasised that 'an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.'[99] The ECtHR, however, held that there had been no breach of Article 2 ECHR.[100] It took note of the fact that the European Commission of Human Rights had not been able to establish that the Turkish authorities (the 'TRNC' authorities) 'deliberately withheld medical treatment from the population concerned or adopted a practice of delaying the processing of requests of patients to receive medical treatment in the south.'[101] Although the ECtHR acknowledged that medical visits were indeed hampered due to restrictions imposed by the 'TRNC' authorities, and that delays did in fact occur, it found that it had not been established that the lives of any patients were put at risk on account of delays in individual cases.[102] The ECtHR also attached importance to the fact that Greek Cypriots and Maronites could avail themselves of medical services in the north.[103]

As to the applicant Government's critique of the level of health-care available in the north, the ECtHR did not consider it 'necessary to examine in this case the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care.'[104] It is clear, therefore, that in this case the ECtHR was unwilling to define in positive terms the content of a minimum core

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96 *Wiater v Poland*, *supra* nt 88, para 39.

97 Havers, P, "The Impact of the European Convention on Human Rights on Medical Law" 70 *Medico-Legal Journal* (2002).

98 *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

99 *Ibid*, para 219.

100 *Ibid*, para 221.

101 *Ibid*, para 219.

102 *Ibid*.

103 *Ibid*, para 219.

104 *Ibid*.

right. This decision is significant because it clarifies that, at least for the time being, it is left up to the Contracting States to define their own level of health-care provision.[105] The ECtHR, however, might be willing to undertake such an examination, which is undoubtedly a very difficult one,[106] under different circumstances, as Koch has observed.[107] This can be inferred from the ECtHR's use of the term 'necessary'.[108] In addition, in this case, the ECtHR could have defined at least in negative terms what level of health-care it considered to be inadequate under Article 2 ECHR, given that in cases which concerned detention conditions, the Court stated in negative terms what level it considered to be unacceptable under Article 3 ECHR (the prohibition of degrading treatment).[109]

iv. Destitution

As has been made clear, there is no requirement flowing from Article 2 ECHR to provide a particular type or level of health-care. Nevertheless, the ECtHR has recognised that acts and omissions by State authorities in the field of health-care, which expose individuals to threats to their lives, might in certain circumstances engage their responsibility under Article 2 ECHR. O'Cinneide has argued that the responsibility of States under Article 2 ECHR might be also engaged in cases which concern threats to life which stem from lack of shelter.[110] According to him, the true potential of Article 2 ECHR in this context is best suggested in *Öneryildiz v Turkey*.[111] This case concerned the failure of administrative authorities to take action to protect slum-dwellers, who were living near a rubbish tip, from the threat of a methane gas explosion. The failure of the authorities was held to constitute a violation of the right to life of the applicant's nine relatives, who died when the explosion eventually occurred.[112] The ECtHR noted that the State authorities had not done 'everything within their power to protect them from the immediate and known risks to which they were exposed.'[113]

Even though in the case of *Öneryildiz* the threat to life did not directly stem from the destitute status of the slum-dwellers, but more indirectly from their residence in a hazardous area,

> 'it would involve no great conceptual leap to suggest that [S]tate responsibility may be engaged where state action or inaction exposes the destitute to…threats to their life where the nature and existence of that…threat should have been known to the authorities and reasonable remedial action could have been taken to avoid it.'[114]

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[105] Mowbray, A, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd ed, Oxford University Press 2012), 125.

[106] Chapman, AR, "Core Obligations Related to the Right to Health" in Chapman, A, and Russell, S, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002), 188.

[107] Koch, *supra* nt 85, 64.

[108] *Ibid*.

[109] Koch, *supra* nt 85, 64. See, for instance, *Khokhlich v Ukraine* App no 41707/98 (ECtHR, 29 April 2003), para 181; *Kuznetsov v Ukraine* App no 39042/97 (ECtHR, 29 April 2003), para 128; *Poltoratskiy v Ukraine* App no 38812/97 (ECtHR, 29 April 2003), para 148.

[110] O'Cinneide, *supra* nt 1, 590.

[111] *Ibid*; See, *Öneryildiz v Turkey* App no 48939/99 (ECtHR, 30 November 2004).

[112] *Öneryildiz*, *Ibid*, paras 109-110.

[113] *Ibid*, para 109.

[114] O'Cinneide, *supra* nt 1, 590.

According to O'Cinneide, therefore, States might be under a responsibility in particular circumstances to protect destitute individuals against knowable threats to their lives. Since there has been no case law on this yet, it is too early to draw definite conclusions.

v. Subsistence Provision

In the cases of *Nencheva and others v Bulgaria* and *Centre of Legal Resources on behalf of Valentin Câmpeanu v Romania*, which concerned threats to life stemming from, *inter alia*, material deprivation, the ECtHR held that the responsibility of States under Article 2 ECHR was engaged.[115] The former case concerned 15 children and young people who died in a specialised public facility for mentally and physically disabled children, from the effects of cold and shortages of food, medicines and basic necessities. The director of the home had unsuccessfully tried on several occasions to alert the public institutions which had the responsibility for funding the home and which could have been expected to act. The ECtHR held that there had been a violation of Article 2 ECHR in that the relevant authorities had failed in their duty to protect the lives of the vulnerable children and young people from a serious and immediate threat.[116] The ECtHR considered that the authorities should have known that there was a real risk to the lives of the children and young people, and that they had not taken the necessary protective measures within the limits of their powers.[117] Critical was the fact that the children and young people in question had been entrusted to the care of the State in a specialised public facility, and that they had been, especially in the light of their vulnerability, under the exclusive supervision and control of the authorities.[118]

The case of *Valentin Câmpeanu* concerned the death of a mentally and physically ill young person in a psychiatric hospital. In this case, the ECtHR held that the domestic authorities had not provided the requisite standard of protection for Câmpeanu's life.[119] The Court found, in particular, that the person in question had been placed in medical institutions that were not equipped to provide adequate care for him and his condition due to lack of heating, appropriate food, medical staff and medical resources, including medication.[120] The ECtHR also noted the continuous failure of the medical staff to provide Câmpeanu with appropriate care and treatment.[121] According to the ECtHR, the national authorities, despite being aware of the difficult situation in the psychiatric hospital where he had been placed, had unreasonably put his life in danger.[122] In light of these considerations, the ECtHR concluded that there had been a breach of Article 2 ECHR.[123]

Although the ECtHR held that the responsibility of States under Article 2 ECHR was engaged in *Nencheva* and *Câmpeanu*, cases which concerned threats to life stemming from, *inter alia*, material deprivation, it does not necessarily follow that the ECtHR will reach the same conclusion in cases which concern threats to life stemming from destitution or lack of basic necessities. In such cases, the ECtHR might not be as willing

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[115] *Nencheva and others v Bulgaria* App no 48609/06 (ECtHR, 18 June 2013); *Centre of Legal Resources on behalf of Valentin Câmpeanu v Romania* App no 47848/08 (ECtHR, 17 July 2014).
[116] *Ibid*, para 141.
[117] *Ibid*, para 124.
[118] *Ibid*, para 119.
[119] *Ibid*, para 144.
[120] *Ibid*, para 143.
[121] *Ibid*.
[122] *Ibid*, para 143.
[123] *Ibid*, para 144.

to hold that the responsibility of States under Article 2 ECHR is engaged as it was in *Nencheva, Câmpeanu* and other cases concerning threats to life, which stemmed from inadequate medical treatment in detention.[124] Given that in these cases, which concern children and people who are under the exclusive control and care of the State, the State control imparts more responsibility on the States, the ECtHR is less reluctant to conclude that State responsibility is engaged than it is in cases which concern threats to the lives of the destitute or those with no means of support.

Edwards and Billings have argued that Article 2 ECHR should be interpreted as guaranteeing more than a purely mechanical physical existence.[125] However, as the ECtHR emphasised in the case of *Pretty v the United Kingdom*, Article 2 ECHR should be 'unconcerned with issues to do with the quality of living'.[126] This statement demonstrates that the ECtHR is not willing to interpret Article 2 ECHR in the light of human dignity so as to read into the provision in question an obligation on States to provide the destitute or those with no means of support with the basic amenities of life. Beyond the circumstances of dependency and State control, there remain difficult questions about the extent to which States should be obliged to provide individuals with the basic necessities of life, as Palmer has observed.[127] Indeed, it would have been difficult for the ECtHR to embark on these questions and to adjudicate on such cases. Despite the difficulties inherent in such cases, subsistence interests should be protected under Article 2 ECHR. Given that more people die as a result of hunger and disease than are killed,[128] the right to life should guarantee health interests as well as subsistence interests, if it is to say that its provisions are practical and effective.

vi. Environmental Interests

In the case of *Brincat and others v Malta*, which concerned a complaint about the Maltese Government's failure to protect the applicants and their deceased relative from the fatal consequences of exposure to asbestos, the ECtHR held that there had been a violation of Article 2 ECHR in respect of the applicants whose relative had died.[129] The ECtHR reiterated the principles as stated in *Öneryildiz*.[130] It considered that the positive obligation flowing from Article 2 ECHR includes a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against

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[124] See, for instance, *Salakhov and Islyamova v Ukraine* App no 28005/08 (ECtHR, 14 March 2013); *Jasinskis v Latvia* App no 45744/08 (ECtHR, 21 December 2010); *Tarariyeva v Russia* App no 4353/03 (ECtHR, 14 December 2006); *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002); *Velikova v Bulgaria* App no 41488/98 (ECtHR, 18 May 2000). For a discussion of the case *Tarariyeva v Russia*, see, Leif Scheimann, "Detainees, Medical Treatment and the European Convention on Human Rights" 13 *Coventry Law Journal* (2008) 38, 43.

[125] Edwards and Billings, *supra* nt 54, 102.

[126] *Pretty v the United Kingdom*, *supra* nt 12, para 39.

[127] Palmer, E, "Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights" 2 *Erasmus Law Review* (2009) 397, 400-401.

[128] Ramcharan, BG, "The Right to Life" 30 *Netherlands International Law Review* (1983) 297, 305. See, also, Dinstein, Y, "The Right to Life, Physical Integrity, and Liberty" in Henkin, L, (ed), *The International Bill of Rights* (Columbia University Press 1981), 115.

[129] *Brincat and others v Malta* Apps nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 July 2014), para 117. For a discussion of the environmental protection under Article 2 ECHR, see, Ann Sherlock and Francoise Jarvis, "The European Convention on Human Rights and the Environment" 24 (1999) *European Law Review, Human Rights Survey* 15, 29.

[130] *Brincat and others v Malta*, *Ibid*, para 101.

threats to the right to life.[131] This obligation, as the ECtHR emphasised, 'must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous.'[132] In the particular context of dangerous activities, the ECtHR highlighted the need for regulations, which 'must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.[133] The ECtHR found that the State had failed to satisfy its positive obligation to legislate or take other practical measures in order to protect the applicants from the consequences of exposure to asbestos.[134]

Despite the progress marked by *Öneryildiz*, *Brincat* and other similar cases (which were decided under Article 8 ECHR – the right to respect for private and family life) toward the opening up of an environmental horizon of human rights, 'they still fail to achieve the objective of the recognition of an independent right to a decent environment', as Francioni has maintained.[135] As he has noted, environmental integrity is not seen as a value *per se* for the community affected or society as a whole, but only as a criterion to measure the negative impact on a given individual's life.[136] This mainly results, as he has observed, from the ECtHR's 'purely individualistic conception of human rights'.[137] And indeed, in *Öneryildiz* and *Brincat*, the ECtHR focused on the consequences on the individual applicants. Nevertheless, one has to acknowledge that the ECtHR has taken a major conceptual step. It has moved far from an orthodox conception of life protection by clarifying that the protection of Article 2 ECHR might apply in cases, which concern environmental interests.

B. The ICCPR

In the ICCPR, Article 6 guarantees the right to life.[138] As the HRC stated in General Comment 6, the protection of Article 6 ICCPR requires that States adopt positive measures.[139] By reading positive obligations into Article 6 ICCPR, the HRC has extended the protection of the right to life to the socio-economic arena. The HRC has interpreted Article 6 ICCPR as encompassing, in particular, subsistence interests, health interests, and interests regarding a healthy environment. This demonstrates that the integrated approach to interpretation has been put into practice by the HRC. The HRC has interpreted the traditional right to life in a progressive manner. In this way, it has permeated the provision in question with significant social and economic elements.

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131 *Ibid*.
132 *Ibid*, para 101.
133 *Ibid*.
134 *Ibdi*, para 116.
135 Francioni, F, "International Human Rights in an Environmental Horizon" 21 *European Journal of International Law* (2010) 41, 50.
136 *Ibid*.
137 *Ibid*, 50.
138 ICCPR, art 6.
139 UNHRC 'General Comment No.6', *supra* nt 3, para 5.

i. Subsistence and Health Interests

The HRC's use of the two techniques discussed above is especially evident in two General Comments. In General Comment 6, the HRC stated that 'it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'[140] In General Comment 6, the HRC interpreted therefore Article 6 ICCPR as encompassing subsistence and health interests. It also clarified that it would be desirable for States to take positive steps in this context. Later on, in General Comment 28, the HRC stated that it 'wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.'[141]

The HRC applied the same approach in the context of the reporting procedure. In a number of Concluding Observations, the HRC highlighted the need for adequate living conditions in prison facilities and reception facilities for asylum seekers and refugees.[142] In the Concluding Observations on Canada, the HRC recommended that the State party take positive measures, as required by Article 6 ICCPR, to address homelessness, as this had led to serious health problems and even to death.[143] In the Concluding Observations on Israel, the HRC stated that the State should lift its military blockade of the Gaza Strip as it had hampered people's access to all basic and life-saving services such as medical care, sufficient drinking water, adequate sanitation, food and electricity.[144] The HRC also declared that the State should 'ensure that all residents of the West Bank have equal access to water, in accordance with the World Health Organization quality and quantity standards', that it should 'allow the construction of water and sanitation infrastructure, and wells', and that it should 'address the issue of sewage and waste water in the occupied territories emanating from Israel.'[145]

The HRC's approach in the General Comments and Concluding Observations mentioned above leads to the conclusion that human dignity plays a crucial role in the interpretation of Article 6 ICCPR. By interpreting Article 6 ICCPR as encompassing subsistence interests, the HRC has accepted, albeit impliedly, that Article 6 ICCPR is to be interpreted in the light of human dignity, and that the right of individuals to live in a manner worthy of their dignity is protected under the provision in question. However, the HRC has not gone as far as to suggest that Article 6 ICCPR protects the right to an adequate standard of living. What the HRC has confirmed in the aforementioned General Comments and Concluding Observations is that States should provide the

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[140] *Ibid.* See, also, UNHRC 'General Comment No.14', *supra* nt 45, para 3.

[141] UNHRC 'General Comment No. 28', *supra* nt 45, para 10.

[142] See, for instance, UNHRC 'Comment on Mozambique's First Periodic Report on Implementation of the ICCPR' (19 November 2013) UN Doc CCPR/C/MOZ/CO/1, para 14; UNHRC 'Comment on Tajikistan's Second Periodic Report on Implementation of the ICCPR' (22 August 2013) UN Doc CCPR/C/TJK/CO/2, para 9; UNHRC 'Comment on Albania's Second Periodic Report on Implementation of the ICCPR' (22 August 2013) UN Doc CCPR/C/ALB/CO/2, para 13.

[143] UNHRC 'Comment on Canada's Fourth Periodic Report on Implementation of the ICCPR', *supra* nt 45, para 12.

[144] UNHRC 'Comment on Israel's Third Periodic Report on Implementation of the ICCPR', *supra* nt 3, para 8; UNHRC 'Comment on Israel's Fourth Periodic Report on Implementation of the ICCPR', *supra* nt 3, para 12.

[145] UNHRC 'Comment on Israel's Third Periodic Report on Implementation of the ICCPR', *supra* nt 3, para 18.

minimum needs for survival.[146] In this way, the HRC has accepted that the right to live is envisaged as part of the right to life.[147]

In a number of Concluding Observations, the HRC emphasised that health interests are protected under Article 6 ICCPR.[148] Regarding Uganda, for instance, the HRC expressed concerns about the inadequate access to HIV treatment, particularly antiretroviral treatment.[149] Similarly, regarding Namibia, the HRC stated that the efforts of the State to combat HIV/AIDS and to provide sexual education in this regard had been inadequate.[150] It stated that the State should 'pursue its efforts to protect its population from HIV/AIDS', and that it should 'adopt comprehensive measures encouraging greater numbers of persons suffering from the disease to obtain adequate antiretroviral treatment and facilitating such treatment.'[151] The HRC expressed concerns about the number of deaths resulting from AIDS and the unequal access to appropriate treatment for those infected with HIV in the Concluding Observations on Kenya.[152]

By interpreting Article 6 ICCPR in such a broad manner, the HRC has managed to furnish a positive social right encompassing health and subsistence interests. The HRC has taken 'a major conceptual step, motivated at least in part by the interdependence of human rights', as Scott has correctly observed.[153] Even though this is a significant development regarding the fate of socio-economic interests under the ICCPR, the HRC's reference to 'desirability' in General Comment 6[154] is a matter of concern. It indicates that States may have a 'soft law' obligation to tackle problems such as infant mortality and low life expectancy, rather than a legal 'hard law' obligation, as Joseph, Castan and Nowak have observed.[155] It follows that the HRC would not necessarily hold Article 6 ICCPR to be violated when States do not create satisfactory conditions for survival.

Pessimism is also fuelled by the decision of the HRC on a communication, which concerned health interests, as it demonstrates that it is very difficult for individuals to prove that they have been victims of an Article 6 ICCPR violation. The communication

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[146] For a discussion of the distinction between 'a basic standard of living' and 'an adequate standard of living', see, Menghistu, F, "The Satisfaction of Survival Requirements" in Ramcharan, BG, (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985), 67.

[147] Ramcharan, *supra* nt 128, 305.

[148] See, for instance, UNHRC 'Comment on Romania's Third Periodic Report on Implementation of the ICCPR' (5 November 1993) UN Doc CCPR/C/79/Add.30, para 11; UNHRC 'Comment on Jordan's Third Periodic Report on Implementation of the ICCPR' (10 August 1994) UN Doc CCPR/C/79/Add.35, para 4; UNHRC 'Comment on Brazil's First Periodic Report on Implementation of the ICCPR' (24 July 1996) UN Doc CCPR/C/79/Add.66, para 23; UNHRC 'Comment on Nepal's First Periodic Report on Implementation of the ICCPR' (10 November 1994) UN Doc CCPR/C/79/Add.42, para 8.

[149] UNHRC 'Comment on Uganda's First Periodic Report on Implementation of the ICCPR' (4 May 2004) UN Doc CCPR/CO/80/UGA, para 14. See, also, UNHRC 'Comment on Zimbabwe's First Periodic Report on Implementation of the ICCPR' (6 April 1998) UN Doc CCPR/C/79/Add.89, para 7.

[150] UNHRC 'Comment on Namibia's First Periodic Report on Implementation of the ICCPR' (August 2004) UN Doc CCPR/CO/81/NAM, para 10.

[151] *Ibid.*

[152] UNHRC 'Comment on Kenya's Second Periodic Report on Implementation of the ICCPR' (29 April 2005) UN Doc CCPR/CO/83/KEN, para 15.

[153] Scott, *supra* nt 31, 877.

[154] UNHRC 'General Comment No. 6', *supra* nt 3, para 5.

[155] Joseph and Castan, *supra* nt 29, 203; Nowak, M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel 1993) 107.

in question is *Plotnikov v the Russian Federation*.[156] This communication concerned a claim that the author's life had been put at risk because of lack of funds for medicine, caused by an indexing law which reduced the value of his savings, thus preventing him from buying medicine. The complaint was held to be inadmissible.[157] The HRC noted that:

> 'the arguments advanced by the author [did] not substantiate, for purposes of admissibility, that the occurrence of hyperinflation or the failure of the indexing law to counterbalance the inflation would amount to a violation of any of the author's Covenant rights for which the State party can be held accountable.'[158]

As Joseph and Castan have observed, this decision confirms that 'it will be difficult to prove that one is a victim of an [A]rticle 6 violation entailed in socio-economic deprivation.'[159]

ii. Healthy Environment

In its Concluding Observations on Kosovo, the HRC emphasised that Article 6 ICCPR does not only protect the right to access health treatment but also the right to a healthy environment.[160] The HRC entertained an individual communication based on its broad interpretation of the right to life. In *EHP v Canada*, which concerned disposal of nuclear waste in dumpsites around Port Hope, the HRC observed that the communication 'raise[d] serious issues, with regard to the obligation of States parties to protect human life'.[161] The HRC therefore accepted that the right to a healthy environment might be protected under Article 6 ICCPR. Given that the exposure of the author and of other residents of Port Hope to environmental hazards posed a threat to their lives, they could legitimately claim to be victims of a potential violation of Article 6 ICCPR. The HRC, however, declared the communication inadmissible due to failure to exhaust domestic remedies.[162]

In another example, *Dahanayake and others v Sri Lanka*, the authors complained that they were being deprived of a healthy environment because of the construction of an expressway road.[163] The HRC held that the authors had not sufficiently substantiated their claim.[164] Accordingly, the communication was declared inadmissible.[165] Similarly, in *Brun v France*, which concerned a claim that the French decision to allow a trial for open-field testing of genetically modified organisms would breach Article 6 ICCPR, the HRC held that the author had not presented any evidence that 'the cultivation of transgenic plants in the open field represent[ed], in respect of the author, an actual violation or an imminent threat of violation of his right to life'.[166] The communication

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[156] *Plotnikov v the Russian Federation* Communication no 784/1997, UN Doc CCPR/C/65/D/784/1997 (1999).
[157] *Ibid*, para 5.
[158] *Ibid*, para 4.2.
[159] Joseph and Castan, *supra* nt 29, 206.
[160] UNHRC 'Comment on Kosovo's First Periodic Report on Implementation of the ICCPR' (14 August 2006) UN Doc CCPR/C/UNK/CO/1, para 14.
[161] *EHP v Canada* Communication no 67/1980, UN Doc CCPR/C/OP/1 (1984).
[162] *Ibid*, paras 8-9.
[163] *Dahanayake and others v Sri Lanka* Communication no 1331/2004, UN Doc CCPR/C/87/D/1331/2004 (2006).
[164] *Ibid*, para 6.4.
[165] *Ibid*, para 7.
[166] *Brun v France* Communication no 1453/2006, UN Doc CCPR/C/88/D/1453/2006 (2006), para 6.3.

was again declared inadmissible.[167] These decisions are significant because they were based on a broad interpretation of the right to life. It remains to be seen, however, whether the HRC would decide future communications based on its broad interpretation of Article 6 ICCPR.[168]

Conclusion

Both the ECtHR and the HRC have interpreted the right to life in a progressive and broad manner. The right to life has been permeated with significant economic and social elements. It has been interpreted, in particular, as encompassing health, subsistence and environmental interests. Both bodies therefore have made use of the integrated approach to interpretation. Both bodies have also heavily relied on the second technique – the reading of positive obligations into civil and political rights. This technique has enabled them to identify socio-economic related obligations in various contexts. However, the wording of certain General Comments, in particular General Comment 6, indicates that the obligations of States under Article 6 ICCPR may not be legal obligations, which is undoubtedly a matter of concern. The HRC has also relied, albeit indirectly, on the first technique – the interpretation of civil and political rights in the light of human dignity – and has clarified that Article 6 ICCPR encompasses subsistence interests. The ECtHR, by contrast, seems unwilling to adopt the same approach, as has been demonstrated from its approach in the case law. Even though the ECtHR and the HRC have interpreted the right to life in a broad manner, the case law demonstrates that it is very difficult for individuals to succeed in their claims. This leads to the conclusion that although socio-economic interests are protected in theory under the right to life, in practice they are not. They remain to a great extent theoretical and illusory.

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[167] *Ibid*, para 7.
[168] Scott, *supra* nt 31, 878.

The Colonial Aspects of International Environmental Law: Treaties as Promoters of Continuous Structural Violence

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Keywords
IMPERIALISM; STRUCTURAL VIOLENCE; INTERNATIONAL ENVIRONMENTAL LAW; TWAIL; METANARRATIVES

Abstract

The formation of international institutions in the twentieth century occurs under a scenario marked by the rule of colonialism and imperialism. Thus, instead of reducing inequalities in the world system, international institutions reproduce a prevalent logic of material and subjective discrimination based on a colonialist ideology marked by violence, which is communicated in a certain way so that it can justify its importance and legitimacy. The colonial violence is perpetuated under the form of *symbolic violence* manifested in the language that imposes a universal meaning and *systemic violence* that manifests itself in the 'perfect' functioning of the world economic and political system as the ultimate form of development. One of the perverse and subtle dimensions of this violence is observed in the emergence of the International Environmental Law in terms of metanarratives that exclude minorities and perceptions other than the ones propagated by international institutions. The main objective of this article is to identify the dynamics in the formation of environmental treaties leading to standard results of discursive practices that feed the process of dependence and legitimation marked by colonial ruling and structural violence. The methodological approach relies on the critical theory tenets to expose the non-emancipatory features of current International Environmental Law. For that matter, this article applies the socio-legal approach to environmental treaties that consists of the analysis of text (law), subtext (the moral aspects of the law – deep or implicit meanings), and context (the undeniable connection between law and reality) in the search of empirical evidence. This task is performed using the *computer assisted qualitative data analysis software* (CADQAS) called *ATLAS.ti*.

Introduction

There is a fundamental issue in investigating social reality[1] – there are objective facts in the real world that are fact only by human agreement, which Searle named institutional facts.[2] Although dealing with a complex hoard of variables involving natural process, and to a certain point relying on scientific knowledge, International Environmental Law

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1 Searle, JR, *The Construction of Social Reality*, Free Press (1997).

2 According to Ludwig Wittgenstein, 1.1 of the Tractatus Logico-Philosophicus: *Die Welt ist durch die Tatsachen bestimmt und dadurch, dass es alle Tatsachen sind* (The world is determined by the facts, and by these being all the facts). In Wittgenstein, L, *Tractatus Logico-Philosophicus Logisch-philosophische Abhandlung* , Kegan Paul 1922, (accessed on 7 September 2017).

(IEL) is an institutional fact that reflects the construction of political consensus among the basic units in the international system – the States.

The prevalent discourse of the states is marked by the scientific rationality and the search for universality, which promotes the false reality that whatever is enacted by way of the historical sources of law, as posed by Article 38 of the International Court of Justice Statute, is good for humanity. Thus, any non-compliance with its tenets constitutes a violation of International Law and subjects the violator to sanctions (whatever sanction means in International Law, some might say.)

IEL is the part of the totalizing and non-temporal visions of history that prescribes political and ethical rules for all humanity based on the modern West epistemology. Modern scientific discourse is based on the premise that science is a self-referent activity that has the purpose of breaking the ties with tradition and common sense, thus, contributing to the moral and spiritual development of humanity.

The existing discourses considering complete views of history and politics are known as metanarratives. The social reality in the 21st century is marked by an increasing degree of globalization and technological development that generates a strong tension with the metanarratives embodied in IEL. As a result, new language and concepts scape the theoretical provisions of the modernist project, which crumbles its legitimacy, thus, questioning the notion of order and/or the 'normal' functioning of the international system. This fact points to the contradiction between the discourse of universality and the empirical dimension marked by non-emancipatory and non-liberating features that exacerbates the existing tensions due to inequality, underdevelopment, hunger, and environmental challenges, just to name a few.[3]

Although there is a massive consensus concerning the importance of preserving and protecting the environment for the present and future generations, its epistemology and ontology are relegated to a second tier of concern due to the fact that political rhetoric of fear is introduced as the natural justification for states to apply extreme measures as pleased.[4]

Mapping the history of the global institutions and law concerning the environment, we observe that concerns about the environment started during the colonization period of history during which natural resources were regulated by the great European powers for the purpose of continuous use. For instance, the 1900 International Convention on the Conservation of Wild Animals, Birds and Fish in Africa negotiated by hunters is considered the precursor of the Convention on International Trade in Endangered Species, which mimics the calibration of destruction of its colonial predecessor. Other historical evidence is the initial attempt to contain deforestation in the colonies during the 1700s that still persist in our days in the form of the climate change regime. While the international community recognizes the urgency of taking actions for human survival, a disconcerting apathy due to the inaction of countries is the most distinguishable trace.[5]

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[3] Nicholls, P, "Divergences: Modernism, postmodernism, Jameson and Lyotard" 33(3) *Critical Quarterly* (1991) 1, <onlinelibrary.wiley.com/doi/10.1111/j.1467-8705.1991.tb00958.x/epdf> (accessed on 19 November 2017).

[4] Bauman, R, "Changes in the Appalachian Wage Gap, 1970 to 2000" 37(3) *Growth and Change* (2006) 416, <onlinelibrary.wiley.com/doi/10.1111/j.1468-2257.2006.00330.x/epdf>; Weiss, EB, " In Fairness To Future Generations and Sustainable Development" 8(1) *American University International Law Review* (1992) 19 <digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1498&context=auilr> (accessed on 12 December 2017).

[5] Grove, RH, *Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600-1860*, Cambridge University Press (1996,), 45.

Therefore, this paper intends to cast some light on the structures of IEL to reveal the hidden structures of imperialism in dealing with the environment. To do so, this article builds a theoretical framework composed by feminist theory (FT), which should be tested in the international climate change regime in searching for minimal empirical evidences. [6]

The central argument of this paper is that there is a 'moral grammar' in the climate change regime that excludes the participation of women as an imperialist practice.[7] The figure below is representative of the quantitative discrepancy in terms of participation of women (Ms) versus men (Mr) in the climate regime, which for the purposes of our work consists of the visible dimension of the excluding nature of IEL. The 'word cloud' is made using treaties dealing with climate change from the 1991-2015 interval, which were randomly selected (listed in Figure 2).

Figure 1
Source: The Author[8]

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[6] More about feminist theory is explained in the next section; however, I should mention that from the existing strings of critical theory, I have chosen feminist theory due to its epistemological spectrum that might be appropriated by other marginalized people, especially considering the application of the intersectionality concept (Davis, K, "*Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful*", Feminist Theory (2008), 9(1), 67–85).

[7] Zurn, C, *Axel Honneth*, John Wiley & Sons, 2015.

[8] The word cloud has been prepared by the author using a *computer assisted qualitative data analysis software* (CADQAS) called *ATLAS.ti*. The documents used for this analysis were: Geneva, 1991 section 2; Nairobi, 1991 section 3; Geneva, 1991 section 4; New York, 1991 section 5; New York, 1991 section 5-II; Geneva, 1992 section 6; New York, 1993, section 6; Geneva, 1993 section 8; Kyoto, 1997, section 3; Paris, 2015 section 20; and Marrakesh, 2016, section 22. These are the randomly chosen preparatory meetings for the conclusion of the United Nations Framework Conference on Climate Change (1992), Kyoto Protocol (1998), and Paris Agreement (2015). The provisional lists of participants can be found at <unfccc.int/documentation/documents/items/3595.php. > (accessed on 18 November 2017).

The quantitative dimension is not enough to provide evidence for our argument. The research, therefore, adopts the procedure of content analysis of selected IEL treaties to identify the substantial and relational social history that shapes the moral grammar of gender oppression as one of the axes of a larger context of imperial power, that is, unveiling the hidden structures of power in the IEL´s lexicon.[9] To conduct a more rigorous content analysis, the methodological path should follow the socio-legal approach[10] as well, which consists of the text analysis (law), subtext (the moral aspects of the law – deep or implicit meanings), and context (the undeniable connection between law and reality).[11]

The empirical objective is identifying in the IEL selected documents the excluding language of metanarratives that contradict the emancipatory concepts used by FT such as hope, creativity, resilience, persistence, and solidarity.[12] This task will be conducted using a computer assisted qualitative data analysis software (CADQAS) called *ATLAS.ti*.[13]

I. The Visible and Less Visible Dimensions of Domination in International Environmental Law

In the introduction of this paper, we have already pointed out the existence of a visible dimension in the international system related to the lack of participation of women. The trend observed in the climate change regime might be observed in other fields of International Law as this discriminatory feature is not exclusive to the IEL field. Thus, this part of the article presents the theoretical and empirical dimensions, conditions and encounters of IEL with FT to produce implications for other areas of International Law.

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9 See Emirbayer, M, "Manifesto for a Relational Sociology",103(2) *American Journal of Sociology* (1997), 281-317, *at* <jstor.org/stable/10.1086/231209>, (accessed on 18 November 2017); (Krippendorff, K, *Content Analysis: An Introduction to its Methodology* 3rd ed, Sage (2012); Bardin, S, "Investigating Transport of Dust Particles in Plasmas" 51(2-3) *Contributions to Plasma Physics* (2011).

10 Firstly, what is approached? Socio-legal approaches consider not only legal texts, but also the contexts in which they are formed, destroyed, used, abused, avoided and so on; and sometimes their subtexts. Secondly, how is socio-legal thinking and practice undertaken? It is interdisciplinary, drawing (analytically) on the concepts and relationships and (empirically) on the facts and methods of the social sciences, and sometimes the humanities. Thirdly, why is socio-legal thinking and practice undertaken? Socio-legal approaches to international economic law aim to understand legal texts, contexts and subtexts, sometimes for the objective purpose of achieving clarity, sometimes with a view to changing them, Perry-Kessaris, AP, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 6.

11 It is an essential task of any complete theory of society to investigate not just social institutions and practices, but also the beliefs agents have about their society – to investigate not just the social reality in the narrowest sense, but the social knowledge which is part of that reality (Geuss, R, *The Idea of a Critical Theory: Habermas and the Frankfurt School*, (Cambridge University Press 1981), 56; Perry-Kessaris, A, *What Does it Mean to Take a Socio-Legal Approach to International Economic Law?* (Routledge 2012).

12 Otto, D, "Feminist Approaches to International Law" *In* Orford, A and Hoffmann, F, *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

13 In expressly stating the methodology used in this article, my intent is to point out the urgent need for researchers working on with postcolonial theory to build epistemological and ontological foundations to avoid the criticism of the lack of it and the pamphleteer nature of the TWAIL studies.

A. The Visible Dimension of Domination

The evidence of the visible dimension becomes a serious issue in IEL, considering its alleged progressive nature that, among other things, incorporates non-state agents such as non-governmental organisations (NGOs) as important actors in the formation of international norms and institutions related to the environment.[14]

In Figure 2 below, the data behind the graphic represents the participation of men and women as representatives of States, Intergovernmental Organisations and Non-Governmental Organisations. In Figure 3, we isolated the participation of men and women as representatives of NGOs. As observed by comparing the graphics, the gap between the men and women´s participation as representatives of NGOs is larger than the consolidated graphic. It is interesting to note that NGOs have emerged in the context of the failure of the State´s performance in providing public goods to society, including gender equality in politics. Thus, the general expectation is that NGOs constitute spaces of plurality and participation, which seems not to be the case in the climate change regime.[15]

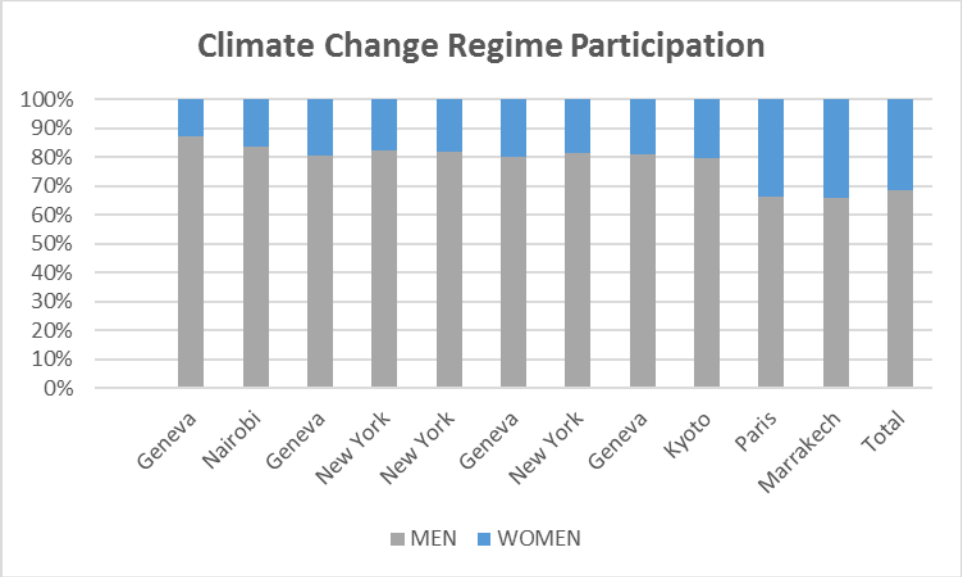

Figure 2

[14] Charnovitz, S, "Particapation of Nongovernmental Organizations in the World Trade Organization (Participation of Nongovernmental Parties in the World Trade Organization)" 17(1) *University of Pennsylvania Journal of International law* (1996) 331, <scholarship.law.upenn.edu/jil/vol17/iss1/11/> ; Yamin, F, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" 10(2) *Review of European, Comparative and International Environmental Law* (2001) 149, <onlinelibrary.wiley.com/doi/10.1111/1467-9388.00271/abstract>, (accessed on 19 November 2017).

[15] As one of the purposes of this work is providing insights for the development of research agendas, this phenomenon is worth collecting data and analyzing variables for the non-participation of women as expected. To see a complete inventory on the theories for conceptualizing NGO´s, we suggest Sama, TB, "*Conceptualizing Non-Governmental: Still Searching for Conceptual Clarity*", 3(1) Journal of Social and Psychological Sciences (2010), 32; (Kelly, BC, "Some Aspects of Measurement Error in Linear Regression of Astronomical Data" 665 *The Astrophysical Journal* (2007), <iopscience.iop.org/article/10.1086/519947/pdf> (accessed on 19 November 2017).

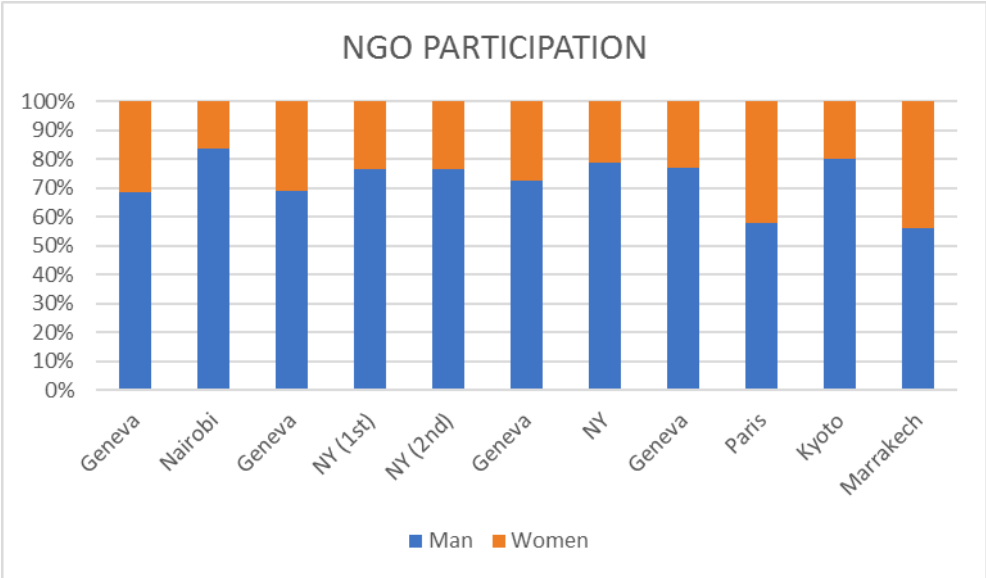

Figure 3

Thus, this simple quantitative analysis provides empirical indications of the gap which reflects how IEL grasps, or fails to do so, the social demands in society and, more importantly, how it affects those who need the most extension of protection of law. As such, according to Sweetman, this discrepancy between women and men participation affects directly the concept of climate justice:

> The United Nations is formally committed to gender mainstreaming in all policies and programmes, and that should include policy-making processes relating to climate change. Yet gender aspects are rarely addressed in climate-change policy, either at the national or at the international levels. Reasons include gaps in gender-sensitive data and knowledge about the links between gender justice and climate change; and the lack of participation of women and gender experts in climate-related negotiations…In some European countries, women have been more supportive of their governments' climate-protection policies than men, and would also be more supportive of more ambitious reduction goals, basically expecting their countries and the European Union to take a leadership role. The international climate negotiations are in dire need of such support.[16]

The analysis of the visible dimension of discrimination in IEL leads us to a more elusive form of discrimination incorporated into the language of IEL under the flags of development, sustainable development, universality, among other common terms, known as metanarratives. Thus, in the next part of the article, we investigate the less visible form of domination that permeates IEL.

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[16] Sweetman, P, "Revealing habitus, illuminating practice: Bourdieu, photography and visual methods" 57(3) *The Sociological Review155* (2009) 491, <onlinelibrary.wiley.com/doi/10.1111/j.1467-954X.2009.01851.x/abstract> (accessed on 19 November 2017).

B. The Less Visible Dimension of Domination

i. Conceptualizing Domination

Our starting point in unveiling the less visible dimension of domination is presenting the general tenets of the concept of imperialism.[17] Young presents the concept of imperialism in such a way that is less problematic in terms of contrasting it with colonialism. For some both concepts are wrongfully interchangeable:

> 'The term 'empire' has been widely used for many centuries without, however, necessarily signifying 'imperialism'. Here a basic difference emerges between an empire that was bureaucratically controlled by a government from the centre, and which was developed for ideological as well as financial reasons, a structure that can be called imperialism, and an empire that was developed for settlement by individual communities or for commercial purposes by a trading company, a structure that can be called colonial.'[18]

Therefore, the conceptualization of imperialism is based on the exercise of power

> '[…] either through direct conquest or (latterly) through political and economic influence that effectively amounts to a similar form of domination. Both involve the practice of power through facilitating institutions and ideologies'.[19]

The key-point in this discussion involves the notion of spreading institutions and ideologies that propagate social and political structures as a form of domination and discrimination. Of course, the economic dimension is present in this notion of imperialism. However, note that it is not a simply colonial venture we are referring to but one larger in scope and purpose, which demands a high level of bureaucratic control that dictates the rules and conditions of participation of minorities.[20] This is what Skolimowski refers to when stating, 'The present physical interpretation of power is but a

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[17] The concept of imperialism and its relationship with the concept of colonialism is complex and controversial. For a deeper analysis on this matter: Young, RJ.C, *Postcolonialism: An Historical Introduction* (Wiley-Blackwell 2001).

[18] Niemi, L and Young, L "When and Why We See Victims as Responsible - The Impact of Ideology on Attitudes Toward Victims" 42(9) *Personality and Social Psychology Bulletin* (2016) 1227 p, 16, <journals.sagepub.com/doi/abs/10.1177/0146167216653933> (accessed on 19 November 2017).

[19] Interesting to note that even gender discourse might be used as a tool for domination as the following passage suggests: Positing the nation as Imperial Mother can be viewed, on the one hand, as a reworking of France's imperial identity, but also as the expression of concerns relating to the future of the French race, sexual morals, and the position of France in the colonized territories. The feminized version of imperial identity functioned to some degree not only as an assertion of plenitude toward the colonized, but also as a symbol of the hope of a national regeneration abroad, see Fishcher-Tine, H and Gehrmann, S, *Empires and Boundaries: Race, Class, and Gender in Colonial Settings*, (Routledge 2008). See also Hobson, JA, *Imperialism: A Study* (Andesite Press 2015); Niemi and Young, *Ibid*, 27.

[20] The speech made by Lord Cruzon at the Byculla Claub in 1905 is representative of this logic:
To fight for the right, to abhor the imperfect, the unjust or the mean, to swerve neither to the right hand nor to the left, to care nothing for flattery or applause or odium or abuse it is so easy to have any of them in India never to let your enthusiasm be soured or your courage grow dim, but to remember that the Almighty has placed your hand on the greatest of his ploughs, in whose furrow the nations of the future are germinating and taking shape, to drive the blade a little. Internet Archive, *Full text of "Lord Curzon's farewell to India. Being speeches delivered as viceroy & governor-general of India. During Sept.-Nouv. 1905"*, <archive.org/stream/lordcurzonsfarew00curzrich/lordcurzonsfarew00curzrich_djvu.txt> (accessed on 18 November 2017).

manifestation of the larger process of turning everything into an object, generally an object of manipulation.'[21]

Thus, spreading institutions and ideologies as forms of domination and discrimination is closely related to violence as conceptualized by Zizek.[22] The signals of violence that the human race receives are associated with crime and terror, civil unrest and international conflict. Thus, it is a type of violence that is perceived upfront and perpetrated by identified agents. According to Zizek, we should take a step back to perceive the context in which these outbursts of violence happen, so we might identify the violence that sustains our efforts to fight violence and promote tolerance (such a paradox one might say).[23]

The visible form of violence is called subjective, which brings undesired perturbation to the normal state of affairs of a given society and institutions. On the other hand, objective violence is a refined kind of violence that is imposed to define the parameters of the normal, which systemic and symbolic violence are part of.[24] For Zizek, symbolic violence is the one embodied in the language and forms that directs to domination or imposes a certain universal meaning, and systemic violence is related to the smooth functioning of the dominating economic and political institutions.

In this sense, material conditions within international institutions are fundamental to the formation of the normal state, alongside with the construction of this state through a set of meanings so powerful that it becomes the ideology that shapes social reality within the boundaries of the dominating group.[25]

Therefore, challenging the climate change regime as it is institutionalized nowadays is a perturbation of what is institutionalized as normal for the international community. In defying a system that is prevalently masculine or that excludes Third World Countries from the debate of what is desired in terms of sustainable development disrupts the normal order of things as institutionalized in the world system, which is embodied in the process of the decolonization of countries.[26] This is what Chimni refers to:

> There is the old idea, which has withstood the passage of time, that dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised. Force is only used when absolutely necessary, either to subdue a challenge or to demoralize those social forces aspiring to question the 'natural' order of things. [27]

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[21] Skolimowski, H, "Power and Myth" 9(1) *Alternatives* (1983), 25, http://journals.sagepub.com/doi/10.1177/030437548300900102>, (accessed on 19 November 2017), p 1.

[22] Zizek, S, *Violence: Six Sideways Reflections* (Profile Books 2008).

[23] *Ibid*.

[24] *Ibid*.

[25] This is what Habermas calls *forms of technocratic management*. See Habermas, J, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, 6th edition (The MIT Press 1991); Eagleton, T, *The Meaning of Life*, (Oxford University Press 2007).

[26] Wallerstein, I, *World-Systems Analysis: An Introduction* (Duke University Press 2004).

[27] Chimni, BS, "The World Trade Organisation, Democracy and Development: A View from the South" 40(1) *Journal of World Trade (2006)* 5, <kluwerlawonline.com/abstract.php?area=Journals&id=TRAD2006002> (accessed on 19 November 2017).

Upon the prevalent logic of systemic and symbolic violence that permeates international institutions,[28] the question posed by Spivak remains unanswered – can the subaltern speak?[29] Rather, the question should be how will the subaltern speak? The second question is important as international institutions are excluded due to the need the West has in keeping itself as the subject of higher social relations, and thus, the constructor of the subaltern through the imposition of politics, economy, law, culture and so forth as universal truths.[30] In addition to being a construction of the subject, referring to climate change, the relationship with nature is historically and politically marked by the subject-object logic that reflects the 'right' or enticement of exploring natural resources.[31]

In terms of providing the basis for the rationale and legitimation of this logic, International Law is an important venue. Theories of International Law have focused traditionally on keeping the status of the state as the privileged subject of theorization, mainly to make sure that sovereignty, as principle and practice, remains unchallenged or at least in place to exclude undesired disturbances to the normal functioning of the system. In addition, theories in International Relations, especially realism, are keen to secure this rationale by pointing to an international structure marked by anarchy with the state as the main and unitary actor due to its sovereignty.[32] To Mattei, the process of construction of this logic is based on the following process:

> The rhetorical artifice used in the process of curbing deviant behaviour and claiming, as universal and inevitable, the Western modalities of social organisation and economic development centred on individualism and social fragmentation, is usually an explicitly juridical concept: "international human rights." In the interests of these rights, a doctrine of "limited sovereignty" has threatened the traditional nature of international law as a decentralized system based on territoriality and has advocated the need for decentralization in order to make it more like any other Western national legal system. (Translated by the Author).[33]

To that end, environmental phenomena tend to create stress and generate heat in the system by disregarding states´ boundaries and thus sovereignty, the growing dependency of states on scientific and epistemic communities to explain changes and negative impacts of anthropic activities to the environment, and the increasing participation of

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[28] In this article, we should not present a complete inventory of the debate around the general claim made that international institutions reproduce colonial structures of domination. See Chimni, BS, "International Institutions Today: An Imperial Global State in the Making*." 5*(1) *European Journal of International Law*, 1 , <://doi.org/10.1093/ejil/15.1.> (accessed on 18 November 2017); Magdoff, H, and Foster, JB, *Imperialism Without Colonies* (Monthly Review Press 2003); Magdoff, H, and Foster, JB, *Imperialism Without Colonies* (Monthly Review Press 2003).

[29] This question refers to and is the title of the books: Spivak, GC, *Can the Subaltern speak*, (Turia + Kant 2007).

[30] For the debate about civilizational formation and conceptualization we recommend reading: GONG, G W, "*The Standard of "Civilization" in International Society*" (Oxford University Press 1984); Spivak *Ibid*; Said, EW, *Orientalism* (Vintage Books 1979).

[31] Chakrabarty, B and Zhang, G "Credit Contagion Channels: Market Microstructure Evidence from Lehman Brothers' Bankruptcy" 41(2) *Financial Review* (2012) 320, <onlinelibrary.wiley.com/doi/10.1111/j.1755-053X.2012. 01194.x/abstract>, (accessed on 19 November 2017).

[32] For a deeper debate on the formation of theories in International Law see Oxford, Orford A and Hoffmann, F, *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

[33] See also, Anghie, A et al, *Imperialismo y Derecho internacional* (Siglo del Hombre 2016); Mattei, U and Nader, L, *Pillaging*/268, WMF Martins Fontes (2013).

civil society, mainly NGOs in the debates, just to name a few. The metanarratives that we find in IEL are representative of the reaction of International Law to the introduction of variables that disturb the normal functioning of the system, which in its classical way is to rely heavily on the sources of International Law, with treaties being the most important one.

ii. Empirical Manifestations of Metanarratives in IEL

The visible and non-visible dimensions of imperial domination in IEL are manifest in the irradiating discourse of technology and progress as the only way for survival in the post-modern world. For that reason, the language of IEL adopts indirect and sophisticated content that indicates the attainment of noble goals such as increasing environmental security and eradicating hunger or poverty as part of the quest for a climate change governance, which shall be examined below.

First let us take a look at the security goal. To Buzan, the concept of security is very problematic because it presents elements that impede its investigation and recognition empirically.[34] As a form of discourse, the objectification of security depends on the moral, ideological and normative markers in the international system at a certain point in history.

The end of the Cold War brought severe changes in these markers to a point in which inherent social transformations in the international system were necessary to incorporate a more comprehensive notion of international security that includes new threats and actors.[35] According to Ullman, a new meaning of security is necessary:

> A more useful (although certainly no conventional) definition might be: a threat to national security is an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of a state, or (2) threatens significantly to narrow the range of policy choices available to the government of a state or to private, nongovernmental entities (persons, groups, corporations) within the state.[36]

Thus, the securitization of an issue in international politics means a deliberate political process that places a referential object (climate change, for instance) in a special position or urgency that an immediate response is required by the State, region or international society. As such, security '[…] has to be staged as an existential threat to a referent object by a securitizing actor, [to generate] endorsement of emergency measures beyond the rules that would otherwise bind'.[37] Presenting the issue as an existential threat provokes a generalized concern that justifies extreme measures followed by 'extra-budgetary reallocation of resources to combat it'.[38]

The process and discourse of securitization of climate change follows the rationale describes before, in which the existential threat is posed by developed countries. As stated by Bodansky:

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[34] Acharya, A and Buzan, B, "Conclusion: On the possibility of a non-Western IR theory in Asia" 7(3) *Oxford Academic – International Relations of the Asia-Pacific* (2007) 427, <academic.oup.com/irap/article/7/3/427/758315> (accessed on 19 November 2017).

[35] Mathews, JT, "Redefining Security" 68(2) *Foreign Affairs* (1989) 162; Ullman, RH, "Redefining Security" 8(1) *International Security* (1983) 129.

[36] Ullman, *Ibid*, 133.

[37] Buzan, B, Waever, O, and De Wilde, J, *Security: A new Framework for Analysis*/21 (Lynne Rienner Publishers 1998).

[38] *Ibid*.

> North American heat wave and drought of the summer of 1988 gave an enormous popular boost to greenhouse warming proponents, particularly in the United States and Canada. By the end of 1988, global environmental issues were so prominent that Time magazine named endangered Earth "Planet of the Year." A conference organized by Canada in June 1988 in Toronto called for global emissions of CO2 to be reduced by 20 percent by the year 2005, the development of a global framework convention to protect the atmosphere, and establishment of a world atmosphere fund financed in part by a tax on fossil fuels. [39]

This leads to a more unstable scenario, which is the dislocation of a political issue to the security sphere that includes the military dimension. As such, Hartmann states:

> This beating of the climate conflict drums has to be viewed in the context of larger orchestrations in U.S. national security policy. While development assistance and humanitarian aid have long been strategically deployed as an element of defense policy, in recent years the military has encroached much further into civilian territory. Observers are beginning to speak of an 'aid-military complex' —in 2005, the share of official U.S. development assistance dispersed by the Pentagon was 21.7 per cent, up from 5.6 per cent 3 years before. The State Department's role in both diplomacy and development has been severely weakened as a consequence, and disaster response is increasingly becoming the purview of the military.[40]

The spill-over of the reaction of developed countries soon reached the international system and institutions as it is impossible under a systemic approach to provide responses to climate change. This is what we see below in Figure 4:

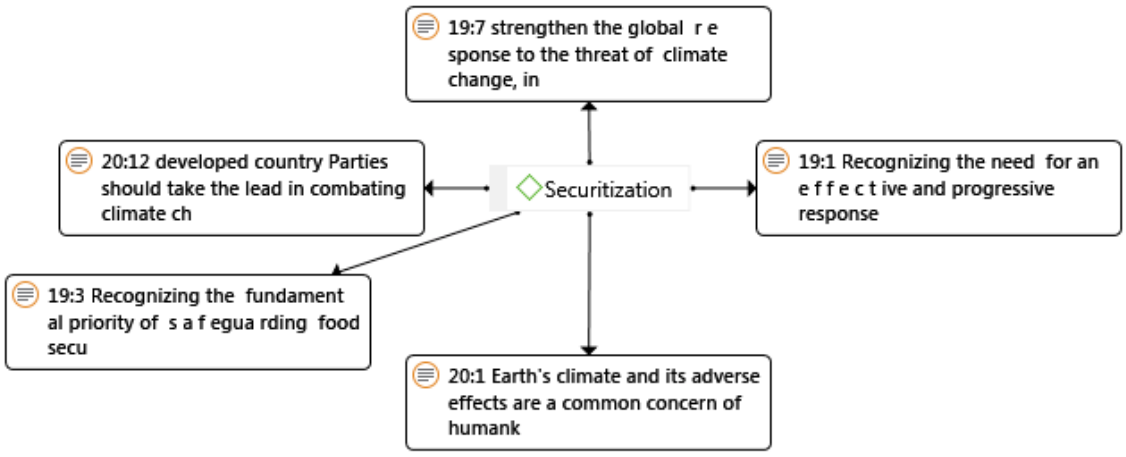

Figure 4 (Quotes from Agreements - the number 19 refers to the Paris Agreement and 20 the UNFCCC).

Therefore, the response to the existential threat that generates environmental insecurity is embedded in IEL in the form of language that developed countries should lead (20:12). Moreover, the need for an effective and progressive response (19:1) generates the

[39] Bodansky, D, "The History of the Global Climate Change Regime" 23 *International Relations and Global Climate Change* (2001) 23.

[40] Hartmann, B, "Rethinking climate refugees and climate conflict: Rhetoric, reality and the politics of policy discourse" 22(2) *Journal of International Development* (2010) 223.

legitimation of any measure that needs to be taken to secure the 'normal' environmental security.[41]

The other form of imposing metanarratives is found in the current international food system. The current food system is grounded on monocultures for exportation. Thus, while declaring the need to increase output to eradicate hunger and poverty, the system generates local degradation of the environment and biodiversity, both important contributing causes to climate change.

The food crises that hit the world food system in 2006 and 2008 had devastating effects on developing countries, providing solid evidence for our argument.[42] The crises have caused great social and political upheaval, especially in developing countries whose vulnerability in the food system is enormous. Protests and violence have been reported in many countries in the Global South, of which we can cite the tragic case in Haiti that had coined the term 'Clorox Hunger', which translates the excruciating sensation of hunger in the body as if the person had ingested bleach.[43] Bello sums up this scenario:

> Alarmed by massive global demand, countries like China and Argentina resorted to taxes or quotas on their rice and wheat exports to avert local shortages. Rice exports were simply banned in Cambodia, Egypt, India, Indonesia, and Vietnam. *South-South solidarity crumbled in the crisis, a victim of collateral damage*.[44]

The United Nation (UN) in the *World Economic Situation and Prospects* called the food crisis of 2008 a 'perfect storm', placing the financial crisis in 2007 as the protagonist of the food riots. According to the report:

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41 See Græger, N., "Environmental Security?" 33(1) *Journal of Peace Research* (1996) 109.

42 Modern agriculture is producing more food per capita than ever before. At the same time, according to estimates from the Food and Agriculture Organization, approximately 795 million people are currently affected by hunger. An additional two billion people are suffering from micronutrient deficiencies, lacking key vitamins and minerals. In 2014, 1.9 billion people were overweight, of these 600 million were obese. Climate change will present an enormous new challenge to agriculture while the world population is predicted to increase to 9 billion by 2050. Whether clean water, fertile soils, forests, wetlands and other natural resources, as well as the biodiversity of the planet, will be available to future generations, in a condition that enables them to survive, will depend crucially on the way we produce our food and on our diets. Agricultural activities and the subsequent processing, storage, transport and disposal of its products are directly or indirectly responsible for almost 40% of human-induced greenhouse gas emissions. One third of the world's population obtains its livelihood from agriculture. Agriculture and food is by far the world's largest business and the measure of all forms of sustainable development. In Global Agriculture, *About the IAASTD Report*, <globalagriculture.org/report-topics/about-the-iaastd-report.html> (accessed on 18 November 2017); Guo, S and Rojas, D, "The Global Food Crisis" 13(2) *Yale Human Rights and Development Journal* (2010), < digitalcommons.law.yale.edu/ yhrdlj/vol13/iss2/8 > (accessed on 19 November 2017).

43 Even before the acute food crisis, the U.S. President George W. Bush had alerted his nations to the need to secure food, 'It's important for our Nation to be able to grow foodstuffs to feed our people. Can you imagine a country that was unable to grow enough food to feed the people? It would be a nation that would be subject to international pressure. It would be a nation at risk. And so, when we're talking about American agriculture, we're really talking about a national security issue.' In The American Presidency Project, *Remarks to the National Future Farmers of America Organization*, July 27 2001, <presidency.ucsb.edu/ws/index.php? pid=63838> (accessed on 18 November 2017); Jayaraman, S, "International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters" 17(1) *Chicago Journal of International Law* (2016) 178, < chicagounbound.uchicago.edu/cjil/vol17/iss1/6/>, (accessed on 19 November 2017).

44 Bello, WG, *The Food Wars* (Verso 2009).

> Speculation in the actual, physical exchange of commodities certainly influenced prices as speculators bought and stored commodities, betting on price increases. Such positions have temporarily reduced the supply of goods and have no doubt affected price movements directly. The impact of speculation in futures markets (that is to say, where speculators do not physically trade any commodities) on price trends is much more difficult to determine, however. Futures trades are bets on buying or selling goods entitlements which are continuously rolled over. It is therefore not clear whether such trading does more to commodity prices other than increase their volatility.[45]

Thus, the food crisis is not related to a lack of sufficient food to feed the poor but rooted in development-oriented economic issues and the need to overcome the limits of the environment at all costs, that is, the maintenance of the current food system, which has already been proved to contain such serious structural failures. The International Assessment of Agricultural Knowledge, Science, and Technology for Development stated:

> Underinvestment in developing country agriculture—including in local and regional market infrastructure, information and services—has weakened the small-scale farm sector in many countries. Trade liberalization that opened developing country markets to international competition too quickly or too extensively further undermined the rural sector and rural livelihoods. Many countries have been left with weakened national food production capacity, making them more vulnerable to international food price and supply volatility and reducing food security.[46]

The alternative to the current food system, and thus an agricultural model that could have a positive impact on climate change, is the food sovereignty model based on local farming. As it defies the mainstream perception of development, it is not very popular among international institutions. For instance, during the Uruguay Round in 1986, the Secretary of Agriculture John Block is quoted in Bello:

> […] the idea that developing countries should feed themselves is an anachronism from a bygone era. They could better ensure their food security by relying on US agricultural products, which are available, in most cases at lower cost.

The fallacy of this argument is that the prevailing food system is good for all. In fact: 'not only in the South but also in the North, farmers and others seek to escape the vagaries of capital by reproducing the peasant condition, working with nature from a limited resource base independent of market forces.'[47]

Thus, the existing food system model grounded in the mantra 'increasing the food output = hunger eradication' is misleading. There is a fundamental dissonance found in international institutions and the crude reality of the world. Although food production is growing, hunger is prevalent around the world, monocultures have been damaging local environment and biodiversity, and the transportation of large sums of food needs an

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[45] United Nations Development Policy and Analysis Division, *World Economic Situation and Prospects (WESP) Report*, <un.org/development/desa/dpad/document_gem/global-economic-monitoring-unit/world-economic-situation-and-prospects-wesp-report/> (accessed on 18 November 2017).

[46] *Ibid*.

[47] Bello *supra* nt 44, 86.

extensive and intensive transportation network. This produces negative impacts on climate change as it increases outputs of greenhouse gases by the high consumption rate of petroleum, fertilizers, intentional burnings to clean fields, etc.[48]

In conclusion, there are important indications of the existing metanarratives being used in IEL that carry out totalizing discourses and world views that are very damaging to minorities, and are thus viewed as obstacles to development. In this sense, the following part of this article promotes a dialectic encounter of the metanarratives with feminist theory.

C. Feminist Theory as a Resistance Stance to Metanarratives in IEL

The interjection of FT in the process of explaining and understanding the logic of institutions in dealing with climate change is necessary in analytical terms and as a form of reaction to the Kafkian nightmare that individuals are impotent when facing the anonymous power of institutions. It consists of a theoretical toolkit that helps non-state actors in dealing with what Anders calls 'the cognitive paralysis', which is self-evident due to the existing state institutions and the high complexity of climate change.[49]

Tickner categorizes FT as liberal, radical, socialist, psychoanalytic, postcolonial, and postmodern.[50] The common traces among those strings of feminism are: 1. explaining the causes for women´s subordination or unjustified economic and social asymmetry in relation to men and 2. prescribing ways to end it. As put by Okin et al., feminism is the flag for those '[…] who believe that women should not be disadvantaged by their sex; women should be recognized as having human dignity equal with men and the opportunity to live as freely chosen lives as men.'[51]

For this article, the string of FT adopted is the postcolonial one, as it intervenes in both feminist and postcolonialist dimensions due to their insufficient treatment of cultural, ethnic, and gender differences. According to Zuckerwise, '[…] postcolonial feminists are in a unique position to articulate the politics of lived reality in its theoretical and material forms',[52] which provides a framework of analysis that goes beyond women´s sexual subordination and victimhood to a more empowering intervention and the formation of critical knowledge that resonates with other classes of disadvantaged people. For that reason, searching for the missing concepts of hope, creativity, resilience, persistence, and solidarity in IEL results in an analysis of finding the trouble boundaries in IEL for the purpose of providing a more challenging account of its impacts and presenting a different story about its possibilities in the international system.[53]

Bringing the theoretical framework of FT, especially postcolonial feminism, to IEL provides a clear picture of the undesired structures of discrimination and domination

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48 Shiva, V, *Monoculturas Da Mente. Perspectivas Da Biodiversidade E Biotecnologia*, 2003; Caron, R, Primavera *silenciosa*, (2015).

49 Anders, G, L'obsolescence *de l'homme. Paris: Éd. de l'Encyclopédie des nuisance, Encyclopédie* des nuisances (2002).

50 Tickner, JA, *Gendering World Politics* (Columbia University Press 2001).

51 The various strings of feminism are formed by the disagreement in relation to what constitutes the subordination to men and how to overcome it. For additional knowledge in the debate: McCann, C and Kim, SK, *Feminist Theory Reader: Local and Global Perspectives* (Routledge 2013).

52 For a deeper discussion on postcolonial feminism, see: Mohanty, CT, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" 12(13) *Jstor* (1984) 333, <jstor.org/stable/302821?origin=crossref&seq=1#page_scan_tab_contents>, (accessed on 19 November 2017).

53 Robinson, M, *International Law: Modern Feminist Approaches: With a Foreward by Mary Robinson* (Hart Publishing 2005).

in international institutions, which the discourse of IEL has sustained by metanarratives of objectivity, universality, and neutrality.[54] For Dianne Otto:

> I conclude by highlighting the paradoxes of feminism engagement with international law and argue that the practices of critique and reform, and their productive tensions, are essential to resisting the law´s colonization of feminist politics and keeping feminist imaginaries of a better world alive. It is in the interstices of hope and despair, conundrum and paradox, that feminists have the best chance of understanding how international law might yet be a means for promoting feminist change.[55]

For that matter, the issues arising from the encounter of FT with IEL might be two-fold. The most visible dimension is the lack of participation of women in international regimes due to national structures that prevent their presence.[56] The lack of participation causes the less visible dimension, which is associated to the marginalization of issues/interests and/or the disrespect of women´s conceptions and practices of the social reality connected to their nurturing and caring nature.[57] In this sense:

> We can see that female politicians are defined more by their deficits than their strengths. In addition to failing to possess the strengths associated with being women (e.g., sensitive or compassionate), female politicians [are seen to] lack leadership, competence, and masculine traits in comparison to male politicians.[58]

In addition, to reinforce the argument above, and advancing the debate of gender inequality in the climate change regime as perpetuator of imperial dominance, Sweetman citing Margareth Skutsch:

> […] expert in development co-operation, energy, and climate change, offers two arguments for including gender considerations in the process of climate-change policy development: the idea that such gender mainstreaming may increase the efficiency of the climate-change process; and the idea that if gender considerations are not included, progress towards gender equity may be threatened. In other words, the quality of policy making will remain unacceptably low, if the discourse

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[54] About metanarratives, see: Eagleton, T, *The Illusions of Postmodernism* (1st ed, Wiley-Blackwell 1996); Lyotard, JF and Jameson, F, *The Postmodern Condition: A Report on Knowledge* (1st ed, University of Minnesota Press 1984); Orford and Hoffmann, *supra* nt 32.

[55] Orford and Hoffmann *supra* nt 32, 490.

[56] Outshoorn, J and Kantola, J, *Changing State Feminsim* (Palgrave Macmillan 2007).

[57] In a 2008 Pew Research Center survey of eight important leadership traits, women outperformed men on five and tie on two. Americans ranked women higher in honesty, intelligence, compassion, creativity, and outgoingness—by as much as 75 percent. And in the qualities of hard work and ambition, men and women tied, according to the survey. The only quality in which men scored higher than women is decisiveness, in which men and women were separated by a mere 11 percentage points. Yet when asked the single question if men or women make better leaders, the results seemed to contradict these other findings: a mere 6 percent of the 2,250 adults surveyed say women make better political leaders than men, with 21 percent favoring men and 69 percent saying the sexes are equal in this area, which explains the report's subtitle, 'A Paradox in Public Attitudes.' *At* Big Think, Cookson, J, *Why Women Make Better Politicians, <bigthink.com/women-and-power/why-women-make-better-politicians>*, (accessed on 18 November 2017). See also: Coleman, I, *Paradise Beneath Her Feet: How Women Are Transforming the Middle East* (Random House Trade Paperbacks 2013); Fiske, ST, Gilbert, DT and Lindzey, G, *Handbook of Social Psychology* (5th ed, Wiley 2010).

[58] Baksh, R and Harcourt, W, *The Oxford Handbook of Transnational Feminist Movements* (Oxford University Press 2015), p 237.

> does not consider the gender issues, including relevant differences between women's and men's experience.[59]

D. The Encounter of Imperial Language With FT Operative Concepts

One of the persistent dimensions of imperialism is imbricated into the legal tradition. In this sense, Wolkmer presents:

> It is not too important to remember that in Latin America both the legal culture imposed by the metropolises throughout the colonial period and the legal institutions formed after the independence process (courts, codifications and constitutions) derive from the European legal tradition, In the private sphere, by the classical sources of Roman, Germanic and canonical rights. Similarly, in the formation of the legal culture and the post-independence constitutional process, account must be taken of the inheritance of bourgeois political charters and of the illuminist and liberal principles inherent in the declarations of rights as well as of the new capitalist modernity, free market, based on false tolerance and on the liberal-individualist profile (Translated by the author).[60]

This tension is captured by Débora Ferrazzo in the essay *O Novo Constitucionalismo e Dialética da Descolonização* by pointing out the premises of what she called the Eurocentric theorization of legal science inherited by the countries of the Third World. She states that:

> The hierarchical structure of norms is Eurocentric theorization of legal science. Consolidated by Hans Kelsen in his Pure Theory of Law, the proposal to submit rules of social regulation to other norms that confer efficacy to the reach of a fundamental norm spread throughout the West and much of the East. This means that all the expressions of law of different societies must be validated, identified with the law, in order to be able to take effect and be enforceable between members of these societies. In short, it is only right if becomes positive law, validated by a higher norm, that in the legal culture homogenized in the world, would be the Constitution Translated by the author)[61]

In this same vein, according to Boaventura de Sousa Santos resisting this paradigm of domination requires to overcome what he calls the abyssal line:

> It consists of a system of visible and invisible distinctions, the latter of which are based on the former. Invisible distinctions are established by radical lines dividing social reality into two distinct universes: the 'this side of the line' and the 'the other side of the line.' The division is such that 'the other side of the line' disappears as reality, becomes non-existent and even produced as non-existent. Inexistence means not existing in any way of being relevant or understandable. Everything that is produced as non-existent is radically excluded because it remains outside the universe which the very conception of inclusion considers as the 'other.' The fundamental characteristic of abyssal thinking is the impossibility

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[59] Sweetman, C, *Climate Change and Gender Justice* (Practical Action Publishing 2009), 156.

[60] Wolkmer, AC, *Constitucionalismo Latino-Americano - Tendências Contemporâneas* (Jurua Editora 2013), 22-23.

[61] Wolkmer, AC, *Pluralismo Jurídico. Fundamentos de Uma Nova Cultura no Direito* (Edição 2015), 32.

> of co-presence on both sides of the line. The universe 'on this side of the line' only prevails insofar as it exhausts the field of relevant reality: beyond the line there is only non-existence, invisibility and non-dialectical absence (translated by the author).[62]

Therefore, the abyssal line of thinking requires homogenizing politics, law, values, and democracy, just to mention a few, so a non-existence and invisibility exists. This implicates in the prevalence of reductionisms contained in the metanarratives that no longer respond to the challenges in the world as of today.[63] On the other hand, facing these metanarratives such as International Law requires a critical thinking position that provides the tools to identify forms of domination, especially the subtle ones.

In Figures 5 and 6 we observe the dialectics of IEL and FT grounded in the Agreements regulating the climate change regime. The concepts or codes representing the metanarratives of IEL (in blue) are 'development', 'sustainable development', and 'universality' that disregard the stages of modernity in which the North and South are historically located today.[64]

The codes representing FT (highlighted in yellow) are '~solidarity', '~resilience', and '~creativity', with the '~' sign being added to reference the contradiction of the core concepts of FT with the metanarratives within the Agreements.

In addition, the analysis of the Agreements showed the emergence of another contradictory concept that challenges the metanarratives of IEL – climate justice (in green). According to Heyward & Roser, the concept of climate justice is associated with the following debate:[65]

> For most people, the main reason for limiting greenhouse gas (GHG) emissions is not the impacts on the environment per se but the resulting effects of climate change upon humans. Of particular concern is that climate change is expected to have disproportionate effects on regions where severe poverty is already widespread. At present, more than 2.2 billion people are vulnerable to multidimensional poverty and 1.2 billion people live on less than $1.25 per day.[66] Climate change stands to make the very poorest in the world even poorer. Indeed, it is 'one of the most critical challenges to the global development agenda'.[67] Although the poorest are potentially most affected by climatic impacts, they are least involved in creating the problem. Historically speaking, it is people in developed countries who have emitted the most.[68] Since climate change is primarily caused by some parts of humanity whilst the effects of climate change will be largely suffered by others, it is a matter of justice. Indeed, most theorists who write about climate change do so in the language of justice.[69]

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62 Santos B and Meneses, MP, *Epistemologias Do Sul* (Almedina 2010).

63 Lyotard and Jameson, *supra* nt 54.

64 *Ibid*.

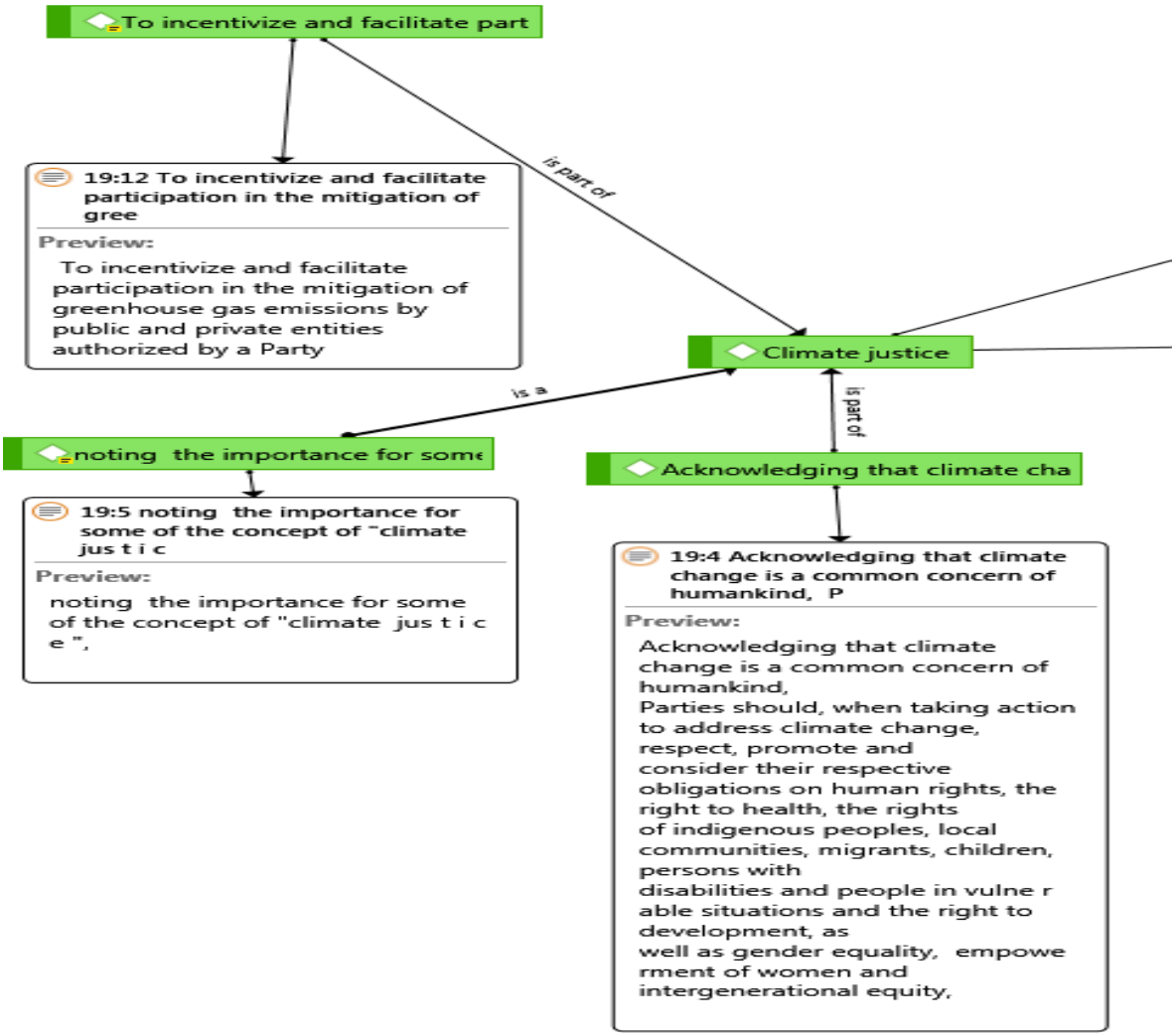
65 Heyward, C and Roser, D, *Climate Justice in a Non-Ideal World* (Oxford University Press 2016), 2.

66 United Nations Development Program, REPORT : *Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience*, 2014, *at <hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>* (accessed on 19 November 2017), 19.

67 *Ibid*, 12.

68 Den Elzen, MGJ and Hof AF and Roelfsema, M, "Analysing the greenhouse gas emission reductions of the mitigation action plans by non-Annex I countries by 2020" (56) *Energy Policy* (2013) 633.

69 See, for example, Page 2006; Vanderheiden 2008; Gardiner 2011; McKinnon 2012; Cripps 2012; Caney 2014; Shue 2014.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19:4 Acknowledging that climate change is a common concern of humankind, P
Preview:
Acknowledging that climate change is a common concern of humankind,
Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulne r able situations and the right to development, as well as gender equality, empowe rment of women and intergenerational equity,

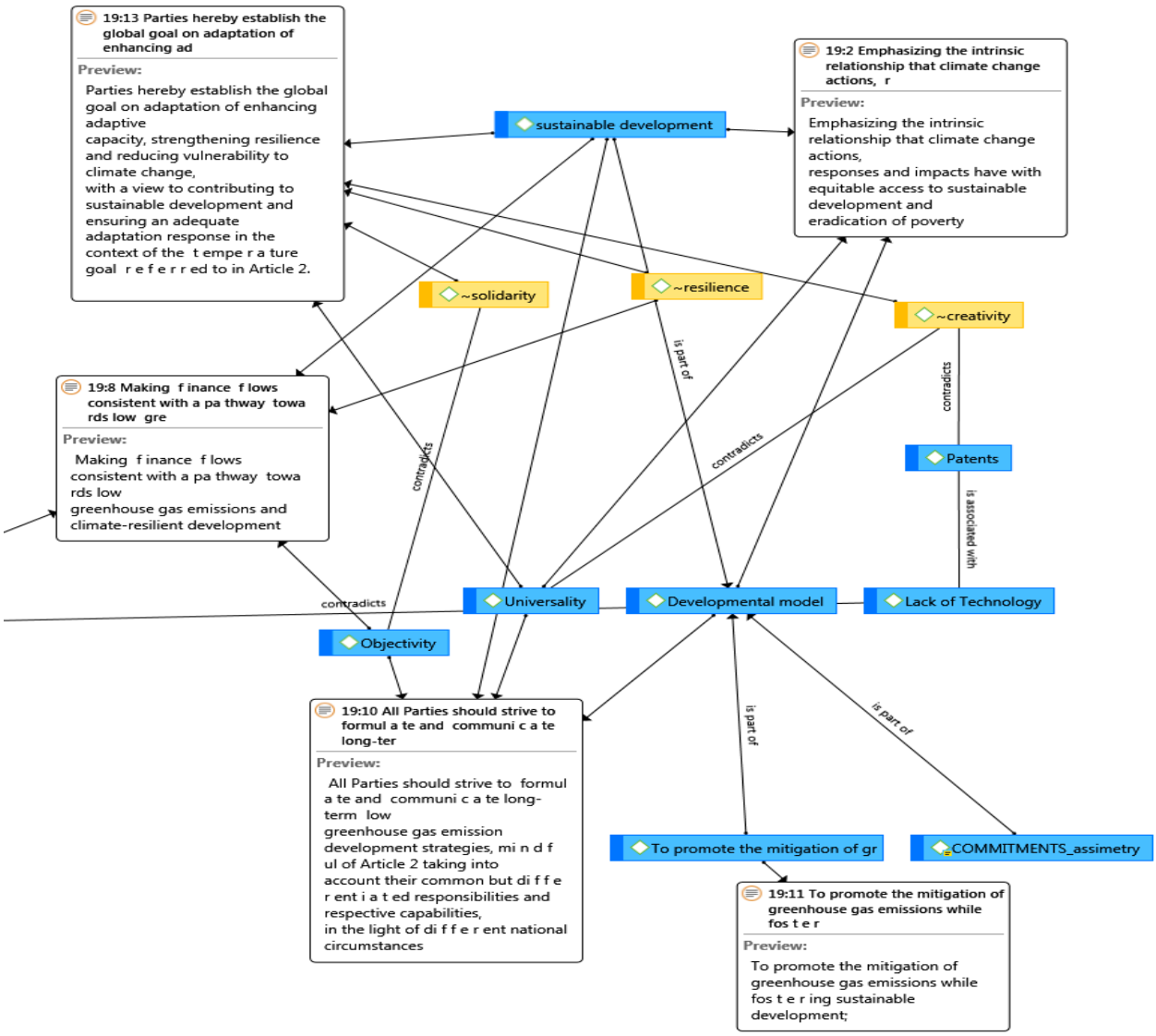

Figure 5 and 6 (Relations between metanarratives and FT concepts, and excerpts of the Agreements as empirical evidences)

i. The Logic of Metanarratives: Sustainable Development to Whom?

The language in the Agreements presents a strong and central presence of metanarratives such as development, economic, sustainable, etc. and a peripheral or marginal location for ideational factors such as hunger, socially, vulnerability, resilience, etc. Figure 8 below provides empirical evidence of the less visible dimension of the domination and violence against women, and other misrepresented minorities in the international system dominated by what Déborah Danowski and Eduardo Viveiros de Castro call the super-developed countries, which are eager to continue the process of super-development.[70] Using the same set of treaties as explained before, the 'word cloud' below shows the centrality of terms such as 'development' and 'economic', while 'beneficial' and

[70] Danowski, Déborah and Castro, EV, *The Ends of the World* (1st ed, Polity 2016).

'poverty', for instance, are peripheral to institutions dealing with the climate change debate.

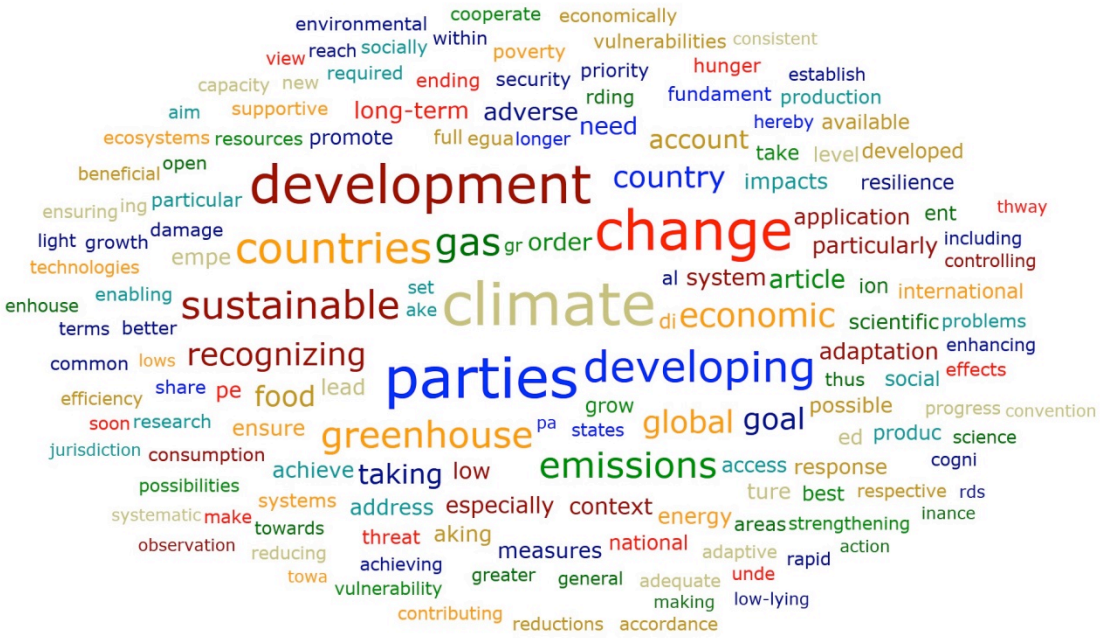

Figure 7

One of the devices found in IEL that reflects the argument above is the principle of sustainable development that appears in IEL as 'cultural performance', which for Alexander is '[…] the social process by which actors, individually or in concert, display for others the meaning of their social situation.'[71] Let us understand the dynamics played by this metanarrative as the normal or desired functioning of the climate change regime.

Initially, we need to note that there are multiple views and perceptions on how to achieve sustainable development. The normal concept as generally adopted in IEL is described by Sands, Peel, Fabra, & MacKenzie:

> The Brundtland Report defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It contains two key concepts: the concept of needs, in particular the essential needs of the present generation, and the idea of limits imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.[72]

As observed, the normal concept lacks two important historical and material dimensions – how development is perceived by Third-World countries vis-à-vis environmental protection and use of natural resources and to what extent developed countries that plundered the nature to achieve their status possess legitimation to dictate how the scale between environmental protection and development will work towards one or the other end (and the pervasive unwillingness to transfer technology to help increase environmental protection).

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[71] Alexander, JC, *Performance and Power* (Polity 2011), 26.

[72] Sands, PP et al, *Principles of International Environmental Law* (Cambridge University Press 2012), 9.

Fredrick Oduol Oduor presents an important implication of the normalization of the sustainable development principle:

> Sustainable development continues to evolve into a fundamental concept in international law. It is because of sustainable development that the South accepted to be part of environmental discourse. As a result, their view changed from contestation to participation as clearly evidenced in Johannesburg. The Johannesburg forum expanded on the concept of sustainable development and the south embraced it because it recognized their needs. Unfortunately, the schism between the two blocks reinvented itself into the understanding and implementation of the concept. O'Riordan opined that sustainable development is 'becoming accepted as the mediating term that bridges the gap between developers and environmentalists. Its beguiling simplicity and apparently self-evident meaning have obscured its inherent ambiguity.[73]

By carving the concept of sustainable development, and including it in the legal framework of IEL, super-developed countries underscore the goal of imposing their political agenda. As posed by Skolimowski:

> The implications of performance theory for understanding power are clear. According to conventional conceptions, whether Weberian or Marxist, power is institutional- structural. It is the ability to make somebody do something whether they like it or not. Coercion, or the ability to threaten it, is critical from such a perspective, which leads to the centrality of such ideas as control over means of production or monopolization of the means of violence. From this point of view, you don't need ideas to exercise power; you just need resources and capacities.[74]

In that sense, it is worthwhile noting a similar political phenomenon involving development that illustrates the potential outcome for adopting sustainable development as proposed by IEL. The need and desire for development of Latin American countries received heavy attention after the end of the Second World War, mainly due to what has been known as the Trumann Doctrine, in which the motto is *Producir más es la clave para la paz y la prosperidad*.[75] Development had become a fundamental problem to the underdeveloped countries that submitted themselves to interventionist practices as 'the' only way to achieve development.[76] In conclusion, Galeano states how the metanarrative of development works:

> In the rigid framework of a global capitalism integrated around the big U.S. corporations, the industrialization of Latin America has increasingly less to do with progress and national liberation. The talisman was robbed of its power in the decisive defeats of the past century, when ports triumphed over interiors and free

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[73] At Social Science Research Network, Oduor, FO, Developing *Countries, Environmental Challenges, Politics and Human Rights: Another Conundrum in the Quest to Deconstruct the 'Right to Poverty',* 9 September 2010, <papers.ssrn.com/sol3/papers.cfm?abstract_id=1674231> (accessed on 19 November 2017).

[74] Skolimowski, "H, Power: Myth and Reality" 9(1) *Alternatives* (1983) 25, <journals.sagepub.com/doi/abs/10.1177/030437548300900102> (accessed on 19 November 2017), p. 4.

[75] To produce more is the key for peace and prosperity (Translated by the Author); Escobar, A, *La Invencion del Tercer Mundo* (Norma 2000), 19.

[76] See also Silva, GB, *Estado De Derecho Y Globalizacion. El PapeL*, ILSA - Instituto Latinoamericano de Servicios Lega (2009).

> trade crushed new-born national industries. Arid, the twentieth century produced no bourgeoisie strong and creative enough to shoulder the task and follow it through to its end. Every effort weakened the goal. What happened to Latin America's industrial bourgeoisie was what happens to dwarfs: it became decrepit without having grown. Our bourgeois of today are agents and functionaries of prepotent foreign corporations. Truth compels us to admit that they never did anything to deserve a better fate.[77]

The use of language devices international institutions put forward to justify the status quo of domination as an imperial project in the climate change regime is so surmountable that they are virtually impossible to examine in this paper, however, for the sake of the argument we present one additional example. IEL is prone to provide bad empirical evidence of the standard practice of the developed countries such as Bophal (India)[78] and Mariana (Brazil).[79] The standard practice is described by Agarwal & Narain:

> The fate of the Third World in this garbage business is now clear. As far as the West is concerned it can live to fix its carbon or plant cheap trees or dispose its toxic wastes as has been the case in the past. A World Bank staff paper has even given this garbage business a high sounding new name; 'intergenerational compensation project'. Whose generation are they talking about?[80]

Conclusion

The emergence of IEL is directly connected to the growing anthropogenic activities and the complexity encountered in dealing with natural resources with no physical limitation. The international institutional responses to environmental challenges, although necessary due to the systemic nature of the problem, are subordinated to tenets grounded in International Law long before the environment became a problem.

In this sense, the climate change regime has been formed under the prevalent logic of imperialistic domination, which as theorized and observed in this article presents both visible and less visible dimensions of domination and violence that exclude minorities usually located in the Global South, and therefore, more exposed to the vulnerabilities of the international system and protection of International Law.

The application of the socio-legal methodology in which text, subtext and context of IEL are examined allowed to expose some of the metanarratives and confronting them with FT. To that end, the study presents evidence of the existing disconnection in the political agenda of developed and Third World countries, which results in a body of law that (1) increases the vulnerability and inequality, (2) does not allocate properly the responsibility, (3) promotes super-development of the already developed countries and (4) imposes externalities only to Global South countries.

The findings in this study represent an initial effort to build a research agenda that confronts IEL to other world views and perceptions, which at the end is expected to

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77 Galeano, E, *Open Veins of Latin America: Five Centuries of the Pillage of a Continent* (Monthly Review Press; Anniversary Edition 1997), 207.

78 Oduor, *supra* nt 73.

79 The Guardian, Phillips, D, *Brazil's Mining Tragedy: Was it a Preventable Disaster?* 25 November 2015, *at* <theguardian.com/sustainable-business/2015/nov/25/brazils-mining-tragedy-dam-preventable-disaster-samarco-vale-bhp-billiton> (accessed on November 19 2017).

80 Agarwal, A, and Narain, S, *Global Warming in an Unequal World: A Case of Environmental Colonialism*, Centre for Science and Environment (1991), 17.

present strong empirical evidence that supports the argument that metanarratives as currently found in IEL do not provide enough reach to emancipate or protect minorities, increase inclusion, protect the environment and so forth. This paper also represents a provocative piece to generate enough incentives to international lawyers to further pursue applying critical approaches to specific international regimes or institutions.

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A New Nuclear Age: An Exclusionary Global Order?

Amrita Chakravorty*

Keywords
NON-PROLIFERATION; DISARMAMENT; UNITED NATIONS SECURITY COUNCIL (UNSC); NUCLEAR NON-PROLIFERATION TREATY (NPT); JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA); NUCLEAR SUPPLIERS GROUP WEAPON STATES (NNWSS)

Abstract

The global nuclear power play seems to be changing form and altering courses with each passing day. The world has realised the enormous destructive potential of nuclear weapons and has even made reasonable room for curbing and containing their use in the past. However, whether or not the world leaders today continue to share this wisdom is a matter of contention, as well as high concern. The recently concluded 72nd Session of the United Nations General Assembly (UNGA) witnessed the world leaders discussing some of the most pertinent nuclear issues; however, there was no visible cohesion in their policy narratives, nor any international wisdom in their approach to these problems. The recently adopted Treaty on the Prohibition of Nuclear Weapons, on the other hand, failed to see the participation of any nuclear weapon State, or even those States within their broad umbrellas; while the Middle East once again seems to be mired in a fresh crisis, with the Iran Nuclear Deal on the verge of being de-certified and the possibility of Iran no longer being bound by its mandates. This paper attempts to analyse in brief these issues and a few more, and to bring forth the glaring discrepancies in the way they are being dealt with by the global actors.

Introduction: The Present Global Issues

The changing dynamics of the international regulation of nuclear power – be it the civilian use of nuclear energy or the storing or testing of nuclear weapons – is one of the most pertinent global issues to date. Multilateral nuclear disarmament forums today face huge obstacles, since most of them largely remain deadlocked. Several stakeholders, hence, continue to draw public attention to what has been referred to as a 'legal gap' in the nuclear non-proliferation and disarmament regime. They lament that in contrast to the regimes governing other weapons of mass destruction (biological and chemical), as well as those governing conventional weapons such as landmines and cluster munitions, the nuclear regime has failed to comprehensively prohibit the weapon in question. One of the major steps in the direction of filling this gap within the last fifty years has been the Treaty on the Prohibition of Nuclear Weapons. 122 UN Member States have acceded to this Treaty, adopting it in September 2017 in New York. It is, however, important to note that none of the nine (known to be) nuclear weapons nations – the United States (US), the United Kingdom (UK), France, Russia, China, North Korea, Israel, India and Pakistan –

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participated in the talks leading up to this nuclear prohibitive treaty. Overall, 69 countries chose not to participate in the talks – most of whom included Asian and European countries that are under Washington's nuclear umbrella. The UK, US and France declared in a joint statement, following the UNGA adopting the new treaty on 7 July 2017, that

> "[They did] not intend to sign, ratify or ever become party to it. Therefore, there will be no change in the legal obligations on [their] countries with respect to nuclear weapons".[1]

This was the first multilateral, legally binding instrument for nuclear disarmament to have been negotiated in 20 years. The treaty prohibits a full range of nuclear weapon-related activities, such as undertaking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons. The new treaty has been described by many as an expression of the deep concern about the enormous risks posed by nuclear weapons and the growing frustration with the failure of nuclear armed States to fulfil their nuclear disarmament commitments.

Another relevant and fervently debated issue concerns the 2015 Joint Comprehensive Plan of Action (JCPOA), commonly known as the Iran Nuclear Deal, which once again made headlines while being extensively discussed at the 72nd UNGA Session. Iran signed the Nuclear Non-Proliferation Treaty (NPT) in 1968. The Parliament ratified it in February 1970 (uranium enrichment was allowed under the treaty). Iran also signed the NPT's Safeguards Agreement with the International Atomic Energy Agency (IAEA). The safeguards allowed inspections for the purpose of verifying that nuclear enrichment for peaceful nuclear energy is not diverted to nuclear weapons or other nuclear explosive devices. From 2006 onwards, the UN Security Council (UNSC) began to issue a series of resolutions imposing sanctions on Iran following reports by the IAEA regarding Iran's non-compliance with its safeguards agreement under the (NPT). Sanctions were first imposed when Iran rejected the UNSC's demand that Iran suspend all uranium enrichment-related and reprocessing activities.

Ultimately, endorsed unanimously by the UNSC in 2015, the JCPOA, between its five permanent members (China, France, Russia, the UK and the US), along with Germany (P5+1)[2], the European Union (EU) and Iran, set out rigorous mechanisms for monitoring the limits on Iran's nuclear programme, whilst paving the way for lifting UN sanctions against the country. The JCPOA required constraints that seek to ensure Iran's nuclear

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[1] UN News Centre, *"UN Conference adopts Treaty Banning Nuclear Weapons",* 7 July 2017 *at* <un.org/apps/news/story.asp?NewsID=57139#.WeRrvLhx2v8> (accessed 19 November 2017).

[2] The initial diplomatic efforts on the Iranian nuclear issue were spearheaded by the United Kingdom, France and Germany (E3). Some of the few instances of successful engagement were the *Tehran Agreed Statement* of October 2003 and the *Paris Agreement* of November 2004 that Iran entered into with the E3. The E3 engagement process, however, hit a roadblock in the light of Iran's decision of August 01, 2005 to resume uranium conversion activities at Isfahan. The P5+1 (made up of five permanent members of the UNSC along with Germany) or a grouping also commonly known as E3+3 took forward the process of engagement spearheaded by E3 countries after the Iranian nuclear issue was referred to the UNSC by the IAEA in February 2006. Germany's involvement therefore began as part of the E3 as early as in 2003 and continued when the negotiation process was expanded to include the other three permanent members of the UNSC in 2006.

programme will be used for purely peaceful purposes in exchange for a broad lifting of US, EU, and UN sanctions on Iran. Its 'Implementation Day' was declared by the P5+1 to be 16 January 2016, representing the completion of Iran's nuclear requirements, the entry into effect of UNSC Resolution 2231 – which endorsed the JCPOA – and the start of sanctions relief stipulated in the agreement.

The Obama Administration and other P5+1 leaders asserted that the JCPOA is the most effective means to ensure that Iran cannot obtain a nuclear weapon and that all US options to prevent Iran from developing a nuclear weapon remain available even after the key nuclear restrictions of the JCPOA expire. Critics of the JCPOA, however, expressed concerns that the extensive sanctions relief provided under the accord give Iran additional resources to extend its influence within the Middle-Eastern region and that the accord does not contain any restrictions on Iran's development of ballistic missiles. Resolution 2231, which was adopted in July 2015, prohibits arms transfers to or from Iran, but only for five years, and contains a voluntary restriction on Iran's development of nuclear-capable ballistic missiles for only up to eight years.[3] The expiration of these restrictions sets the stage for Iran to emerge as a key regional actor. Therefore, the Trump Administration has begun to argue that the JCPOA does not address Iran's 'malign' activities in the region nor any other activities that the Administration considers provocative or destabilizing, such as the continued development of ballistic missiles. Administration officials have also said that these weaknesses in the agreement might lead the Administration to conclude that the agreement is not adequately serving US interests. Yet, other States within the P5+1 grouping and other US allies argue that the agreement contributes to regional stability and that the United States should continue to implement it.[4]

The third most pertinent issue regards the Nuclear Supplier's Group (NSG), which has 48 members and sets guidelines for nuclear trade so that transfers do not contribute to weapons proliferation. The NSG has been in the news lately for its recently concluded plenary meeting in June 2017, which ended inconclusively regarding participation by non-NPT States (particularly the bids by India and Pakistan). The People's Republic of China and a few others continued to object to India's and Pakistan's membership bids, which were

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[3] UNSC Resolution 2231 (2015), S/RES/2231 (2015)
Annex A: Joint Comprehensive Plan of Action (JCPOA), Vienna, 14 July, 2015
"3. Iran will continue to conduct enrichment R&D in a manner that does not accumulate enriched uranium. Iran's enrichment R&D with uranium for 10 years will only include IR-4, IR-5, IR-6 and IR-8 centrifuges as laid out in Annex I, and Iran will not engage in other isotope separation technologies for enrichment of uranium as specified in Annex I. Iran will continue testing IR-6 and IR-8 centrifuges, and will commence testing of up to 30 IR-6 and IR-8 centrifuges after eight and a half years, as detailed in Annex I".
Annex B: Statement
"6 (b). Take the necessary measures to prevent, except as decided otherwise by the UN Security Council in advance on a case-by-case basis, the supply, sale, or transfer of arms or related materiel from Iran by their nationals or using their flag vessels or aircraft, and whether or not originating in the territory of Iran, until the date five years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier."

[4] Congressional Research Service (CRS), Katzman, K and Kerr, PK, REPORT: *Iran Nuclear Agreement*: *Prepared for Members and Committees of Congress*, Doc R43333, 15 September 2017, *at* <fas.org/sgp/crs/nuke/R43333.pdf > (accessed 19 November 2017).

submitted last year. The NSG, which operates by consensus, has sought to reach agreement on membership criteria for non-NPT States.[5]

II. The Future of Nuclear Disarmament

The Vienna Conference of 2014 set the ball rolling for a global movement 'to fill the gap between proliferation and elimination of nuclear weapons' with the enunciation of a Pledge on the Humanitarian Impact of Nuclear Weapons. The Pledge called upon State parties to the NPT to fulfil their Article VI obligation by pursuing effective measures «to fill the legal gap for the prohibition and elimination of nuclear weapons. This campaign, initiated in the run up to the 2015 NPT Review Conference (RevCon), gained support from a vast majority of non-nuclear weapon States attending it. This ultimately led to the adoption of the Treaty on the Prohibition of Nuclear Weapons on 7 July 2017. However, as already stated, a number of countries abstained from the negotiations. Moreover, with the NPT having a near universal jurisdiction, the need for another treaty has also been questioned.

In March 1970, the NPT came into effect and since then has provided a foundation for legal and political efforts to curb the spread of nuclear weapons. The NPT is a nearly universal treaty (except for India, Pakistan, Israel, and North Korea) and the linchpin of the global non-proliferation regime. Many critics of the NPT, however, have been of the opinion that the key implication of the US-Soviet joint draft emerging as the text of the NPT in 1968 was the absence of any effort to conceptualise the idea of non-proliferation, as either an *end* in itself or a *means* towards the anticipated end of total elimination.[6] The NPT divided States into two categories namely, the Nuclear Weapon States (NWS) and the Non-Nuclear Weapon States (NNWS). The NPT in a nutshell may be described as a bargain between NWSs and NNWSs in which NWSs (the US, Russia, France, the UK and China) agreed to share nuclear technology for peaceful purposes and gradually disarm their nuclear arsenals while NNWSs agreed not to develop nuclear weapons and to accept IAEA (International Atomic Energy Agency) safeguards.[7] In 1963, President Kennedy warned that 15 to 25 nations could possess nuclear weapons within a decade. However, it is mainly due to the NPT that merely nine States are known to be Nuclear Weapon States to date.

There is little doubt that the NPT regime worked well during the Cold War period, not because the regime itself exerted some direct effects on its members, but rather because the two superpowers had a convergence of interest in creating and maintaining the treaty. There was a common understanding that the world of increased nuclear weapons would be a dangerous one. The history of the NPT points to the fact that many States joined the NPT because of the persuasive powers of the Americans and the Soviets. Nuclear weapons, first

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[5] The NSG is not a formal organization, and its guidelines are not binding. Decisions, including on membership, are made by consensus. At the NSG plenary meeting in June, Member States designated Rafael Mariano Grossi, an Argentine diplomat and outgoing chair of the group, to lead consultations on a draft document that provides a "basis for the commitments and understanding to augment the applications of the non-NPT applicants." See Arms Control Association, Kelsey Davenport, *Document Proposes Measures, which Would Apply to India and Pakistan*, 11 January 2017, *at* <armscontrol.org/taxonomy/term/23> (accessed 18 November 2017).

[6] Institute for Defense Studies and Analysis, Kumar, AV, *2017 Conference to Outlaw Nuclear Weapons: Time Ripe for a Stand-Alone Disarmament Instrument?*, 4 November 2016, *at* <idsa.in/issuebrief/2017-conference-to-outlaw-nuclear-weapons_avkumar_041116> (accessed 18 November 2017).

[7] International Policy Digest, Bano, S, *Is the NPT Irrelevant?,* 29 November 2014, *at* <intpolicydigest.org/2014/11/29/is-the-npt-irrelevant/> (accessed 18 November 2017).

and foremost, have been procured out of security concerns. The most popular explanation why States have chosen the non-nuclear option is thus a security guaranteed by others. This proposition, however, opens more questions than it answers. For example, it cannot explain why so many 'renouncers' came from the non-aligned camp, or even the cases of the 'allied renouncers', as they had no reliable guarantees, especially in the face of the NATO nuclear programme.

A possible explanation of the NPT's success may be as follows. Interestingly, none of the 'nuclear aspirants' were democracies when the NPT was being negotiated. A significant number of these aspirants stopped their programmes during the negotiations or when the negotiations had been completed. Notably, during processes of democratisation, when young democracies struggled to prove their 'good citizenship' in order to attract international recognition and assistance, renouncing nuclear weapons appeared a particularly fit instrument to demonstrate good international behaviour. Thus, to most of them the NPT marked the line in the sand beyond which nuclear weapons aspirations lost their legitimacy. The increasingly strong non-proliferation norm shaped the discursive arena of domestic decision-making and changed the balance of influence between the proponents and opponents of a national nuclear option. The burden of proof that 'going nuclear' was the right thing to do became ever stronger.[8] The NWSs, on the other hand, joined the NPT because it not only legitimized their nuclear weapons programme, but also provided them with an effective means to maintain their nuclear dominance.

The treaty provides legal justification for coercive actions when a State tries to acquire nuclear weapons under the cover of the NPT. Violation of the treaty results in economic and military sanctions and isolation.[9] The NPT also requires the NWSs to

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[8] Muller, H, "Between Power and Justice: Current Problems and Perspectives of the NPT Regime" 34(2) *Strategic Analysis* (2010) 190, *at* <tandfonline.com/doi/pdf/10.1080/09700160903542740> (accessed 19 November 2017).

[9] The IAEA Safeguards are embedded in legally binding agreements. In line with the IAEA's Statute, States accept these Safeguards through the conclusion of such agreements with the Agency. The vast majority of safeguards agreements are comprehensive safeguards agreements that have been concluded by the IAEA with non-nuclear-weapon States parties to the NPT and nuclear-weapon-free zone treaties. The IAEA has to date concluded comprehensive safeguards agreements with 174 States. Some 100 of these States have also concluded small quantities protocols to their comprehensive safeguards agreements.

All non-nuclear-weapon States party to the NPT, as well as States parties to the regional nuclear-weapon-free zone treaties, are required to conclude comprehensive safeguards agreements with the IAEA. Such agreements are concluded on the basis of INFCIRC/153. The five NPT nuclear-weapon States have concluded safeguards agreements covering some or all of their peaceful nuclear activities. Under these voluntary offer agreements, facilities are notified to the IAEA by the State concerned and offered for the application of safeguards. The IAEA applies safeguards under voluntary offer agreements to nuclear material in selected facilities. Safeguards are implemented in three States that are not party to the NPT – India, Pakistan and Israel – on the basis of item-specific agreements they have concluded with the IAEA.

Article III of the IAEA Statute provides the Agency with the authority, among others, to establish and administer safeguards. When the Board of Governors approves a safeguards agreement, it authorizes the Director General to conclude and subsequently implement the agreement.

Over the past 35 years the International Atomic Energy Agency's (IAEA) safeguards system under the Nuclear Non-proliferation Treaty (NPT) has been a conspicuous international success in curbing the diversion of civil uranium into military uses. It has involved cooperation in developing nuclear energy while ensuring that civil uranium, plutonium and associated plants are used only for peaceful purposes and do not contribute in any way to proliferation or nuclear weapons programs.

negotiate in good faith to disarm their nuclear arms. It is the lack of success on the latter pledge that has prompted the NNWSs to reframe their demand for nuclear disarmament with references to the humanitarian consequences of the use of nuclear weapons, international law, and international humanitarian law. Even though the NPT remains widely popular, the reluctance of the NWSs to disarm has created a legitimacy crisis. Without the cooperation of major States, it is unlikely that the NPT will be an effective barrier against nuclear proliferation.

The reality today is that States feel compelled to strive for absolute security. Hence, it becomes individually rational to procure these weapons. Accordingly, the criticism against the NPT and the widening gap between non-proliferation and complete disarmament lead to two conflicting approaches: a) non-proliferation was to establish a global framework and structures to inhibit the further spread of nuclear weapons technology and resources alongside a series of calibrated measures, pursued in a parallel and phased manner, together leading to a conclusive disarmament process, and (b) non-proliferation could facilitate the progress towards a tipping point – a post-proliferation world – where proliferation no longer happens and sets the ideal conditions for the disarmament treaty and subsequent measures for total elimination to be initiated.[10]

The impetus for a nuclear weapons prohibition treaty is in many ways a reversal of the politics witnessed during the negotiations for the NPT. A vast number of the NNWSs, led by the non-aligned group, have rallied against the nuclear powers demanding a comprehensive treaty that would not only inhibit new nuclear weapon States, but also facilitate the dismantling of existing arsenals, along with steps for a ban on nuclear testing, ending fissile materials production, and allowing uninterrupted access to peaceful nuclear energy resources. The US and Soviets overlooked these demands and persuaded their allies to agree on a draft which allowed their maintenance of arsenals and incorporation of ambiguous provisions for incremental measures. Subsequently, NWSs have remained opposed to any timeline-oriented plan or stand-alone legal instrument for nuclear disarmament. The permanent members of the UNSC (P5) had issued a statement in April 2015 (days before the 2015 RevCon) reiterating their support for "an incremental, step-by-step approach (as) the only practical option for making progress towards nuclear disarmament, while upholding global strategic security and stability", arguing that a suitable security environment should be facilitated in order to make progress in all areas .[11]

Recently, countries, such as India, who had rejected the NPT in 1968, have gradually begun to assume the position that they are willing to join the treaty, but solely as NWSs'. Hence, nuclear policies of developed, as well as developing States can at best be described today as 'incoherent' and 'self-serving' (not a far-cry from what it has been from the very start). India, for example, on its part has continued to maintain that the UN's Conference on Disarmament (CD) is the only

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See "Safeguards Agreements), <https://www.iaea.org/topics/safeguards-agreements>. See also, "Safeguards to Prevent Nuclear Proliferation", <http://www.world-nuclear.org/information-library/safety-and-security/non-proliferation/safeguards-to-prevent-nuclear-proliferation.aspx>.

10 Kumar, *supra* nt 6.

11 UN Statement, *Statement by the People's Republic of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the 2015 Treaty on the Non-Proliferation of Nuclear Weapons Conference*, 30 April 2015, *at* <un.org/en/conf/npt/2015/statements/pdf/P5_en.pdf.> (accessed 18 November 2017).

> "right place for pursuing nuclear disarmament in all its essential elements … It has the mandate, the membership and the rules for embarking on the path to nuclear disarmament. Accordingly, India is not participating in the work of the conference on the prohibition of nuclear weapons that has started this week in New York."[12]

As stated by India's Permanent Representative to the CD, at the CD Plenary, on 28 March 2017. He further added

> "We live in a world full of asymmetries. Imagine if all States with asymmetry concerns started to address these concerns with such dangerous tools. Strategic trust would be impossible to sustain in such a situation and progress on disarmament and international security would grind to a halt. […] these challenges would look less stark if the world was moving as a whole towards the complete and verifiable elimination of nuclear weapons and all other weapons of mass destruction."[13]

He further and notably added,

> "nuclear disarmament requires a universal commitment and an agreed multilateral framework; it will have to rest on three pillars: a universal prohibition, complete elimination and international verification. India is ready to begin work on these essential elements".[14]

III. Where is the JCPOA Headed?

Despite it being repeatedly confirmed by the IAEA that Iran has been in compliance with the provisions of the nuclear deal, the reason why the current US administrative regime has been critical of the deal is, as quoted by Secretary of State Rex Tillerson, that even though Iran is in 'technical compliance', it 'is clearly in default of' the expectation that the JCPOA would also have helped address other issues, such as Iran's regional activities and continued missile testing'.[15] A collapse of the 2015 deal, which the current US administration has called 'an embarrassment' but which is supported by the other major powers that negotiated it with Iran, could trigger a regional arms race and stoke Middle East tensions.

Speaking at the 72nd Session of the UNGA on 19 September 2017, the US President, Mr. Donald Trump described Iran as

> "an economically depleted rogue State whose chief exports are violence, bloodshed, and chaos … Rather than use its resources to improve Iranian lives, its oil profits go to fund Hezbollah and other terrorists that kill innocent Muslims and attack their peaceful Arab and Israeli neighbours. This wealth, which rightly belongs to Iran's

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[12] Permanent Mission of India to Conference on Disarmament, *Statement by Ambassador Amandeep Singh Gill Permanent Representative of India to the Conference on Disarmament at the CD Plenary on March 28, 2017,* 28 March 2017, *at* <meaindia.nic.in/cdgeneva/?pdf5909?000> (accessed 19 November 2017).

[13] *Ibid.*

[14] *Ibid.*

[15] The Hill, Greenwood, M, *Tillerson: Iran is in 'technical compliance' with the nuclear deal*, 20 September 2017, *at* <thehill.com/policy/international/351677-tillerson-iran-in-technical-compliance-with-nuclear-deal> (accessed 18 November 2017).

> people, also goes to shore up Bashar al-Assad's dictatorship, fuel Yemen's civil war, and undermine peace throughout the entire Middle East."[16]

He finally concluded the US' position on the Iran nuclear deal by stating that

> "We cannot let a murderous regime continue these destabilizing activities while building dangerous missiles and we cannot abide by an agreement if it provides cover for the eventual construction of a nuclear program. The Iran Deal was one of the worst and most one-sided transactions the United States has ever entered into. Frankly, that deal is an embarrassment to the United States, and I don't think you've heard the last of it – believe me."[17]

The US administration has since then maintained that the agreement must be changed or the US would not stick with it.[18] Some of the other parties to the agreement, such as France, the UK and the EU have, however, continued to re-affirm their commitments towards the deal.

As per a recent Congressional Research Service Report, Iran has not built any new nuclear facilities or expanded the existing ones since beginning implementation of the JCPOA in January 2014.[19]

JCPOA requires the parties to the agreement to refrain from re-imposing the sanctions that are lifted or suspended, as long as Iran is complying. However, paragraphs 36 and 37 of the Agreement also contain a mechanism for the "snap back" of UN sanctions if Iran does not satisfactorily resolve a P5+1 inquiry about a possible breach of compliance. If the US sanctions are re-imposed (other than on the grounds of Iranian non-compliance), Iran is not bound by its nuclear commitments.

The JCPOA has had significant implications for the Middle East, and particularly for Israel and for the states of the Gulf Cooperation Council (GCC: Saudi Arabia, Kuwait, Bahrain, the United Arab Emirates, Qatar, and Oman). The JCPOA has, by most accounts, reduced any short-term threat of a nuclear-armed Iran. However, the sanctions relief of the

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[16] The White House, Office of the Press Secretary, *Remarks by President Trump to the 72nd Session of the United Nations General Assembly*, 19 September 2017, *at* <whitehouse.gov/the-press-office/2017/09/19/remarks-president-trump-72nd-session-united-nations-general-assembly> (accessed 18 November 2017).

[17] *Ibid.*

[18] Reuters, Mohammed, A and Irish, J, *Iran nuclear deal must change if US to stay: Tillerson*, 19 September 2017, *at* <reuters.com/article/us-un-assembly-france/iran-nuclear-deal-must-change-if-u-s-to-stay-tillerson-idUSKCN1BU2DB> (accessed 18 November 2017).

[19] Tillerson issued this certification on July 17 2017 and State Department Spokesperson Heather Nauert stated on July 18 2017, that "Iran is in compliance with" the agreement. President Trump has indicated that his administration may not issue this certification in the future. (See "The JCPOA in the Trump Administration"). All official reports and statements from the United Nations, European Union, the IAEA, and the P5+1 indicate that Iran has complied with the JCPOA. See for example IAEA, Director General, REPORT: *Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, GOV/2017/35, 31 August 2017; German Federal Ministry of the Interior, *Brief Summary 2016 Report on the Protection of the Constitution: Facts and Trends*, 8 July 2017; German Federal Foreign Office, *Federal Foreign Office on the Second Anniversary of the Signing of the Agreement on Iran's Nuclear Programme*, 14 July 2017, *at* <auswaertiges-amt.de/en/infoservice/web-archiv-node/archivepressemitteilungen-node/170714-nuklearabkommen-iran/291414> (accessed 19 November 2017) ; Chair's statement following the 21 July 2017 meeting of the JCPOA Joint Commission, July 21 2017; United Kingdom, Statement on the Preparatory Committee for the 2020 Review Conference of the Treaty on Non-Proliferation of Nuclear Weapons, Vienna 2-12 May 2017.

JCPOA has allegedly increased the economic resources available to Iran to promote its interests in the region, including the maintenance in office of Syrian President Bashar Al Assad.[20]

The French President, Emmanuel Macron, in his speech at the 72nd General Assembly Session stated that

> "Our commitment to nuclear non-proliferation enabled us to achieve a solid, robust and verifiable agreement on 14 July 2015, which will enable us to ensure Iran does not acquire nuclear weapons. Terminating it today, without anything to replace it, would be a grave mistake … For my part, I would like us to supplement this agreement with work that will help control Iran's ballistic activities, and to govern the situation after 2025 which is not covered by the 2015 agreement. We need to be more demanding, but we should in no way unpick what previous agreements have secured." [21]

Some authors are of the view that a congressional decision to re-impose US nuclear sanctions could be potentially fatal to the JCPOA. It would also put the other signatories in a very difficult position, both politically and economically due to the fact that the US sanctions are mainly extra-territorial, as they would not hit Iran directly, but instead target third parties dealing with Iran. Such a step by the US would not only de-recognise Iran's compliance with the agreement[22], it would also create greater instability in the Middle East, and weaken America's position in the wider global order.[23]

IV. The Nuclear Suppliers Group (NSG)

As stated before, the Nuclear Suppliers Group (NSG) is a group of nuclear supplying countries that seeks to contribute to the non-proliferation of nuclear weapons through the implementation of two sets of guidelines for nuclear exports and nuclear-related exports. One of the most crucial guidelines is the "Non-Proliferation Principle", as per which a supplier, notwithstanding other provisions in the NSG Guidelines, authorises a transfer only when satisfied that the transfer would not contribute to the proliferation of nuclear weapons. The Non-Proliferation Principle seeks to cover the rare yet important cases where adherence to the NPT, or to a Nuclear Weapon Free Zone Treaty, may not by itself be a guarantee that a State will consistently share the objectives of the Treaty or that it will remain in compliance with its Treaty obligations.[24]

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[20] *Ibid*.

[21] UN General Assembly, *Speech by M. Emmanuel Macron, President of the Republic (New York,19 September, 2017) at* <diplomatie.gouv.fr/en/french-foreign-policy/united-nations/united-nations-general-assembly-sessions/unga-s-72nd-session/article/united-nations-general-assembly-speech-by-m-emmanuel-macron-president-of-the> (accessed 18 November 2017).

[22] Iran is under the most extensive nuclear inspection regime in the world: in addition to implementing the IAEA Additional Protocol, it has also agreed to additional inspections including potential IAEA access to suspected undeclared nuclear facilities and military sites

[23] The Wire, Cronber, T and Erasto, T, *Will the US and EU go their Separate Ways on the Iran Nuclear Deal*?, 13 October 2017, *at* <thewire.in/186800/eu-us-iran-nuclear-deal/> (accessed 18 November 2017).

[24] Nuclear Suppliers Group, *About the NSG, at* <nuclearsuppliersgroup.org/en/about-us> (accessed 18 November 2017).

During its initial period of existence, the NSG did not have any fixed criteria for membership. Although the group was formed as early as 1974, its first formal plenary meeting was held only in 1992 in Warsaw. At that meeting, the 27 participating governments took a decision by consensus requiring the application of the full scope of IAEA safeguards to all current and future nuclear activities as a necessary condition for all significant and new nuclear exports to NNWSs. It was only in 1993 that procedural requirements for membership were introduced in the guidelines for the first time. As per this procedure the membership of the group would initially consist of the countries adhering to the NSG Guidelines. Other countries could be invited to join the NSG by a consensus decision of its members. Although at this time, the NSG had no NPT requirements – in view of the fact that it had adopted full-scope safeguards as a condition for nuclear exports by NSG members – from 1993 onwards, the NSG had an unwritten requirement of full-scope safeguards as a precondition for NSG membership. Participation in the NSG, as of 11 May 2001, thus, consists of those participating governments adhering to and having exchanged diplomatic notes of acceptance of the guidelines for the export of nuclear material, equipment and technology, and the guidelines for transfers of nuclear related dual-use equipment, materials, software and related technology. Accordingly, the participating governments have to consider certain important factors while dealing with the possible acceptance of a new participating member. Such factors include: the applicant should have in force a legally-based domestic export control system which gives effect to the commitment to act in accordance with the Guidelines; the applicant must be a party to the NPT, the Treaties of Pelindaba, Rarotonga, Tlatelolco or Bangkok or an equivalent international nuclear non-proliferation agreement and be in full compliance with the obligations of such agreement(s); as appropriate, the applicant must have in force a full-scope safeguards agreement with the IAEA; and, lastly, be supportive of international efforts towards non-proliferation of weapons of mass destruction and of their delivery vehicles, among others. However, how far NSG, as a group, has followed its own rules is a matter of debate.[25] A related question is whether or not the NSG has created an exclusionary global order.

Another regime, the Zangger Committee, held its first meeting four years before the NSG came into existence. Nonetheless, it is the NSG that has demonstrated greater dynamism and has emerged as more relevant since the end of the Cold War. The Zangger Committee was established to help signatories to the NPT understand the technical issues related to transfers of nuclear materials and technology. However, the committee did not include countries that were not signatories to the treaty.

One such nation was France. The NSG, established as a complement to the committee, brought nations such as France into the control regime (France would subsequently accede to the treaty and also join the Zangger Committee in 1992). Many developing nations believed (and some continue to do so) that the Zangger Committee and the NSG were both regimes for denying technology to the developing world. For example, many scholars from the Global South have stated that these institutions have acted as

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[25] China's membership in the group, for example, has been frequently criticized as not strictly adhering to the rules set up by the group's guidelines. Yet, the group went ahead with accepting the membership, ignoring the blatant discrepancies. See Institute of Defence Studies and Analyses (ISDA), Balachandran, G and Kazi, R, *Membership Expansion in the Nuclear Suppliers Group*, 22 June 2016, *at* <idsa.in/specialfeature/membership-nuclear-suppliers-group_gbalachandran_220616> (accessed 18 November 2017).

barricades that blocked the flow of goods and technology to countries pursuing economic development through peaceful nuclear energy programmes.[26]

Some of the prominent authors from the Global South are of the opinion that when an organisation is international, not to mention informal like the NSG, the group's objectives must be internationally acceptable. Therefore, in order for the NSG's decision-making to gain international acceptance, the regime's membership must be representative of the world community.[27] The group's membership manifests a distinct bias towards the developed world in general and Europe in particular, with over 30 members being European. It must be noted that not all of these belong to the European Union, but only a few of them are classified as 'developing' by the World Bank. Beyond Europe, the developed world gains further representation from Australia, Canada, New Zealand, and the US. Among Asia's four NSG members (China, Japan, Kazakhstan, and South Korea) only two are developing nations. Meanwhile, Latin America is solely represented by Argentina and Brazil, and Africa by South Africa alone.

Though only a few Asian countries qualify as developed today, Asia is a continent that promises to shape a new global order. Moreover, it is a continent with large, fast-growing economies that will demand a great deal of energy, including nuclear energy. These developing countries, as well as other developing nations have long complained that multilateral export control regimes stunt their economic development. While it is true that even the development of civil nuclear energy has the potential of becoming a hazardous weapon in the hands of a wayward State if not properly regulated, the NSG would nevertheless have to begin to strike a better balance between economic development and nuclear controls. The group should send a signal that it does not oppose development of peaceful nuclear energy, even as it remains strongly opposed to proliferation and proliferation networks.

Conclusion

In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice held in 1996 that the mere possession of nuclear weapons would not constitute an unlawful 'threat' to use force contrary to Article 2(4) UN Charter, unless the particular use of force envisaged would be directed against the territorial integrity or political independence of a State or would be inconsistent with the purposes of the United Nations or, in the event that it were intended as a means of defence, such envisaged use of force would violate the principles of necessity and proportionality.[28] The relevance of this judgment in the present day is withering away as the pragmatic and concerned section of society is rightly pushing towards the complete elimination of nuclear weapons.

However, unfortunately, the chasm between non-proliferation and elimination of nuclear weapons, which may at best be described as an artificial categorization created to

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[26] See for example – Bulletin of the Atomic Scientists, Nayan, R, *Adapting to the 21st Century*, 31 December 2012, *at* <thebulletin.org/paths-forward-nuclear-suppliers-group> (accessed 18 November 2017).

[27] *Ibid*. Also, Brazil for example, argues that institutions such as the UN, the World Bank, the International Monetary Fund (IMF) and others have failed to adequately represent the rising South and developing countries. Even though a part of the NSG, it maintains the view that the global nuclear order is a microcosm of the global order more broadly. *See* Kassenova, T, "Brazil and the Global Nuclear Order" in Stuenkel, O and Taylor, MM, eds, *Brazil on the Global Stage: Power, Ideas and the Liberal International Order* (Palgrave Macmillan 2015), 117-142.

[28] Article 2(4), United Nations, *Charter of the United Nations* (1945) 1 UNTS XVI (UN Charter).

suit the political and economic needs of the stronger nations, has only widened with time. Today the nuclear global order is indeed a neo-colonial order, which seems nowhere to be giving way to the ideals and objectives on which the UN was built and the new international order formed.

There is no doubt that to think nations would negotiate with one another on an equal footing, respecting each other's right to economic and infrastructural development, on any matter of international politics, is nothing but holding on to naïve ideals. To think of multilateralism to be invincible is to be far removed from reality. The huge gap that continues to exist between the Global North and South, especially in terms of matters of international policy, is a harsh truth that we all must face. Nevertheless, the nuclear issue today is a matter that needs to be viewed more objectively by the world powers, due to the sheer destructive potential of nuclear weapons. The ongoing crisis in the Middle East on the issue of decertifying the Iran Nuclear Deal, the political onslaught being exchanged between the US and the Democratic Republic of Korea regarding the continued nuclear testing being carried out by the latter despite various UNSC resolutions, the opaque functioning of the Nuclear Suppliers Group, and other similar instances add enough emphasis to this argument.

Elimination of nuclear weapons is a difficult target, which cannot be achieved unless the NWSs consensually act upon it, acknowledging the acute necessity for the same. Nuclear weapons, as the new tools for international political power-play, will lead to perhaps the most dangerous situations humanity has ever faced.

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In the Name of Climate Change: How *Leghari v Federation of Pakistan* Is Instrumental to the Pursuit of the Right to Life in the Philippines

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Keywords
HUMAN RIGHTS; RIGHT TO LIFE; CLIMATE CHANGE; CLIMATE CHANGE LITIGATION; STATE RESPONSIBILITY; INTERNATIONAL LAW; MANDAMUS

Abstract

Climate change is a phenomenon that has pushed the public to turn to the government for solutions. After all, the government has the mandate of protecting the right to life. Despite the adverse effects of climate change, the steps taken by the Philippine government have been surprisingly meagre. As the people continue to experience the wrath of environmental changes, they have not been adequately empowered. *Leghari v Federation of Pakistan* provides a framework on how an ordinary person can resort to a legal remedy before a domestic court. The *Leghari* case suggests how an effective response to climate change can be secured through the judicial branch of the government. It identifies the government's duties regarding climate change and notes the delay in assuming functions, to the detriment of the public. In the Philippines, the bridge connecting the right to life and climate change is far from completion. As an example of 'climate change litigation', the *Leghari* case can be applied by analogy in the Philippines, which is facing threats to the existence of communities. The Philippine government has tried to alleviate the impact of climate change through its agencies and strategies, but to no avail. In this respect, it can be held accountable for failing to protect the right to life.

Introduction

Climate change is a global reality. The constant fear of higher temperature, rising sea level, and destruction of communities has left humanity searching for answers. Reasonably, the public expects that the government should enact mechanisms to resolve this problem. After all, the government has the mandate of protecting the right to life.

Climate change mitigation and adaptation measures have been adopted in the Philippines. Still, government action falls short in protecting the right to life. Trapped in a cycle of dealing with climate change and finding ways to survive, Filipinos continue to struggle with inadequate delivery of basic services. With all of the powers enjoyed by the State, it is rather unusual that at this point, steps have been preliminary. Acknowledgment

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that climate change is a serious issue does not suffice. The absence of concrete State action has deprived the people of an opportunity for empowerment.

Given this predicament, one can look at the decision of the Lahore High Court in *Ashgar Leghari v Federation of Pakistan*[1] for guidance. The principles developed in this case provide a framework on how ordinary Filipinos can resort to a legal remedy before a domestic court. *Leghari* suggests how an effective response to climate change can be secured through the intervention of the judiciary. Furthermore, the doctrines in *Leghari* shed light on a legal process to identify the government's responsibilities and shortcomings undermining the right to life.

The magnitude of climate change cannot be considered as a purely domestic matter, especially if conditions have been aggravated by government inaction. In a global sense, the perpetration of the violation of the right to life contravenes international conventions. Inasmuch as the Philippines is a trusted player in the international sphere, the country has not lived up to its commitment to covenants to which it is a party. Instead of stabilising international norms and shared sentiments, the Philippines seems to be heading in the opposite direction.

The first part of the paper discusses the situation of the Philippines in the midst of the climate change phenomenon. It further enumerates the actions taken by the government to address community challenges and environmental destruction. The next portion of the paper explains the advantages and disadvantages of 'climate change litigation,' a judicial remedy that is gaining prominence in the legal profession. It also examines several cases demonstrating a trend towards increasing resort to judicial proceedings for relief. Thereafter, the paper examines the key points in the *Leghari* case and applies them to the Philippines. The last section of this paper lays down the arguments that can be raised to hold the government responsible for allowing the effects of climate change to persist. It identifies particular instances where the State did not fulfil its domestic and international obligations with respect to the right to life.

I. With the Philippines Suffering from the Ill-Effects of Climate Change, the Government Created the Corresponding Framework of Response

Climate change denotes 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.'[2] The effects of climate change on different aspects of the society cannot be taken lightly. Climate change affects 'lives, livelihoods, health, ecosystems, economies, societies, cultures, services and infrastructure.'[3] Environmental impact makes it difficult for individuals to survive.[4]

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1 Lahore High Court, W.P. No. 25501/2015, 4 September 2015.

2 Article 1(2), UN General Assembly, *United Nations Framework Convention on Climate Change*, (1992) 1771 UNTS 107.

3 Intergovernmental Panel on Climate Change, 'Climate Change 2014: Synthesis Report, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2015), 124.

4 Kalin, W, "Displacement Caused by the Effects of Climate Change: Who will be Affected and What are the Gaps in the Normative Framework for their Protection" in Scott Leckie, Ezekiel Simperingham and Jordan Bakker, *Climate Change and Displacement Reader* (Earthscan 2012).

The Philippines is no stranger to the negative effects of climate change. In the long-term climate risk index, the country is ranked fourth among States most affected by climate change.[5] From 1951 to 2010, temperatures have increased by 0.64 degrees Celsius, an average of 0.01 degrees Celsius every year.[6] On top of the twenty typhoons experienced every year,[7] the Philippines was at the centre of the strongest tropical cyclones in 2013. Typhoon Haiyan left 6,300 people dead, over 3 million families affected, more than 1 million houses damaged, and over PhP95,000,000,000.00 worth of economic loss.[8] Recently, typhoons with intensities of Category 4 or higher have hit the Philippines in the span of one week. This was only the third time since 1950 that consecutive typhoons of such degree smashed the country.[9]

The World Bank declared that between 2000 and 2008, weather-related disasters in the Philippines accounted for around 98% of all people affected by disasters and 78% of all deaths.[10] In the agricultural sector, the quantified impact of climate change to the Philippines is in the amount of PhP12,000,000,000.00 per year.[11] The destruction to agricultural products is caused by typhoons, drought and floods. The impact of climate change also goes into the capacity to produce. It has been shown that the gross production value of Philippine agriculture decreases by USD 19.21 million for every one-degree Celsius rise in temperature.[12]

As a response to the problems of increasing temperature, storm surge, and agricultural destruction, Republic Act No. 9729[13] was enacted. Under this statute, the Climate Change Commission was established as the policy-making body of the government on climate change matters.[14] It consists of the President of the Philippines, serving as Chairperson, and three Commissioners. Its advisory board is composed of the heads of various executive departments and government agencies, as well as representatives from local government units and the private sector.[15] Among the key departments constituting the advisory board are the Department of Environment and Natural Resources, Department of Agriculture, Department of Health, and the Department of Science and Technology.[16]

Pursuant to its functions, the Climate Change Commission formulated the National Framework Strategy on Climate Change. The framework strategy was intended to enhance

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5 Kreft, S and others, 'Global Climate Risk Index 2016: Who Suffers Most from Extreme Weather Events? Weather-related Loss Events in 2014 and 1995 to 2014' (2015), 6.

6 Climate Change Commission, 'National Climate Change Action Plan 2011-2028' (21 November 2011), 2.

7 Asian Disaster Reduction Center, 'Information on Disaster Risk Reduction of the Member Countries' (*Asian Disaster Reduction Center* 2008), *at* <adrc.asia/nationinformation.php?NationCode=608> (accessed 18 November 2017).

8 National Disaster Risk Reduction and Management Council, 'Final Report re Effect of Typhoon "Yolanda" (Haiyan)' (6-9 November 2013), 3-5.

9 Griffiths, J, Belinger, J, and Westcott, B, 'Typhoon Haima: Philippines Hit by Second Storm in a Week' (*CNN,* 20 October 2016), *at* <edition.cnn.com/2016/10/18/asia/typhoons-haima-philippines/> (accessed 18 November 2017).

10 Sustainable Development, East Asia and Pacific Region, World Bank, 'A Strategic Approach to Climate Change in the Philippines' (27 January 2010),5, *at* <siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/PHCCSNJan27final.pdf> (accessed 18 November 2017).

11 Climate Change Commission, *supra* nt 6, 7.

12 Dait, JMG, "Effect of Climate Change on Philippine Agriculture" (2015) 4(9) IJSR 1922, 1923.

13 Climate Change Act of 2009 (Philippines).

14 *Id,* s 4.

15 *Id,* s 5.

16 *Ibid.*

the adaptation of the country's ecosystems and communities to climate change.[17] The Commission also drafted the National Climate Change Action Plan 2011-2028, which, in essence, determined the country's strategic direction in resolving climate change. Specifically, the government prioritised food security, water sufficiency, environmental and ecological stability, human security, climate-smart industries and services, sustainable energy, and knowledge and capacity development.[18]

The global impact of climate change bolstered the Philippines' resolve to address the problem on an international level. Aside from being a party to the United Nations Framework Convention on Climate Change,[19] the Philippines submitted its instrument of acceptance of the Doha amendment to the Kyoto Protocol on 13 April 2016.[20] It has likewise expressed its commitment to the Paris Agreement, a convention, which seeks unified action on climate change by keeping the global temperature at a certain level and by extending assistance to States in furtherance of their respective national goals. Since the pre-condition of fifty-five State Parties representing fifty-five percent (55%) of the total greenhouse gas emissions[21] have been met, the Paris Agreement entered into force on 4 November 2016, with the Philippines having ratified the Paris Agreement on 23 March 2017.[22]

II. The Worsening Impact of Climate Change Is Triggering Resort to Litigation for Relief

Given the dire consequences of climate change, people anticipate a viable response from the State. At the domestic level, cases have been filed in an attempt to secure a clean environment, an enumeration of which will be discussed in detail later. Meanwhile, the aforementioned Republic Act No. 9729 was premised on a recognition of the 'vulnerability of the Philippine archipelago and its local communities, particularly the poor, women, and children, to potential dangerous consequences of climate change.'[23] Frustrations culminated during the United Nations Framework on Climate Change's 19th Conference of Parties. During the conference, Naderev Saño, the Philippines' lead negotiator, launched a hunger strike to urge delegates to take concrete measures against climate change.[24]

While the framework is already in place, the Philippine government is suffering from a serious gap in the enactment of statutes and implementation of policies related to climate change. Inasmuch as the people would like to take the initiative, they cannot pre-empt matters that are within the domain of the government. For large-scale and long-term

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17 Climate Change Commission, 'National Framework Strategy on Climate Change' (2010), 5.

18 Climate Change Commission, *supra* nt 6, 6.

19 The Philippines submitted its ratification acceptance to the Convention on 2 August 1994.

20 United Nations Treaty Collection, '7.c. Doha Amendment to the Kyoto Protocol: Doha, 8 December 2012' (*United Nations*, 2017), *at* <treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-c&chapter=27&clang=_en> (accessed 18 November 2017).

21 Article 21(1), United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement* (2015).

22 United Nations Framework Convention on Climate Change, '7.d Paris Agreement: Paris, 12 December 2015' (*United Nations,* 2017), *at* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> (accessed 19 November 2017).

23 Climate Change Act of 2009 (Philippines) s 2.

24 Smith, M and Cullinnane, S, 'Philippine Delegate Refuses to Eat Until Action on Climate Change Madness' (*CNN*, 12 November 2013), *at* <edition.cnn.com/2013/11/12/world/europe/poland-philippines-sano-cop/index.html> (accessed 29 November 2017).

solutions, the private sector is hampered and can only wait for the public sector to take positive actions.

Left without a direct remedy against the concerned government officials, the people can look to the participation of the judiciary to fill the void. In this regard, climate change litigation is a remedial concept that offers both potential and advantages. Firstly, it serves as a 'catalyst for legislative and executive action.'[25] Secondly, climate change litigation enhances decision-making. Through this legal process, the government becomes more conscientious when considering all possible environmental issues attached to an undertaking.[26] Climate change litigation serves as a means to uncover inadequacies of existing statutes, rules and regulations, which warrant the introduction of appropriate amendments.[27]

Broad State recognition of climate change litigation remains to be seen.[28] A major roadblock on the expansion of climate change litigation is establishing a causal link between climate change and the threat to right to life.[29] Paramount attention must be placed on the right to life, given that the enjoyment of other rights, such as the right to property, is ultimately hinged on the ability of a person to exist.[30] After all, the right to life is formatively linked to natural law, or the set of rights that are by definition 'inherent in human nature, outside and above positive law, binding on State, rights with a superior legal nature, that are universal, the same always and forever.'[31]

In addition, given that the effects of climate change transcend national boundaries, it becomes more difficult to ascertain the party from which proper relief can be sought.[32] Even the mere identification of available judicial remedies poses a hurdle to the development of this field.[33]

The foregoing considered, the foundation of climate change litigation is slowly emerging as an avenue to shape progress.[34] Cases in other jurisdictions illustrate the growth. In *Urgenda Foundation v The State of Netherlands,*[35] petitioner Urgenda Foundation filed a class

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[25] Preston, B, "Climate Change in the Courts" (2010) 36 Monash U L Rev 15, 21, citing Joseph Sax, *Defending the Environment: A Handbook for Citizen Action* (Knopf 1971), xviii, 152, and Brian Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 EPLJ 337, 339.

[26] Preston, B, "The Influence of Climate Change Litigation on Governments and the Private Sector" (2011) 2 Climate L 485, 487, citing Joseph Sax (n 25), 111-112.

[27] *Ibid*, citing Preston, "The Role of Public Interest Environmental Litigation" (n 25), 339-340.

[28] Preston, B, 'Climate Change Litigation (Part 1)' (2011) 1 *Carbon & Climate Law Review* 3, 4.

[29] Jaimes, V, "Climate Change and Human Rights Litigation in Europe and the Americas" (2015) 5(1) *Seattle Journal Environmental Law* 165, 195.

[30] See *Secretary of National Defense v. Manalo,* 568 SCRA 1, 38-39 (2008) [Supreme Court of the Philippines], where the Highest Court noted that the right to life implies a life lived without fear that the ruler will unreasonably violate his/her person and property. Also, security in life implies legal and uninterrupted enjoyment of life, including the right to exist.

[31] Pavel, N, "The Right to Life as a Supreme Value and Guaranteeing the Right to Life" (2012) 4 Contemp Readings L & Soc Just 970, citing Jean Rivero, *Les libertés publiques,* Tome 1, *Les droits de'homme* (Presses Universitaires de France 1991), 23.

[32] Aminzadeh, S, "A Moral Imperative: The Human Rights Implications of Climate Change" (2006-2007) 30(2) Hastings Int'l & Comp L Rev 231, 233, citing Hari Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 Wash U L Q 1789, 1802.

[33] Nyinevi, C, "Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation" (2015) 8(3) J Pol & L 135, 135.

[34] Aminzadeh, *supra* nt 32, 232.

[35] The Hague District Court, C/09/456689, 24 June 2015.

suit, grounded on the inadequate protection provided by the government with respect to climate change. Following the European Court of Human Rights' statement that 'human rights law and environmental law are mutually reinforcing,'[36] The District Court in The Hague directed the government to reduce greenhouse gas emission by 25% by the end of 2020, instead of the policy direction of 14-17%.[37]

Similarly, in *Foster v Washington Department of Ecology,*[38] the respondent Department of Ecology denied petitioner Our Children's Trust's request that CO_2 emissions reduction be set at 4% annually and 80% from 1990 levels by 2050. Subsequently, the Superior Court ordered the Department of Ecology to issue the emissions reduction rule, in view of the urgency brought about by climate change.[39]

In particular, *Budayeva v Russia*[40] demonstrates how the State has been held accountable for failing to provide access to information that would have prepared the people for a disaster. In that case, residents of Tyrnauz, where mudslides have been recorded annually, lodged an application with the European Court of Human Rights. They claimed that the government should be held accountable for the death and destruction caused by a series of mudslides in July 2000. In ruling that there was a violation of the right to life and that there must be an award of non-pecuniary damage, the European Court of Human Rights cited the government's failure to take measures to resolve the mudslide problem as grounds,[41] as well as taking note of the inadequate information campaign on the imminent danger.[42] While *Budayeva* did not specifically tackle climate change, the frequency of mudslides during summer[43] suggests a correlation between rising temperature and the likelihood of mudslides.

The Philippines has its own share of environmental cases. In *Oposa v Factoran*,[44] petitioners sought the cancellation of timber licences, grounded on the detrimental effects of deforestation. The Philippine Supreme Court acknowledged the legal standing of petitioners, consisting of minors, on the basis of 'inter-generational responsibility' with respect to the right to a balanced and healthful ecology.[45] A similar case would be *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay*.[46] Affected residents sought the issuance of a court order for the government to rehabilitate the polluted Manila Bay. The Supreme Court ruled that the Metropolitan Manila Development Authority and other government agencies are bound to comply with their statutory duties of protecting the bay and that they are precluded from opting not to assume their roles.[47] Finally, there is a pending petition filed by Greenpeace Southeast Asia and Philippine Rural Reconstruction

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[36] *Id*, [4.48], citing Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, Council of Europe Publishing 2012), 30-31.
[37] *Urgenda Foundation v The State of Netherlands* (n 35), [5.1].
[38] Superior Court of the State of Washington for King County, No. 14-2-25295-1 SEA, 19 November 2015.
[39] *Id,* 5.
[40] European Court of Human Rights, Chamber Judgment, Application No 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008).
[41] *Id,* 4.
[42] *Ibid.*
[43] *Id,* 1.
[44] 224 SCRA 792 (1993) [Supreme Court of the Philippines].
[45] *Id,* 802-803.
[46] 574 SCRA 661 (2008) [Supreme Court of the Philippines].
[47] *Id,* 672-673.

Movement before the Commission on Human Rights.[48] Premised on the significant contribution of the so-called 'Carbon Majors'[49] to greenhouse gas emissions, petitioners seek to hold these corporations responsible for violation of the right to life, right to the highest attainable standard of physical and mental health, right to food, right to water, right to sanitation, right to adequate housing and right to self-determination.[50]

To be clear, the aforementioned Philippine cases are substantially different from the subject of this paper. In *Oposa*, the issues pertained to the propriety of a class suit and the duty to preserve nature for the next generation. On the other hand, the present paper will tackle the deleterious effects of climate change and how the government can be held accountable for violating the right to life, the paramount importance of which will be demonstrated in the following section. In *Metropolitan Manila Development Authority*, the issue revolves around pollution and the discretion of the government to clean the environment. The present paper amplifies the mandate of the government to address climate change. In the Greenpeace petition, redress is sought against private companies, not the government. Additionally, the petition was filed before the Commission on Human Rights, which is an investigatory body and not a court.[51] In contrast, the present paper will contemplate a court action against the State and a determination of the rights and duties of the concerned parties. Due to these distinctions, the present paper will draw parallels to the *Leghari* case as a method of uncovering the deficiencies of the Philippine government in its response to climate change.

III. *Leghari v Federation of Pakistan* Can Serve as a Legal Framework Against the Philippine Government

The focus of the paper is the aforementioned *Leghari v Federation of Pakistan*. Petitioner Ashgar Leghari, an agriculturist, instituted public interest litigation before the Lahore High Court. The petitioner questioned the lack of action on the part of the Federal Government of Pakistan in meeting climate change issues and the supposed threats to water, food and energy security of Pakistan which infringe on the right to life. He added that no significant progress has been accomplished from the time the 2012 National Climate Change Policy and the Framework for Implementation of Climate Change Policy (2014-2030) were formulated.[52]

Ruling in favour of petitioner, the Lahore High Court acknowledged the challenges posed by climate change, emphasising a shift from Environmental Justice to Climate Change Justice. The Lahore High Court held that climate change makes the protection of the citizen's fundamental right more imperative. According to the Court, the right to life, which includes the right to a healthy and clean environment, as well as the right to human

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48 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, 'Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change' (22 September 2015), *at* <columbiaclimatelaw.com/files/2016/12/Wentz-and-Burger-2016-12-Submission-Case-No.-CHR-NI-2016-0001.pdf> (accessed 18 November 2017).

49 'Carbon Majors' refers to the largest multinational and state-owned producers of crude oil natural gas, coal and cement. In the petition, Chevron USA, Exxon Mobil USA, Royal Dutch Shell Netherlands, and Conoco Phillips USA were among those identified as part of "Carbon Majors.'

50 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement (n 48), 5.

51 *Cariño v Commission on Human Rights* 204 SCRA 483, 492 (1991) [Supreme Court of the Philippines].

52 *Leghari v Federation of Pakistan, supra* nt 1, 2.

dignity, should be read in conjunction with the concept of sustainable development, the precautionary principle, inter- and intra-generational equity and the idea of public trust. On this score, it noted the delay of the government in implementing the Framework of Climate Change Policy (2014-2030). Such inaction on the part of the State was viewed as a violation of the fundamental rights of the people.[53]

Pursuant to the Lahore High Court decision, the concerned federal government ministries, consisting of the Ministry of Climate Change, Ministry of Planning Development and Reform, the National Disaster Management Authority, and the Ministry of Water and Power, among others, were directed to nominate their respective climate change focal person. The government ministries were likewise instructed to identify adaptation action points that can be achieved by December 31, 2015. Lastly, the Lahore High Court expressed the need for the creation of a Climate Change Commission.[54] The doctrines set forth by the Lahore High Court can be used as guidelines for a successful claim against the Philippine government. The author regards *Leghari* as a landmark and fairly recent decision that validates the trend towards climate change litigation. The applicability of *Leghari* to the Philippines is premised on the absence of a counterpart Philippine case addressing the issue of climate change in relation to the shortcomings of the government. It is also predicated on stark similarities in the antecedent between the two countries, in terms of the impact of climate change, the right adversely affected, and the shortcomings of the government to protect the people from further harm, which are set forth below. The discussion starts from the concept of the right to life, in the context of climate change. While the right to life is supported by legislation, laws are not fully implemented. The next portion enumerates specific examples where the Philippine government's efforts to protect its people from the adverse effect of climate change have been inadequate.

A. The Right to Life of Filipinos Is Placed in Danger Due to Climate Change

The right to life is an inherent right.[55] It is a right enjoyed by everyone regardless of origin and economic status, and a right that cuts across communities and represents a national concern. Furthermore, it contemplates a 'supreme right from which no derogation is permitted even in times of public emergency which threatens the life of the nation.'[56] In the Philippines, the Constitution sets forth that the 'State values the dignity of every human person and guarantees full respect for human rights.'[57] More specifically, the right to life is entrenched within the Constitution: 'No person shall be deprived of life, liberty, or property without due process of law.'[58] The right to life takes numerous forms. In relation to climate change, the right to life implies a positive duty for States to protect the environment,[59] which

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53 *Id,* 7-8.

54 *Id,* 8.

55 Article 6(1), UN General Assembly, *International Covenant on Civil and Political Rights* (1966) 999 UNTS, 171 (ICCPR).

56 UN Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 16th session, UN Doc HRI/GEN/1/Rev.1 at 6 (1994) (30 April 1982), [1].

57 1987 Constitution (Philippines) art 2, s 11.

58 1987 Constitution (Philippines) art 3, s 1.

59 Bach, T, "Human Rights in a Climate Changed World: The Impact of COP21, Nationally Determined Contributions, and National Courts" (2015-2016), 40(3) Vt L Rev 561, 562, citing John Knox, 'Greening Human Rights' (*Open Democracy,* 14 July 2015), *at* <opendemocracy.net/openglobalrights/john-knox/greening-human-rights> (accessed 19 November 2017).

means a freedom from environmental factors that may cause harm to the people. There is a valid reason to integrate the right to life with the environment: the protection of the environment is essential to the well-being and enjoyment of the right to life of an individual.[60]

In *Leghari,* the Lahore High Court identified alterations in the climate system of Pakistan. It observed that 'these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security.'[61] As elucidated by the Lahore High Court, the people were impeded from enjoying the right to life, a right that is supposed to be guaranteed under the Constitution.[62] In a similar manner, climate change in the Philippines highlights the degradation of the environment and deprivation of the right to life. Strong typhoons and extreme rainfall deny Filipinos a sense of safety in their own homes. Accordingly, rising temperature and agricultural shortage hinder stable access to daily sustenance. As communities deal with the effects of climate change, their very source of livelihood hangs precariously. The totality of the conditions places Filipinos' lives at risk, as they become more prone to sickness and worse, closer to death.

Invoking the right to life is closely linked to the concept of self-preservation. Self-perpetuation is a theme that has existed since time immemorial, with both self-preservation and self-perpetuation remaining independent of the existence of a government or a legal system.[63] They are fundamental in character, serving as guiding principles for the survival of men and women. The essence of the right to life is so basic that its protection is of paramount importance.

On this score, the right to life in both the Philippines and Pakistan constitutes a fundamental freedom that is far from being realised. Although this is a global concern, for these two States in particular, the deprivation of the right to life intersects with the negative implications of climate change.

B. The Adverse Effects of Climate Change in the Philippines Can Be Attributed to the Government and the Functions Attached to Its Agencies

The impact of climate change can be attributed to the Philippine government. Despite a general framework strategy and an action plan, key agents of the State have not assumed their respective functions in accordance with their mandate. The aforementioned *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* is a concrete example of how the Philippine Supreme Court called on the various agencies of the government to perform their duties pertaining to the environment. Regardless of the reasons for inaction, the government can be easily identified as the party instrumental for the absence of initiative in combating climate change, to the detriment of the people. To be clear, climate change is not created by the State. However, notwithstanding the phenomenon and the prevalence of its impact, the government has failed to take relevant positive action. Aggravating the situation is the fact that government obligations with respect to the environment did not emerge simply because of climate change awareness.

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[60] UN General Assembly, *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/Conf.48/14/Rev.1 (1973) (16 June 1972), [1-2].

[61] Lahore High Court, W.P. No. 25501/2015, 4 September 2015, 6.

[62] *Id,* 7.

[63] 224 SCRA 792 (1993) [Supreme Court of the Philippines], 805.

The State's functions have constitutional underpinnings that are intended to withstand the test of time and current demands. For one, the State has the mandate to 'protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.'[64] For another, it has the duty 'to protect and promote the right to health of the people.'[65] The mandate of the State in relation to the environment has an international character. Under the International Covenant on Civil and Political Rights, States are bound to ensure the rights as set forth in the convention,[66] one of which being the right to life. Thus, the State is expected to take positive action, in the form of laws and measures, to accomplish its legal obligations.[67]

In *Leghari*, the Lahore High Court pointed out that the Framework for Implementation of the National Climate Change Policy is not the end goal of the government. Rather, the Framework should set the tone for future planning. The High Court also noticed that no substantial action has been taken by the government to implement the Framework. On this ground, the High Court expressed the need for effective protection of the fundamental rights of the people.[68]

In the Philippines, the duties of the State in relation to climate change are positive in character, pursuant to the policy of 'protecting the climate system for the benefit of humankind, on the basis of climate justice or common but differentiated responsibilities and the Precautionary Principle to guide decision-making in climate risk management.'[69] Additionally, the State is bound to realise its policy of allowing the ecosystem to adapt to climate change, ensuring food production, and promoting sustainable economic development.[70] More importantly, the State is bound to reduce the adverse effects of climate change and maximise its benefits, to adopt an approach that favours the impoverished in climate change efforts, and one that institutionalises government initiatives for proper coordination during the implementation of climate change projects.[71]

Similar to *Leghari,* the foregoing ideals of the Philippine government have not come into fruition. The Philippine government has no one to blame but its own agencies for the continuing damage brought by climate change and for weak coordination in employing a holistic effort to the problem. The delineation of the functions of the departments under the Executive branch provides a clearer understanding of the government agencies directly involved in managing the risks of climate change. The Climate Change Commission is tasked to 'to coordinate, monitor and evaluate the programs and action plans of the government' relating to climate change.[72] Furthermore, it has the duty to create an environment that integrates climate change mitigation and adaptation, formulate plans to mitigate greenhouse gas emissions, facilitate capacity building, and provide technical and financial assistance to research.[73] Furthermore, the Department of Environment and Natural

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64 1987 Constitution (Philippines) Article 2, s 16.
65 *Id*, Article 2, s 15.
66 Article 2(1), UN General Assembly, *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR).
67 Human Rights Committee, *supra* nt 56, 5.
68 *Leghari v Federation of Pakistan*, Lahore High Court, W.P. No. 25501/2015, 14 September 2015, [9, 11].
69 Climate Change Act of 2009 (Philippines), s 2.
70 *Ibid.*
71 *Ibid.*
72 *Id,* s 4.
73 *Id,* s 9(g), (h), (m), (n).

Resources is compelled to set up a climate change information management system and network.[74] The Department of Foreign Affairs similarly is required to recommend the ratification of international agreements pertaining to climate change.[75] The Department of Interior and Local Government further has to provide capacity-building projects for local government units with respect to climate change.[76] As a final example, government financial institutions are committed to giving preferential financial packages for programmes relating to climate change.[77]

At first glance, the joint effort of the aforementioned agencies appears to be remarkable. It provides an assurance that there is a structured response to climate change. Despite the inter-agency participation in climate change policies, shortcomings unfortunately persist. While the response to climate change is strong on paper, implementation is a completely different matter. The absence of effective government tools has resulted in the failure to equip parties with sufficient skills to manage climate change risk.

i. The Philippines Is a Reluctant Party to the Paris Agreement

Although the Philippines is a signatory to the Paris Agreement, ratification took time to be concluded. The country's commitment to the Paris Agreement can be regarded as mere lip service. In its Intended Nationally Determined Contributions submitted to the United Nations Framework Convention on Climate Change, the Philippines committed to reduce greenhouse gas emissions by 70% come 2030. However, the mitigation contribution is dependent on aid, whether financial, technological or in terms of capacity building.[78] This is effectively a conditional commitment, which relies on external factors, not domestic efforts. Given the economic situation of the Philippines, and its status as a developing country, the government can easily justify its failure to comply with the commitment to reduce greenhouse emissions.

No less than the President of the Philippines initially declared an unwillingness to observe the country's pledge to contribute to climate change mitigation. According to President Rodrigo Duterte, since developed countries have benefitted from substantial emissions, other countries should be given an opportunity to industrialise as well. He then criticised the Paris Agreement for hindering the economic growth of developing countries.[79] It took an urging from his Cabinet before he eventually decided to uphold the agreement.[80] However, even then, the formalities for accession were not immediately finalised. The

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74 *Id,* s 15(c).
75 *Id,* s 15(d).
76 *Id,* s 15(b).
77 *Id,* s 15(f).
78 Republic of the Philippines, 'Intended Nationally Determined Contributions' (October 2015) 3-4, *at* <http://www4.unfccc.int/submissions/INDC/Published%20Documents/Philippines/1/Philippines%20-%20Final%20INDC%20submission.pdf> (accessed 19 November 2017).
79 King, E, 'Philippines Won't Honour UN Climate Deal, Says President' (Climate Home, 18 July 2016), *at* <climatechangenews.com/2016/07/18/philippines-wont-honour-un-climate-deal-says-president/> (accessed 19 November 2017).
80 Sabillo, KA, 'Duterte to Uphold Paris Agreement' *Inquirer* (Manila, 7 November 2016), *at* <globalnation.inquirer.net/148972/duterte-to-uphold-paris-agreement> (accessed 19 November 2017).

additional period of delay gave the President more time to slam the 'industrialised countries' for violating the agreement without facing sanction.[81]

Because the Philippines is an insignificant contributor to greenhouse gas emission, the direction of the State is to excuse itself from the obligations under the Paris Agreement. This is exactly the point raised by the High Commissioner of the Human Rights Council regarding the need to adopt positive measures to protect the right to life.[82] Beyond simple words of support for a common cause, the Philippine government should perform positive acts, regardless of the degree of its contribution to global emission. The country's expectation under the Paris Agreement was almost derailed by a contrary perspective. On this score, it can be argued that the Department of Foreign Affairs failed in making necessary, effective, and immediate recommendations for the country's compliance with the Paris Agreement.

ii. Reductions of Greenhouse Gas and Carbon Dioxide Emissions Remain to Be Seen

The Philippines has not met its commitment on climate change risk management, based on its emission levels. As reported by the United Nations Climate Change Secretariat, the trend in recent years shows a steady rise of emissions in the Philippines.[83] In particular, carbon dioxide emissions from fuel combustion and greenhouse gas emissions saw a consistent increase from 1990 up to 2012. The percent of change in carbon dioxide emissions during this period is at a staggering 109.5%, or 3.4% growth annually. This figure is not in harmony with the Philippine government's projected carbon dioxide emission reductions by 2015, 2020, 2025 and 2030.[84]

The energy sector and gas account for the majority of the total emissions in the Philippines. Expectedly, energy production, in the form of imports and exports, rose in the same span.[85] Overall, while there was a slight reduction in total greenhouse gas emissions from 2010-2012,[86] it did not conclusively indicate whether the Philippines is on track to meet its targeted 70% reduction in greenhouse gas emissions by 2030.

Notably, the Philippines did not submit its emission reduction target for the second commitment period from 2013-2020.[87] Although the country signified its acceptance of the Doha amendment, the lack of reduction target tells a different story. Ideally, the Philippines should work hand in hand with other States, even if the country's contribution to total greenhouse gas and carbon dioxide emissions is insignificant on a global scale. The implication of the Philippines' attitude on this issue is that the government is not fully committed to reducing carbon emissions. The approach taken by the State on this matter is tantamount to the government consenting to the perpetuation of the global problem of

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81 *Ibid*.

82 Human Rights Committee*, supra* nt 56, 5.

83 United Nations Climate Change Secretariat, 'UNFCCC Country Brief 2014: Philippines' (1 October 2015).

84 Climate Change Commission, *supra* nt 6, 27.

85 United Nations Climate Change Secretariat, *supra* nt 83.

86 European Commission, Joint Research Centre and Netherlands Environmental Assessment Agency, 'Total Greenhouse Gas Emissions (kt of CO_2 Equivalent)' (*World Bank*, 2016), *at* <data.worldbank.org/indicator/EN.ATM.GHGT.KT.CE?end=2012&locations=PH&start=1970&view=chart&year_high_desc=true> (accessed 19 November 2017).

87 Annex B, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, (1998) 2303 UNTS, 162.

climate change. Worse still, it validates the country's disregard for its international obligation of stabilising greenhouse gas concentrations at a level that prevents dangerous anthropogenic interference with the climate system.[88] This emphasises how the Philippines overlooks the Paris Agreement, specifically the obligation to undertake rapid reduction in greenhouse gas emissions.[89]

iii. The People's Survival Fund Has Not Been Fully Utilised

Under the law, the People's Survival Fund is a special fund in the National Treasury of the Philippines, intended to support adaptation activities of local government units and communities.[90] Every year, the government is required to allot at least PhP1,000,000,000.00 to this fund.[91] The distinct character of the People's Survival Fund lies in the non-reversion of the balance and amount appropriated to the general fund.[92]

The People's Survival Fund was meant to reach far-flung areas of the Philippines and facilitate financing programs under the National Framework Strategy on Climate Change. Yet, there was considerable delay in its availability. For three years, beginning from the incorporation of amendments to the Climate Change Act in 2012,[93] potential beneficiaries had no clue as to when the People's Survival Fund would be activated.

Information dissemination on climate change and adaptation and mitigation measures is under the supervision of the Philippine Information Agency.[94] Local provision of information serves as the tool for communities to institute change in their areas.[95] However, those interested in utilising the People's Survival Fund have not taken full advantage of it. Local government units were not aware that the fund exists.[96] That even the highest elected official of a local government unit was not sufficiently apprised of government mechanisms, such as the People's Survival Fund, depicts a weak national government information campaign.

While other local government units may have an idea about the People's Survival Fund, they lacked sufficient information on the application process. Less than one hundred local government units have applied for the People's Survival Fund, where some of the applications did not proceed due to non-compliance with documentary requirements.[97] To

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88 Article 2, United Nations Framework Convention on Climate Change.

89 Article 4(1), Paris Agreement.

90 Climate Change Act of 2009 (Philippines), s 20.

91 *Id,* s 19.

92 *Ibid.*

93 An Act Establishing the People's Survival Fund to Provide Long-Term Finance Streams to Enable the Government to Effectively Address the Problem of Climate Change, Amending for the Purpose Republic Act No. 9729, Otherwise Known as the 'Climate Change Act of 2009', and for Other Purposes (Philippines).

94 Climate Change Act of 2009 (Philippines), s 15(e).

95 International Council on Human Rights Policy, 'Climate Change and Human Rights: A Rough Guide' in Scott Leckie, Ezekiel Simperingham and Jordan Bakker, *Climate Change and Displacement Reader* (Earthscan 2012).

96 Rey, A, 'LGUs Frustrated Over Delayed Use of People's Survival Fund' (*Rappler*, 30 May 2015), *at* <rappler.com/move-ph/issues/disasters/94713-mayors-frustrated-over-people-survival-fund> (accessed 18 November 2017).

97 Lagsa, B, '1,715 Towns and Cities Reminded of Available People's Survival Fund' (*Rappler*, 8 June 2016), *at* <rappler.com/move-ph/135785-climate-change-local-governments-survival-fund> (accessed 18 November 2017).

put things in perspective, there are 1,715 local government units all over the Philippines. Even with the nationwide effects of climate change, less than 10% of the total number of local government units tried to apply for the People's Survival Fund. The low turnout is alarming, to say the least. As of March 2016, 38 proposals have been submitted for funding. These proposals emanated from 19 local government units, one district representative, two local community organisations and one private citizen. Nine submissions, covering more than PhP450,000,000.00, have the potential to be approved.[98] The capacity of the People's Survival Fund has not been fully realised. Bearing in mind the serious impact of climate change, it is strange that the fund is still a work-in-progress. The nature of the matter, as well as the possible risks to the lives of Filipinos, have not convinced the government to act with resolve, by accelerating the application review and release of the funds requested.

iv. The Government Has Not Enacted Specific Measures to Address Climate Change

Formulating the National Framework Strategy on Climate Change and National Climate Change Action Plan is not the end of the government's duty of protecting the people's right to life. Actual fulfilment of the vision is the next phase of this function. Sadly, concrete action leaves much to be desired. On this score, the government has not taken the crucial step of crafting the statutes necessary to pursue the objectives set forth in the framework strategy and action plan.

One of the targets outlined in the framework strategy is the development of other efficiency measures towards a low carbon economy in the energy sector.[99] Priority is placed on enhancing energy efficiency and conservation, reinforcing energy infrastructure and diversifying energy sources.[100] Yet, the corresponding statute has not been enacted. The legislative bill[101] is still being consolidated/substituted in the Report under the Energy, Ways and Means, and Finance Committees as of 2017.[102] Had Congress enacted the statute, the State would have achieved an efficient and judicious utilization of energy.[103] Another bill that has not progressed relates to the increased uptake of alternative fuels.[104] Senate Bill No. 460 grants incentives for manufacturers, importers, and users of electric, hybrid and other alternative fuel vehicles.[105] In spite of this State target, the bill[106] providing incentives for

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98 Antonio Fernandez, 'People's Survival Fund: Overview and Status' (2016), *at* <slideshare.net/NAP_Global_Network/peoples-survival-fund-overview-and-status> (accessed 18 November 2017).

99 Climate Change Commission, 'National Framework Strategy on Climate Change' (n 17), 22.

100 *Id*, 23.

101 Senate Bill No. 30, 17th Congress (Philippines) entitled 'An Act Institutionalizing Energy Efficiency and Conservation, Enhancing the Efficient Use of Energy, Granting Incentives to Energy Efficiency and Conservation Projects, and For Other Purposes.'

102 Senate of the Philippines, 'Energy Efficiency and Conservation Act' (*Senate of the Philippines,* 2017), *at* <senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-30> (accessed 29 November 2017).

103 Senate Bill No. 1531, 17th Congress (Philippines), s 2(a).

104 Climate Change Commission, 'National Framework Strategy on Climate Change' (n 17), 24.

105 Senate Bill No. 460, 17th Congress (Philippines), ss 5-8.

106 Senate Bill No. 460, 17th Congress (Philippines) entitled 'An Act Providing Incentives for the Manufacture, Assembly, Conversion and Importation of Electronic, Hybrid and other Alternative Fuel Vehicles, For Other Purposes.'

vehicles using alternative fuel has not moved forward. It is still pending in the Committee on Ways and Means and Trade, Commerce and Entrepreneurship as of 2016.[107]

The two bills demonstrate that the government has a long way to go before it can meet the objectives specified in the National Framework Strategy on Climate Change. The lack of enabling laws reduces the framework strategy into lofty aspirations. With no clear sight on how to execute these objectives, the government has settled with small victories in the form of a framework strategy and action plan, which are mere statements of intent and expressions of willingness to pursue a certain direction.

Verily, the inadequacy of government action symbolises the enduring struggle of Filipinos in dealing with climate change. Although the State is equipped with the resources and technical expertise to formulate a course of action, it has not implemented the necessary projects. Neither has the government manifested that it is taking climate change mitigation and adaptation measures seriously.

IV. The Philippine Government Can Be Held Accountable for Its Inaction in Addressing Climate Change

After identifying the instances when the right to life was put in danger as a result of climate change and the weaknesses of the State and its agents, a case can be filed before the domestic court. The aim of this climate change litigation is to hold the government accountable for failing to protect the Filipinos' right to life. The case also intends to enjoin the government to adopt a concrete and prompt response to climate change. The discussion is premised on an affirmation of legal standing to file a case before Philippine courts. This legal standing will be closely linked to the corresponding cause of action against the State. Formulating the cause of action entails an examination of the policy direction of the government and establishing accountability. Compliance with the elements of legal standing, cause of action, and the specific mandate involved gives rise to the appropriate remedy before the court. It is in this regard that the proper party can seek a relief to compel the State and its agents to perform an act.

A. Filipinos Have Legal Standing to Sue Before the Court

An essential element for successful climate change litigation is standing to sue. Due to the overriding interests attached to climate change litigation, addressing the preliminary question of standing requires a lower quantum of proof.[108] Liberality in assessing legal standing is not uncommon in the Philippines. In the aforementioned *Oposa v. Factoran*,[109] the Supreme Court stressed the novelty of the environmental case in order to recognise the standing of minors, who represent the current and future generations. In other cases, the Supreme Court had the occasion to elucidate the procedural requirement of legal standing, clarifying that ordinary citizens can sue, even in the absence of direct injury. The case must demonstrate 'transcendental importance,' 'paramount interest,' or 'far-reaching

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[107] Senate of the Philippines, 'Electric, Hybrid and Other Fuel Vehicles Incentives Act of 2016' (*Senate of the Philippines*, 2017), *at* <https://www.senate.gov.ph/lis/bill_res.aspx?congress=17&q=SBN-460> (accessed 29 November 2017).

[108] Mank, B, "Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation" *Michigan State Law Review (2012)* 869, 918, citing *Comer v Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), 864.

[109] 224 SCRA 792 (1993) [Supreme Court of the Philippines].

implications.'[110] Legal standing will also be acknowledged if the case relates to public expenditures. The case then takes the form of a taxpayer's suit, where the petitioner, invoking his or her capacity as taxpayer and premised on the injury to be caused by unlawful expenditure, asserts the legality of the government's use of public funds.[111]

Thus, the potential litigation against the government can be instituted by an ordinary Filipino. For example, a farmer can invoke legal standing on the ground that said farmer has a personal and substantial interest in the subject climate change litigation such that a direct injury will be sustained.[112] To reiterate, the agricultural industry is one of the sectors that suffers the most damage due to climate change. The farmer's direct injury consists of loss of crops, which is the very source of livelihood.

People from other sectors can also invoke legal standing. With the broad impact of climate change, they have their respective accounts of the injuries incurred. Warmer temperature, floods, typhoons, and rising sea level cause detriment to communities. Legally speaking, each individual in the Philippines has a direct and specific interest in holding the State accountable for failing to adopt measures to protect the right to life.

The legal standing of a farmer and an ordinary Filipino can also be based on their capacity as taxpayers. An amount of PhP50,000,000.00 has been allocated under the Climate Change Act for the initial operating fund of the Climate Change Commission.[113] For 2016, the budget of the Climate Change Commission for general administration, operations and projects is PhP64,946,000.00.[114] Moreover, PhP1,000,000,000.00 is annually set aside for the People's Survival Fund.[115] As a taxpayer, a farmer or an ordinary Filipino, each person has a stake in government spending. From the public character of the funds involved, the possibility of these large sums of money being left unused or even misused will contravene the proper disbursement of public funds.[116]

Another ground for leniency in determining legal standing in climate change litigation is the fact that the potential case is of paramount importance. The situation in the Philippines is a clear case of disregard by the government of its constitutional and statutory duties.[117] As previously identified, various government agencies and instrumentalities have not fully assumed their functions with respect to climate change. The government's indifference to this environmental issue is a matter imbued with national interest, thus clothing the individual with proper standing to sue.

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[110] *Mamba v Lara*, 608 SCRA 149, 163 (2009) [Supreme Court of the Philippines], citing *David v Macapagal-Arroyo*, 489 SCRA 160 (2006) [Supreme Court of the Philippines].

[111] *League of Cities of the Philippines v Commission on Elections,* 571 SCRA 263, 305 (2008) [Supreme Court of the Philippines].

[112] See *Bayan Muna v Romulo*, 641 SCRA 244, 254 (2011) [Supreme Court of the Philippines], citing *Jumamil v Café*, 470 SCRA 475 (2005) [Supreme Court of the Philippines] and *Integrated Bar of the Philippines v Zamora*, 338 SCRA 81 (2000) [Supreme Court of the Philippines].

[113] Climate Change Act 2009 (Philippines), s 21.

[114] General Appropriations Act, Fiscal Year 2017 (Philippines), pt 27B.

[115] Republic Act No. 10174 (Philippines), s 13.

[116] See *Jacomille v Abaya,* 757 SCRA 273, 292 (2015) [Supreme Court of the Philippines], citing *Land Bank v Cacayuran*, 696 SCRA 861 (2013) [Supreme Court of the Philippines].

[117] See *Francisco v Nagmamalalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc.,* 415 SCRA 44, 139 (2003) [Supreme Court of the Philippines], citing *Kilosbayan v Guingona*, 232 SCRA 110 (1994) [Supreme Court of the Philippines].

B. There Is a Cause of Action Against the Government

A cause of action is defined as 'the act or omission by which a party violates a right of another.'[118] It implies 'facts which are stated entitling a complaining party to some judicial relief'.[119] In the domain of climate change litigation, substantiating the violation of a right warrants an allegation against the government. Ultimately, the government is in charge of enacting measures to mitigate and adapt to the effects of climate change.

A perusal of the main priority areas of the Philippine government and the outcomes envisioned summarises the cause of action against the State. In principle, the government concentrates on: 1) food security, 2) water sufficiency, 3) environmental and ecological stability, 4) human security, 5) climate-friendly industries and services, 6) sustainable energy and 7) knowledge and capacity development. These seven priorities have their corresponding outcomes: 1) ensure availability, stability, accessibility, and affordability of safe and healthy food, 2) manage supply and demand, quality and conservation of water, 3) protection and rehabilitation of critical ecosystems, 4) reduce risks of people to climate change and disasters, 5) create sustainable consumption and production, 6) promote energy efficiency and conservation and 7) enhance knowledge on climate change.[120] After discussing in detail the living conditions of communities and the inadequacies of the government, there is sufficient basis to assert that the government has not accomplished significant progress to realise these seven priorities and outcomes. This intersection of the right to life and the State's duties gives rise to a cause of action against the government.

Internationally, the Philippines has struggled to cope with climate change expectations, such that human rights protection is derailed. A formal communication from the Special Procedures mandate-holders of the Human Rights Council, which enumerated State duties with respect to climate change, captures the weaknesses of the Philippine government. The letter called for the promotion of human rights in climate change action, adoption of mitigation measures to reduce global emissions, use of adaptation measures to protect against harm and facilitation of access to information.[121] The Philippine government has not attained the aspirations outlined in the letter. Its agencies continue to languish, figuring out how to enforce the objectives they undertook.

The prevalence of climate change is not an unbearable burden that constitutes an excuse for the State's disregard of its duties. The Philippine government's failure to adopt effective measures is a departure from its international mandate of protecting the people against climate change-related threats to human rights. When a State ignores the principles set forth in the United Nations Framework Convention on Climate Change and the Paris Agreement, it likewise overlooks the essence of international cooperation as an obligation.[122] This is tantamount to violations of other international instruments, which uphold the right

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[118] Rules of Court (Philippines) Rule 2, s 2.

[119] Harris, S "What is a Cause of Action?" (1927-1928) 16(6) Cal L Rev 459, 467.

[120] Climate Change Commission, *supra* nt 6, 6.

[121] Special Procedures Mandate-Holders of the Human Rights Council, 'A New Climate Change Agreement Must Include Human Rights Protections for All' (*United Nations Human Rights Office of the High Commissioner*, 17 October 2014) 3, *at* <ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf> (accessed 18 November 2017).

[122] Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, A/HRC/10/61, 10th sess, Agenda Item 2 (15 January 2009), 99.

to life and affirm human dignity, such as the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

As aptly observed by the High Commissioner for Human Rights, accountability mechanisms in policy implementation should be installed. This mechanism should guarantee relief against human rights violations.[123] Establishing a cause of action under climate change litigation is an example of this accountability tool, thus bolstering the people's will to take a stand against insufficient government response to climate change.

C. Mandamus Lies Against the Government

Mandamus is a remedy to command the performance of an act within the powers of an office and equivalent to a public duty.[124] It is specifically directed at breaches of a statutory duty and aimed at compelling the performance of a discretionary power by an administrator.[125] In the Philippines, a petition for *mandamus* can be resorted to when an officer unlawfully neglects to perform an act specifically enjoined by law, or unlawfully excludes the enjoyment of a right and there is no other speedy remedy in the ordinary course of law.[126] Furthermore, *mandamus* is employed to require execution of a ministerial duty.[127] As jurisprudentially defined, a ministerial duty is one where an officer performs in a given set of facts, pursuant to the mandate of legal authority.[128]

To understand a ministerial duty, reference should be made to pertinent laws and guidelines. The duties of the government are outlined in the Climate Change Act, while the specific targets set by the State are found in the National Framework Strategy on Climate Change and the National Climate Change Action Plan. The directive on the government has been clearly specified. Hence, the concerned government agencies and instrumentalities are bound to comply with their respective mandates. The State does not have discretion on whether or not to adopt measures on climate change and has the ministerial duty to give due attention to the provision of services to the public.

Given the failure of the government to perform its duty of formulating an effective response to climate change, the issuance of a writ of *mandamus* is warranted. To facilitate climate change proceedings, the Supreme Court issued the Rules of Procedure for Environmental Cases.[129] Although the scope of the rules does not explicitly include the Climate Change Act, the latter is subsumed in 'other existing laws that relate to the conservation, development, preservation, protection and utilisation of the environment and natural resources.'[130] In accordance with the general concept of mandamus, the Rules of Procedure for Environmental Cases has a counterpart section on writ of continuing *mandamus*.[131] The writ is designed to address the government's unlawful neglect of a duty enjoined by law in relation to the enforcement of an environmental regulation or a right

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[123] *Id,* 83.
[124] Benjafield, DG, 'Statutory Discretions' (1956) 2(1) Sydney Law Review 1, 2.
[125] Fowler, RJ, 'The Prospects of Judicial Review in Relation to Federal Environmental Impact Statement Legislation' (1977) 11(1) Melb Univ L Rev 1, 13, 16.
[126] Rules of Court (Philippines) Rule 65, s 3.
[127] *Angchangco v Ombudsman*, 268 SCRA 301, 306 (1997) [Supreme Court of the Philippines].
[128] *Heirs of Venturillo v Quitain*, 506 SCRA 102, 110 (2006) [Supreme Court of the Philippines], citing *Symaco v Aquino,* 106 Phil. 1130 (1960) [Supreme Court of the Philippines].
[129] A.M. No. 09-6-8-SC (Philippines).
[130] Rules of Procedure for Environmental Cases (Philippines), s 2.
[131] *Id,* Rule 8.

therein. The relief available to the petitioner is a command to the government agency to perform the acts required of it. It also contemplates payment for damages incurred by said petitioner.[132]

In relation to climate change litigation, the writ of continuing mandamus allows an aggrieved party to obtain a favourable order from government inaction. Accordingly, an ordinary Filipino will invoke the difficulty of dealing with the ill-effects of climate change as a premise for filing the petition, with allegations pointing to the State's disregard of its mandate under the Climate Change Act. The relief sought by the petitioner is for the concerned government agencies and instrumentalities to take action. After all, enforcement of the law is the primary function of these offices, which is ministerial in character and may be compelled by *mandamus*.[133]

Pursuant to the writ of continuing *mandamus*, the court can direct the government to perform specific acts, such as: 1) enhanced coordination with local government units on the use of the People's Survival Fund, through the Climate Change Commission and Department of the Interior and Local Government, 2) further reduction of greenhouse gas emissions, through the Department of Environment and Natural Resources, Department of Science and Technology, and Philippine Atmospheric, Geophysical, and Astronomical Services Administration and 3) heightened information drive for Filipinos so that they can lobby for the passage of relevant bills on climate change priorities of the government, through the Philippine Information Agency and Department of Education. To monitor progress and ensure compliance, the court can require these agencies to submit periodic updates on the status of their accomplishments.[134]

Conclusion

With the preparatory framework for climate change having been set, now is the right time to implement the policies of the government, in line with the State's direction of pursuing climate change adaptation and mitigation. However, the government is struggling to meet expectations. Considering the urgency attached to climate change, it comes as a surprise that various agencies and instrumentalities of the government have not been effectively prompt in their response. Years after the enactment of the Climate Change Act, the Philippines seems settled in continuing to identify guiding principles and priorities.

Climate change litigation offers an alternative remedy. Filipinos have the requisite legal standing to institute a case on the ground of violation of their right to life. The persistence of the adverse effects of climate change can be traced to the government's material lack of action in improving the conditions of communities. The distinct weak points of the government are identifiable, based on the statutory obligations of its agencies and instrumentalities. Finally, the procedural rules for climate change litigation represent the commitment of the judicial branch to facilitate legal battles for environment's sake.

The institution of a case against the State should not be regarded as detrimental to government administration. After all, non-governmental actors play integral roles in the development of climate change policies and implementation of measures.[135] Climate change

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[132] *Id,* Rule 8, s 1.

[133] *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay* (n 46), 671.

[134] Rules of Procedure for Environmental Cases (Philippines) Rule 8, s 7.

[135] Peel, J, "Climate Change Law: The Emergence of a New Legal Discipline", (2008) 32(3) *Melbourne University Law Review* (2008) 922, 968.

litigation provides an avenue for a meaningful discussion of possible deficiencies in the present framework. It may even lead to the introduction of other mechanisms that are equally, if not more, beneficial to the people and the environment. In the end, the entire proceedings concern the preservation of the right to life in the midst of climate change.

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Judicial Interpretation of the Convention for the Prevention and Punishment of the Crime of Genocide: What Rules Apply When Determining State and Individual Responsibility?

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Keywords
INTERPRETATION OF TREATIES; GENOCIDE CONVENTION; INTERNATIONAL TRIBUNALS; INTERNATIONAL CRIMINAL LAW.

Abstract

The rules of interpretation of the 1969 Vienna Convention on the Law of Treaties are considered customary law and have been extensively applied by different international tribunals, including in cases involving the commission of the crime of genocide, either before the International Court of Justice or before international criminal tribunals. These rules are not regarded as an exhaustive list of interpretative techniques, but rather as an umbrella set of rules that do not exclude other principles or means compatible with them, and thus, offer enough flexibility to be applied by different *fora*. This paper examines the manner in which, in the context of genocide cases, the International Court of Justice and international criminal tribunals have resorted to the rules of interpretation in order to identify whether all those tribunals (regardless of their jurisdiction *ratione personae*) have applied Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Moreover, it analyses whether those articles are equally applicable in cases where the responsibility of the State is under discussion and in criminal cases seeking to determine the responsibility of the individual. It is argued that even though international criminal law is deemed to have caused a change to the traditional paradigm of the international system by bringing the individual to its forefront and causing a rupture in the State-centric logic that had prevailed since its origins, Articles 31 and 32 have proved themselves adaptable enough in order to be applied to the realm of international criminal law.

Introduction

The crime of genocide was defined and codified in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide and has since remained unchanged.[1] Indeed, despite the amount of criticism and proposals of new and enlarged definitions, the statutes of international criminal tribunals have included the 1948 definition, even after multilateral negotiations such as the 1998 Rome Conference that adopted the Statute of the permanent International Criminal Court (ICC). Nevertheless, the judicial interpretation adopted by both, criminal tribunals and the International Court of Justice (ICJ), has been said to, somehow, modify the meaning of the Convention by,

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1 Article 1, UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) 973UNTS 1021 (CPPCG).

for example, broadening the scope of the protected groups – asserting that, in light of the *travaux préparatoires* of the Genocide Convention, the definition encompasses 'stable' groups – or by adding certain elements not included in the original text, such as a 'manifest pattern of similar conduct'.

Moreover, even if the elements of the crime of genocide are, admittedly, the same both in the case of State and individual responsibility, their interpretation can vary since, for example, the discussion of the special mental element – the intention to destroy in whole or in part a certain group, the so-called 'genocidal intent' – seems to follow a criminal law logic, as opposed to the rules of attribution of State responsibility. Furthermore, the principle of legality, applicable in criminal cases, is bound to affect the interpretation in cases discussing individual responsibility, perhaps yielding different results.

This raises certain questions regarding the scope and limits of judicial interpretation in the context of a procedure seeking to determine both individual and State responsibility for the crime of genocide. Do the rules of the Vienna Convention on the Law of Treaties of 1969 (VCLT)[2] apply equally? Have international tribunals followed the general rule of interpretation of Article 31 and the supplementary means of Article 32 as foreseen in the Convention?

This paper seeks to examine the manner in which, in the context of genocide cases, the ICJ and international criminal tribunals have resorted to the rules of interpretation in order to identify whether all those tribunals (regardless of their jurisdiction *ratione personae*) have applied Articles 31 and 32 of the VCLT. Moreover, it will look at whether those articles are equally applicable in cases where the responsibility of the State is under discussion and in criminal cases determining the responsibility of the individual.

It is submitted that the ICJ in its two contentious cases on the Genocide Convention has followed a more traditional approach, in accordance with the VCLT. On the other hand, an analysis of the case law of international criminal tribunals shows that even if the judges have purported to apply the VCLT rules, they have also added other criteria to better suit the realm of their work. Nevertheless, this does not mean that the VCLT rules are irrelevant in the sphere of international criminal law, but that a special reading is needed in order to comply both with the interpretation rules specifically applicable to criminal process and the VCLT rules.

I. The ILC's Work on the Development of the Rules of Interpretation of the 1969 Vienna Convention on the Law of Treaties

The main rule of interpretation is codified in Article 31(1) of the VCLT, which reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The International Law Commission's commentary on draft Article 27 (which was re-numbered as Article 31 in the final version) remarked that some of its members had expressed doubts about the utility of including rules of interpretation. In fact, the first Special Rapporteur on the subject had questioned whether those rules even existed.[3]

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2 UN International Law Commission, *Vienna Convention on the Law of Treaties* (1969) UNTS 1155 (1980).

3 UN International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" 2 *Yearbook of the International Law Commission* (1966) 218. Hersh Lauterpacht observed that even if international tribunals resorted to rules of interpretation, scholarly literature considered them unhelpful, *cf.* Lauterpacht, H, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 *British Yearbook of International Law* (1949) 51. See also, D'Aspremont, J, "The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment

However, the Commission held that there was 'sufficient evidence of recourse to principles and maxims in international practice to justify their inclusion' in the Draft Articles.[4] The Commission also highlighted three different approaches to treaty interpretation, depending on the element they emphasised the most: 1) 'the text of the treaty as the authentic intention of the parties', *i.e.* the textual interpretation; 2) 'the intention of the parties as a subjective element distinct from the text', *i.e.* the intentionalist interpretation; and 3) 'the declared or apparent object and purposes of the treaty', *i.e.* the purposive interpretation. Nonetheless, it noted that the majority put more weight on the primacy of the text, 'while, at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty'.[5]

Therefore, even when the Commission admitted that 'the character of a treaty may affect the question of whether the application of a particular principle maxim or method of interpretation is suitable in a particular case',[6] it decided that it would include general interpretation rules. In any case, the Commission also clarified that even if current Article 31(1) combined different means of interpretation, 'the process of interpretation is a unity' and thus, it contains one 'single, closely integrated rule'.[7] At the same time, the Commission asserted that the general rule is based on three separate principles: 1) interpretation must be carried out in good faith; 2) the intention of the parties is presumed to be found in the ordinary meaning of the terms used by them; and 3) the ordinary meaning of the term must be determined in the context of the treaty and in light of its object and purpose.[8]

The approach chosen by the Commission and included in the 1969 VCLT considers the text of the treaty as the authentic expression of the intention of the parties and thus, places it as the starting point of the interpretation process. In its commentary, the Commission pointed out that the ICJ had taken this textual approach as established law.[9] As explained below, textualism has proven itself insufficient to resolve the difficulties entailed in the definition of the crime of genocide and international tribunals have resorted to other means of interpretation. Indeed, several authors have observed that words in themselves are not enough and they are just an expression of the intention of the parties.[10] In the same sense, Hart has referred to the open texture of law, which in his opinion 'leaves a vast field for a creative activity which some call legislative'.[11]

The Commission decided to include a general rule of interpretation in current Article 31 and supplementary means of interpretation in current Article 32. The Commission asserted that even though supplementary means, in particular, the *travaux préparatoires*, had usually been applied to confirm the interpretation, it clarified that they could also be used for the purpose of determining the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a

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Distinguished" in Bianchi, A, Peat, D and Windsor, M, eds, *Interpretation in International Law* (Oxford University Press 2015) 123.

4 UN International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" 2 *Yearbook of the International Law Commission* (1966) 218.

5 *Ibid*.

6 *Ibid,* 219.

7 *Ibid,* 220.

8 *Ibid,* 221.

9 *Ibid,* 220.

10 Lauterpacht, *supra* nt 3, 83.

11 Hart, HLA (1994) cited in Hernandez, G, "Interpretative Authority and the International Judiciary" in Bianchi, A, Peat, D and Windsor, M, *supra* nt 3, 172.

result which is manifestly absurd or unreasonable. It also further added that they are not an alternative or autonomous means of interpretation.[12]

The Commission adopted the general rule and the supplementary means of interpretation without establishing any exceptions for particular treaties. This includes the Genocide Convention, even though the ICJ itself had deemed it to possess particular characteristics that separate it from other international treaties. Indeed, the Court asserted that, unlike the great majority of international treaties, one could not 'speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'.[13] In this sense, the ICJ observed that the Convention is based on 'principles which are recognized by civilized nations as binding on States, even without any conventional obligation' and 'to be definitely universal in scope'.[14] Moreover, it held that the Convention was 'manifestly adopted for a purely humanitarian and civilizing scope', given that 'its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality'.[15] Furthermore, it is worth noting that in its Commentary to the Draft Convention, the International Law Commission did take into account the Genocide Convention regarding other clauses of the Draft, such as the reservations regime or the existence of *jus cogens* norms, but the Convention was not mentioned with regard to the rule of interpretation.

As will be described in the following sections, the fact that the Genocide Convention presents special features that separate it from other treaties does have a bearing on its interpretation, both when determining State and individual responsibility. Indeed, the perspective of the ICJ in the 1951 Advisory Opinion resembles the current description of human rights treaties according to which they are not merely an exchange of obligations between States for their mutual benefit, but seek to protect 'the basic rights of individual human beings –irrespective of their nationality–, both against the State of their nationality and all other contracting States'.[16] Consequently, their interpretation must not be guided by the ultimate goal of protecting the sovereignty of States.[17] Along those lines, it is worth noting that, as described above, in the Draft Convention, the International Law Commission did not adopt a *Lotusian*[18] approach whereby the absolute respect for State sovereignty calls for a restrictive interpretation or the application of the *in dubio mitius* principle. Indeed it did not include such principle in the crucible of rules, and, instead, affirmed that interpretation is 'an art, not an exact science',[19] therefore allowing the interpreter greater freedom.

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[12] UN International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" 2 *Yearbook of the International Law Commission* (1966) 223.

[13] ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, 28 May 1951.

[14] *Ibid*.

[15] *Ibid*.

[16] Inter-American Court of Human Rights (IACtHR), *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75*), Advisory Opinion 2/82, 24 September 1982, para 29. The Inter-American Court observed that the European Court of Human Rights had adopted the same position and also cited the 1951 Advisory Opinion of the ICJ to support its affirmation.

[17] Maisley, N, "The International Right of Rights: Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making" 28(1) *The European Journal of International Law* (2017) 103.

[18] The judgment of the Permanent Court of International Justice in the Lotus case is considered a reflection of the Westphalian doctrine, whereby international rules are binding upon States only when the "emanate from their free will". *Cf.* Permanent Court of International Justice, *S.S. Lotus* (*France v Turkey)* Series A, nª 10, 7 September 1927, 18.

[19] UN International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" 2 *Yearbook of the International Law Commission* (1966) 218.

II. The ICJ and the Interpretation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide

The ICJ had to interpret the Convention on the Prevention and Punishment of the Crime of Genocide early on, when in November 1950 the General Assembly submitted a request for an advisory opinion on reservations to the 1948 Convention. It was then that the Court famously developed the object and purpose test in order to analyse the validity of a reservation. Moreover, despite the fact that the advisory opinion was adjudicated only with regard to the Genocide Convention, it ushered in the modern reservations regime, which would be included in the 1969 Vienna Convention.

When interpreting the Genocide Convention, the Court took into account its 'origins and character (…), the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter se, and between those provisions and these objects', all of which, it held, furnished the 'elements of interpretation of the will of the General Assembly and the parties'.[20] Therefore, the Court mentioned both the will of the parties – and the General Assembly's – and the object of the Convention in order to interpret the text and conclude that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any convention obligation'.[21] It also referred to the Preamble, which is included in the context of the treaty under article 31(2) of the VCLT, to support its claim with respect to the universal character of the Genocide Convention.[22] Finally, the Court also examined the *travaux préparatoires* in order to decide on the issue of reservations.[23] On this point, it is worth noting that in his Dissenting Opinion, Judge Alvarez rejected the use of the *travaux préparatoires* in the interpretation of a treaty because the text of a Convention is distinct from that work and acquires a life of its own, and thus must not be interpreted with regard to the past, and only to the future.[24] As will be shown, neither the ICJ nor the international criminal tribunals have followed Alvarez's approach. In fact, they seem to have gone exactly the opposite way by placing great importance on the preparatory works in order to justify and support their interpretations of the crime of genocide.

The first contentious case regarding the Genocide Convention was brought before the Court by Bosnia and Herzegovina forty years later in March 1993 in the midst of the Balkans conflict. Bosnia and Herzegovina instituted proceedings for alleged violations of the 1948 Convention and requested provisional measures, which were granted by the Court.[25]

The judgement was the first opportunity for the Court to settle a long-standing dispute on whether the Convention foresaw the obligation of States not to commit genocide, together with the obligation to prevent and punish the crime. After the Nuremberg International Military Tribunal famously held that [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law by

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20 ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, 28 May 1951, 23.
21 *Ibid*.
22 *Ibid*.
23 *Ibid*.
24 *Ibid*, Dissenting Opinion of Judge Alvarez, 53.
25 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)); Order of the Court on Provisional Measures,* ICJ Reports 1993, 8 April 1993, 325.

enforced',[26] it seemed that international law did not foresee States' responsibility for the commission of international crimes. Indeed, Serbia itself had argued that the Convention was of an international criminal law nature and, thus, only included the responsibility of individuals for the commission of the crime of genocide and the responsibility of the State for the prevention and punishment of such individual conduct.[27] Nonetheless, the Court rejected this claim, affirming that the Convention foresees both individual and State responsibility for the commission of genocide and that the 'duality of responsibility' is a constant characteristic of international law.[28] Furthermore, it held that it was not necessary firstly to establish the responsibility of individuals to determine the State's.[29]

In order to reach this decision, the ICJ applied the rules of interpretation of the VCLT, which it considered to be part of customary law.[30] It started from the ordinary meaning of the terms of the 1948 Convention 'read in their context and in the light of its object and purpose', [31] and then also referred to the possibility of resorting to 'the preparatory work of the Convention and the circumstances of its conclusion' as supplementary means.[32]

Consequently, the Court observed that the wording of Article I stated that genocide is 'a crime under international law' – prohibited by a peremptory international norm.[33] Subsequently, the Court considered the last part of the Article that establishes that States 'undertake to prevent and punish' such crime. It examined the ordinary meaning of the term 'undertake', which it understood 'to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation'. Moreover, it remarked that it was a word commonly used in treaties, that the 1948 Convention did not qualify its scope, and that Article I created a distinct obligation from the rest of the clauses. The Court supported this statement by referring to the purpose of the Convention[34] as well as its preparatory works,[35] but only as a means of confirmation for the earlier interpretation and not because the result of the application of the general rule of interpretation had led to an ambiguous or obscure meaning or to a manifestly absurd or unreasonable result. In this sense, it recalled *inter alia* that in 1947 the General Assembly declared 'that genocide is an international crime entailing national and international responsibility on the part of individuals and States' (A/RES/180 (II), a concept included also in A/RES/177(II) and A/RES/178(II)).[36] The ICJ then went back to the purpose of the Convention to affirm that even though Article I does not expressly mention the obligation of States to refrain from committing genocide, the established purpose of the treaty had the effect of including this prohibition.[37] Indeed, it considered that it 'would be paradoxical if States were thus under an obligation to prevent (…) but

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[26] International Military Tribunal for Nuremberg, *the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialists Republics v Hermann Wilhelm Goering et al*, Trial of the Major War Criminals before the International Military Tribunal Vol 22 1947, 1 October 1946.

[27] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*) ICJ Reports 2007, 26 February 2007, 43, para 171.

[28] *Ibid*, para 173.

[29] *Ibid*, paras 180-182.

[30] *Ibid*, para 160.

[31] *Ibid*.

[32] *Ibid*.

[33] *Ibid*, para 161.

[34] *Ibid*, para 162.

[35] *Ibid*, para 163.

[36] *Ibid*.

[37] *Ibid*, para 166.

were not forbidden to commit such acts', and that the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[38]

The Court extended this conclusion to other acts enumerated in Article III of the Convention by referring to the meaning of the terms used by other clauses of the treaty, mainly Article IX, which reads '[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'[39]

Therefore, the ICJ proposed an expansive interpretation of the obligations of the 1948 Convention by using the general rule and the supplementary means of interpretation, thus ushering in the possibility of determining the responsibility of the State for the commission of genocide.

In the second contentious case involving the Genocide Convention,[40] the Court also applied the VCLT rules to interpret the meaning of Article II, although it did not necessary follow the logic of Article 31 and 32. Indeed, when deciding on the scope of the phrase 'destruction of a group' in light of the opposing views of the States (Croatia contended that it was not a 'physical destruction' whereas Serbia argued the contrary)[41], the Court resorted in the first place to the *travaux préparatoires* to assert that even though the drafters originally envisaged two types of genocide – physical or biological, and cultural genocide –, the latter was eventually left out of the treaty.[42]

On the other hand, in interpreting the meaning of the special *mens rea* of the crime, the intent to destroy in whole or in part, the Court first made use of the rule of Article 31 of the VCLT.[43] In this sense, it referred to the Preamble of the Convention, which states that the parties seek to 'liberate mankind from such an odious scourge'. Furthermore, it recalled the 1951 Advisory Opinion where the Court had asserted that one of the objects of the Convention is the 'safeguarding of the very existence of certain human groups', and its 2007 judgment where it held that the intent to destroy a group in whole or in part is a specific element of the crime of genocide and 'distinguishes it from other related criminal acts such as crimes against humanity and persecution'.[44]

Moreover, in order to interpret the meaning of the acts included in the *actus reus* of the crime, in particular, paragraph (b) (causing serious bodily or mental harm), the Court analysed the meaning of the word 'serious' in light of the object and purpose of the Convention.[45] Then, again looking for confirmation of its interpretation, it resorted to the *travaux préparatoires* regarding its conclusion that the harm 'must be such as to contribute to the physical or biological destruction of the group, in whole or in part'.[46]

Finally, it is interesting to note that the ICJ also confirmed its interpretation in light of the case law of the International Criminal Tribunal for the former Yugoslavia

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38 *Ibid*.
39 *Ibid*, para 169.
40 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* ICJ Reports 2015, 3 February 2015, 3.
41 *Ibid*, paras 134-135.
42 *Ibid*, para 136.
43 *Ibid*, para 138.
44 *Ibid*, para 139.
45 *Ibid*, para 157.
46 *Ibid*, para 157.

(ICTY), albeit without clarifying the VCLT rule on which it based this approach.[47] This raises the question of determining the role of international case law in the process of interpretation. International law does not recognise the doctrine of *stare decisis* and considers decisions of international tribunals as auxiliary sources. In general, the constituent documents of the various existing international courts and tribunals have followed the approach adopted by Article 59 of the Statute of the International Court of Justice whereby decisions are binding only on the parties to the case and in respect of that particular case. A different approach may be found in the Statute of the International Criminal Court which, though it falls short of adopting the doctrine of *stare decisis*, nonetheless recognises that the Court may apply principles and rules of law as interpreted in its previous decisions',[48] thus expanding the scope of its case law to future decisions, should the Court choose to do so. Moreover, international case law is not expressly included in the VCLT, neither in the general rule of Article 31 nor within the subsidiary means mentioned in Article 32. Therefore, the reference of the ICJ might be considered as just resorting to an auxiliary source rather than applying a means of interpretation.

Notwithstanding this, the ICJ has referred to decisions of other international tribunals in order to confirm its own interpretation after applying the general rule of Article 31. It appears that there is an overlap of applicable law and means of interpretation and that the ICJ considered international case law as a supplementary means under Article 32, which is deemed an open provision.[49] In this sense, judicial decisions can be understood as prior interpretations that will influence 'future arguments about the content or meaning of a rule', or even 'create a strong presumption that the prior interpretation of the rule is in fact the rule'.[50] In any case, as it will be shown by the practice of international criminal tribunals, prior decisions are often cited and used by the different chambers in order to confirm and support their own judgments.

III. The Application of the Rules of Interpretation by International Criminal Tribunals

Even though the statutes of the so-called *ad hoc* tribunals, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are not treaties, they were annexed to resolutions of the Security Council, both tribunals have referred to the articles of the VCLT on interpretation with regard to Article 4(2) and 4(3) and Article 2(2) and 2(3) respectively, which reproduce *verbatim* Article II and Article III of the 1948 Convention. Indeed, the ICTY has observed that even though the Statute is not a treaty, it is a 'sui generis international instrument resembling a treaty' and added that the rules of the VCLT 'are applicable under customary law to international instruments which are not treaties', and thus 'recourse by analogy' to Article 31(1) was appropriate.[51] Furthermore, the Tribunal held that it was 'well settled that an interpretation of the Articles of the Statute and provisions of the Rules should begin with resort to the general principles of interpretation

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47 *Ibid*, In particular, it referred to two judgments of the Trial Chamber, *Prosecutor v Krajišnik,* (Judgment) IT-00-39-T (27 September 2006) and Prosecutor v Tolimir, (Judgment) IT-05-88/2-T (12 December 2012).

48 Article 21(2), UN General Assembly, *Rome Statute of the International Criminal Court* (1998) UNTS 2187 (Rome Statute).

49 *Ibid*.

50 Cohen, HG, "Theorizing Precedent in International Law" in Bianchi, A, Peat, D, and Windsor, M, eds, *Interpretation in International Law* (Oxford University Press 2015) 275.

51 ICTR, *Kanyabashi v the Prosecutor* (Appeals Chamber, Joint and Separate Opinion of Judge McDonald and Judge Vohrah) ICTR-97-21-A (3 June 1999) para 15.

as codified in Article 31 of the Vienna Convention on the Law of Treaties'.[52] Moreover, it has been observed that the statutes derive from the Charter of the United Nations and thus, the VCLT rules should apply.[53] Finally, in the case of the crime of genocide, it is worth noting that, as mentioned before, since the definitions in both Statutes are identical to the one of the 1948 Convention, it is not unreasonable to use the VCLT rules given that, actually, the *ad hoc* tribunals had to interpret the conventional description of the crime.

For example, a Trial Chamber of the ICTY affirmed that it interpreted the Genocide Convention 'pursuant to general rules of interpretation of treaties laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties'.[54] Consequently, it took into account 'the object and purpose of the Convention in addition to the ordinary meaning of the terms in its provisions'. This is a clear reference to the general rule of Article 31, albeit it did not expressly mention the principle of good faith. Moreover, it added the preparatory works as a supplementary means of interpretation.[55] However, it then mentioned 'international case-law on the crime of genocide', the 'Report of the International Law Commission on the Draft Code of Crimes against Peace and Security of Mankind', the 'reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights', 'the work done in producing the Rome Statute on the establishment of an international criminal court' and it also took as guidance the legislation and practice of States, especially their judicial interpretations and decisions.[56] It is not clear whether the Trial Chamber considered these last elements as subsequent practice according to Article 31(3)(b) or supplementary means within Article 32 of the Vienna Convention, because it held that even though the Preparatory Commission for the International Criminal Court post-dates the acts involved in the case, it was helpful in assessing the state of customary international law and was also useful to determine the existence of *opinio juris*.[57] Therefore, there seems to be a certain degree of confusion and mixture between means of interpretation and evidence of customary international law as an applicable source, similar to the case of the ICJ regarding international jurisprudence.

A. The Interpretation of "Protected Groups"

Maybe one of the most famous – and contentious –[58] interpretations of the *ad hoc* tribunals is the Akayesu judgment of Trial Chamber I of the ICTR.[59] In order to determine whether the Tutsi minority could be considered as one of the groups protected in the Convention, the Trial Chamber made use of the *travaux préparatories* to ascertain that the treaty seeks to protect stable or permanent groups, whose membership is determined by birth, thus excluding the 'more mobile' groups to which people can join

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52 ICTY, *Prosecutor v Delalic et al* (Trial Chamber Judgment) IT-96-21-T (16 November 1998) para 1161.

53 Schabas, W, *Genocide in International Law: The Crime of Crimes*, (2nd ed, Cambridge University Press 2009), 638.

54 ICTY, *Prosecutor v Krstic* (Trial Chamber Judgment) IT-98-33-T (2 August 2001) para 541.

55 *Ibid.*

56 *Ibid.*

57 *Ibid*.

58 It has been labelled both "imaginative and somewhat radical", *cf.* Schabas, W, "The Odious Scourge": Evolving Interpretations of the Crime of Genocide" 1(2) *Genocide Studies and Prevention: An International Journal* (2008) 98. Elsewhere, the same author held that the Trial Chamber "indulged in judicial 'gap-filling' in an effort to satisfy itself that the Tutsi were contemplated by article II of the Genocide Convention, *cf.* Schabas, W,*supra* nt 53, p 639.

59 ICTR, *Prosecutor v Akayesu* (Trial Chamber Judgment) ICTR-96-4-T (2 September 1998).

voluntarily.[60] The Chamber did not develop this idea further nor did it explain its reasoning, but just cited the Summary Records of the meeting of the Sixth Committee of the General Assembly – from 21 September to 10 December 1948 – without describing how the *travaux* supported its affirmation. Instead, the Chamber limited itself to adding that in its opinion, it was 'particularly important to respect the intention of the drafters of the Genocide Convention'.[61]

The Trial Chamber, thus, adopted an expanded definition of the Convention basing itself on a supplementary means of interpretation without first exploring whether the general rule could lead to a clear and reasonable solution. In fact, the Trial Chamber did not even refer expressly to the VCLT rules but directly resorted to the *travaux préparatoires*.[62] It was clearly a choice of the Chamber to use only the preparatory works to justify its reasoning.

Notwithstanding, this approach was not challenged by the defence and, in fact, in a subsequent case, the Appeals Chamber took judicial notice of the fact that genocide occurred in Rwanda in 1994 in the form of a campaign of mass killing intending to destroy in whole or at least in a very large part Rwanda's Tutsi population, a group protected by the Genocide Convention.[63] However, the Chamber did not state that the Tutsi population was an ethnic group but simply a 'protected group' under the Convention, despite the fact that the Prosecution had sought that the Chamber follow the *Semanza* judgment where the Trial Chamber had indeed considered that the Tutsi were an ethnic group.[64] Nevertheless, the Appeals Chamber held that this approach did not prejudice the Prosecution nor rendered the proceedings less fair and expeditious and, thus, dismissed the Prosecution's claim in this respect.[65]

Even though the Appeals Chamber of the ICTR did not confirm the *Akayesu* interpretation nor was it confirmed by the ICTY,[66] it is possible to find other examples that seem to go in the direction of applying an expansive interpretation. Indeed, the International Commission of Inquiry on Darfur,[67] when determining the scope of the groups mentioned in the 1948 Convention, applied the principle of effectiveness (also expressed by the Latin maxim *ut res magis valeat quam pereat*) – which it considered as a 'principle of interpretation of international rules', thus using the broader notion 'rules

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[60] *Ibid,* para 511. The Trial Chamber in the Musema case reached the same conclusion, *cf. Prosecutor v. Musema* (Judgment and Sentence) ICTR-96-13-T (27 January 2000) para 162. The Rutaganda Trial Chamber also held the same, *cf. Prosecutor v Rutaganda* (Trial Chamber Judgment) ICTR-96-3-T (6 December 1999) para 374.

[61] ICTR *Prosecutor v Akayesu* (Trial Chamber Judgment) ICTR-96-4-T (2 September 1998) para 516.

[62] This was, in fact, the case in other judgments of the ICTR that follow the *Akayesu* interpretation on the protected groups. See, for example, *Prosecutor v Rutaganda* (Trial Chamber Judgment) ICTR-96-3-T (6 December 1999) or *Prosecutor v Musema* (Trial Chamber, Judgment and Sentence) ICTR-96-13-T (27 January 2000).

[63] ICTR (Appeals Chamber, Decision on the Prosecution's Interlocutory Appeal on Judicial Notice) *Prosecution v Karemera et al*, ICTR 98-44-T (16 June 2006) para 35.

[64] ICTR, *Prosecutor v Semanza* (Trial Chamber, Judgment and Sentence) ICTR-97-20-T (15 May 2003) para 422.

[65] ICTR, *Prosecution v Karemera et al* (Appeals Chamber, Decision on the Prosecution's Interlocutory Appeal on Judicial Notice) ICTR 98-44-ART73 (16 June 2006) para 25.

[66] Schabas, W, "The Odious Scourge": Evolving Interpretations of the Crime of Genocide" 1(2) *Genocide Studies and Prevention: An International Journal* (2008) 99; Schabas, *supra* nt 53, 153.

[67] Even though the Commission of Inquiry is not a jurisdictional body, its conclusions are of interest and bear judicial consequences because its mission included the investigation of reports of violations of international humanitarian law and human rights law, the determination of whether or not acts of genocide had occurred, and the identification of the perpetrators of such violations with a view to ensuring that those responsible are held accountable. *Cf.* S/RES. 1564 (2004) para 12.

instead of 'treaties' – to assert that 'the rules of genocide should be construed in such a manner as to give them their maximum legal effects'.[68] Consequently, the Commission held that while the Convention clearly specified the categories of prohibited conduct, it used a broad and loose terminology when referring to the protected groups.[69] The Inquiry Commission asserted that the ICTR had reinforced its conclusions on the protected groups by developing a subjective standard of perception and self-perception as a member of a group,[70] because 'collective identities, and in particular ethnicity, are by their very nature social constructs, 'imagined' identities entirely dependent on variable and contingent perceptions and not social facts, which are verifiable in the same manner as natural phenomena or physical facts'.[71] The Inquiry Commission based its assumptions on a purposive interpretation by remarking that the elements of the crime must be interpreted in an expansive manner due to the object and scope of the rules on genocide and, moreover, on the fact that this interpretation had not been contested by States, which it considered evidence of its customary nature.[72]

It seems that these bodies have chosen an expansive interpretation to determine the scope of the *chapeau* of the crime by resorting to a purposive interpretation, highlighting collective goals or objects of the Convention such as ending impunity, securing justice for victims or safeguarding the very existence of a certain human group. This interpretation, though compatible with the VCLT rules, runs counter to the principle of strict construction or *in dubio pro reo*, basis of any criminal procedure. In this sense, it has been observed that in order to harmonize both, Article 31 and the requirements of the *nullum crimen sine lege* principle, an interpretation based on the object and purpose should be carried out in a moderate manner.[73] Therefore, even though the references to the object and purpose of the Genocide Convention have highlighted the fight against impunity when applied by international criminal tribunals, they should also include the goal of prosecuting those accused of genocide in accordance with the Law, thus, respecting the principles of criminal procedure.

On the other hand, it seems that the tribunals have applied a strict interpretation to define the scope of the *actus reus* when analysing the individual responsibility within such context by referring to other principles of interpretation, not included in the Vienna Convention. For example, the Trial Chamber in *Akayesu* applied a restrictive interpretation of Article 2(2)(a) stating that the English term 'killing' was too general whereas the French term 'meurtre' was more precise. On the basis of the presumption of innocence of the accused and pursuant the general principles of criminal law it upheld the version that was more favourable for the accused.[74] The Trial Chamber further confirmed this interpretation by referring to the *travaux préparatoires*.[75] In the same line, in

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68 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, *at* <un.org/news/dh/sudan/com_inq_darfur.pdf> para 494.

69 *Ibid*.

70 *Ibid*, para 498.

71 *Ibid*, para 499.

72 *Ibid,* para 501.

73 Grover, L, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014), 202.

74 ICTR, *Prosecutor v Akayesu* (Trial Chamber Judgment) ICTR-96-4-T (2 September 1998) para 501. The Trial Chamber in the *Musema* case reached the same conclusion, *cf. Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13-T (27 January 2000) para 155. It is also worth noting that the International Court of Justice in its 2007 and 2015 Judgment held that those two words had, in fact, the same meaning. *Cf.* para 642 and para 155, respectively.

75 ICTR, *Prosecutor v Akayesu*, (Trial Chamber Judgment) ICTR-96-4-T (2 September 1998) para 501.

the *Kashishema et al*. case, the Trial Chamber held that in case of doubt regarding the interpretation of its Statute, 'the doubt must be interpreted in favour of the accused'.[76]

It is not evident whether this approach is consistent with the rules of the VCLT.[77] As shown before, these rules have been applied in order to justify an expansive interpretation and, thus, may not be suitable when used in criminal proceedings. Even if Article 31(1) places emphasis on a textual interpretation, which could lead to a restrictive reading of a term,[78] the fact that it also allows for a purposive interpretation has opened the way for tribunals to propose a broad reading of the definition of the crime, or at least of some elements thereof.

In this sense, as mentioned above, one of the rules applied by international tribunals to support an expansive reading is the so-called 'effective interpretation', which demands the adoption of the interpretation that enables the treaty to have appropriate effects. However, the International Law Commission has observed that this 'maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty'.[79] Hersh Lauterpacht has argued in favour of the rule of effective interpretation against the rule of restrictive interpretation,[80] which states that the best interpretation is that which is less restrictive of the sovereignty of the parties, following the famous *dictum* of the Permanent Court of International Justice's decision in the *Louts* case: 'restrictions upon the sovereignty of States cannot therefore be presumed'.[81] He contented that this principle was suitable to identify the intention of the parties and respected the principle of good faith.[82] Nevertheless, Lauterpacht was clearly thinking of traditional treaties addressed to States and applied by international jurisdictions, such as the ICJ, thus, the reference to the *Lotus* case. The meaning of restrictive interpretation defined by this author does not necessarily coincide with the strict construction of criminal law.[83] Therefore, even in the context of the VCLT, if international criminal tribunals choose to apply the principle of effective interpretation, it should not lead to an excessively expansive interpretation because this would contravene the principle of good faith – included in Article 31(1) – and, in the context of a criminal procedure, this could additionally violate the rule of strict construction.

International tribunals have placed great weight on the *travaux préparatoires* to confirm their interpretations, sometimes after first applying the general rule of Article 31(1) and sometimes directly as a principal means of interpretation instead of a supplementary one. This approach can be problematic for a number of reasons. In the first place, it does not follow the logic of the VCLT whereby the preparatory works, like any supplementary means, cannot replace the general rule because they are not an alternative or autonomous means of interpretation. In the second place, the International Law Commission itself has observed that sometimes the records of treaty negotiations are incomplete or misleading and, thus, judges should exercise 'considerable discretion in

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[76] ICTR, *Prosecutor v Kashishema and Ruzindana* (Trial Chamber Judgment) ICTR-95-1-T (21 May 1999) para 103.

[77] Schabas, *supra* nt 53, 639.

[78] The principle of legality entails the textual primacy. *Cf.* Grover, *supra* nt 73, 393.

[79] UN International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" 2 *Yearbook of the International Law Commission* (1966) 219.

[80] Lauterpacht, *supra* nt 3, 59.

[81] Permanent Court of International Justice, *S.S. Lotus (France v Turkey)* Series A, nª 10, 7 September 1927, para 18.

[82] Lauterpacht, *supra* nt 3, 83.

[83] Lauterpacht, *supra* nt 3, 57, 59.

determining their value as an element of interpretation'.[84] The *travaux préparatoires* of the Genocide Convention have indeed led to a great number of discussions and disagreements regarding diverse issues.[85] In the third place, the *travaux préparatoires* do not really reflect the authentic expression of the intention of the parties, which is, in fact, found in the text of the treaty.[86] In this sense, Judge Shahabuddeen's partial Dissenting Opinion in the *Krstic* case held that even though the *travaux préparatoires* are of value and interest, 'the interpretation of the final text of the Convention is too clear to be set aside by them' and 'on settled principles of construction, there is no need to consult this material'.[87] Finally, William Schabas has observed that reliance on the *travaux préparatoires* may freeze the interpretation and prevent its evolution, referring to the evolutive or dynamic interpretation developed by human rights bodies.[88]

Despite these words of caution, the *ad hoc* tribunals have frequently referred to the drafters' intent in order to confirm their own interpretation without necessarily explaining in detail the manner in which they have arrived at their reading of the provision in question. In this sense, it does not seem that recourse to the *travaux préparatoires* has led to a frozen or non-evolved interpretation of the Convention. In fact, judges have relied on them to justify their interpretation in accordance with customary international law, because, at least in the case of the ICTY, it had to apply only that source to the facts before it.[89] Indeed, some of the Chambers applied the principle of progressive interpretation in order to capture the subsequent practice and evolving norms and values.[90]

In sum, even if no prevailing hermeneutic has emerged,[91] it seems that the *ad hoc* tribunals have attempted to use the general rules of interpretation albeit with their own specificities based on the nature of their jurisdiction. In this sense, it would be possible to consider the rules applied by these tribunals as supplementary means not mentioned in Article 32 of the VCLT since, as stated above, this clause provides only for the principal means[92] and is not considered to constitute an exhaustive list.[93] In fact, it could be used to

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84 UN International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" 2 *Yearbook of the International Law Commission* (1966) 220.

85 See, for example, Payam Akhavan, who challenges whether the *travaux préparatoires* are conclusive regarding the exclusion of cultural genocide from the Convention, *cf.* Akhavan , P, "Cultural Genocide: Legal Label or Mourning Metaphor?"62 *McGill Law Journal* (2009)263, or Daniel Feierstein, who questions whether political groups were indeed clearly excluded, *cf.* Feierstein, D, "La Convención sobre Genocidio: algunos datos histórico-sociológicos para aportar a las discusiones jurídicas" 5(1) *Revista de Derecho Penal y Criminología* (2015) 137, 138. In addition, Hannibal Travis argues that the *travaux* préparatoires do not warrant the excessively pro-perpetrator restrictive interpretation that has been proposed by certain scholars and prosecutors, *cf.* "On the Original Understanding of the Crime of Genocide" 7(1) *Genocide Studies and Prevention: An International Journal* (2012) 31.

86 Berner, K, "Judicial Dialogue and Treaty Interpretation: Revisiting the 'Cocktail Party' of International Law" 54(1) *Archiv des Völkerrechts* (2016) 75.

87 ICTY, *Prosecutor v Krstic* (Appeals Chamber Judgment, Partial Dissenting Opinion of Judge Shahabuddeen) IT-98-33-A (19 April 2004) para 52.

88 Schabas, *supra* nt 53, 637.

89 Grover, *supra* nt 73, 56. Indeed, on 3 May 1993, the Secretary-General of the UN submitted a report to the Security Council where he stated that by creating the Tribunal, the Security Council "would not be created or purporting to 'legislate' that law", rather, "it would have the task of applying existing international humanitarian law". Such existing law stemmed from both conventional and customary rules. The Secretary General stated that "while there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law" (UN Security Council, S/25704, 3 May 1993).

90 Grover, *supra* nt 73, 57.

91 *Ibid*, 63.

92 Aust, A, *Modern Treaty Law and Practice*, (Cambridge University Press 2000), 200.

resort to any useful material that does not fit within Article 31.[94] Therefore, human rights standards such as fairness to the suspect or the accused or the principle of strict construction as well as consistency with customary law invoked by the tribunals as guiding considerations[95] could be framed within Article 32.[96]

B. The International Criminal Court and the Elements of the Crime of Genocide

The case of the International Criminal Court differs from the situation of the *ad hoc* tribunals for two main reasons: a) it was created by an international treaty and b) its statute contains an article detailing the applicable law as well as a provision expressly referring to the principle of *nullum crimen sine lege* and the consequent strict construction of the Statute's text.[97] Therefore, since its very first decisions, the Appeals Chamber has held that the interpretation of the Rome Statute is 'governed by the 1969 Vienna Convention on the Law of the Treaties, specifically the provisions of articles 31 and 32'.[98] It also asserted that the context of a given article 'is defined by the particular sub-section of the law read as whole in conjunction with the section of an enactment in its entirety' and that its objects 'may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aim of the law as may be gathered from its preamble and general tenor of the treaty'.[99] The Court also referred to Article 32 of the VCLT on several occasions. However, it did so merely to confirm an interpretation and not because the application of Article 31 left the meaning ambiguous or obscure or led to a manifestly absurd or unreasonable result.[100]

Article 21 of the Rome Statute stipulates the applicable law, establishing a hierarchical order of its sources. Accordingly, in the first place the Court must apply its Statute, the Elements of Crime, and the Rules of Evidence and Procedure. In the second place, where appropriate, applicable treaties and the principles and rules of international law. Failing that, the Court applies general principles of law derived from national laws of legal systems of the world. This provision also allows the Court to apply principles and rules of law as interpreted in its previous decisions. Moreover, paragraph 3 states that 'the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction', thus, including a specific guideline of interpretation, which requires *inter alia* that the interpretation of the Statute be consistent with the principle of *nullum crimen sine lege*.[101] This principle is expressly recognised in Article 22, whose paragraph 2 reads: '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being

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93 Berner, *supra* nt 86, 71.

94 Ibid, 73.

95 Grover, *supra* nt 73, 63

96 Although, at the same time, some of those standards can be said to be "other relevant rules of international law", under article 31(3)(c). For a discussion of the meaning of this sub-paragrpah in the context of international criminal law treaties, see Grover, *supra* nt 73, 358.

97 Articles 21 and 22, Rome Statute.

98 ICC, *Situation in the Democratic Republic of Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's I's 31 March 2006 Decision Denying Leave to Appeal* (Appeals Chamber) ICC-01/04-168 (24 July 2006) para 33.

99 *Ibid.*

100 *Ibid*.

101 *Cf.* UN Report of the Preparatory Committee on the Establishment of an International Criminal Court. UN Doc. A/CONF.183/2Add.1, [incorporating documents A/CONF.183/2/Add.1 of 14 April 1998, Add1/Corr.1 of 26 May 1998 and Add.2/Rev.1 of 15 April 1998] 14 April 1998, p 30, footnote 68. However, it is worth mentioning that the Chambers of the Court have also referred to article 21(3) in order to examine the rights of the victims.

investigated, prosecuted or convicted'. Consequently, the Rome Statute presents the ICC different rules of interpretation, which the tribunal must take into account when applying its norms, though it does not offer any guidance on the relationship among them, a task that was left to the judges.

To date, the only case including charges of genocide is the case against Omar Hassan Ahmad Al Bashir, president of Sudan, within the situation of Darfur. The case is still in the preliminary phase because the arrest warrant has not been executed yet. The first arrest warrant issued on 3 March 2009 rejected the Prosecution's application to include this crime. However, this decision was reversed by the Appeals Chamber,[102] thus, leading to a new order, which now does contain the charges of genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.[103]

The first decision on the arrest warrant stated that in the context of Article 21 of the Statute the Court can only resort to the sources mentioned in sub-paragraphs 1(b) and 1(c) when there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes, and the Rules and this *lacunae* cannot be filled by the application of Articles 31 and 32 of the VCLT and Article 21(3) of the Statute.[104] This approach seems to allow the application of the VCLT only in case of a gap and distance itself from the first decisions that did not qualify the opportunity for the application of such rules.

In this decision, the Chamber referred to the Elements of Crimes, which can be considered to constitute a subsequent agreement in the sense of Article 31(3)(a) to interpret the definition of genocide provided for in Article 6 of the Rome Statute.[105] The Elements of Crimes include a requirement not mentioned in the Statute that was used by the majority of the Chamber: that the relevant conduct 'took place in the context of a manifest pattern of similar conduct directed against the group or was conduct that could itself effect such destruction'. In doing so, the majority of the Pre-Trial Chamber considered that there was no contradiction between Article 6 and the Elements of Crimes, when interpreting the latter instrument in a purposive manner, remarking that its object and purpose was to further the *nullum crimen sine lege* principle 'by providing a priori legal certainty on the content of the definition of the crimes'.[106] Therefore, it appears that the Pre-Trial Chamber used the principle of strict construction to add an element not expressly mentioned in the Statute but included in an instrument adopted for the purpose of assisting the judges in the interpretation of the former, thus, blurring the line between applicable law and interpretative aids.[107] Indeed, paragraph 3 of article 9 states that 'The Elements of Crimes and amendments thereto shall be consistent with this Statute'.

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[102] ICC, *Judgment on the Appeal of the Prosecutor against Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (Appeals Chamber) CC-02/05-01/09-73 (3 February 2010).

[103] ICC, *Second Decision on the Prosecution's Application for a Warrant of Arrest* (Pre-Trial Chamber) ICC-02/05-01/09-94 (12 July 2010).

[104] ICC, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber) ICC-02/05-01/09-3 (4 March 2009) para 44.

[105] This instrument is foreseen in Article 9 of the Rome Statute as an aid for the Court in the interpretation and application of the articles of the Statute which define the crimes. It was adopted by two-thirds majority of the members of the Assembly of States Parties ICC-ASP/1/3 (part II-B). On the other hand, some authors have treated the Elements of Crime as an agreement made in connection with the conclusion of the Rome Statute, under article 31(2). *Cf.* Grover, *supra* nt 73, 363.

[106] ICC, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber) ICC-02/05-01/09-3 (4 March 2009) para 131.

[107] Grover, *supra* nt 73, 364.

In her Dissenting Opinion, Judge Usacka held that the legal definitions of the crimes are included exclusively in the Statute, and the Elements of Crime only assist the judges in their interpretation.[108] In any case, she held that even if the Chamber were to accept the requirement of a manifest pattern of similar conduct, 'the plain meaning of the term "manifest pattern"', in accordance with the Vienna Convention, 'refers to a systematic, clear pattern of conduct in which the alleged genocidal conduct occurs', which was met in the case.[109]

The discussions and diverse readings in the different decisions show that, even though there was a clear consensus on the 1948 definition – which is widely regarded as customary international law – at the Rome Conference, and it was not subject to revision, there were still dissimilar understandings, which were reflected in the *travaux préparatoires*.[110] Indeed, the draft document includes footnotes regarding the meaning of 'the intent to destroy in whole or in part' and 'mental harm' or the possibility of including new groups, such as social or political groups. Furthermore, the Working Group noted that other relevant provisions of the 1948 Convention may be taken into account in the interpretation of the definition of the crime, together with other sources of international law.[111]

Despite the wide acceptance of this definition, its interpretation has led to certain difficulties given the open texture of the concept,[112] as shown by the decisions of the Chambers of the ICC. In this sense, since its *chapeau* does not include a 'contextual element', it seems that one individual could commit the crime by him or herself.[113] This was, on a theoretical level at least, admitted by a Trial Chamber of the ICTY.[114] Nevertheless, in the case of international crimes it is almost impossible to separate the individual from the general context given that the conduct is at the same time individual and collective based on an organized structure.[115] In fact, Raphael Lemkin himself has held that '[g]enocide is intended to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves'.[116] This is perhaps the reason why the Assembly of State Parties decided to include a quasi-contextual element of a 'manifest pattern of similar conduct' in the Elements of Crimes that does not exist in the 1948 Convention nor in the definition included in Article 6 of the ICC Statute,[117] thus, ushering in a number of interpretation problems, which cannot be resolved by resorting to other

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[108] ICC, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (Pre- Trial Chamber, Dissenting Opinion of Judge Usacka) ICC-02/05-01/09-3 (4 March 2009) para 18.

[109] ICC, *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (Pre- Trial Chamber, Dissenting Opinion of Judge Usacka) ICC-02/05-01/09-3 (4 March 2009) para. 19.

[110] Grover, *supra* nt 73, 274.

[111] Preparatory Committee on the Establishment of a Permanent International Criminal Court A/AC.249/1997/WG.1/CRP.1, 14 February 1997.

[112] Cupido, M, "The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts" 15 *Melbourne Journal of International Law* (2014) 380.

[113] Kress, C, "The International Court of Justice and the Elements of the Crime of Genocide" 18(4) *European Journal of International Law* (2007) 620.

[114] ICTY, *Prosecutor v Goran Jelisic* (Judgment) IT-95-10 (14 December 1999) paras 100-101.

[115] Simpson, G, "Men and Abstract Entities: Individual Criminal Responsibility and Collective Guilt in International Criminal Law" in Van Der Wilt, H and Nollkaemper, A, eds, *System Criminality in International Law* (Cambridge University Press 2009), 71.

[116] Kress, *supra* nt 113, 620.

[117] Kress, *supra* nt 113, 622.

relevant provisions of the 1948 Convention as suggested by the Working Group of the Preparatory Committee.[118]

With regard to this point, it has been asserted that, in fact, the Preparatory Commission held that the 'pattern of similar conduct' does not have to be committed with genocidal intent or pursuant to a genocidal plan but that this element 'is satisfied when an individual – acting with the intent to destroy a protected group – commits, for example, a murder in the course of a collective campaign involving the widespread commission of murders'.[119] On the other hand, it is worth noting that the Darfur Inquiry Commission has gone even further and examined whether genocide had been committed in pursuance of a State plan or policy, as an element of the crime.[120] Finally, in its judgments the ICJ rejected this element as a part of the definition and instead used it as evidence of the genocidal intent, according to the case law of the ICTY Appeals Chamber.[121] In any case, neither the 'manifest pattern' nor the State plan or policy is expressly included in the 1948 Genocide Convention and, therefore, it seems that its inclusion goes beyond the text of the treaty.

IV. Some Final Remarks

The rules of interpretation of the VCLT are considered customary law and have been applied extensively by different international tribunals, including in cases involving the commission of the crime of genocide, either before the ICJ or before international criminal tribunals. These rules are not regarded as an exhaustive list of interpretative techniques but rather as an umbrella set of rules that do not exclude other principles or means compatible with them and, thus, offer enough flexibility to be applied by different fora.[122] For example, the ICJ has made use of these rules in a rather traditional manner, following its previous case law. The International Law Commission based many of its proposals for the VCLT on the decisions of the Court. Therefore, it is possible to think that the rules of interpretation were created with the jurisdiction of the ICJ in mind and, thus, the Court has found no difficulties in applying the rules. On the other hand, even though international criminal law judges have applied the VCLT articles, they have done so in a slightly different manner, partly enabled by the flexibility of the rules, which offer the judges a certain measure of discretion to apply rules that better suit their jurisdiction *ratione materiae* and *ratione personae*. Nevertheless, on certain occasions despite this flexibility these tribunals appeared instead to have gone beyond the limits of the VCLT, perhaps due to the lack of sufficient justification, such as in the *Akayesu* case.

All things considered, even though international criminal law is deemed to have caused a change of the traditional paradigm of the international system by bringing the

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[118] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, *at* <un.org/news/dh/sudan/com_inq_darfur.pdf>, paras 518- 640.

[119] Cupido, *supra* nt 112, 401.

[120] Some commentators have held that a "manifest pattern of similar conduct" is equivalent in practice to a State plan or policy, *cf*. William Schabas cited in Loewenstein, AB and Kostas, SA, "Divergent Approaches to Determining Responsibility for Genocide. The Darfur Commission of Inquiry and the ICJ's Judgment in the Genocide Case" 5 *The European Journal of International Law* (2007) 851 nt 58. On the other hand, it has been observed that the Preparatory Commission held that the 'pattern of similar conduct' does not have to be committed with genocidal intent or pursuant to a genocidal plan, but that such element "is satisfied when an individual--acting with the intent to destroy a protected group--commits, for example, a murder in the course of a collective campaign involving the widespread commission of murders".

[121] *Ibid*, 853.

[122] Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, *supra* nt 73.

individual to its forefront and causing a rupture in the State-centric logic that had prevailed since its origins, Articles 31 and 32 have proved themselves adaptable enough to be applied in the realm of international criminal law.

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Blurring the Beginning of Non-International Armed Conflict: The Frustration of Legal Paradigms in Response to Terrorism

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Keywords
INTERNATIONAL HUMANITARIAN LAW; NON-INTERNATIONAL ARMED CONFLICT; LAW ENFORCEMENT; TERRORISM; COUNTER-TERRORISM; APPLICABILITY OF IHL

Abstract
The past decades have seen an increasing amount of intra-State wars unfold. The term 'terrorism' has increasingly become a license for States to unilaterally conduct their action. Because of that, determining the applicable legal norms that delimit the State's military power and regulate the warring parties' conducts is of ultimate importance. Although the legal test for the applicability of international humanitarian law in non-international armed conflict has been largely settled – first found in the second Protocol additional to the Geneva Convention and second supplemented by international tribunals as declaratory of customary IHL – terrorism has caused much frustration in the course of such legal determination, not helped by the obscure facts on the ground. This article will argue that by subjectively classifying a situation as 'terrorism' the State has not displaced the applicability question. In fact, the impact that terrorism has on the legal assessment is minimal, if any.

Introduction

Traditionally, law enforcement is for States to regulate violence occurring within its domestic sphere. If such violence escalates to a sufficient intensity between the State and an organised armed group, the situation may fall under the ambit of international humanitarian law (IHL). The applicability of IHL is definable by the legal existence of an armed conflict. Today, asymmetrical warfare and terrorism have drastically changed the academic discourse because the search for an 'armed conflict' is no longer so clear-cut. It thus leaves much political discretion for States to opt for a law enforcement paradigm in response to terrorism.

This article will examine the impact that terrorism has on the legal establishment of non-international armed conflict (NIAC). The need to focus on NIAC is manifested in the frequent commission of terrorist acts and the label of '(counter-)terrorism' in these situations. It will begin by recalling the essential elements in establishing NIAC and the challenges that can already be identified in relation to terrorism. The article will then go on to discuss the relationship between IHL and law enforcement with regard to terrorism. Most often, the State's choice has frustrated the applicable paradigms. Lastly, this analysis will show that such a frustration comes from a lack of understanding of the role of terrorism in establishing NIAC.

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I. The Beginning of a Non-International Armed Conflict

In search for the correct legal paradigm applicable to a situation of terrorism, it is necessary to first address the question of whether IHL is applicable, that is, whether an armed conflict can be legally established. It is proper to inquire firstly into IHL's applicability because in an armed conflict, IHL prevails over a national legal framework.[1] Article 2(2) of the second Additional Protocol to the Geneva Conventions (AP II) negatively defines a NIAC by excluding violence of insufficient intensity.

To determine the existence of a NIAC, the sources of law include treaty law and customary IHL. The latter has been interpreted and applied by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* decision. Despite the clear non-exhaustive list of indicators provided by the Appeals Chamber, difficulties abound, the situation is not helped by the fact that terrorist acts often possess characteristics that make the evidence on the ground obscure.

A. Treaty Law

The starting point in treaty law to define NIAC can be found in Common Article 3 of the Geneva Conventions.[2] It refers to 'armed conflict not of an international character occurring in the territory of one of the High Contracting Party'. Depending on the situation at hand, hostilities may occur between governmental armed forces and non-State armed groups, or between such groups only.

Separately, Article 1 of the AP II excludes from NIAC 'situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.'[3] Instead, AP II offers a narrow definition of NIAC – the armed conflict shall:

> take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

This enunciates a more restrictive scope than Common Article 3. Firstly, it contains the cumulative requirements for responsible command[4] and territorial control[5] by the non-

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1 International Committee of the Red Cross (ICRC), 'Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 31st International Conference of the Red Cross and Red Crescent (2011), 49. Some scholars have called IHL the *lex specialis* in armed conflict. See e.g.. Gill, T, 'Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach' 16 *Yearbook of International Humanitarian Law (YIHL)* (2013) 251–252.

2 There remains in the ICTY's jurisprudence to be a need for a responsible command: International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Enver Hadžihasanović and Others* (Appeals Chamber, Decision on interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility), ICTY-01-47-AR72 (16 July 2003) 11.

3 AP II, Article 1(2). Also see Pedrazzi, M, 'The beginning of IAC and NIAC for the purpose of the applicability of IHL' at the Sanremo Roundtable: 'The Distinction between International and Non-International Armed Conflicts: Challenges for IHL?', at 7.

4 There remains, in the ICTY's jurisprudence to be, a need for a responsible command: ICTY, *Prosecutor v. Enver Hadžihasanović and Others* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) Case No. IT-01-47-AR72 (16 July 2003) at 11 and ff.

5 The common view is that the group only needs to control the portion of territory sufficient to enable them carrying out sustained and concerted military operations. See ICRC Opinion Paper, 'How is the Term 'Armed Conflict' Defined in International Humanitarian Law?' (March, 2008), 4. It has also been

State armed groups. Second, it excludes conflicts arising solely between non-State armed groups but envisages the involvement of governmental forces.[6] Lastly, the words 'in the territory of a High Contracting Party between its armed forces' implies that, in order for IHL to apply to a State's armed forces, those forces must be present in the territory of that State.[7] Hence, it undermines the applicability of IHL to State armed forces operating extraterritorially.

It is noted, however, that the more restrictive criteria present in AP II do not in any way modify the content of Common Article 3.[8] Rather, the definitions of both regimes are complementary, the differences of which had later been brought closer by the *Tadić* decision.[9]

B. The *Tadić* Decision[10]

The often-cited *Tadić* decision is instrumental in elaborating on the content of Common Article 3. Considered to propound the legal norms in Common Article 3 as reflective of customary IHL,[11] the Appeals Chamber interpreted NIAC as a situation of 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.'[12] This formulation has a two-pronged test of thresholds as to: 1. the intensity of violence and 2. the degree of organisation of the non-State armed group.[13]

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suggested that the territory does not have to be substantial nor the control stable: see e.g., ICRC Commentary AP II, 4464—7; and *Prosecutor v. Akayesu* (Appeals Chamber, Judgment) ICTR-96-4-A (1 June 2001) 626.

6 Schindler, D, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979-II) 163 *Recueil des Cours* 131, 148—149.

7 Pejić, J, 'The Protective Scope of Common Article 3: More than Meets the Eye', 93(881), ICCR (2011) 189—199; Lubell, N, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press 2010) 100.

8 ICRC Opinion Paper, *supra* nt 5; Milanović, M and Hadzi-Vidanovic, V, "A Taxonomy of Armed Conflict" in White, N, and Henderson, C, eds, *Research Handbook on International Conflict and Security Law* (Edward Elgar Pub. Ltd 2012) 286.

9 Abi-Saab, G, "Non-International Armed Conflicts" in Baxter, R and Pilloud, C, eds, *International Dimensions of Humanitarian Law* (UNESCO 1988) 229.

10 Note that Article 8(2)(f) of the Rome Statute provides for a similar definition. The *Tadić* formulation was also adopted by the ICC in the case *Prosecutor v. Thomas Lubanga Dylio,* (Trial Chamber, Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) para 234.

11 The Trial Chamber stated that 'the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law.' *Prosecutor v Tadic* (Trial Chamber Judgment) IT-94-1-AR72 (2 October 1995) para 60. See also, e.g. ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (Haradinaj et al.)* (Trial Chamber Judgment) ICTY-04-84-T (3 April 2008): '[t]he rules contained in Common Article 3 are part of customary international law applicable in non-international armed conflict'; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement of 26 February 2007, paras 406—407.

12 ICTY, *Prosecutor v. Dusko Tadić,* (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-A (2 October 1995) para 70. The *Tadić* interpretation has been accepted as custom by ICC in International Criminal Court (ICC), *Prosecutor v. Thomas Lubanga Dylio,* (Trial Chamber, Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) para 233. See generally, Sivakumaran, S, *The Law of Non-International Armed Conflict* (Oxford University Press 2012).

13 ICRC has adopted the same legal test: see ICRC Opinion Paper, *supra* nt 5.

i. Intensity of Violence

In determining the intensity of violence, the ICTY has laid down numerous factors. In the leading case of *Prosecutor v. Ramush Haradinaj*, concerning the conflict between the Federal Republic of Yugoslavia and Kosovo Liberation Army, the Trial Chamber took into consideration *inter alia* the number, protraction, and intensity of individual confrontation; the types of weapons and other military equipment used; the number of persons and types of forces partaking in the fighting; and the number of casualties.[14] It is worth noting that terrorist acts may also be factored in this intensity threshold, which will be discussed in the next section.

These indicative factors are nonetheless non-exhaustive, as one still needs to proceed to assess the existence of a NIAC by reference to the overall context.[15] It is an objective determination without the need to resort to the State's declaration.[16]

ii. Degree of Organisation of Non-State Armed Groups

The ICTY has also set out useful indicators to determine whether a certain non-State armed group is sufficiently organised to be considered a party to an armed conflict. These include, *inter alia*, the existence of a command structure within the group; its control over a certain territory; its ability to gain access to weapons, other military equipment, recruits and military training; and its ability to plan, coordinate and carry out military operations, including troop movements and logistics.[17] As far as terrorism is concerned, the motivation of or the purpose advanced by the group is irrelevant.[18]

In the situation of Syria, the main opposition armed group, the Free Syrian Army, is composed of insurgents who have carried out coordinated attacks. They were capable of controlling certain parts of the territory, including northern Syrian and towns around Damascus.[19] An opposite example is Al-Qaeda, which does not control a certain territory and operates across borders.[20]

C. Challenges of Establishing the Existence of NIACs

At this stage, we can already identify profound difficulties in establishing the existence of NIAC from the *Tadić* formulation. Further, each of the two criteria can be prone to the terrorist aspect of a conflict.

At the outset, the *Haradinaj* case requires that a non-State armed group must achieve the requisite degree of organisation so that it can engage in military activities of a certain intensity but not merely sporadic attacks. At times, States would subjectively classify a group as 'rebels' or 'terrorists'. In the past, these were the Kurdistan Workers'

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[14] ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (Haradinaj et al.)*, (Trial Chamber Judgment) ICTY-04-84-T (3 April 2008) para 49.

[15] See ICTY, *Prosecutor v. Fatmir Limaj et al.,* (Trial Chamber Judgment) ICTY-03-66-T (30 November 2005) para 86. The Inter-American Commission of Human Rights (IACHR) held that a confrontation lasting thirty hours between the Argentinian military and dissident soldiers was covered by Common Article 3 in Inter-American Court of Human Rights (IACHR), *Abella v. Argentina*, Case No. 11.137, Report No. 55/97 (18 November 1997).

[16] Under the same rationale, the fact that a State announces public emergency derogation from human rights treaties is irrelevant.

[17] ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (Haradinaj et al.)*, (Trial Chamber Judgement) ICTY-04-84-T (3 April 2008) para 60.

[18] Akande, D, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Wilmshurst, E, ed., *International Law and the Classification of Conflicts* (Oxford University Press 2012) 52.

[19] Grignon, J, 'The beginning of application of international humanitarian law: A discussion of a few challenges' (2014) 96 IRRC 893, 156.

[20] Brooks, R, 'Protecting Rights in the Age of Terrorism: Challenges and Opportunities' 36 *Georgetown Journal of International Law* (2005) 669, 675.

Party in Turkey,[21] the Revolutionary Armed Forces of Colombia in Colombia[22] and the Liberation Tigers of Tamil Eelam in Sri Lanka.[23] But again, a State's declaration has no legal impact on the qualification of the parties to a conflict.

Rather, a question that often baffles international lawyers is how far we can include a non-State armed group's affiliates. IHL does not have a clear answer. Pejić looks at whether the affiliation to the core group is merely ideological or if military operations can be autonomously conducted by the affiliates.[24] In the second situation, the affiliates may be deemed 'co-belligerents' in the same armed conflict.[25] In the example of Al-Qaeda, its structure has been increasingly decentralised and degraded. The fact that its offshoots were involved in sporadic attacks in Iraq or Yemen does not warrant the conclusion that one single NIAC exists on its own.[26] In the words of Milanović, one simply cannot aggregate all terrorist acts motivated by Islamic fundamentalism coupled with professed allegiance to Al-Qaeda all across the world in order to satisfy the twofold intensity and organization test.[27]

Another difficulty arising from Common Article 3 are situations involving cross-border violence. With regard to an established armed conflict, the issue of how to categorise spill-over violence into a neighbouring State appears to remain uncertain. This is the case for the Al-Shabaab militia from Somalia on the Kenyan territory, Colombia's fighting with the members of the Revolutionary Armed Forces of Colombia on the Ecuadorian territory and the Kurdish armed struggle for independence against Iran and Turkey. Both Common Article 3 and the Appeals Chamber in *Tadić* refer the existence of a NIAC to violence coming from one single State. The next natural implication is that spill-over violence countered by the neighbouring State would result in a separate, parallel NIAC. But what if the new NIAC does not independently reach the intensity threshold?

Under international law, the mere fact that an international border has been crossed does not absolve the parties of their IHL obligations, much less permitting the deprivation of civilian protection.[28] In a situation where the non-State armed group from State A crosses the border to the territory of State B, there are two possibilities. First, if the sporadic violence within State B is in itself insufficient to trigger the application of IHL, domestic legal orders would fill the regulatory gap.[29] Second, in case a sufficient nexus can be established between the military operations in State B and the ongoing NIAC in State A, those operations can nonetheless be attributed to become part of the overall armed conflict.[30] In a similar vein, the ICTY Appeals Chamber has stated that,

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21 In 2005, Turkey claimed that the violence with the PKK was a matter of law enforcement against a terrorist organisation: see Letter from Ambassador Türkekul Kurttekin in response to the characterisation of the PKK, Landmine Monitor Report, 15 December 2005.

22 Colombia did not recognise a state of war, but recognised IHL applicability in 1999: see Intervention of President Uribe, Forum on 'Internal Conflict or Terrorist Threat?', Chía, Colombia, 26 April 2005, quoted in Roa-Castro, D, 'Mine Action in the Midst of Internal Conflict: The Colombian Case' in Geneva Call, Mine Action in the Midst of Internal Conflict (2005) 17.

23 Political Committee of the LTTE, Special Press Release, 10 October 1997.

24 Pejić, J, 'Extraterritorial targeting by means of armed drones: some legal implications' (2014), 96 IRRC 893, 83.

25 *Ibid*.

26 Lubell, N, 'The War against Al-Qaeda' in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 451–452.

27 Milanović, M, 'The end of application of international humanitarian law', (2014) 96 IRRC 893, 187.

28 Pejić, J, *supra* nt 24, 107, 194.

29 Milanović and Hadzi-Vidanovic, *supra* nt 8, 290.

30 *Id*, 291: 'organic or structural link between the sporadic extraterritorial outbreaks of violence and the main body of the conflict.'

one can merge the cross-border violence if it is 'closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict'.[31] The Taliban fighting that spread from Afghanistan onto the Pakistani territory is a case in point.

II. The Legal Relationship Between IHL, Law Enforcement and Terrorism

It is proper now to introduce law enforcement given the extent to which it might confuse the applicability of IHL. The challenges of establishing the existence of a NIAC for IHL to apply are heightened by the State's desire to prioritise law enforcement. As a matter of applicable paradigms, although IHL and law enforcement can theoretically be co-extensive, they do provide competing protection standards. Insofar as a counter-terrorism operation is conducted within the realm of law enforcement, it does not immediately negate the classification of the situation as a NIAC.[32] From the perspective of the sovereign State, specific rules governing a conflict situation must be selected. This frontline discretion left to the State to decide the applicable paradigm as they see fit often leads to collateral ramifications.[33] In the view of the International Committee of the Red Cross (ICRC), 'the law is not a question of choice, but based on the situation.'[34] It added that:

> They [the authorities] cannot choose to switch freely from one legal framework to the other as it suits them. The application will depend on objective criteria as to whether the overall situation qualifies as an armed conflict or not and whether the action taken is directed against a legitimate target and can therefore be considered as part of the conduct of hostilities or as a normal law enforcement activity.[35]

For this reason, we will now look at the competing nature of IHL and law enforcement as legal paradigms in response to terrorism, and some examples of their frustrated application.

A. Differentiating IHL and Law Enforcement

At risk of oversimplification, law enforcement denotes the legal regime containing a set of legal norms applicable during law enforcement operations. These norms are often times derivable from domestic legal orders and encompass, in particular for our purposes, criminal law provisions prohibiting terrorist offences, constitutional law ensuring human rights protection and administrative law which delimits the scope of authority of the State agent. One can further distil the law applicable to law enforcement from international law, including international human rights law (IHRL).[36]

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[31] *Tadić, supra* nt 11, para 70.

[32] Akande, D, *supra* nt 18, 53.

[33] ICRC, *Violence and Use of Force* (2015), 399: 'for political reasons, authorities may deny the fact that their country is in a situation of non-international armed conflict, while at the same time deploying military means to neutralize and kill their adversaries.'

[34] ICRC, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces* (2014), 398.

[35] *Ibid*.

[36] See generally, Krähenmann, S, 'Foreign Fighters under International Law and National Law' 20 *Recueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre* 249 (2015), for international treaties relating to counter-terrorism.

In principle, IHL and law enforcement bear marked differences. Firstly, IHL is characterised by a horizontal relationship between parties to the conflict.[37] The ultimate aim of military operations is to prevail over the enemy's armed forces,[38] whereas under law enforcement the relationship between the State and individuals is vertical, typical of the enforcement of domestic legislation.[39] Although law enforcement agents can derogate from human rights in "emergency" situations,[40] one cannot simply shift the scope and content of obligations by rhetorically avoiding the IHL paradigm. This is despite the blurred separation in practice when the same State agency has the authority to carry out both hostilities and law enforcement activities.[41]

Secondly, the two paradigms answer the question of the applicability of legal norms at differing stages. By placing counter-terrorism responses in a purely terrorism context, the legal norms of the law enforcement paradigm – often a mix of IHRL and domestic criminal law – automatically apply and guide the subsequent judicial assessment on any human rights violations. The applicability of IHL, on the other hand, depends on the existence of an armed conflict, which is a legal determination *ex post facto* by a competent judicial body.[42]

Lastly, from a protection perspective, IHL and law enforcement entail discrepancies in their protection standards. Take detention incommunicado as an example. Under IHL, holding persons at 'black sites' is only lawful if necessary for military advantages in relation to and for the duration of the conflict at hand.[43] Detainees shall be tried before an independent and impartial military tribunal and be repatriated as soon as the hostilities end.[44] In a NIAC situation, in addition to the Common Article 3 standards, AP II lays down fundamental guarantees for the treatment of detainees.[45] In contrary, IHRL requires detention to be necessary and proportionate to preventing a person's commission of offences or for prosecution purposes.[46] Holding a person incommunicado, however, is unlawful by definition due to the lack of procedural guarantees relating to the right to liberty and associated fair trial rights.[47]

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37 On the equality of belligerents, see e.g., Clapham, A, and Gaeta, P, *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 52: 'To a large extent, the law of armed conflict can only practically function if it is premised on the equality and non-discrimination of the belligerents.'

38 *Id*, 395.

39 Römer, J, *Killing in a Gray Area between Humanitarian Law and Human Rights* (Springer 2010) 37.

40 Chadwick, E, *Self-Determination, Terrorism, and the International Humanitarian Law of Armed Conflict*, (Martinus Nijhoff Publishers 1996) 135.

41 *Ibid*.

42 ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez* (Pre-Trial Chamber, Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3) IT-95-14/2-PT (2 March 1999) paras. 14-16.

43 For a detailed distinction between detention under IHL and LE, see e.g., Weissbrodt, D, and Bergquist, A, 'Extraordinary Rendition: A Human Rights Analysis', 19 Harvard Human Rights Journal (2006) 123, 148 (noting that inhumane treatment may include 'cut[ting] prisoners of war off completely from the outside world,' especially from their families). See also, *Hamdi v. Rumsfeld*, 542 U.S. 507, 2004, paras 518—524.

44 Geneva Convention III, Article 118.

45 Additional Protocol II, Article 4 on humane treatment of persons detained, and Article 5 on minimum provisions for the treatment of persons interned, detained or deprived of their liberty for reasons related to the armed conflict).

46 See ICCPR, Article 9 and ECHR, Article 5.

47 See ICCPR, Article 9(3); ECHR, Article 5(3), Article 6.

B. The Significance of the Applicability Question

Clearly, the question of which paradigm is applicable to the situation at hand is necessary to determine the set of legal norms when later adjudicating on specific legal issues. The distinct ways of prosecuting terrorists in each paradigm has direct bearing on the post-conflict transitional justice through accountability of all parties concerned. During an armed conflict, where IHL (and IHRL with certain restrictions)[48] is applicable, attacks towards military personnel and objectives may be lawful, provided that the means employed does not cause unnecessary suffering to the enemy's soldiers.[49] This is regardless of whether the attack is performed by the State or the non-State armed group, in line with the principle of equality of belligerents.[50]

Terrorist acts committed by either party to a NIAC and in connection with the armed conflict are considered a grave breach to the AP II and customary IHL and thus, they are prosecuted as war crimes.[51] More specifically, Article 4(2)(d) and Article 13(2) of the AP II provide that violent acts intended to spread terror among a civilian population or individuals are prohibited 'at any time and in any place'. It should be noted, as it has been specified in Articles 3(d) and 4(d) of the Statute of the Special Court for Sierra Leone (SCSL), that terrorist acts are a serious violation of AP II and Common Article 3 applicable to NIAC. The jurisprudence of the SCSL also reflects this position.[52]

On the other hand, in a situation falling short of an armed conflict due to the insufficient intensity of violence or organisation of the non-State armed group, this would not create a legal void. Under the umbrella of Article 2(2) of the AP II, namely 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature',[53] law enforcement appears to be the appropriate paradigm for legal regulation. Under it, any (terrorist) attack against military objects or civilian populations are automatically deemed unlawful.[54]

Therefore, the overarching question is where do we draw a dividing line between IHL and law enforcement? Apparently, establishing the beginning of a NIAC is the starting point. Attached to it is the blurring of such a legal determination due to the characteristics of terrorism we have discussed. But before attempting to offer an answer, we need to appreciate the escalated frustration due to the mere choice by the State for a law enforcement paradigm.

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[48] IHRL is also applicable during an armed conflict. IHL and IHRL rules should be interpreted harmoniously as far as possible. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, 226; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ. Reports 2004, 136; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 11. For an opposite view, see e.g., Gill, *supra* nt 1, 251 - 252.

[49] Article 35 of AP I; Article 8(b)(xx) of the Rome Statue United; UN Secretary General (UNSG), Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, No. ST/SGB/1999/13, 6 August 1999, para 6.1; and ICRC Customary IHL, Rules 12, 70—71.

[50] ICRC, 'Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 31st International Conference of the Red Cross and Red Crescent (2011) 48.

[51] Pejić, J, 'Counter-terrorism and The Rule of Law Framework' in María Salinas de Frías, A, Samuel, A, and White, N, (eds.), *Counter-Terrorism: International Law and Practice* (2012), 173. See also AP II, Articles 4, 13.

[52] *Prosecutor v. Brima* (Appeals Chamber Judgment) SCSL-2004-16-A (22 February 2008) para 172; *Prosecutor v. Sesay* (Trial Chamber Judgment) SCSL-04-15-T (2 March 2009) para. 677; *Prosecutor v. Taylor* (Appeals Chamber Judgment) SCSL-2003-01-A (26 April 2012) para 1979.

[53] AP II, Article 1(2).

[54] ICRC, *supra* nt 50, 49.

C. The Frustration of Applicable Paradigms in Response to Terrorism

The frustration and sometimes incorrect application of paradigms is attributable to the State's unwillingness to recognise the applicability of IHL. With less control over the situation, a State fighting in accordance with IHL rules is forced to recognise the non-State armed group as a legitimate party to a NIAC. The intensity threshold required for a NIAC also implies the State's inability to contain the spiralling violence within its own territory. As a consequence, IHL categorically endorses the legal entitlement of the non-State armed group to use lethal force to advance their military position against State agents under *jus in bello*.[55] Hence, States generally prefer a domestic law enforcement framework, which provides more latitude in their criminalising and prosecuting 'terrorists', so to speak.[56]

Still, in recent decades, we have seen a gradual change in the attitude of States when it comes to their extraterritorial counter-terrorism operations. The decision of the United States to conduct drone strikes in Afghanistan, for instance, was made coupled with an IHL-regulated mandate.[57] One plausible explanation is that IHL permits the use of lethal force provided that proportionality is satisfied, whereas a law enforcement paradigm would almost certainly render such lethal force unlawful under IHRL.

We have noted that the determination of the existence of a NIAC is *ex post facto*. Insofar as counter-terrorism responses are concerned, it is easier for States to put in place law enforcement within the domestic legal bounds, regardless of whether an armed conflict could have been established. The borderline situations are exemplified by the law enforcement units deployed by the United Kingdom in Northern Ireland to curb 'The Trouble' movement until the 1998 Belfast Agreement, as well as Russia's punitive measures against the Chechen insurgents participating in the hostilities.

To add to the complexity, there are other situations where States would co-apply both IHL and law enforcement. One example are the Israel/Palestine checkpoints, an occupation case which attracts the application of IHL. Nonetheless, the Rules of Engagement for the Israel Defence Forces regulate lethal force through the law of self-defence, as imaginably influenced by IHRL. This has dismissed the soldier's obligation to apply status-based judgment under IHL. Likewise, the Israel Supreme Court has demanded the 'capture-before-kill' principle in targeted killing cases, making specific legal issues in the occupied territory more aligned to IHRL.[58]

Another example is the co-execution of conducting hostilities and law enforcement operations by the same State agents in Colombia. During the conflict with the Revolutionary Armed Forces of Colombia (FARC), the Colombian armed forces were provided with multi-coloured cards instructing whether the current operation falls within the context of the NIAC or law enforcement.[59] It becomes extremely difficult to

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[55] On the equality of belligerents, see for example, Clapham and Gaeta, *supra* note 47, 52. See also, Chadwick *supra* nt 40, 8.

[56] However, in certain cases, States may resort to law enforcement due to their lack of capacity to implement IHL. In the case of Al-Shabaab, Somalia's police and security forces were deployed while the spill-over violence was tackled by Uganda's military troops cross the border. See e.g. United States Department of State, *Country Reports on Terrorism 2015 - Somalia* (2 June 2016).

[57] Dorsey, J, and Paulussen, C, "The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism" (ICCT Research Paper, April 2013) 11.

[58] *The Public Committee against Torture v. The Government of Israel* ("Targeted Killings"), Israeli Supreme Court, sitting as the High Court of Justice (11 December 2005). This requirement is also due to the application of IHRL in occupation cases where effective control is shown. See e.g., Milanović, M, "When to Kill and When to Capture?" *European Journal of International Law Blog*, (2011); Goodman, R "The Power to Kill or Capture Enemy Combatants", *European Journal of International Law* 24 (2013).

[59] Carlos Gomez, J, "Twenty-First-Century Challenges: The Use of Military Forces to Combat Criminal

draw a dividing line between those military operations executed against insurgents in the NIAC, and those executed against ordinary criminals.[60] Even though a State may wish to deploy law enforcement agents in an armed conflict, they cannot opt out of IHL rules.[61] However, the State may run the risk of losing IHL protections to law enforcement agents if those agents are considered part of the *de facto* armed forces by IHL.[62]

III. The Dividing Line Between IHL and Law Enforcement

Returning to our point of departure, namely, where to draw the dividing line between the two paradigms, it is necessary to assess the validity of the claim by States that a situation of terrorism of itself can negatively impact the applicability of IHL. In doing so, it is perhaps most helpful to examine the role of terrorism based on the two-pronged test in *Tadić*.

A. Identification of Parties

Often times, States tend to qualify a non-State armed group as a 'terrorist group' so as to delegitimize the group, deny the existence of a NIAC, and reject the applicability of IHL. This trend has led to increasing criminalization under the national legal framework without amnesty. On the contrary, Common Article 3 puts the emphasis that the applicability of IHL rules 'shall not affect the legal status of the Parties to the conflict.' In the context of a NIAC, States are encouraged to grant the 'broadest possible amnesty to persons who have participated in the armed conflict.'[63] In fact, the Draft Comprehensive Convention against International Terrorism preserves the distinction between prosecution of terrorism in the context of an armed conflict and in a context that falls short of an armed conflict. Like other Conventions prohibiting terrorism, the Draft Comprehensive Convention contains an exemption clause, providing that '[n]othing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under […] international humanitarian law.'[64]

Parallel to the indicators identified in *Haradinaj*, the Trial Chamber in the *Boškoski* case again emphasized that the non-State armed group must have 'some hierarchical structure' and must be able to implement the basic obligations of Common Article 3.[65] In any case, if a State believes that an alleged terrorist group does not possess a sufficient

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Threats", *International Law Studies* 88 (2012) 279, 285—86.

60 Dinstein, Y, "Concluding Remarks on Non-International Armed Conflicts" in Watkin, K, and Norris, AJ, eds., *Non-International Armed Conflict in the Twenty-first Century*, International Law Studies 88 (2012) 414.

61 In a NIAC, it is up to each nation to decide whether existing law enforcement agencies should continue to carry out their responsibilities: see e.g., ICRC, *Violence and Use of Force*, *supra* nt 33, 41. In addition, there has been a noteworthy trend that local police use drones within the State's border: see e.g., Kearney, K, "Police in Northern Ireland consider using mini drones" (BBC, 16 November 2011). The US Federal Aviation Authority Modernization and Reform Act of 2012 grants increased powers to local police forces across the USA to use their own drones.

62 ICRC, *To Serve and to Protect, supra* nt 34, 394. c.f. subject to two exceptions: (1) Article 43(3) of AP I provides that '[w]henever a Party to a conflict incorporates [... an] armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict'. (2) Direct Participation in Hostilities.

63 AP II, Article 6 (5).

64 Draft Comprehensive Convention against International Terrorism Article 20(1). See also Article 4(2) of the International Convention for the Suppression of Acts of Nuclear Terrorism; and Article 19(2) of the International Convention for the Suppression of Terrorist Bombings.

65 ICTY, *Prosecutor v Boskoski* (Trial Chamber Judgment) ICTY-04-82-T (10 July 2008) para 195.

degree of organisation, they cannot conduct military operations against it. Clearly, they cannot create a war against a non-existing adversary party.[66]

It bears repeating that the assessment of the degree of the group's organization must objectively consider the facts on the ground.[67] In this sense, Colombia and Ireland are two cases in point.

i. Fuerzas Armadas Revolucionarias de Colombia (FARC)

In the case of Colombia, the government has repeatedly denied the existence of a NIAC on its territory, opting to define the hostilities as part of a 'war on terror' instead. On the contrary, numerous international bodies, including the ICRC and Amnesty International have consistently defined the situation in Colombia as a NIAC and the FARC as an 'armed opposition group.'[68] In order to establish its jurisdiction, the International Criminal Court (ICC) had unequivocally concluded 'a reasonable basis to believe that war crimes […] have been committed in the context of the non-international armed conflict in Colombia' between November 2009 and November 2002.[69]

Legally speaking, despite the frequent listing of the FARC as a 'terrorist organisation',[70] it does not undermine the factual determination that the group 'exhibits a sufficient degree of organisation, and have engaged in sustained military hostilities against the Colombian government.'[71] The FARC had a well-established command structure with a Commander in Chief, Secretariat, Central High Command, Bloc, Front, Column, Company, Guerrilla and Squad. It also possessed a system for firearms and ammunition, effective control over part of the territory of Colombia, and official Rules of Engagement. This degree of organisation had enabled the FARC to carry out attacks causing civilian damages. In a period of 10 years, between 15,000 and 30,000 people have been victims of enforced disappearances, while more than 20,000 people were kidnapped or taken hostage.[72] More than 70,000 people, the vast majority of whom were civilians, have been killed as a result of the conflict.[73]

ii. Irish Republican Army (IRA)

'The Troubles' movement in Northern Ireland is another prime example of how States subjectively rejected the status of a non-State armed group, denied the applicability of IHL, and adopted a law enforcement paradigm to counter terrorism. The IRA has been labelled as 'terrorist' since the 1970s when it was founded.[74] The group however explicitly considered themselves as a national liberation movement engaged in a war for self-

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66 Ojeda, S, 'Global Counter-Terrorism must not Overlook the Rule of War', *Humanitarian Law & Policy*, 13 December 2016.

67 Milanović, *supra* nt 27, 188.

68 Amnesty International, '"Leave us in Peace!": Targeting Civilians in Colombia's Internal Armed Conflict' (2008), 4; ICRC, "Summary Report: Afghanistan, Colombia, Democratic Republic of the Congo, Georgia, Haiti, Lebanon, Liberia and the Philippines: Opinion Survey and In-Depth Research, 2009" (November 2009) 24.

69 ICC Office of the Prosecutor, "Report on Preliminary Examination Activities 2016" (14 November 2016), para 138; ICC Office of the Prosecutor, "Situation in Colombia, Interim Report" (November 2012), para 128.

70 These include the U.S. Department of State's List of Foreign Terrorist Organisation since 10 August 1997, the European Union terrorist list enlisting the FARC in June 2002, and the United Kingdom "terror list" since 2001.

71 ICC Office of the Prosecutor, "Situation in Colombia, Interim Report" (November 2012), para 128.

72 *Ibid.*

73 *Ibid.*

74 Turns, D, 'The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues' (2007) 10 *New York City Law Review*, 445.

determination from a foreign army.[75] Even though the United Kingdom Home Secretary and the Prime Minister of Northern Ireland once stated that the authorities were 'at war' with the IRA, they categorically denied the existence of an armed conflict.[76] In constructing their narrative, the British government called the violence a 'civil conflict' of a strong criminal nature, which the national law enforcement agents were authorised to deal with.[77]

This was followed by the United Kingdom's ratification of the 1949 Geneva Conventions and the Additional Protocols. At the same time, it produced an understanding that an armed conflict excludes ordinary crimes, including acts of terrorism.[78] The understanding failed to contemplate that terrorism may occur in times of armed conflict.[79]

It was obvious that the IRA had an effective command structure, including an Army Council. They were also able to conduct armed operations in Northern Ireland, Britain and other parts of Western Europe, and they had control over certain parts of Londonderry and Belfast.[80] Their degree of organisation is also manifested in the ability to ultimately declare a ceasefire subsequent to the Canary Wharf and Manchester bombings in 1997.[81] Later on, these factors were countered by the fragmentation of the group in 1969 due to conflicting ideologies. Hence, it had become difficult to identify the party participating in the hostilities.[82] But insofar as establishing the beginning of a NIAC is concerned, the proper paradigm to subject both parties in their operations appeared to be IHL.[83]

B. Intensity of Violence

The legal existence of a NIAC requires 'protracted armed violence' which denotes a minimum level of intensity to distinguish itself from internal disturbances.[84] In the case of *Haradinaj*, the term 'protracted armed violence' has also been interpreted as 'referring more to the intensity of the armed violence than to its duration.'[85] With regard to the increasing use of counter-terrorism law enforcement, it is helpful to recall that the ICTY,

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75 *Id*, 446.

76 *Ibid.* Also see, Shanahan, T, *Provisional Irish Republican Army and the Morality of Terrorism* (Edinburgh University Press 2008) 95.

77 *Ibid*, 96.

78 Turns, *supra nt* 74, 445, 449. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under [Article 96(3) of the Protocol] unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which [Article 1(4)] applies.

79 O'Connell, M E, "The Choice of Law Against Terrorism" 4 *Journal of National Security Law and Policy* (2010) 749, 348.

80 Turns, *supra* nt 74, 445, 450; Dewar, M, *The British Army in Northern Ireland* (Arms and Armour 1996) 69—70.

81 Akande, *supra* nt 18, 130—133.

82 Shanahan, *supra* nt 76, 98.

83 Timothy Shanahan, *Provisional Irish Republican Army and the Morality of Terrorism* (Edinburgh University Press 2008) 97.

84 Article 1(2) of AP II states 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. Also see, Hessel, D, Shu, J, and Weiner, S, 'Below the Threshold: The Law Governing the Use of Non-State Actors in the Absence of a Non-International Armed Conflict' (2015) *Yale Law School Center for Global Legal Challenges*, 2; See *Tadić*, *supra* nt 11, para 70.

85 Haradinaj et al., *supra* nt 11, para 49.

in 1997, already attempted to distinguish armed conflicts from 'banditry, unorganized and short-lived insurrections, or terrorist activities.'[86]

Adding one clarification on this point, Dinstein viewed that this reference to 'terrorist activities' should be taken as relating not to the nature of the acts but to their sporadic incidence. It is only when terrorist activities do not meet the required preconditions of a NIAC that they would move into a legal classification other than IHL.[87] In other words, the fact that an act of violence is terrorist in nature cannot be taken on its own to undermine or aggravate the intensity of violence. In this sense, the *Boškoski* judgment acknowledged that terrorist acts may also be factored in to the intensity threshold.[88] In these situations the intensity threshold is not crossed, meaning that the violence in question must be alternatively subjected to law enforcement and its associated regimes, such as IHRL, and that non-State actors cannot be targeted militarily as combatants.

Although terrorism commonly signifies sporadic attacks, the global picture of the overall violence should not be underestimated. Rather, the level of intensity should be judged for the entire period of hostilities.[89] One difficulty is that civilian casualties indicating the intensity of violence are often attributable to multiple responsible non-State armed groups in the region. In the case of Syria, an individual assessment of the conflicts would not cross the threshold. This explains why, while more than 16,000 civilians had been killed as of March 2011, the ICRC only classified the protracted violence in Syria as meeting the intensity threshold in July 2012.[90] This is essentially a question of attributability. The prevailing view is that one cannot add up all associated violence from different non-State armed groups, or from the same group but without an established nexus to the conflict.[91]

Finally, terrorist acts may also be conducted by a party to an armed conflict but fall outside the context of that conflict. Only terrorist acts with sufficient connection to that armed conflict are governed by IHL.[92] In this way, whether IHL or law enforcement should be the guiding paradigm does not dismiss the fact that their applicability still remains issue-specific. In the case of Chechnya, the Russian constitutional court determined that AP II was applicable to the first Chechen conflict.[93] Russia has denied the applicability of IHL to the second Chechen war, arguing that the authorities were merely targeting terrorism and criminal acts. When the case of *Finogenov v. Russia*

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[86] ICTY, *Prosecutor v Ljube Boškoski and Johan Tarčulovski*, (Trial Chamber Judgement) IT- 04-82-T (10 July 2008) 184-90.

[87] Dinstein, Y, Non-International Armed Conflicts in International Law 108–14 (Cambridge University Press 2014) 34.

[88] ICTY, *Prosecutor* v. *Ljube Boškoski and Johan Tarčulovski* (Trial Chamber Judgement) ICTY- 04-82-T (10 July 2008) 184-190.

[89] ICTY, *Prosecutor* v. *Ljube Boškoski and Johan Tarčulovski* (Trial Chamber Judgement) ICTY- 04-82-T (10 July 2008) 128-9.

[90] Caphalm, A, *et al.*, *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015), 412. Also see, BBC News, 'Syria in Civil War, Red Cross Says,' July 2012, *at* < http://www.bbc.com/news/world-middle-east-18849362 > (accessed 18 November 2017).

[91] Pejić, J, 'Terrorist Acts and Groups: A Role for International Law?' 75 *British Yearbook of International Law* (2004) 86, 86–87.

[92] Saul, B, "Terrorism and international humanitarian law," in Saul, B, *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014). 'Not all acts of terrorism in a territory affected by armed conflict will comprise part of that conflict'.

[93] Judgment of the Constitutional Court of the Russian Federation of 31 July 1995 on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1.

reached the European Court of Human Rights, the Court analysed the violations in IHRL terms, not because Russia had unilaterally classified the situation as domestic, but because the hostage-taking of the Moscow theatre occurred outside the battlefield.[94] Of course, this approach was not without criticism.[95]

Conclusion

The determination of the applicable paradigm drastically impacts who a State may or may not kill. The extensive ramifications continue beyond the hostilities to the criminal proceedings that seek to determine post-conflict accountability. Given the increasing amount of intra-State wars, tactics of terrorism and civilian casualties, the stake now is higher than ever.

This article has shown that the determination of NIAC is not without its inherent difficulties. This is yet further frustrated by not only the characteristics of terrorism, but also the intentional use of the law enforcement paradigm at the disposal of States in lieu of IHL. But as we have seen, terrorist acts of violence do not simply fall within the hands of law enforcement because they are terrorist in nature. Judicial assessment remains as such that it resorts to the factual determination on the ground. In this sense, the impact of terrorism on the legal establishment of armed conflicts and hence the applicability of IHL, if any, has proven minimal.

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94 ECtHR, *Finogenov and Others v. Russia,* App. No. 18299/03 (10 December 2011), para 220.

95 'If one considers that IHL applied to such a situation given that this event had a clear nexus with the Second Chechen War, then the use of a gas in this situation would have been considered unlawful under IHL […] In that case, the lack of reference to IHL did not allow affording a better protection to individuals in a situation of armed conflict.' Gowlland-Debbas V, and Gaggioli G, "The Relationship Between International Human Rights and Humanitarian Law", in Kolb, R, and Goggioli, G, *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013).

The Status of Access to Effective Remedies by Victims of Human Rights Violations Committed by Multinational Corporations in the African Union Member States

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Abstract

The main purpose of this paper is to document the failure and dysfunction of the existing judicial structures of many African Union's Member States (AUMS), to address human rights violations that are often committed by Multinational Corporations (MNCs) on their territories. Concretely, it assesses the access of victims of the MNCs' human rights abuses (in the AUMS) to effective remedies and the obstacles they face through a number of case studies. Although these victims' cases are specific to some countries, they illustrate a general challenge faced by victims of such abuses from many AUMSs. The examination of these cases, in turn, results in the examination of the legal remedies the victims use and the obstacles they face in the pursuit of such remedies, either in their domestic jurisdictions or in other foreign national jurisdictions. The present paper also weighs the obstacles faced by the same victims in their quest for effective remedies against the concept of "African solutions to the problems of Africa." Finally, it is suggested that the reluctance of the AUMSs to hold MNCs accountable for their human rights violations, which are often committed on their territories, and the non-redress of the same violations by other forums outside the African continent, places the onus on African regional and sub-regional mechanisms of human rights protection to get involved.

Introduction

The access to an effective remedy for victims of human rights violations is an internationally recognised right guaranteed under international and regional human rights law. For instance, at the international level, this right is provided for under Article 8 of the Universal Declaration of Human Rights,[1] as well as Article 2(3)(a) and (b) of the International Covenant on Civil and Political Rights.[2] In Europe, the same right is provided for under Article 13 of the European Convention on Human Rights, as well as by Article 14 of the European Charter of Fundamental Rights[3]. At the African Union (AU) level, although the African Charter on Human and People's Rights (African Charter) does not have a specific provision of that kind, its Article 1 obliges Member States to respect and enforce the rights enshrined therein. Moreover, its Article 7(1) provides that 'every individual shall have the

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1 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, (183rd plenary meeting) A/RES/3/217 A.

2 UN General Assembly, *International Covenant on Civil and Political Rights*, (1976) 999 UNTS 407 (ICCPR).

3 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14* (1950) ETS 5 (ECHR).

right to have his cause heard, including a right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by convictions, laws, regulations and customs in force'.[4] In its decisions, the African Commission on Human and People's Rights (ACHPR) has repeatedly interpreted Article 7(1) of the African Charter to include the right of access to an effective remedy.[5]

More specifically, when MNCs are accused of being involved in human rights abuses, the UN Guiding Principles on Business and Human Rights (UNGP) require states to take appropriate measures to ensure the access to effective remedies for victims.[6] Under this obligation states are also required to investigate, to punish the perpetrators, and to repair the damage suffered by the victims. The UNGPs also require MNCs to play an active role in the remediation of the victims' damages either themselves or by co-operating with the authorities for that purpose.[7]

Despite the existence of such obligations imposed on the African Union Member States (AUMSs) and Multinational Corporations (MNCs), nowadays, the lack of redress regarding human rights abuses committed by MNCs in the AUMSs has become a major concern. There are many MNCs that stand accused of involvement in human rights abuses and yet their victims still face many barriers to access effective remedies in domestic jurisdictions.[8] The same cases are often also brought before the MNCs home jurisdictions or in other foreign domestic jurisdiction, yet all efforts appear to be without success.

The present paper discusses the problems regarding the access to effective remedies by victims of the MNCs human rights abuses in three main sections. The first section provides a general background to this question within the AUMSs. The second discusses cases that expose the barriers victims face in their quest for remedies, either in domestic jurisdictions or before the MNCs home jurisdictions, as well as in other foreign domestic fora. The third section examines how the lack of access to effective remedies for victims from AUMSs in domestic jurisdictions constitutes a challenge to the concept of 'African solutions to the problems of Africa.' The conclusion summarises the main points discussed in each section.

I. Background: MNCs' Human Rights Abuses in the AUMSs

A. Why African Countries Remain a Favourite Destination for MNCs Today

For several reasons, the African continent has been perceived as a risky destination for MNCs. These include, for example, insecurity, weak democracies, poor governance, as well as poor economic regulatory policies, all of which prevail in many AUMSs.[9] However, to

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4 African Union, *African Charter on Human and People's Rights*, (1986) UNTS 218.

5 African Commission, *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communications 64/92-68/92- 78/92_8AR, para 12, *at* <achpr.org/communications/decision/64.92-68.92-78.92_8ar/>, (accessed 19 November 2017).

6 United Nations, Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, Geneva and New York, 2011, 27-31.

7 *Id*, 31-33.

8 Aguirre, D, "Corporate social responsibility and human rights law in Africa" 5(2) *African Human Rights Law Journal* (2005), *at* <ahrlj.up.ac.za/aguirre-d> (accessed 19 November 2017).

9 Africa Progress Panel, "Despite steady improvement, corruption remains a concern", *at* <africaprogresspanel.org/governance-and-transparency/?gclid=EAIaIQobChMI5-jbg7T81QIVExMbCh3C4AUIEAAYAiAAEgLkEvD_BwE>, (accessed 19 November 2017).

this date it is remarkable that the African countries remain a favourite destination for MNCs of varying nations. The term MNC itself in this paper refers to "a legal person that owns or controls production, distribution or service facilities outside the country in which it is based",[10] while the term MNCs' accountability refers to the legal responsibility of MNCs vis-à-vis their obligation to respect human rights under national legislations and international and regional human rights law.[11]

There are many reasons that render the AUMSs attractive to MNCs. First, the AUMSs are "resource-rich."[12] According to the Business and Human Rights Resource Centre (BHRRC), the current MNC investments that are booming in the AUMSs are linked to continuous discoveries of oil, gas and minerals sites as well as new prospects in agriculture in the AUMS.[13] As stated by the Institute of the West-Asia and African Studies of the Chinese Academy of Social Sciences, 'African countries contain more than half of the world resources of cobalt, manganese, gold and significant supplies of platinum, uranium and oil.'[14] According to scholars like Chella, the natural resources from the AUMSs generate billions of dollars in the extractive industries.[15] In other words, MNCs are mostly attracted to the natural resources that the African continent abounds. Moreover, unlike a number of other continents, Africa records a high rate of population growth, a fact which has a direct correlation with a cheap workforce likely to sustain activities of these MNCs across the African continent as well as a consumer market growth.[16] In addition, most of these MNCs which invest in the AUMSs are often subjected to fewer regulatory constraints or are accorded many concessions for purposes of attracting them.[17]

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[10] Jagers, N, *Corporate human right obligations: In search of accountability*, (School of Human Rights research 2002) 11.

[11] Cernic, J L, *Human rights Law and Business: Corporate Responsibility for fundamental Human Rights* (Europa Law Publishing 2010) 14.

[12] International Monetary Fund, Lundgren, C J et al., *Boom, Bust, or Prosperity? Managing Sub-Saharan Africa's Natural Resource Wealth,* 2013, 4–8, *at* <imf.org/external/pubs/ft/dp/2013/dp1302.pdf> (accessed 19 November 2017).

[13] Business and Human Rights Resource Center (BHRRC), *Business and human rights in Africa: Time for a responsibility revolution. A regional overview,* September 2014, 2–3, *at* < https://business-humanrights.org/sites/default/files/documents/Time-for-responsibility-revolution-business-human-rights-Africa-Sep-2014_1.pdf> (accessed 2 November 2017).

[14] The institute of West-Asia and Africa Studies of the Chinese Academy of Social Sciences and John Kennedy School of Government, Harvard University, Forstater, M et al., *Corporate responsibility in African Development,* October 2010, 9, *at* <sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_60.pdf>, (accessed 19 November 2017).

[15] Jessie, C, *The complicity of the Multinational Corporations in international Crimes: An examination of principles* (Bond University 2012) 11.

[16] Blackston, S K et al., *Game on: private equity and investment in Africa, A discussion with the US private equity executives on some of the newest opportunities in emerging markets,* PWC, March 2014, 8, *at* <pwcavocats.com/fr/assets/files/pdf/2014/05/investment-in-africa.pdf> (accessed 19 November 2017).

[17] *Ibid.*

B. MNCs and Human Rights Abuses in the AUMSs

It is comprehensible that the activities of MNCs are needed in the AUMSs because they contribute to the development of their economies, create more jobs, bring new technologies, and contribute to building new and modern infrastructures across these countries.[18] On the other hand, there are many controversies on how these MNCs fail to respect human rights in the AUMSs. In pursuit of their economic interests, a large number of MNCs operating in the AUMS are currently accused of being involved in human rights abuses.[19] Some of them are even alleged to be implicated in war crimes and crimes against humanity as well as supporting repressive regimes in many AUMS.[20] For example, reports from various human rights organisations have alleged implications of more than 80 MNCs, from developed and developing countries, in the illegal exploitation of natural resources, forced labour, and distribution of weapons to different armed groups in the current conflicts in the Democratic Republic of Congo (DRC).[21] A prime example is the *AngloGold Ashanti* mining company from South Africa which was accused of buying weapons and funding criminal activities of different rebel movements during the ethnic conflicts in the Ituri region in Eastern DRC.[22]

As argued by Kremnitzer, MNCs enjoy much more economic and political influence than their host states as they retain "limitless capacities to do well and to cause harm."[23] This is the case in many AUMSs where MNCs use their economic powers to control, not only their economies, but also other key sectors including politics and justice systems.[24] In other words, the economic vulnerability of many AUMS renders them vulnerable vis-a-vis MNCs, a fact that has a negative impact on human rights and in particular on the right to access effective remedies by victims of MNCs. The power influence of MNCs weighs more on AUMS because these countries are still facing challenges such as extreme poverty, poor governance, corruption, inefficiency of their judicial systems, and armed conflict.

According to Mnyongani, nowadays, MNCs have become strategic in their approaches because they prefer to invest in countries whose human rights records are poor.[25] This also means that the AUMS' desperate need for investments constitutes another fact that renders them vulnerable vis-à-vis MNCs. To attract MNCs to their countries, most AUMSs accord concessions, in terms of compliance with human rights standards, to MNCs in their investment agreements. The same fact also explains why many AUMS often try to cover or hide human rights abuses that are committed by MNCs on their territories,[26] or co-operate

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[18] Giuliani, E, *Multinational Corporations' Economic and human rights impacts on developing countries: A review and research agenda*, University of Pisa, Italy, (2013), 7, *at* <ec.unipi.it/documents/Ricerca/papers/2013-158.pdf> (accessed 19 November 2017).

[19] Aguirre, *supra nt* 8*, pp.* 2–3.

[20] Mugambi, L, *Multi-National Corporations in Human Rights Protection and the Role of the African Union*, 7 August 2014, 4, *at* <ssrn.com/abstract=2477261> (accessed 19 November 2017).

[21] Gotzman, N, *Legal personality of the corporation and International Criminal Law: Globalization, corporates human rights abuses and the Rome Statute,* (The University of Queensland, Australia 2008) 39.

[22] Jessie, supra *nt*, 15.

[23] Kremnitzer, M, "A possible case for imposing criminal liability on Corporations in International Law", 910 *Journal of International Criminal Justice* (2010), *at* <corteidh.or.cr/tablas/r26652.pdf> (accessed 19 November 2017).

[24] Chukwuemeka, E, "African Underdevelopment and the Multinationals – A Political Commentary", 4(4) *Journal of Sustainable Development* (2011) 104.

[25] Mnyongani, F D, *Accountability of Multinational Corporations for human rights violations under international law* (PhD thesis, University of South Africa, 2016) 31.

[26] Jessie, supra *nt* 15*,* 13.

with them in their perpetration.[27] By investing in such countries, these MNCs are aware that in case they abuse human rights their hosts will be unable or unwilling to hold them accountable for their wrongdoing in national jurisdictions. Although every AUMS is free to design its own legal framework in order to attract as many MNCs as possible to its territory, such legal framework has to comply with the international human rights instruments to which it is a party. More practically, the bilateral agreements between AUMSs and MNCs should be designed in such a way as to guarantee the right of access to effective remedies for those whose human rights are affected by the activities of the MNC in question.

II. Cases of MNC's Human Rights Abuses in the AU MS: The Elusive Quest for Remedies by Victims

In case of human rights violations, international law requires that the perpetrators be brought to justice, regardless of whether they are natural or legal persons, such as MNCs.[28] The victims' rights to access effective remedies in case of human rights abuses is also provided for under various national constitutions, procedurals rules, and regulations in different countries including those of the African Union. These human rights instruments, regulations, and national legislations require states to investigate and to punish the perpetrators and to repair the damages suffered by victims in case of any human rights abuse. As mentioned earlier in the introduction of this paper, the UNGPs also require MNCs to play an active role in the promotion and the protection of the victims' right to access effective remedies in cases where they are implicated in human rights abuses.

Despite the existence of such obligation imposed upon the AUMSs and MNCs, nowadays, the lack of access to effective remedies for victims of the MNCs' human rights abuses from the AUMSs has become a major concern. Today, there are many MNCs operating in the AUMSs that stand accused of involvement in human rights abuses while their victims face many barriers to access effective remedies in domestic jurisdictions.[29] The same cases are often also brought before the MNCs' home jurisdictions or in other foreign domestic fora but without success.

For further exploration of this topic, three cases were selected to illustrate the complex challenges that victims of such abuses face in their quest for remedies. These cases shed light on the inefficiency of the justice systems in AUMSs vis-à-vis human rights abuses committed by MNCs. They highlight how MNCs undermine the victims' right to access effective remedies within domestic jurisdictions and in jurisdictions outside the AUMS as well as the conflict of interests that AUMS' governments are often confronted with. Finally, these cases illustrate a general challenge that these victims face which warrants the establishment of African regional or sub-regional solutions. In concrete the examination of these cases focuses on the three following points: 1) the nature of violations in terms of what happened and the role played by an MNC in the perpetration of the alleged human rights abuses; 2) the types of remedies pursued by victims and where those remedies were pursued; 3) the obstacles faced by victims in pursuit of said legal remedies, either in domestic courts

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[27] Tsafack, J B F, *In research for direct corporate responsibility for human rights violations in Africa: Which way forward,* (University of Pretoria, South Afria 2004) 2.

[28] Amnesty International, *Injustice Incorporated, Corporate abuse and the human rights to remedy* 2014, 11, *at* <amnesty.org/download/Documents/8000/pol300012014en.pdf> (accessed 19 November 2017).

[29] Aguirre, *supra* nt 8, 3.

or before the MNCs' home courts as well as in other foreign domestic jurisdictions outside the African continent.

A. The Anvil Mining's Case of the DRC

i. Introduction

Anvil Mining Ltd. is a MNC from Canada. When the alleged violations of this case were committed, Anvil Mining maintained another main headquarters in Australia.[30] On the African continent, Anvil Mining is mostly engaged in mining operations in the DRC and in its neighbouring country of Zambia.[31] The incident at the centre of this case took place in Kilwa town at the Dikulushi Copper and Silver mining extraction site on the 14th October 2004. Anvil Mining had been operating in this region since 2000.[32] The Kilwa town was a strategic point for Anvil Mining's operations due to its location near the Lake Moëro port. The company used this port to facilitate all its operations in the former Katanga province in the South-East region of the DRC.[33] According to the latest provincial reforms, the town of Kilwa is now situated in the province of Haut-Katanga.[34]

The Anvil Mining case illustrates the barriers that victims of human rights abuses face due to the dysfunction, irregularities and political interference within domestic justice systems. It also exhibits the reluctance of the MNCs' home courts, along with other foreign domestic jurisdictions, to address human rights abuses committed by MNCs in the AUMSs.

ii. A Brief Description of the Facts

The facts around the involvement of Anvil Mining in human rights abuses in Kilwa were internationally revealed in a report of the United Nations Mission (MONUSCO) in the DRC.[35] The same facts were also exposed by reports from human rights organisations such as CIDH *(Action Contre l'Impunité des Violations des Droits de l'Homme* – based in Lubumbashi), ASADHO *(Association Africaine de Défense des droits de l'Homme* –based in Kinshasa), and RAID (Rights and Accountability – based in the UK) of September 2005.[36] These three organisations monitor the impacts of the activities of MNCs on human rights in the DRC.

According to the MONUSCO report, on the 14th October 2004 a small group of 'six or seven persons', who were poorly armed and organised, claimed to belong to the Revolutionary Movement of the Liberation of Katanga, occupied the mining town and the port of Kilwa.[37] In response to that insurgency, with the logistic support of Anvil Mining, the

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30 Adam, M, "Crushed by an Anvil: A case study of Responsibility for Human Rights in the Extractive Sector", 11(1) *Yale Human Rights and Development* Journal (2014) 4.

31 *Ibid.*

32 *Id,* 5.

33 Canadian Center for International Justice (CCIJ), "Backgrounder: The case against Anvil Mining", 1, *at* <https://www.ccij.ca/content/uploads/2015/07/Anvil-backgrounder-FINAL-EN.pdf> (accessed 6 November 2017).

34 *The Organic Law No. 15/006 of 25 March 2015 establishing the news boundaries of the provinces and those of the city of Kinshasa* (2015).

35 United Nations Missions in the Democratic Republic of Congo (MONUSCO*), Report on the Conclusions of the special investigation concerning allegations of Summary executions and other Human rights violations perpetrated by armed forces of the Democratic Republic of Congo (FARDC) in Kilwa*, Katanga Province of October 15, 2004, 23 September 2005 *at* <raid-uk.org/sites/default/files/monuc-final-report.pdf> (accessed 19 November 2017).

36 ACIDH, ASADHO and RAID, *Joint report on Kilwa: Anvil Mining Limited and the Kilwa Incident: Unanswered Questions,* October 2005, *at* <raid-uk.org/sites/default/files/qq-anvil.pdf> (accessed 19 November 2017).

37 MONUSCO Report*, supra* nt 35*,* 1.

DRC's soldiers committed many human rights violations. These abuses included the killing of more than 100 civilians,[38] torture, rape, widespread looting, extortions of civilians' properties and arbitrary detentions.[39] Many reports on the incident claimed that Anvil Mining's vehicles were used in the transportation of looted property as well as the transport of corpses to mass graves.[40] The same reports also alleged that Anvil Mining's aeroplanes were used in the transfer of arrested civilians from Kilwa to Lubumbashi (the capital city of the Katanga province).[41] Additionally, during an interview with Anvil Mining's representative by the MONUSCO investigators, he acknowledged having provided vehicles, drivers, aeroplanes, food rations and the payment of salaries to the DRC's military forces.[42] In brief, the facts of this case prove that it is unquestionable that Anvil Mining bears great responsibility for the human rights abuses committed in Kilwa on 14th October 2004. In legal terms, Anvil Mining acted in complicity with the DRC soldiers in the commission of human rights violations in Kilwa. Its responsibility stems from the fact that this company facilitated the perpetration of such abuses by DRC soldiers.

iii. The Victims' Endeavours to Access Effective Remedies

After the publication of various reports on the Kilwa incident, the international community exerted pressure on the DRC's government, requesting it to bring to justice those presumed to be implicated in human rights abuses in Kilwa. In collaboration with victims, the Prosecutor of the Military Court of Lubumbashi opened an investigation.[43] This investigation was completed in October 2006 and has led to charges against nine government soldiers for war crimes, arbitrary arrest and detention, as well as torture and murder.[44] Three employees of Anvil Mining were also accused of aiding and abetting the government's soldiers in the perpetration of the above-mentioned violations.[45] On 28 June 2007, the Lubumbashi military court dismissed these accusations by concluding that what happened in Kilwa was simply the 'incidental results of the fighting' and therefore acquitted all the accused. Likewise, Anvil Mining, which was not formally accused before the court, was also cleared of any charge in relation to this case.[46]

In collaboration with victims, the Prosecutor appealed against that decision but in vain. In its decision of December 2007, the military high court of Lubumbashi declared that the victims' claims against Anvil Mining would not be examined in the appeal, therefore,

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[38] *Id*, 6.

[39] Kyriakakis, J, "Australian Prosecution of Corporations for international Crimes, The Potential of the Common Wealth Criminal Code" 5 *Journal of International Criminal Justice* (2017) 813.

[40] ACIDH and RAID, Kilwa: *A year after the massacre of October 2004, a joint report of October 2005*, 6 *at* <https://www.oecdwatch.org/cases/Case_82-en/625/at.../fil > (accessed 6 November 2017).

[41] *Ibid*.

[42] MONUSCO report, *supra* nt 35, 8.

[43] *Id*, 11.

[44] Global witness, RAID, ACIDHP, ASADHO/ KANTANGA, *Kilwa Trial: A denial of justice, a chronology October 2004 – October 2007*, 8, *at* <https://reliefweb.int/sites/reliefweb.int/files/resources/569D040ADAA80E0A8525731B0072DC2E-Full_Report.pdf> (accessed 6 November 2017)

[45] *Id,* 9.

[46] BHRRC, *Anvil Mining lawsuit (re Dem. Rep. of Congo), at* <business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo> (accessed 19 November 2017).

restricting that request to the cases examined by the lower court.[47] In other words, the Military and the High Military Courts of Lubumbashi declared the accusations against Anvil Mining to be inadmissible without any clear legal ground. For the retained charges, the appellate court merely confirmed the decision of the lower court and therefore acquitted all of the accused, including three employees of Anvil Mining.[48] Since Anvil Mining had other main offices in Australia during the Kilwa incident, the Australian Federal Police (AFP) opened an investigation into the company in September 2004.[49] However, this investigation was closed after the case was rejected by the DRC's courts.[50] Moreover, as Anvil Mining was from Canada, victims brought their cases before the Canadian courts, without success. With the assistance of the Canadian Association against Impunity (CAAI), victims of these abuses filed their complaints in the Superior Court of Quebec in November 2010.[51] In its first decision of April 2011, the Court declared itself to be competent to adjudicate the case.[52] The Judge found that the case's rejection in Canada would result in the denial of the victims' right of access to an effective remedy.[53] In fact, the possibility for this case to be heard in other domestic fora was exhausted. However, on 25 January 2012, this decision was unfortunately reversed by the Appellate Court on the ground that the Canadian courts are not competent to rule on this case because victims failed to prove their impossibility to access a remedy in other fora.[54] Victims and their supporters appealed against this decision before the Supreme Court but in vain. In its decision of November 2012, the Canadian Supreme Court declared that 'it would not hear the plaintiffs' appeal.'[55]

iv. Obstacles Faced by Victims in the Pursuit of Remedies

The major obstacles faced by victims in domestic courts include first of all dysfunctions and irregularities within the DRC's justice system. According to different external observers, the trials of this case before the DRC's courts were characterised by a lack of independence and transparency, significant barriers in lawyer's access to victims, and lack of co-operation with the military authorities.[56] Secondly, various awareness campaigns for victims and local leaders were conducted by the government authorities and military officials, requesting them to drop their accusations against Anvil Mining on the grounds that this company had contributed much to their well-being.[57] The MONUSCO report also alleged that government

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47 Global Witness, *Military Court of Appeal succumbs to political interference in Kilwa Trial in 21 December 2007,* 21 December 2007, *at* <globalwitness.org/en/archive/military-court-appeal-succumbs-political-interference-kilwa-trial/> (accessed 19 November 2017).

48 BHRRC, *Anvil Mining lawsuit (re Dem. Rep. of Congo)*, *supra* nt 46.

49 Kyriakakis, *supra* nt 39, 811–812.

50 BHRRC, *Anvil Mining lawsuit (re Dem. Rep. of Congo), supra* nt, 46.

51 Lee, R, *Anvil wins latest round in Congo massacre case,* Open Society Initiative for Southern Africa (OSISA), February 2012, *at* <osisa.org/economic-justice/drc/anvil-wins-latest-round-congo-massacre-case> (accessed 19 November 2017).

52 Cameron, A, Hughes, N, "*Mining in the Courts"*, 3 *Year in Review* (2015) 15, *at* <mccarthy.ca/pubs/Mining%20in%20the%20Courts%202013.pdf> (accessed 19 November 2017).

53 Meeran, R, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An overview of the position outside the United States", 5 *City University of Hong Kong Law Review* (2011) 12.

54 *Ibid.*

55 BHRRC, *Anvil Mining lawsuit (re Dem. Rep. of Congo), supra* nt 46.

56 De Schutter, O et al., *The Third Pillar: Access to judicial remedies for human rights violations by Transnational Business,* December 2013, *at* <corporatejustice.org/documents/publications/eccj/the_third_pillar_-access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf> (accessed 19 November 2017) 111–112.

57 MONUSCO Report, *supra* nt 35*,* 11.

authorities had pressured local human rights organisations to give up their support to victims in their quest for justice against Anvil Mining.[58] The third major obstacle faced by victims before the DRC's courts was the political interference in the justice system. During the trial before the Military Court, the government authorities pressured the prosecutor, who had collaborated actively with victims, to drop the charges against Anvil Mining and its three employees.[59] When trying to resist, he was removed and transferred to another jurisdiction.[60] Consequently, even though Anvil Mining was not formally accused, neither in the Military Court nor the Military High Court of Lubumbashi, both of them ruled that Anvil Mining was not implicated in human rights violations committed in Kilwa, with the aim of countering any other domestic initiative that could lead to the reopening of this trial at the national level.

Some scholars such as Clapham have argued that the reluctance of prosecuting MNCs in domestic courts by many AUMSs is mostly linked to the fear of losing them.[61] For others, like Abiodun, MNCs and most of their host AUMSs share the same objective of exploiting the natural resources in these countries while the protection of human rights is relegated to the background.[62] In this case, it is clear that the DRC should choose either the protection of its economic interests or the provision or real remedies to victims. Consequently, the outcome of the proceedings before the Military and the High Military courts of Lubumbashi showed that the priority was given to economic interests rather than the protection of human rights.

The main obstacle faced by victims in accessing effective remedies in Canada and Australia was the unwillingness of both countries to prosecute Anvil Mining for its wrongdoing abroad. Despite the fact that the Canadian judges were aware that this case was unfairly rejected by the DRC's jurisdictions, Canadian courts rejected it on the ground that victims were unable to prove their impossibility to access effective remedies in other domestic fora. In Australia, this case was not even brought before any court. After its dismissal by the DRC's courts, under the conditions described above, the Australian Federal Police abandoned its investigation against Anvil Mining. According to the BHRRC, the MNC's home countries frequently do not want to restrain their companies in carrying out their activities abroad, and this was the scenario in the Anvil Mining case.[63]

Although victims were unable to overcome the obstacles to access effective remedies in the domestic courts (as well as in other foreign domestic jurisdictions), in 2010 the same case was brought before the ACHPR where, in June 2017, the ACHPR condemned the DRC to pay USD 2.5 million to compensate the victims and obligated it to re-open criminal

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58 MONUSCO Report, *supra* nt 35*,* 11.

59 McBeth, A, "Crushed by an Anvil: A case study of Responsibility for human rights in the Extractive Sector" 11(1) Yale Human Rights and Development Journal (2014) 144.

60 Global Witness, *supra* nt. 47*,* 11.

61 Clapham*,* A, *Human rights obligations of Non-State Actors*, (Oxford University Press, 2006) 238.

62 Abiodun, J O, *Global commerce and human rights: Towards an African Legal Framework for corporate human rights responsibility and accountability*, (PhD thesis, University of the Witwatersrand, Johannesburg, South Africa, 2015) 93–94.

63 BHRRC*, Corporate Legal Accountability*, June 2012, *at* <business-humanrights.org/sites/default/files/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf> (accessed 19 November 2017).

investigations against the perpetrators of the human rights violations of Kilwa.[64] Moreover, in the *SERAC v. Nigeria* case, the ACHPR previously held Nigeria to also be responsible for the degradation of the environment in Ogoni Land. In reality, however, these abuses were committed by Shell, a Dutch MNC.[65] Even if in the two decisions the ACHPR was clearly influenced by the traditional view of international law, where violations can only be found against states and not private entities, the ACHPR was used to force member states to provide effective remedies to victims.

B. The Talisman's Case of Sudan

i. Introduction

Talisman Energy (known simply as Talisman) was one of the largest MNCs from Canada engaged in the exploitation, development, production, transportation, and marketing of crude oil and natural gas.[66] This company operated in Sudan from August 1998 until March 2003.[67] During the same period, Talisman sustained other activities in various parts of the world including the U.S.[68] As of January 2016, Talisman Energy has acquired a new name and is now called Repsol Oil & Gas Canada.[69]

The entry of Talisman into partnership with the Sudanese government in 1998 was highly criticised by different countries and many human rights organisations because Sudan was accused of using the oil revenue to finance the war during which many human rights violations were reported to be committed.[70] After the installation of Talisman in Sudan, the criticism did not cease. For example, in 2000, Canada, in which Talisman was incorporated, continued to denounce the use of the oil revenue by the government of Sudan in the exacerbation of the conflict in that country.[71] Analysis of the criticism, which was addressed to Talisman, suggests that this company was likely to have been aware that its activities in Sudan would have negative impacts on the rights of the non-Muslim populations who were targeted by the Sudanese military and pro-government militias during the ongoing war.

This case illustrates how a collaboration between an MNC and its host AUMS in the violation of human rights constitutes a major obstacle to the victims' right to access effective remedies in national jurisdictions. It also reveals how similar AUMSs lack appropriate laws

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64 African Commission, *The Institute for Human Rights and Development in Africa (IHRDA) and other v. Democratic Republic of Congo*, Communication 393/10, pp. 41-42, *at* <raid-uk.org/sites/default/files/african_commission_decision_on_kilwa_2017.pdf> (accessed 19 November 2017).

65 Amao, O O, "The African Regional Human rights System and multinational Corporations: Strengthening the Host State Responsibility for control of Multinational Corporations," 12(5) *International Journal for human rights* (2008) 771.

66 Office of Fair Trade, *Anticipated acquisition by Talisman Energy Resources Limited of Paladin Resources plc*, 12 December 2005, *at* <assets.publishing.service.gov.uk/media/555de40640f0b666a20000e2/talisman.pdf> *(*accessed 19 November 2017).

67 Kobrin, S J, *Multinational Enterprise, and public responsibility: The case of Talisman Energy and human rights in Sudan,* (Cambridge University Press, 2005) 188–189.

68 US District Court for the Southern District of New York, *The Presbyterian Church of Sudan V. Talisman Energy Inc. and the Republic of Sudan,* Opinion 01 Civ. 9882(AGS), 19 March 2003, *at* <law.justia.com/cases/federal/district-courts/FSupp2/244/289/2287736/> (accessed 7 November 2017).

69 Business guide, *Canadian oil company Talisman Energy now has a new name*, *at* <offshoreenergytoday.com/talisman-energy-has-a-new-name/> (accessed 19 November 2017).

70 Magdalena, B, *Exploring Responsibility. Public and private in human Rights protection*, (Lund University, 2005) 108.

71 Kobrin, *supra* nt 67, 191.

to deal with the MNC's human rights abuses committed on their territories. Moreover, the present case also captures other barriers that these victims face in foreign domestic jurisdictions, such as diplomatic relations or political interference, that hinder their right of access to an effective remedy.

ii. A Brief Description of the Facts

As Talisman landed in Sudan during the civil war, it was necessary to first obtain security guarantees from the Sudanese government to be able to operate. For that purpose, in 1999 the Sudanese government re-grouped all MNCs which were engaged in oil exploitation in Sudan in what they called the Greater Nile Petroleum Operating Company (GOPC) where a security arrangement was concluded with them.[72] Firstly, under the arrangement, the GOPC was requested to build the roads linking the military bases with the oil concession areas and to upgrade two airports that could be used by Sudanese soldiers within the oil exploitation areas. Secondly, the Sudanese government committed to open military garrisons around the oil exploitation fields.[73] As argued by Kobrin, while Talisman was one of the MNCs within the GOPC, its huge funding and technical expertise were crucial for the success of that initiative.[74] Later on it was reported that the facilities upgraded by the GOPC group, in which Talisman had a prominent role, were used by the Sudanese military forces and the pro-government militias in the perpetration of gross human rights abuses in Sudan. For instance, the Heglig*,* one of the airports upgraded by Talisman in its area of exploitation, was used by the Sudanese forces and the pro-government militias to carry out indiscriminate attacks against civilians.[75] In its report of 2000 on the situation in Sudan, the Canadian Ministry of Foreign Affairs as well as Talisman itself confirmed the use of the Heglig airport by the Sudanese forces during the attacks against Christians and other non-Muslim people in Sudan.[76] It was also alleged that the same airport was frequently used by the Sudanese military forces to refuel their aeroplanes during their operations in which numerous human rights abuses were committed.[77]

In legal terms, Talisman's responsibility in the alleged human rights abuses arises from its close co-operation with the Sudanese government in the killings of Christians and other non-Muslims of Sudan. This is why Talisman was accused in American courts of aiding and abetting the Sudanese security forces and the pro-government militias in the perpetration of human rights abuses in Sudan. Moreover, many observers agree that Talisman benefited from these violations because its oil activities expanded in that region during that period.[78]

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[72] Morrissey, J, "Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and abetting Liability under the Alien Tort Statute" 20 *The Minnesota Journal of International Law*, (2011) 147.

[73] *Ibid.*

[74] Kobrin, *supra* nt 67*,* 443.

[75] Gagnon, G et al., *Deconstructing engagement: Corporate self-regulation in conflicts zones, implication for human rights and Canadian Public Policy,* Social Sciences and Humanities Research Council and the Law Commission of Canada, (January 2003), 26.

[76] Morrissey, *supra* nt 72, 144.

[77] *Human Security in Sudan: The report of a Canadian Assessment Mission*, Canadian Ministry of Foreign Affairs, Ottawa, (January 2000),15, *at* <ecosonline.org/reports/2000/Human%20Security%20in%20Sudan.pdf> (accessed 19 November 2017).

[78] Milbank et al., *Litigation: No liability for violation of international law unless aid was purposeful, second circuit rules in case brought under Alien Tort Statute,* (October 2009), 1, at <milbank.com/images/content/6/9/699/101309-Presbyterian-Church-of-Sudan-v-Talisman-Energy-Inc.pdf> (accessed 19 November 2017).

iii. The Victims' Endeavours to Access Effective Remedies

Given the nature of the acts which were committed and the direct involvement of the Sudanese government in their perpetration, victims were afraid to seek remedies in domestic courts. For that reason, on 8 November 2001, the Presbyterian Church of Sudan together with other residents from Southern Sudan – a region where Talisman was operating – filed a case against Talisman in the New York District Court.[79] The plaintiffs accused Talisman to have collaborated with the Muslim government of Sudan in violating the rights of Christians and other non-Muslim people around its areas of operation.[80] In concrete terms, Talisman was accused of aiding and abetting the Sudanese government in 'the killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rapes, and enslavement' of Christians and other non-Muslim people in the South Sudanese region; acts which together were qualified as genocide.[81] This case was introduced in the US Court under the Alien Tort Claim Act (ATCA), providing US federal courts with powers to deal with cases of human rights abuses committed by MNCs abroad irrespective of the nationality of the victims or the MNCs in question.[82]

Before ruling on the merits of such cases, in practice, the U.S. courts must first weigh the facts against the *forum non conveniens* doctrine. This doctrine allows US courts to dismiss a case if the defendant is able to prove the existence of another appropriate forum to deal with the case and to take into account other public or private interests, such as the possibilities of both parties to access evidence.[83] In the New York District Court's decision of March 2003, the judges initially allowed the case to proceed. In the decision, the judge first questioned the independence of the Sudanese courts because the Sudanese forces and the pro-government militias were alleged to be the direct perpetrators of these abuses.[84] Secondly, the judge held that the application of Sharia law to victims who were largely non-Muslims was unfair.[85] Moreover, the Court found that the Canadian courts were not the appropriate forum to deal with the case because Canada lacked proper legislation to deal with the situation at hand and therefore decided to dismiss Talisman's defence.[86] However, this decision has been strongly contested by the Canadian and American governments, in such way that their opinions have influenced, in one way or another, the final outcome of this case in the US courts. According to Seck, Canada intervened twice to support Talisman before the US courts.[87] Likewise, when this case was ongoing in the New York District

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79 Kobrin, *supra* nt 67*,* 450.

80 US District Court for the Southern District of New York, *The Presbyterian Church of Sudan V. Talisman Energy Inc. and the Republic of Sudan,* Opinion 01 Civ. 9882(AGS), 19 March 2003, *at* <law.justia.com/cases/federal/district-courts/FSupp2/244/289/2287736/> (accessed 7 November 2017).

81 US District Court for the Southern District of New York, *The Presbyterian Church of Sudan V. Talisman Energy Inc. and the Republic of Sudan,* Opinion 01 Civ. 9882(AGS), 19 March 2003, *at* <law.justia.com/cases/federal/district-courts/FSupp2/244/289/2287736/> (accessed 7 November 2017).

82 Par, N S et al., *Beyond impunity: Strengthening the legal accountability of transnational corporations for human rights abuses*, (Hertie School of Governance, 2009) 18.

83 Jägers, N M C P, *Corporate human rights obligations: in search of accountability,* (Intersentia, 2002) 196–197.

84 Mongelard, E, "Corporate civil liability for violations of international humanitarian law", 88(865) *International Review of the Red Cross* (2006) 690.

85 *Ibid.*

86 *Ibid.*

87 Seck, S L, "Home state responsibility and local communities: The Case of Global Mining"*,* 11(1) *Yale human rights and development Journal* (2014) 7.

Court, the American government sent a letter to that court with a diplomatic correspondence from Canada that contained an attachment explaining that a continuation of this case in the US will have an impact on the diplomatic relations between the two countries. In the same letter, the US authorities also advised the judges of the New York District Court to narrow the application of the ATCA.[88] It appears that the Canadian and US governments were not concerned about the redress of the abuses which were alleged against Talisman, rather than the pursuit of this case in US courts. The reluctance of both countries to provide effective remedies to victims of these abuses is easily observed through the efforts deployed by both, the Canadian and the US government, to obstruct the victims' right to access effective remedies in US courts. Consequently, in 2006, just four months before the trial of this case on its merits, a summary judgement was issued by the same New York District Court in favour of Talisman in which the court ruled that Talisman did not act with 'an intent' of supporting the Sudanese government in abusing human rights.[89]

In February 2007, representatives of victims appealed against that decision but without success. In its decision of October 2009, the Appellate Court for the 2nd Circuit upheld the decision of the lower court in which the Judge stressed again that Talisman did not act 'purposefully' to support the Sudanese government in the perpetration of human rights abuses.[90] Yet in the same decision, the 2nd circuit Appellate Court acknowledged that victims managed to prove that Sudan has used Talisman's facilities to commit human rights violations.[91] Trying to reverse the decision, representatives of victims filed a petition to the US Supreme Court. Another organisation called Earth Rights International also submitted *amicus curiae* to the same court. The complainants were requesting the Supreme Court to hear the appeal against the ruling from the Court of Appeal.[92] But in October 2010, the U.S. Supreme Court rejected these two requests.[93] As a result, Talisman was discharged from its responsibility in human rights violations in which the company is alleged to have played a big role.

iv. Obstacles Met by the Victims to Access Effective Remedies

The facts in the Talisman case reveal two major difficulties encountered by victims to access effective remedies in the Sudanese courts. First, victims were physically threatened. Given the role played by the Sudanese military and the pro-government militias in the abuses which were alleged against Talisman and the nature of the conflict (ethnic and religious conflict), victims were unable to have their case heard in the Sudanese courts. The collusion between government forces and MNCs in the perpetration of human rights abuses is not unique to Sudan. The same scenario is often alleged in many AUMSs where their victims become unable to bring cases in domestic courts for fear of their physical safety. Second, the independence of the Sudanese justice system, as well as the nature of the applicable law in the Sudanese courts, was questionable since they apply Sharia Law even though all victims

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88 Stephens, B, *Judicial deference and the unreasonable views of the Bush administration,* 798, *at* <brooklaw.edu/~/media/645D4523327F475EA08E0A88BEA513CA.pdf> (accessed 7 November 2017).

89 Davis, J, *Justice across boarders: The Straggle for human rights in U.S. Courts*, (Cambridge University Press, 2008) 83.

90 BHRRC, *Talisman lawsuit (re Sudan), at* <business-humanrights.org/en/talisman-lawsuit-re-sudan> (accessed 7 November 2017).

91 Milbank et al., *supra* nt 78, 2.

92 BHRRC, *Talisman lawsuit (re Sudan), supra* nt 90.

93 *Ibid*.

were non-Muslims. It appears inconceivable to pretend to access effective remedies under the rules of a religion to which you do not belong yourself.

The main obstacle faced by victims to access effective remedies in the US courts was the political interference by both, Canada and the US. The introduction of this case before the New York District Court has raised many reactions from both countries to oppose its continuation within US jurisdiction, reactions which have led to its rejection in the US. Victims could not bring their case in Canadian courts due to the fact that Canada had played an important role in its rejection by the American courts. But legally speaking, the US courts used the concept of 'proof of intent' which, in reality, is not easy to demonstrate in such cases. As argued by de Jonge, in these cases the proof of intent is more complicated than the proof of knowledge.[94] In other words, this new standard introduced by US courts in cases implicating MNCs and human rights constitutes an additional obstacle for victims of the MNCs' human rights abuses from the AUMSs who would like to seek remedies in US courts.

C. The Trafigura Case of Ivory Coast

i. Introduction

Trafigura is an MNC from the Netherlands which has its headquarters in Amsterdam. The company also has many other offices and subsidiaries in different countries worldwide.[95] Trafigura is among the world's largest MNCs trading oil, metals and minerals.[96] The incident at the centre of this case took place on the night of 19 August 2006 when a ship charted by a Trafigura office in London, called Probo Koala, dumped toxic wastes in Abidjan, the capital city of Ivory Coast.[97]As this ship belonged to Trafigura's London office, presumably, the orders to dump these toxic wastes in Abidjan emanated from the same office.

The present case illustrates how MNCs use their power to undermine the victims' right of access to effective remedies in domestic jurisdictions of the AUMSs. It also reveals that the Ivory Coast, like many other AUMSs, lacks appropriate laws to deal with human rights abused committed by MNCs on their territories. Furthermore, the case also demonstrates how the victims' chance to access effective remedies in other foreign domestic jurisdiction is limited.

ii. A Brief Description of the Facts

Before heading to Abidjan, the Probo Koala ship tried first to dispose of these toxic wastes legally in some European ports but without success. For example, in July 2006, the ship concluded an agreement with the Amsterdam port to dispose of the toxic wastes in

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[94] De Jong, A, Transnational corporations and international law: Accountability in the Global Business Environment, Edward Elgard, London/ UK and Northampton USA (2011) 105.

[95] Trafigura Ltd, *Annual report of 2015,* 30 September 2015, 2, *at* <trafigura.com/media/3321/2015-trafigura-annual-report.pdf> (accessed 8 November 2017).

[96] *Id*, 4–5.

[97] Human Rights Council Report, *Rapport of the Special Rapporteur on the adverse effects of the movement and dumping of Toxic and dangerous products and wastes on the enjoyment of human rights: Mission to Cote d'Ivoire (4 to 8 August 2008) and the Netherlands (26 to 28 November 2008) of the 3rd September 2008,* Report n0 *A/HRC/12/26/Add.2*, 8.

question.[98] After its arrival in Amsterdam, a company which was sub-contracted by the Amsterdam port to carry out this job discovered that the toxicity of the waste was very high and decided to increase the price of their treatment.[99] As most MNCs appear to be more concerned about their bottom line, Trafigura did not agree with the port of Amsterdam on the new proposed price and decided to conclude a new agreement with Tommy Ltd., a newly created company in Ivory Coast, which had no prior experience in such matters.[100] It is important to highlight that this Ivorian company was only created ten days before the arrival of the Probo Koala ship in Abidjan,[101]a fact that might suggest that this company was created for that purpose. It is also evident that, before the dumping of these wastes in Abidjan, Trafigura was fully aware of the level of their toxicity and that they could have harmful effects on human lives and the environment.

According to a report by Amnesty International, the toxic wastes in question were dispersed 'in at least 18 sites near the inhabited and business places in Abidjan during the night of 19 August 2006.'[102] The report of the UN Human Rights Council of 2008 also alleged that other similar wastes were dumped later during the night of 14 September 2006 in Abidjan.[103] Immediately after the occurrence of the incident, people who lived around the sites where these wastes were dumped caught different diseases.[104] Different reports alleged that 15 people died, 69 persons were hospitalised and as many as 108,000 went through medical consultations.[105] According to Jägers, 'the Trafigura ship incident of Abidjan has resulted in tragic consequences for human lives and environment.'[106] More specifically, the rights which were violated include the right to life, the right to health, the right to information, the right to food and wellbeing, rights to a satisfactory environment, the right to private life and the right to development. All the listed rights are recognised under different international and regional human rights instruments including the ACHPR to which the Ivory Coast is a party.

iii. The Victims' Endeavours to Access Effective Remedies

Few days after the Probo Koala incident of Abidjan, the Ivorian state prosecutor opened a criminal investigation against those who were suspected to be involved in these outrageous acts and arrested some of them.[107] Among those arrested were three high officials of Trafigura who were present in Ivory Coast and representatives of the Ivorian company

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98 Chuakan, E, *The Probo Koala incident in Abidjan Cote d'Ivoire: A critique of the Basel Convention compliance mechanism,* Secretariat of the Basel Convention, United Nations Environment Programme, (Geneva, 2016) 352–353.

99 *Ibid.*

100 Cox, G, "The Trafigura case and the system of prior information consent under the Basel Convention - A broken system", 3 *Law Development and Environment Journal* (2010) 274.

101 Environmental Justice Organizations Liabilities and Trade (EJLT), *The Trafigura case*, Fact sheet 045, 05 August 2015, *at* <ejolt.org/wordpress/wp-content/uploads/2015/…/FS-45.pdf> (accessed 8 November 2017).

102 Amnesty International, *supra* nt 28, 97.

103 Human Rights Council, *supra* nt 97, 8.

104 *Id*, 9.

105 *Ibid.*

106 Jägers, N M C P and van der Heijden, M J C, "Corporate Human Rights Violations: The feasibility of civil recourse in the Netherlands" 33 *Brooklyn Journal of International Law* (2008) *at* <pure.uvt.nl/ws/files/…/bjil33iii_Jagers.pdf> (accessed 8 November 2017).

107 Amnesty International, *supra* nt 28*,* 101.

Tommy Ltd.[108] As a legal person, however, Trafigura was not a subject of the investigation as Ivorian law does not provide for criminal liability of legal persons.[109] However, surprisingly, when this case was ongoing before the Ivorian courts the government of the Ivory Coast entered into negotiations with the Trafigura Group without any prior consultation with victims. These negotiations resulted in an out-of-court settlement in February 2017.[110] In this agreement, the Trafigura Group agreed to pay USD 198 million for the compensation of the victims but against the release of their employees who were arrested. Under the same agreement, Ivory Coast also agreed to waive any other action against the Trafigura Group in domestic courts in relation to that incident.[111] However, Trafigura has continued to deny any responsibility for the abuses in question.[112] This agreement has negatively affected the victims' rights of access to effective remedies in domestic jurisdictions in many ways. First, as mentioned earlier, the agreement was signed without any prior consultation with the victims which means that those who signed it did not have enough information about what should be redressed. Secondly, victims who have not been compensated or those who received insufficient compensation cannot bring their cases in domestic courts in Ivory Coast. Moreover, as the above-mentioned agreement concerned civil cases only, this agreement constituted a barrier for victims who would like to initiate criminal proceedings against Trafigura group in Ivory Coast. But in March 2008, the Court of Appeal in Abidjan dismissed the complainants' request by ruling that the evidence to proceed with their case was lacking.[113]

After exhausting all domestic remedies in Ivory Coast, some victims filed their case before the English courts due to the fact that, as mentioned before, the Probo Koala ship was charted by the Trafigura London office. This case was introduced before the London High Court in November 2006 by a number of victims who were estimated to be around 30,000.[114] After three years of proceedings, in September 2009, another out-of-court agreement was concluded between the parties to the case. Under this new agreement, Trafigura accepted to pay GBP 1,000 to each of the claimants for compensation.[115] But again, this agreement was achieved with an obligation for victims to release a declaration stating that the toxic waste dumped in the streets of Abidjan by the Probo Koala ship did not have the potential to cause any serious injury or death.[116]

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[108] *Ibid.*

[109] Green Peace and Amnesty International, *The toxic truth about a company called Trafigura, A ship called Probo Koala, and the dumping of the toxic waste in Cote d'Ivoire,* September 2012, 130, *at* <amnestyusa.org/sites/default/files/afr310022012eng.pdf> (accessed 19 November 2017).

[110] Human Rights Council Report, *supra* nt 97, 15.

[111] *Ibid.*

[112] Gwam, CU, "Human Rights implications of illicit toxic waste dumping from developed countries including the U.S.A, especially Texas to Africa, In particular Nigeria", 38 *Thurgood Marshall Law Review* (2014) *at* <tmlawreview.org/assets/uploads/2014/07/9-Gwam1.pdf> (accessed 19 November 2017).

[113] *Ibid.*

[114] BHRRC, *Corporate legal accountability,* Annual brief, June 2012, 5, *at* <business-humanrights.org/sites/default/files/media/documents/corporate-legal-accountability-annual-briefing-final-20-jun-2012.pdf> (accessed 19 November 2017).

[115] Environmental Justice Organizations Liabilities and Trade (EJOLT), *The Trafigura case*, Fact sheet 045, 05 August 2015, *at* <ejolt.org/wordpress/wp-content/uploads/2015/.../FS-45.pdf> (accessed 8 November 2017).

[116] *Ibid*.

In addition to the proceedings which took place in the UK in 2008, the Dutch Prosecutor had also opened a criminal case against the Trafigura Group and some of its employees. The director of the Amsterdam Port Service (APS), where the Probo Koala ship departed to Abidjan from, and the Municipality of Amsterdam were also concerned by these investigations.[117] But before the Dutch courts, the Trafigura Group and its co-accused were only accused for their illegal acts which took place in the Netherlands, not in the Ivory Coast. Trafigura was charged with illegal exportation of toxic waste from the Netherlands to Africa; an act which infringes the European regulations on the shipment of such waste. Other co-accused were considered as accomplices in that operation with different levels of liability.[118] The proceedings in this case took four years in which the Trafigura Group was sentenced to pay EUR one million and the company's employees were condemned to various suspended sentences of imprisonment.[119] The cases of other co-accused, like the Director of the APS and the Amsterdam Municipality, were declared inadmissible under Dutch law.[120]

iv. Obstacles Met by the Victims to Access Effective Remedies

The analysis of the facts in this case demonstrates that two major obstacles have obstructed victims' access to effective remedies in domestic jurisdictions. Firstly, the economic power of the Trafigura Group. While the evidence revealed that the crew of the Probo Koala knew beforehand that the waste was highly toxic, to avoid its responsibility the Trafigura group negotiated an agreement with the Ivorian government where neither party consulted the victims before or during these negotiations. The outcome of this agreement resulted in a denial of the victims' right to access effective remedies. The Trafigura Group paid a certain amount of money – officially for the compensation of the victims – against the release of its employees who were arrested as well as the renunciation and the prohibition of any other action against this MNC in Ivory Coast in relation to the same case. Given the large number of victims and the violations which occurred during the Probo Koala incident in Abidjan, even if the Ivorian government should have used the proceeds of the settlement to compensate the victims, this amount would be insufficient. Secondly, the Ivorian justice system lacked an applicable law to criminally prosecute the Trafigura Group as a private legal entity which is a common barrier in many AUMSs.

In regard to the case which was introduced in the UK, first, this case was again interrupted by another out-of-court settlement in which not all victims were represented. Secondly, according to the Council of Europe, 'a remedy is only effective if it is available and sufficient.'[121] Given the number of victims, it is normal that the harm suffered by each one be different. But under that agreement, every person who was represented was entitled to receive GBP 1,000, which probably was insufficient for some of them. Third, although UK officials were pressured by different organisations to commence criminal proceedings

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[117] Green Peace and Amnesty International, *supra* nt 109*,* 155.

[118] *Ibid*.

[119] Jesse, K D and Verschuuren, J, "Country report: The Netherlands", 1 *The IUSN Academy for environmental law journal* (2011), *at* <pure.uvt.nl/ws/files/1315290/Verschuuren_Country_Report_The_Netherlands_110303_publishers_immediately.pdf> (accessed 19 November 2017).

[120] *Ibid.*

[121] Council of Europe, *Guide to good practice in respect of domestic remedies*, adopted on 18 September 2013, *at* <coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/GuideBonnesPratiques-FINAL-EN.pdf> (accessed 8 November 2017).

against the Trafigura Group, they decided not to do so based on what they called 'a lack of financial resources to finance complex investigations.'[122] This also means that victims lacked financial resources to begin criminal investigations against the Trafigura Group in the UK because they were not entitled to benefit from the legal aid fund which is provided by the UK government. The lack of financial resources by victims to pay advocates and follow the proceedings in their cases in foreign jurisdictions is a general obstacle victims of human rights abuses committed by MNCs in the AUMSs face. As to Amnesty International, in the context of the MNCs' human rights abuses, an effective remedy includes both measures to redress the harm suffered by victims as well as actions taken by States to hold MNCs accountable in their justice systems.[123] This means that the compensation of victims does not preclude criminal charges against MNCs for their human rights violations. In this case, it has to be acknowledged that Trafigura exerted some effort to compensate the victims but no criminal investigation took place, either in Ivory Coast or in the UK.

With regard to what happened in the Netherlands, the victims' case was declared to be inadmissible before the Dutch courts. This is due to the fact that Trafigura was only prosecuted for its wrongdoing in the Netherlands but not in the Ivory Coast. This decision was grounded on what the judge referred to as 'complexity of investigations which required a close collaboration with Ivory Coast.'[124] The reason given by the Dutch court in this case is somewhat strange because it is not common for a court to dismiss a case because of the complexity of its investigations. But on the other hand, this could simply be interpreted as an unwillingness of the Dutch courts to prosecute Trafigura for its human rights misconducts committed in Ivory Coast.

III. Access to Justice for Victims of the MNCs' Human Rights Misconducts in the AUMSs: A Challenge to the 'African Solutions to Africa's Problems' Concept

A. Introduction

Historically, the African solutions to Africa's problems concept originate from Pan-African ideals in the 1960s. But according to Kasaija, its current resurgence resulted from the collapse of the State in Somalia in the 1990s and the failure of the international community to deal with the genocide of the Tutsi in Rwanda of 1994.[125] In its second facet, the same concept also has its source in what some African leaders call a foreign interference in the internal affairs of African states by Western countries.[126] This means that in its purely political aspect, this concept is perceived as a tool to fight against neo-colonialism in African countries.

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[122] The Guardian, "UK authorities' lack resources' to investigate Trafigura over toxic waste", 23 July 2015, *at* <theguardian.com/world/2015/jul/23/uk-authorities-lack-resources-to-investigate-trafigura-over-toxic-waste> (accessed 19 November 2017).

[123] Amnesty International, *supra* nt 28, 29.

[124] Environmental Justice Organizations Liabilities and Trade (EJOLT), *supra* nt 115, 8.

[125] African Centre for Constructive Resolution of Disputes, Kasaija, PA, The *African Union's notion of African Solutions to Africa's problem' and the crises in Cote d'Ivoire (2010-2011) and Libya (2011),* 11 June 2012.

[126] Ferim, V, *African solutions to African Problems: The Fault line in conflict Resolution in Africa*, *at* <academia.edu/5924312/African_Solutions_to_African_Problems> (accessed 19 November 2017) 2.

B. The Content of the Concept of African Solutions to Africa's Problems

The concept of African solutions to African problems advocates that, instead of waiting or asking for support from other continents or any other aid from outside Africa, Africans should first be able to deal with the problems arising on their continent.[127] Some scholars argue that this concept implies a 'sense of self-reliance, responsibility, ownership and indigeneity' of solutions to all problems that affect or may African communities.[128] In relation to the non-redress of the MNCs' human rights abuses committed in the AUMSs this philosophy presupposes that African leaders should not passively watch the development of such phenomena on the continent instead of putting in place adequate and purely African measures to address it.

The 'African solutions to African problems' philosophy is currently applied to a wide range of issues in Africa, but mostly in the area of promoting peace and security. Article 4(f) of the AU Act of 2000 provides the AU with powers to intervene in member states in cases of gross human rights abuses, namely 'war crimes, genocide and crimes against humanity.'[129] This is why today many troops from the AUMSs are engaged in various peacekeeping missions across the African continent. For example, contingents from different AUMSs are currently involved in peacekeeping operations in Mali, the Central African Republic, Somalia and South Sudan. The same understanding of the African leaders of this concept and its application to a wide range of issues on the continent should also motivate them to seek solutions to the question of access to effective remedies for victims of the MNCs' human rights abuses that are often committed in the AUMSs.

C. The Non-Redress of the MNCs' Human Rights abuses in the AUMSs vis-à-vis the African Solutions to African Problems Concept

The experience from the case studies discussed above suggests that most of the MNCs' human rights abuses committed in the AUMS remain unpunished and the AU regional and sub-regional mechanisms have done nothing significant to solve this issue. This situation reflects a lack of confidence in national, regional and sub-regional judicial and quasi-judicial institutions. More specifically, the reluctance of the AU regional and sub-regional mechanisms to solve this problem seems to be in contradiction with the philosophy contained in the concept of African solutions to African problems. In fact, the AU, as a regional organisation, as well as different sub-Regional Economic Communities (RECs), can play a vital role in addressing this situation.

At the regional level, the system of human rights protection is centred around the African Charter of 1986,[130] which has quite similar provisions to those of many other human rights instruments.[131] The Charter obliges member states to provide effective remedies for victims of human rights abuses committed on their territories; most of which are reported to

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[127] Adar, K G et al., *The State of Africa: Parameters and legacies of governance and issue areas*, (Africa Institute of South Africa, Pretoria, 2010) 115.

[128] Laurie, N, *African solutions to African problems,* October 2013, *at* <up.ac.za/media/shared/Legacy/sitefiles/file/46/1322/17295/welttrends92themanathansdafrikaafrikanischeunionsicherheitspolitikdiplomatie.pdf> (accessed 10 November 2017).

[129] The Constitutive Act of the African Union adopted in Lomé, Togo, on the 11th July, 2000, (2000).

[130] African Union, *African Charter on Human and People's Rights*, (1986) UNTS 218.

[131] Nmehielle, V O, "Development of the African Human Rights System in the Last Decade*"*, Human Rights brief 11, n. 3, 2004, *at* <digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1368&conte> (accessed 10 November 2017).

be committed by MNCs in violation of the Charter's provisions. For instance, on the African continent, many reports frequently allege that MNCs fail to meet the requirement of maintaining a satisfactory environment in the oil extraction industry; such acts infringe Article 24 of the African Charter.[132]

To enforce the provisions of the African Charter, as well as other relevant human rights instruments adopted under the auspices of the African regional organisation (OAU/AU), the ACHPR was established under the same instrument.[133] As mentioned earlier, the ACHPR has already tried a number of cases of human rights violations involving MNCs which were committed in the AUMS. According to some scholars, nowadays, states are gradually losing their monopoly on being seen as the only subjects of international law as MNCs have also become duty bearers in regard to human rights issues.[134] As legal entities, today MNCs have duties and responsibilities under the African Charter as well as under other human rights instruments.

To supplement the shortcomings of the ACHPR in the fulfilment of its mandate of protecting human rights across the AUMS, an African Court on Human and Peoples' Rights (ACtHPR) was created.[135] The ACtHPR was created by a protocol that was adopted in 1998 and which entered into force in 2004.[136] First, this instrument commits the AU to the principles of freedom, equality, justice, peace and dignity as well as to the fundamental rights and duties contained in different human rights instruments and declarations adopted by the AU and other international organisations.[137] It also vests the ACtHPR with the mandate to enforce the provisions of the African Charter, the protocol itself and other human rights instruments ratified by the concerned AUMS.[138] Moreover, in May 2012, the AU adopted a protocol providing the court with powers to rule on international crimes committed within member states without any exception.[139] Additionally, Article 46 C of the Protocol to the Statute of the ACtHPR (27 June 2014) provides the ACtHPR with powers to deal directly with the MNCs' criminal liabilities in case they commit human rights abuses in member States.[140]

At the sub-regional levels, most African Regional Economic Communities (RECs) have also put mechanisms in place to protect human rights in their respective regions. Understandably, the initial mandates of these RECs are to improve their trade and other

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[132] The South African Institute for the Advanced Constitutional, *Public Human Rights & International Law, The State Duty to Protect, Corporate Obligations and Extra-territorial Application In the African Regional Human Rights System*, (Johannesburg, 2010) 12.

[133] Article 30, African Union, *African Charter on Human and People's Rights*, (1986) UNTS 218.

[134] Slawotsky, J, "Corporate liability for violating international law under The Alien Tort Statute: The corporation through the lens of globalization and privatization", 2 *International Review of Law*, 2013, 15.

[135] Hansungule, M, *African Courts and the African Commission on Human and Peoples' Rights, at* <kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf> (accessed 19 November 2017) 151–152.

[136] African Union, *Protocol to the African Charter on Human and People's Rights on the establishment of an African Court on Human and People's Rights* (2004).

[137] *Ibid*.

[138] *Id*, Article 3.

[139] Protocol on the amendments to the protocol on the African Court of Justice and Human Rights, adopted in Addis Ababa, Ethiopia on 15 May 2012.

[140] The Protocol on the Statute of the ACtJHR of the 27th June 2014.

economic relations.[141] However, the RECs have gradually acknowledged the reality that their economic goals cannot be achieved without integrating respect for human rights into their activities.[142] This is why most of them integrated human rights provisions in their constituent treaties and their member states are parties to other human rights instruments.[143] RECs are recognised by the AU under the Abuja Treaty of 3 June 1991.[144] Article 3(h) of this Treaty bases the pursuit of Africa's economic integration on the principles of 'recognition, promotion and protection of human and peoples' rights' in accordance with the provisions of the African Charter, accountability and economic justice.[145] Its Article 7(e) also gives powers to these RECs for creating their own Courts of Justice (CJ).[146] Currently, these CJs of different RECs have similar jurisdiction over human rights issues committed in their respective regions as the ACtJHPR.[147]

Given the legal frameworks and mandates and some few good examples from the AU regional and sub-regional mechanisms, these institutions have potentialities that can be exploited to correct the shortcomings of their member states in proving effective remedies for victims of the MNCs' human rights abuses. However, the case studies discussed earlier in this paper have revealed that the non-redress of such abuses is a prevalent phenomenon on the African continent and the AU regional and sub-regional mechanisms remain virtually unused by victims. The same case studies have also exhibited that those victims who decide to seek remedies in foreign fora outside the African continent do not get any support from their home countries. Consequently, victims of the MNCs' wrongdoings committed in the AUMS seem to be left on their own in their quest for remedies, either in domestic courts or in other fora outside the African continent, a fact which seems to contradict the philosophy behind the concept of African solutions to African problems.

Conclusion

The right to access an effective remedy for victims of human rights violations is an internationally recognised right under international and regional instruments of human rights, regardless of whether their perpetrator is an individual or a legal entity such as an MNC. These instruments include measures to ensure procedural fairness to victims, whether by a court or any other competent body or mechanism, as well as the outcome of such proceedings including the relief afforded to victims. But nowadays, there are many MNCs operating in the AUMSs which are accused of being involved in human rights abuses and their victims face many obstacles to access effective remedies.

Through three selected case studies, the present article attempted to investigate and analyse what obstacles victims face, either in domestic jurisdictions, before the MNC's home

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[141] Jibril, A A, "The admissibility of Subregional Court's decisions before the African Commission or African Court", 6(2) *Mizan Law Review* (2012) 242.

[142] *Ibid.*

[143] Rupell, O C, "Regional Economic Communities and Human Rights in East and Southern Africa", *at* <kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/9_Ruppel.pdf> (accessed 10 November 2017) 277–279.

[144] African Economic Community, *Treaty Establishing the African Economic Community*, Adopted in Abuja-Nigeria on 3rd June 1991 and entered into force on 12 May 1994.

[145] *Ibid.*

[146] *Ibid.*

[147] Vicente, DM, *Towards a Universal Justice? Putting international Courts and Jurisdictions into perspective*, (Brill Publishing, 2014) 108.

jurisdiction or in other foreign jurisdictions. The selected cases are the Anvil Mining case of the Democratic Republic of Congo, the Talisman case of Sudan, and the Trafigura case of Ivory Coast. In this paper, two major points are underlined, the types of legal remedies used by victims and the obstacles they faced in each step of the procedure, either in their home countries or in other fora outside the African continent.

The analysis of the facts in these cases demonstrates that, in the Anvil Mining case of the DRC and the Trafigura case of Ivory Coast, both started in domestic jurisdictions and ended up in the MNCs' home jurisdictions. Moreover, two out-of-court settlements interrupted the Trafigura case's proceedings; one took place in Ivory Coast and the other in England. Regarding the Talisman case, this case started and ended in the US courts because victims were unable to introduce their case in the Sudanese courts. This was due to the fact that all the violations alleged against Talisman were directly committed by the Sudanese security forces and pro-government militias, meaning that victims feared for their physical safety. Sudan lacked an appropriate law that could be applied in this case because the Sudanese courts apply Sharia law even though all victims were non-Muslims.

The outcome of the proceedings in all three cases, either in the victims' home courts or in foreign domestic fora has resulted in a denial of the victims' right to access real and effective remedies. The discussions and analysis in these cases proved also that a reliance on the MNCs' home courts or on any other forum, is of a limited value because victims face other obstacles there.

The main obstacles faced by victims in the Anvil Mining case of the DRC included many dysfunctions and irregularities within the DRC's justice system. For example, the victims' difficulties in accessing their lawyers and the lack of co-operation with military officials, political interference within the justice system and the threat and intimidation of victims and their supporters. Whereas in the Trafigura case of Ivory Coast the power influence of Trafigura in conjunction with the lack of an appropriate law in the Ivorian justice system to prosecute legal entities undermined the victims' rights to access effective remedies in the Ivory Coast. These obstacles are not only present in the justice systems of the DRC and the Ivory Coast, but they also exist in many other AUMSs.

Among the major obstacles faced by victims in foreign jurisdictions are the unwillingness of the MNCs' home countries to prosecute them for their human rights abuses committed abroad, political interference, the possible diplomatic fallout between fora of prosecutions and home states of MNCs, the lack of financial resources by victims to commence and follow their cases abroad as well as the difficulties in conducting investigations and limited access to evidence. Considering all these obstacles faced by victims in their quest for remedies, either in domestic or foreign courts, the paper suggests that there is an urgent need for African regional and sub-regional solutions to fill this gap.

Discussions and analysis in this paper revealed, on the one hand, that the lack of redress of human rights abuses that are often committed by MNCs in the AUMS is a common phenomenon on the continent and African leaders contemplate its development passively. On the other hand, although African communities are those who are more affected by this issue, there are mechanisms at the AU regional and sub-regional levels that can be used to correct the shortcomings of national systems from member states in providing effective remedies for victims. Unfortunately, as it was revealed by the case studies, victims of these abuses from the African continent are somehow left in the hands of the MNCs in

question, a reality which seems to be in contradiction with the philosophy behind the concept of African solutions to African problems.

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International Environment Financing: A Review of the Global Environment Facility

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Keywords
INTERNATIONAL ENVIRONMENTAL FINANCING; INTERNATIONAL ENVIRONMENTAL CONVENTIONS; GLOBAL ENVIRONMENT FACILITY

Abstract

After having played the part of a path-breaker and trend-setter in the early years of its existence, the Global Environment Facility (GEF) came to occupy a vital and well-established place in international environmental governance (IEG) from the end of the 1990's onwards. At present, the GEF faces some obvious challenges that threaten to weaken its stature in the global environmental architecture, namely the issues of its efficiency and role in its current form. The proliferation of new funds and funding machineries over the past years is bringing about major changes in the roles of different funding institutions, including the GEF. Particularly, they result in shifting funds for the GEF's focal areas from the GEF to other funding institutions, such as the World Bank and other Multilateral Development Banks (MDBs), which in the opinion of many scholars may relegate the GEF to a minor role in the existing organizational architecture for global environmental financing. As an international funding mechanism approving hundreds of millions of dollars in grants each year, the GEF presents tremendous potential to address some of the most pressing environmental problems threatening human prosperity and survival. The paper, therefore, reviews the Global Environment Facility as an important player in the field of international environmental governance, particularly as it relates to its role within the existing organizational architecture for international environmental financing.

Introduction

The Global Environment Facility (GEF) is an independent and international financial organization established in October 1991 to assist in the protection of the global environment and the promotion of environmentally sound and sustainable economic development[1] through financial support to environmental and climate elements in development projects in low-and middle-income countries.[2] The GEF serves as a consolidated financial mechanism for funding global environmental issues and associated

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1 World Bank, Global Environment Facility, *Operations Manual – Global Environment Facility Operations*, *at* <policies.worldbank.org/sites/ppf3/PPFDocuments/090224b08231a89b.pdf> (accessed 19 November 2017).

2 Government Offices of Sweden, Organization Strategy for Sweden's Cooperation with the Global Environmental Facility (GEF) 2016-2018, *at* <government.se/country-and-regional-strategies/2016/11/organisation-strategy-for-swedens-cooperation-with-the-global-environmental-facility-gef-20162018/> (accessed 18 November 2018).

multilateral environmental agreements[3] by transferring resources North to South to meet the commitments of the new Rio Environmental Conventions.[4] The GEF emerged from the concern over global environmental issues expressed predominately by industrialized countries, such as France, Germany, etc. in the late 1980s.[5] Further support for the GEF came from the United Nations Conference on Environment and Development (UNCED), held in 1992, and the Climate and Biodiversity Conventions with their provisions for financial mechanisms. Donor governments hoped to avoid a proliferation of new funding mechanisms for diverse environmental purposes and therefore stressed that one facility,[6] administered by existing institutions, serves the various global environmental conventions.[7]

The Global Environment Facility (GEF) operates as the financial mechanism for the major international environmental conventions: the United Nations Framework Convention on Climate Change (UNFCCC) (1992), the Convention on Biological Diversity (CBD) (1992), the United Nations Convention to Combat Desertification (UNCCD) (2003), and the Stockholm Convention on Persistent Organic Pollutants (POPs) (2001).[8] The Global Environment Facility also supports other multilateral initiatives.[9] For example, the GEF establishes operational guidance for international waters and ozone activities, the latter consistent with the Montreal Protocol on Substances that Deplete the Ozone. The GEF unites 182 member governments and partners with international institutions, non-governmental organisations and the private sector to assist developing countries and economies-in-transition,[10] fund environmental projects and shape policy reform in six focal areas – biodiversity, climate change,

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[3] Nakhooda, S, and Forstater, M, *The Effectiveness of Climate Finance: A Review of the Global Environment Facility*, October 2013, *at* <odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/863.pdf> (accessed on 18 November 2017); European Parliament Think Tank, Moosmann, L, et al., *International Climate Negotiations – on the Road to Paris – Issues at Stake in View of COP 21*, 16, *at* (accessed 22 November 2017).

[4] The Global Environment Facility, Horta, K, Report: The First Ten Years – Growing Pains or Inherent Flaws, August 2002, *at* <halifaxinitiative.org/content/global-environment-facility-first-ten-years-growing-pains-or-inherent-flaws-august-2002> (accessed on 18 November 2017).

[5] Cohen, S, and Burgiel, SW, *The Global Environment Facility from Rio to New Delhi: A Guide for NGO's*, IUCN Gland, 1997; Nakhooda and Forstater, *supra* nt, 3; Streck, C, *The Global Environment Facility- A Role Model for International Governance,*1(2), *MIT Press Journals*, 2001, 71, *at* <mitpressjournals.org/doi/abs/10.1162/152638001750336604> (accessed 18 November 2017).

[6] The G8, which comprise of Britain, Canada, France, Germany, Italy, Japan, the United States and Russia, controls 68% of the world's monetized economy yet make up only 14% of the world's population. The G7 invited Russia to join in 1999, but in practice, Russia has limited leverage in this powerful group.

[7] Cohen and Burgiel, *supra* nt, 5; Nakhooda and Forstater, *supra* nt 3); Clémençon, R, "What Future for the Global Environment Facility?" 15(1) *The Journal of Environment and Development*, (2006) 50, *at* <journals.sagepub.com/doi/abs/10.1177/1070496506286438> (accessed 18 November 2017).

[8] Global Environment Facility, REPORT: Annual Report 2015 – Financing Global Environment Benefits & Climate Change Adaptation in Africa, 2015, *at* <afdb.org/file admin/uploads/afdb/Documents/Publications/AfDB-GEF_ANNUAL_REPORT_2015.pdf> (accessed on 18 November 2017); Bayon, R, et al., *Environmental Funds: Lessons Learned and Future Prospects*, *at* <69.90.183.227/financial/trustfunds/g-fundlessons.pdf> (accessed 18 November 2017).

[9] Australian Government, Australian Multilateral Assessment 2012 – Global Environment Facility, 2012, *at* <dfat.gov.au/about-us/publications/Documents/gef-assessment.pdf>; Global Environment Facility Evaluation Office, *Fifth Overall Performance Study – Approach Paper - Sub-study on GEF Engagement with the Private Sector*, June 18 2013, *at* <gefieo.org/sites/default/files/ieo/ieo-documents/ops5-ss-private-sector-engagement.pdf>

[10] See Oxford Climate Policy, Muller, B, *the Global Environment Facility (GEF) and the Reformed Financial Mechanism (RFM) of the UNFCCC*, *at* <oxfordclimatepolicy.org/publications/documents/TheGEF andtheRFM.pdf> (accessed 18 November 2017).

international waters, the ozone layer, land degradation and persistent organic pollutants.[11] Since its inception the GEF has allocated $11.5 billion, supplemented by more than $57 billion in co-financing for over 3,200 projects in more than 165 countries.[12] The GEF is currently the largest intergovernmental fund for environmental, climate change and development action.[13]

The three institutions carrying out the GEF's work, known as Implementing Agencies (IAs), are the World Bank, the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP).[14] However, Executing Agencies were added in 1999, following criticism that the monopoly held by the three agencies contributed to widespread dissatisfaction with project performance. The GEF executing agencies include UN agencies (the Food and Agricultural Organization, the United Nations Industrial Development Organization and the International Fund for Agricultural Development) and development banks (Asian Development Bank, African Development Bank, Inter-American Development Bank and the European Bank for Reconstruction and Development).[15]

The GEF currently partners with 18 international agencies.[16] Procedurally, the World Bank administers funding,[17] UNDP oversees project development, and UNEP serves as the scientific and technical advisor. The remaining agencies contribute to the management and delivery of projects.[18]

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[11] Australian Government, Australian Multilateral Assessment 2012, *Supra* nt 9.

[12] Congressional Research Service, Lattanzio, RK, *International Environmental Financing: The Global Environmental Facility (GEF),* June 3 2013, *at* <fas.org/sgp/crs/misc/R41165.pdf> (accessed on 18 November 2017).

[13] Organization Strategy for Sweden's Cooperation with the Global Environmental Facility, *supra* nt, 2; The GEF consists of four trust funds: 1) the main GEF Trust Fund, which covers the expenses for the GEF's regular operations; 2) the Least Developed Countries Fund (LDCF) for climate adaptation projects in low-income countries; 3) the Special Climate Change Fund (SCCF) for supporting technology transfer etc.; and 4) the Nagoya Protocol Implementation Fund (NPIF), established by the Convention on Biological Diversity. The GEF also manages the Adaptation Fund under the Kyoto Protocol. The LDCF and SCCF together have their own Council, or governing board, which has the same composition as the GEF Council. See Nakhooda et al., The Global Climate Finance Architecture (ODI Working Paper 2013) 2, *at* <https://www. odi. org/ sites/odi.org.uk/files/odi-assets/publications-opinion-files/9312.pdf> accessed (22 November 2017).

[14] The Global Environment Facility, Funding *at* <thegef.org/about/funding> (accessed on 18 November 2017); Nakhooda, and Forstater, *supra* nt 3.

[15] Horta, *supra* nt 4; The Global Environment Facility, Fonseca, G, *Global Environmental Facility: Operating with Multiple Implementing Agencies (FCPF Working Group on Multiple Delivery Partners),* 10, September 5 2010, *at* <forestcarbonpartnership.org//sites/fcp/files/Documents/tagged/GEF-%20operating%20 with%20multiple%20IAs.pdf> (accessed 18 November 2017).

[16] The World Bank, the United Nations Development Program (UNDP), the United Nations Environment Program (UNEP), the United Nations Food and Agriculture Organization, the United Nations Industrial Development Organization, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, the International Fund for Agricultural Development, the World Wildlife Fund, the Conservation International, the West African Development Bank (WADB), the Brazilian Biodiversity Fund, the Foreign Economic Cooperation Office, Ministry of Environmental Protection of China (FECO), the Development Bank of Southern Africa (DBSA), the Development Bank of Latin America and the International Union for Conservation of Nature.

[17] See SSRN, Rossati, D, *Inter-Institutional Dynamics of Global Climate Finance: Complementarity and Competition in the Emerging Practices of Coordination,* 12, 2013, *at* <papers.ssrn.com/sol3/papers. cfm?abstract_id=2401309> (accessed 18 November 2017).

[18] Lattanzio, *supra* nt 12; See United Nations Sustainable Development Knowledge Platform, Economic Commission for Europe (UNECE), *Financing Global Climate Change Mitigation* at <sus tainabledevelopment.un.org/index.php?page=view&type=400&nr=804&menu=1515> (accessed on 18 November 2017).

The Implementing Agencies (IAs) are, thus, responsible for developing projects for GEF funding and implementing them through designated executing agencies in the specific country or region. The IAs also provide input on policies and programmes. They work closely with executing agencies through individuals called 'task managers', which are responsible for the day-to-day operations of individual projects. Executing agencies can be government bodies, other UN agencies, NGOs, universities, etc. The IAs are expected to administer projects within their areas of competence. For example, the World Bank specializes in investment projects, UNDP in technical assistance projects and UNEP in targeted research and enabling activities as well as international waters projects. In practice, there is some overlap among the IAs.[19] Funding from the GEF is limited to countries, which qualify for technical assistance grants from UNDP or loans from the World Bank.[20] Further, the country should meet the eligibility criteria established by the Conference of the Parties (COP) of the relevant convention.[21] A recent comprehensive assessment by an independent panel of experts found that the GEF has been a 'catalyst for innovative programmes' and produced 'significant results' to improve the global environment.[22]

I. Global Environment Facility Governance Structures

The governance structure of the GEF comprises six sub-structures:

1. The GEF Council;
2. The Conference of the Parties (COPs) to the environmental conventions;
3. The GEF Assembly;
4. The GEF Secretariat (GEFSEC);
5. The Scientific & Technical Advisory Panel (STAP);
6. The GEF Evaluation Office (GEF EO).

The GEF Council is the GEF's main decision-making body. It is responsible for 'developing, adopting and evaluating the operational policies and programs for GEF-financed activities'.[23] Thus, the Council must ensure that GEF policies, activities and programme are concordant with the purposes, scope and objectives of the facility. It must also develop and monitor the operational strategy of the GEF and review and approve the work programme of the GEF. This involves playing a central role in the project cycle of the GEF. The Council acts following the guidance of the Instrument for the Establishment of a Restructured GEF as well as the guidance of the Conference of the Parties (COPs) of the different conventions that it serves, whenever it acts as their financial mechanism. The relationship between the GEF and the COPs is set out in a Memorandum of Understanding (MOU), jointly prepared by the Executive Secretary of

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19 Cohen and Burgiel, *supra* nt 5; Horta, *supra* nt 4.

20 *Ibid.*

21 The Global Environment Facility (GEF) Trust Fund, *supra* nt 14.

22 Global Environment Facility, *GEF Dynamic Partnerships – Real Solutions (Introduction to GEF),* February 1 2002, *at* <thegef.org/publications/gef-dynamic-partnerships-real-solutions-introduc ti on-gef> (accessed 18 November 2017).

23 Broughton, E, *The Global Environment Facility: Managing the Transition*, June 2009, *at* <ifri.org/sites/default/files/atoms/files/GEF_ManagingtheTransition.pdf> (accessed on 18 November 2017); Global Environment Facility, *Instrument for the Establishment of the Restructured Global Environment Facility*/12, March 2008, *at* <thegef.org/documents/instrument-establishment-restructured-gef> (accessed on 18 November 2017).

the different conventions and the GEF CEO.[24] The COPs assign functions and provide guidance to the GEF through common decisions.

The Council is composed of 32 constituency representatives, which represent the 178 countries, donor and recipient, that are parties to the GEF. Sixteen of these represent developing countries, fourteen represent developed countries and two represent economies-in-transition. The GEF CEO, or their representative, co-chairs Council meetings, along with a Council member elected for each Council meeting. Representatives of each of the Participant countries are invited to observe meetings, while representatives from the World Bank, UNDP, UNEP, the STAP and the conventions are invited to attend.[25] The Council meets, at minimum, every six months. Decisions within the GEF Council are taken by consensus. If no consensus can be reached, decisions are taken through a formal vote by double-weighted majority, i.e., through an affirmative vote representing both a 60% majority of the total number of Participants and a 60% majority of the total financial contributions.[26]

The main role of the GEF Assembly is to review the activities of the GEF and to agree on amendments to be made to the Instrument. In this regard, the Assembly thus has the power to affect the operation of the GEF through a unanimous adoption of amendments to the GEF Instrument. More informally, the Assembly provides a crucial forum for debate on issues affecting the GEF since it is set to meet every three to four years, to coincide with the replenishment rounds of the GEF. The Assembly is composed of representatives of all the participant countries within the GEF, represented by Ministers and high-level governmental representations. Representatives from the World Bank, UNDP, UNEP, regional development banks and the different conventions as well as accredited major groups are invited to the Assembly meetings.[27]

GEFSEC ensures that the decisions taken by the Council and the Assembly are translated into effective action. This mandate involves overseeing the implementation of program activities and of operational policies by liaising with countries and with the Implementing Agencies in charge of the implementation of projects and reporting to the Council and the Assembly. It also involves a crucial coordination role— GEFSEC must facilitate coordination among and between the Implementing Agencies, the Conference of the Parties (COPs) of the conventions and the Secretariats of other relevant international bodies. While the World Bank supports it administratively, it remains functionally independent from it. The CEO of the GEF heads GEFSEC.[28]

The STAP is an advisory body to the GEF. It provides scientific and technical advice to the GEF on its strategy and programmes and provides evaluation on projects before they are approved. The STAP is composed of fifteen members who are scientific experts in one of the GEF's designated focal areas. The UNEP provides for its Secretariat. Finally, the GEF Evaluation Office (GEF EO) is the main body assessing the work of the GEF. It is nested within GEF offices, but operates independently from the GEF since 2003. It has a separate director and its offices and staff are located on a different floor than the GEF staff. The GEF EO produces an Overall Performance Study

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[24] Broughton, *Ibid*; Werksman, J, *Consolidating Global Environmental Governance: New Lessons from the GEF?*, 5, 2003, *at* <citeseerx.ist.psu.edu/viewdoc/download? doi=10.1.1.539.4746&rep= rep1& type=pdf> (accessed on 18 November 2017).

[25] Broughton, *Ibid*; Global Environment Facility, *Rules of Procedure for the GEF Council/*11, May 2004, *at* <https://www.thegef.org/publications/rules-procedure-gef-council> (accessed 18 November 2017).

[26] Broughton *Id*, 21; Global Environment Facility, GEF, Rules of Procedure for the GEF Council *Id*, 16.

[27] Broughton *Ibid*; Global Environment Facility, GEF, Rules of Procedure for the GEF Council *Id*, 7.

[28] *Ibid.*

(OPS) of the GEF every four years, in time for the replenishment round, as well as yearly Annual Performance Reports (APR) and *ad hoc* studies.[29]

II. Global Environment Facility Funding Priorities and Guidelines

The GEF finances the additional or incremental costs involved in converting a national scale project into a concern that has global environmental benefits.[30] Incremental Costs is the difference in cost between a project with global environmental benefits and an alternative project without such global benefits. To be taken into consideration for GEF finance or GEF grants, a project proposal has to fulfil the following project selection criteria:

1. It is undertaken in an eligible country;
2. It is consistent with national priorities and programs;
3. It addresses one or more of the GEF Focal Areas, improving the global environment or advancing the prospect of reducing risks to it;
4. It is consistent with the GEF operational strategy;
5. It seeks GEF financing only for the agreed-on incremental costs on measures to achieve global environmental benefits;4
6. It involves the public in project design and implementation; and
7. It is endorsed by the government of the country in which it will be implemented.[31]

The GEF raises and gathers money through a process of replenishment rounds. Every four years, coinciding with GEF Assembly meetings, donor countries pledge money to the GEF for a period of four years, until the next replenishment round.[32] To access these funds, countries must submit project proposals and for every $1 invested, GEF expects at least $3 of co-financing, which varies based on the project themes and country of implementation.[33] A History of GEF Replenishments is shown below:

Pilot Phase (1991-1994)	$1.00 billion
GEF-1 (1994-1998)	$2.023 billion
GEF-2 (1998-2002)	$2.075 billion
GEF-3 (2002-2006)	$3.000 billion
GEF-4 (2006-2010)	$3.135 billion
GEF-5 (2010-2014)	$4.340 billion
GEF-6 (2014-2018)	$4.43 billion

There are four types of grants allocated through the GEF: 1. PDF (planning) Grants, 2. Full Project Grants, 3. Medium-Size Grants, and 4. Small Grants. The PDF Grants are used to support the short-term preparation of full project proposals for the inclusion in

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[29] *Ibid.*

[30] See United Nations Digital Repository – Economic Commission for Latin America and the Caribbean, Acquatella, J, Carlos, DM, and Barcena Ibarra, A, *Financing for Sustainable Development in Latin America and the Caribbean*/ 10-11, October 12 2001, *at* <repositorio.cepal.org/handle/11362/22569> (accessed 18 November 2017).

[31] The Global Environment Facility (GEF) Trust Fund, *supra* nt 14.

[32] Broughton, *supra* nt 23, 28.

[33] Mava Foundation, Gobin, C, and Landreau, B, *Innovating Conservative Finance in West Africa and the Mediterranean*, *at* <fr.mava-foundation.org/wp-content/uploads/2017/02/MAVA_Innovating ConservationFinance_VF-31Janv2017-v2-1.pdf> (accessed 18 November 2017).

GEF work programmes. Once a potential project has been identified it usually needs further preparation before a full project proposal can be developed. Funding to assist with project preparation is available through the GEF Project Preparation and Development Facility (PDF) which has three funding categories known as 'blocks'. Block A funds (up to $25,000) are be available at very early stages of project identification. Block B (up to $350,000) are to be used for completing project proposals and preparing necessary supporting documentation. Finally, Block C funds (up to $1 million) are available for large scale projects to complete technical design and feasibility studies. Each block has its own documentation requirements and approval levels.[34]

Full Project Grants are for longer-term projects costing more than US $1 million. They are mainly provided to governments following an incremental cost approach. However, NGOs and other nongovernmental entities are eligible for consideration as executing agencies, provided that the host government endorses the project.[35] Medium-Size Grants (MSG) are available for longer-term projects costing between $50,000 and $1 million.[36]Governments, local community organizations, NGOs and academic institutions are eligible to apply. For MSPs to be eligible, they must (i) be based on the national priorities of the country in which they are to be conducted, (ii) coincide with the GEF's operational strategy and operational programmes, and (iii) be endorsed by the host country or countries.[37]

The Small Grants Programme (SGP) is created for projects costing up to $50,000. The SGP is designed exclusively to support projects implemented by community-based organisations and NGOs for activities that address local problems related to the GEF focal areas.[38] These programmes are managed by National Coordinators–either an NGO representative or an official based in the local UNDP office. National Coordinators are supported by National Selection Committees composed of other NGO representatives, as well as government and UNDP representatives. The latter two act as observers but participate when requested by the Committee's NGO members. These National Selection Committees review and approve Small Grant Project proposals for inclusion in the national GEF/SGP work programme.

The principal objectives of the SGP are to:

> 1. Demonstrate community-level strategies and technologies that can contribute to reducing threats to the global environment if they are replicated over time;
> 2. Draw lessons from community-level experience and support the spread of successful community-level strategies and innovations among community groups and NGOs, host governments, GEF, development aid agencies and others working on a larger scale;
> 3. Build partnerships and networks of local stakeholders to support and strengthen the capacities of community groups and NGOs to address environmental problems and promote sustainable development.[39]

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[34] Cohen and Burgiel, *supra* nt 5; Global Environment Facility, *The Project Development and Preparation Facility (Council Meeting*, February 22-241995, *at* <thegef.org/sites/default/files/council-meeting-documents/GEF.C.3.JointSummary_5.pdf> (accessed on 19 November 2017).

[35] *Id,* 13.

[36] The April 1997 GEF Council Meeting approved a Medium-Size Projects Programme (MSP).

[37] Cohen and Burgiel, *supra* nt 5, 34; GEF. July 1997. Global Environmental Facility: Medium-sized Project Kit.

[38] Cohen and Burgiel, *supra* nt 5, 13, 38.

[39] *Ibid,* 13.

III. Strengths of the Global Environment Facility System

A. A Financing Mechanism for Multilateral Environmental Conventions

One of the core strengths of the GEF is its role as a financing mechanism for several multilateral environmental conventions that span most global environmental issues.[40] The grouping of a number of different environmental treaties under the same financial mechanism has the potential to help address cross-cutting issues and avoid transferring negative environmental impacts between focal areas. Since, for example, deforestation impacts both climate change and biodiversity, the GEF could increase the effectiveness of all treaties by addressing them under one umbrella. Similarly, in the ozone focal area, the goal of reducing and eliminating the use of ozone depleting substances could contribute to reducing climate change since many ozone depleting gases are also potent greenhouse gases.[41]

The GEF serves as a financing mechanism for the Convention on Biological Diversity (CBD), the United Nations Framework Convention on Climate Change (UNFCCC), the Stockholm Convention on Persistent Organic Pollutants (POPs), and the United Nations Convention to Combat Desertification (UNCCD). It operates consistent with the guidance provided by the Conference of the Parties (COP) to the conventions. In October 2013, the international community adopted the Minamata Convention on Mercury, a global legally binding instrument, and agreed on the GEF's role as a financial mechanism for the new convention. The GEF also provides resources under the Montreal Protocol for economies-in-transition that are dealing with ozone depleting substances. Since its inception, the GEF has implemented its International Waters Program, which aims to improve the management of transboundary freshwater resources and large marine ecosystems. It has also provided funding to projects that generate multiple environmental benefits and that are consistent with the objectives of the United Nations Forum on Forests (UNFF).[42]

The GEF is versatile and adapts to changing challenges. A number of new programmatic areas have been added to the GEF over time. For example, sustainable forest management that benefits the agenda of the United Nations Forum on Forests was added in 2007. In 2010, with the assistance of several contributors, the GEF established the Nagoya Protocol Implementation Fund (NPIF) to specifically support the access and benefit-sharing objectives under the Convention on Biological Diversity. In parallel, as the case for considering adaptation and resilience grew stronger, at the request of the parties to the UNFCCC, two new funds were established under GEF purview, centred on funding climate change adaptation activities, the Least Developed Countries Fund and the Strategic Climate Change Fund.[43] The GEF has also played a key role in helping to harmonise work on the chemicals and waste conventions.[44]

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[40] Global Environment Facility, *GEF 2020 Strategy-Global Environment Facility*/11-12, *at* <thegef.org/sites/default/files/publications/GEF-2020Strategies-March2015_CRA_WEB_2.Pdf > (accessed May 25 2017).

[41] The Global Environment Facility, Horta, *supra* nt 4.

[42] Global Environment Facility, *GEF 2020 Strategy-Global Environment Facility*/11-12, *supra* nt 40.

[43] Moreover since 2008, the GEF has also been providing secretariat services to the Adaptation Fund, which was established under the Kyoto Protocol.

[44] Global Environment Facility, GEF 2020 Strategy-Global Environment Facility/11-12, *supra* nt 40.

B. The GEF Coordinates Bilateral and Multilateral Efforts and is an Embodiment of a Global Bargain

The GEF has been a mechanism that catalyses coordination between bilateral and multilateral agencies when it comes to sharing knowledge of project pipelines in each country and focal area as well as at the strategic level of policy and programming. Although duplication of effort by the World Bank and UNDP was a serious problem at the beginning of the GEF's operational phase in 1994, joint pipeline reviews by all agencies reduced that problem. The GEF also offers a framework for broader consultation and cooperation among multilateral agencies on strategic approaches to programming in or across focal areas. For example, the GEF Focal Area Task Forces brings together GEF Secretariat specialists and representatives of the GEF agencies to discuss the strategic and effective allocation of GEF resources. This coordination mechanism does not eliminate the tendency toward competition among the GEF agencies but it does harness their common interest in using GEF funds to reduce threats to the global environment.[45]

Moreover, the GEF represents a hard-won bargain between donor and developing countries over priorities, programming strategies and specific project and program choices. Although neither group of states has been entirely happy with the result, one must nevertheless recognize that the GEF structure, as well as its operational principles, is the result of a continued balancing act between the interests of both sets of countries. GEF programming involves a reconciliation of the interests and views of the participants of the Rio Conventions, including both the host and recipient countries.[46] The GEF Council offers the opportunity for donor country representatives to meet every six months to discuss policy and strategy for using their contributions to fund measures that address global environmental concerns. Indeed, Council meetings have provided opportunities for wider consultations among donors, recipient countries, multilateral agencies and the NGO community.[47]

C. Transparency and Inclusiveness

A chief strength is the GEF's strong, diverse and expanding network of implementing partners. Initially, the GEF was designed as a partnership between the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), and the World Bank Group (WBG) each acting as implementing partners in accordance with their comparative strengths. In the early 2000s, seven new agencies were added to the GEF partnership, thus, significantly broadening the GEF's technical expertise and implementation capacity and providing recipient countries with a broader array of choices when they implement GEF-funded projects. Since 2012, the GEF has undertaken a process to accredit additional project agencies.[48]

GEF programming is bolstered by a well-established institutional setup and an inclusive, equitable and transparent governance structure. When it was established in the early 1990s, their governance structure set a new standard, because the GEF Council has an equal number of seats for developing and developed countries. Progressively, many

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[45] World Wildlife Fund/Heinrich Boll Stiftung, Porter, G, et al., *New Finance for Climate Change and the Environment*, 15 July 2008, *at* <odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3882.pdf> (accessed on 19 November 2018); Global Environment Facility, Porter, G, et al., *Study of GEF's Overall Performance*, 1998, *at* <gefieo.org/sites/default/files/ieo /evaluations/ops1. pdf > (accessed on 19 November 2017).

[46] *Ibid*.

[47] *Ibid*.

[48] Global Environment Facility, *supra* nt 40.

GEF recipient countries are also becoming donors to the facility, thus, enhancing the overall ownership of the GEF's priorities and programmes. All project documents that face decision by the Council are at present being made available on the GEF website, along with other information.[49] It maintains a comprehensive project database, where information on all projects that have been approved for funding (and those that have been cancelled) is accessible. The GEF operates with a relatively high degree of transparency, making most documentation on its operations and decisions publicly available, including through its website.[50] Accountability is enhanced by the Independent Evaluation Office (IEO), which reports directly to the Council and provides ongoing monitoring and evaluation of project outcomes. In addition, GEF is advised by the standing Scientific and Technical Advisory Panel (STAP), which consists of world-class scientists and covers all GEF focal areas. The GEF applies best-practice fiduciary standards and has established high standards for environmental and social safeguards, gender mainstreaming, and engagement with civil society organizations and indigenous peoples.[51]

The GEF has a record of delivering good results on the ground. Reports by the IEO repeatedly show that GEF projects deliver benefits. Most recently, the Overall Performance Study for GEF-5 (OPS-5) concluded that GEF projects are effective in producing outcomes: more than 80% of completed projects during GEF-5 received an outcome rating of at least moderately satisfactory, exceeding the international benchmark of 75%. Consequently, OPS-5 concluded that the GEF is achieving its mandate and objectives and is relevant to the conventions and to regional and national priorities. Recent assessments conducted by key bilateral agencies also showed that the GEF delivers value for money invested.[52]

The GEF was the first financial institution to formally engage NGOs in its operations. NGOs are formally represented within the GEF through the GEF/NGO network, which is made up of 18 members, representing 15 regions and three representatives from Indigenous Peoples' Organizations, and coordinated by a focal point. At present, there are over 400 accredited NGOs. Observers can provide written inputs into the work programme of the fund. Furthermore, they select regional representatives who are invited to participate in Council meetings where they can make inputs at the invitation of the chair. Likewise, there is a one-day meeting with the GEF/NGO network alongside all meetings of the GEF council to create a platform for deliberation and debate. NGOs participate in the fund in a range of ways, including as project implementers. Indeed, some major international NGOs have recently been accredited as executing entities of the GEF. This has resulted in a diversity of interests and drivers for NGO participation in the GEF.[53]

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49 *Id,* 13.

50 Nakhooda, and Forstater, *supra* nt 3, 15.

51 Global Environment Facility, *supra* nt 40.

52 *Ibid*; UK Government/Department for International Development (DFID), *Multilateral Aid Revie*w, March 2011, *at* <gov.uk/government/publications/multilateral-aid-review> (accessed on 19 November 2017); Australian Government/ Department of Foreign Affairs and Trade, *Australian Multilateral Aid Assessment*, March 2012, *at* <dfat.gov.au/about-us/publications/Pages/ australian -multilateral-assessment-ama-full-report.aspx> (accessed 19 November 2017).

53 Nakhooda, and Forstater, *supra* nt 3.

IV. Challenges of the Global Environment Facility System

A. Rises in Global Environmental Issues and Low Level of Funding by Donor Countries

The past decade has seen a rise in the significance of global environmental issues on the political agendas of many countries. Proposed policies have not only attempted to address the environmental implications of greenhouse gas mitigation and climate change adaptation but have also become linked to energy and infrastructure issues through international economic, trade and geopolitical concerns. To address these issues, governments have begun to incorporate many global environmental objectives into their sustainable growth and development strategies. Funding for these activities has increased, and various institutional responses for this extensive portfolio are under consideration.[54]

Thus, the amounts needed to address global environmental issues are extremely high. In the climate change sector, where a number of reports on the costs of addressing climate change have been produced, bringing back global CO2 emissions to current levels by 2050 requires an estimated $17 trillion in additional investment in the energy sector between now and 2050. Therefore, any impression that the GEF would be able to solve global environmental problems on its own needs to be qualified immediately.[55] Indeed, GEF was created as a 'catalyst' for taking measures to confront global environmental challenges and is not aimed specifically at countering global threats. This serves to show that the logic underlying GEF, namely how a minimal incremental grant financing may result in 'multi-state investment for transformational change', could indeed be faulty.[56]

More so, GEF has a difficult standing among some of its 177 members. Resistance to its work originates from both camps.[57] Whereas some of its sponsors have repeatedly failed to meet their funding obligations, some of the recipients resist the increasing scope of the Facility's activities and are unwilling to distribute funds among too many focal areas.[58] In light of this opposition, some critics have voiced doubts about the Facility's innovative impulses. Consequently, it has been posited that the GEF has to make considerable co-coordinative efforts in order to preserve a reasonably peaceful working relationship between implementing agencies and associated organizations; a role, which does not grant much leeway for supporting experimental or cutting-edge projects.[59]

B. The Changing Role of Multilateral Development Banks in Environmental Funding

Multilateral Development Banks (MDBs) are key actors in the global system of environmental financing. Some have argued that, as commercial lending institutions, they dispense funds more efficiently than many institutional programmes, such as the GEF. However, as primary mechanisms for economic development, their past

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54 Lattanzio, *supra* nt 12, 10.

55 Broughton, *supra* nt 23; International Energy Agency (IEA), *Energy Technologies Perspective,* 2008, *at* <iea.org/Textbase/npsum/ETP2008SUM.pdf> (accessed on 19 November 2017); Global Environment Facility Evaluation Office, *Fourth Overall Performance Study*, 17 July 2008, *at* <issuu.com/gefieo/docs/2010_ops4_progress_toward_impact> (accessed 19 November 2017).

56 Lattanzio, *supra* nt 12, 10—11.

57 Donor/developed countries and recipient/developing countries.

58 Stephan, HR, and Zelli, F, *The Role of International Organizations in Global Environmental Governance* (Routledge 2009); DeSombre, ER, *Global Environmental Institutions* (Routledge 2006).

59 Stephan, and Zelli, *Ibid*; Young, Z, *A New Green Order? The World Bank and the Politics of the Global Environment Facility* (Pluto Press 2002).

environmental lending practices have demonstrated perceived conflicts of interest.[60] Objectives began to shift in 2005 when MDBs were encouraged by G-8 leaders to play a more leading role in sustainable development and environmentally friendly technologies.[61] Since this time, MDBs have launched many new initiatives to address the environment, including efforts to:

(1) Account for GHG emissions and improve energy efficiency;
(2) Support renewable energy;
(3) Manage forests sustainably;
(4) Promote carbon finance; and
(5) Adapt to climate change.

GEF programmes now find themselves in competition with many of the new initiatives in MDBs' portfolios.[62]

C. Increases in New Bilateral, Multilateral, and Private Funding Mechanisms Resulting from Slowness of GEF Project Initiation and Implementation

Despite the significant financial flows that are channelled through the GEF, one of the main criticisms is the complex and cumbersome project cycle which involves several stages of review and approval by the implementing agencies and other GEF bodies and can take up to 22 months for approval.[63] For example, GEF's two-layer structure means that all funding must be approved twice, by GEF itself and the relevant GEF Agency, leading to inefficiencies.[64] The length of the activity cycle can be attributed to the number of actors involved in it. Applicants have to go through the procedures of both the GEF and the agencies that have been chosen as their Implementing Agencies (IAs), while their projects must also follow COP directives. This leads to certain administrative tasks, such as the preparation of evaluation papers and all report papers, to have to be done twice. This set-up also means that the activity cycle may be disrupted by incongruent procedures between the GEF and the IAs. Poor connections between the time-bound GEF decision points and the Agency cycles are a major cause of delays. The complexity

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[60] The development portfolios of most MDBs strongly emphasize a bias toward conventional fossil fuel power generation and infrastructure loans that often worked counter to environmental aims (e.g.: The World Bank loaned more than $2.5 billion for conventional power projects in 2005 compared to $109 million for renewable energy or energy efficiency). See Porter et al., *supra* nt 45.

[61] See International Finance Cooperation/ World Bank Group, *Catalyzing Private Investment for a Low Carbon Economy: World Bank Group Progress on Renewable Energy and Energy Efficiency in Fiscal 2007*, 2007, *at* <ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site_sustain ability-at-ifc/publications/publications_report_catalyzingprivateinvestment__wci__1319578638 519> (accessed at 19 November 2017); See the Gleneagles Plan of Action at the 2005 G-8 Meeting in Gleneagles, Scotland. It should be noted that the portfolios of many MDBs still retain significant provisions for conventional power and infrastructure projects as compared to most bilateral environmental aid, albeit with a greater ratio of renewable and efficiency resources than in the past. See Hicks, RL, et al., *Aid: Understanding the Environmental Impact of Development Assistance* (Oxford University Press 2008).

[62] Lattanzio, *supra* nt 12.

[63] Friedrich Ebert Stiftung/ International Policy Analysis, Johl, A and Lador, Y, *A Human Rights-based Approach to Climate Finance/* 8, 2012, *at* <ciel.org/Publications/ClimateFinance_Feb2012. pdf> (accessed on 19 November 2017); World Resources Institute, Ballesteros, A, et al., *Power, Responsibility and Accountability: Re-thinking the Legitimacy of Institutions for Climate Finance/* 32, 2010, *at* <wri.org/sites/default/files/pdf/power_responsibility_accountability_executive_summ ary.pdf> (accessed on 19 November 2017); See GEF (Global Environment Facility), GEF Project Cycle (GEF/C.31/7 and GEF/C.31/7/Corr1, June). Washington, D.C.: GEF. 2007)

[64] Lattanzio, *supra* nt 12, 10-12.

of procedures also slows down the project cycle. Indeed, actors dealing with the GEF have trouble knowing what actions they are supposed to take, at what point in the activity cycle, and how such actions should be formulated. This problem has been compounded by the fact that guidelines for procedures within the GEF change frequently.[65] More so, GEF's lack of legal status (the trust is held by the World Bank) prevents it from disbursing funding directly to countries with a one-step approval process.[66]

As a result, many donor governments believe that the existing environmental finance system has not produced satisfactory results. In searching for new and effective approaches to environmental funding, donors have sought options that can be organized quickly, administered directly and be demonstrated to produce a more significant impact on the environment. Many have turned to highly specified multilateral programmes, bilateral or even private sector measures to accomplish these aims and no fewer than 15 environmental finance mechanisms have been announced since 2007.[67]

Additionally, developed countries seem to be looking for alternatives to the GEF in their actions towards the management of global environmental issues.[68] In particular, they were at the root of the World Bank's Climate Investment Funds (CIFs),[69]which was launched at the Gleneagles G8 summit under the impulsion of the United Kingdom and whose activities 'overlap substantially' with those of the GEF.[70] It was stated that the financial commitment signalled by the UK was conditional to the new funds being nested specifically within the World Bank, rather than the GEF.[71] Also, when the decision was taken to create the Adaptation Fund (AF)[72] within the United Nations Framework

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65 Broughton, *supra* nt 23, 67; Global Environment Facility Evaluation Office, *Joint Evaluation of the GEF Activity Cycle and Modalities*, 2007, *at* <gefieo.org/sites/default/files/ieo/evaluations/gef-activity-cycle-modalities.pdf> (accessed on 19 November 2017); Global Environment Facility/Office of Monitoring and Evaluation of the Global Environment Facility, *OPS3: Progressing Towards Environmental Results – Third Overall Performance Study of the Global Environment Facility*/55, 2005, *at* <gefieo.org/sites/default/files/ieo/evaluations/ops3-executive-version.pdf> (accessed 19 November 2017).

66 Lattanzio, *supra* nt 12.

67 *Id*, 11.

68 For example, while the GEF may play a significant role in the future, there is widespread skepticism, particularly in some developed countries, about using it to channel vastly scaled-up climate funds as part of a future international regime. See Council on Foreign Relations, / International Institutions and Global Governance Program, Michonski, K, and Levi, MA, *Harnessing International Institutions to Address Climate Change*, March 2010, *at* <iadb.org/intal/catalogo/PE/2010/05037.pdf> (accessed 19 November 2017) 7.

69 The CIFs comprise the Clean Technology Fund and the Strategic Climate Fund. The Climate Investment Funds were set up within the World Bank as interim financial mechanisms to serve until an agreement on the post-Kyoto governance architecture for climate change has been signed. They are to provide additional grants and concessional funding to developing countries, to address urgent climate change challenges. See World Bank, Climate Investment Funds, at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTCC/0,,contentMDK:21713769~menuPK:4860081~pagePK:210058~piPK:210062~theSitePK:407864,00.html (accessed 29 November 2017) 7.

70 Porter et al., *supra* nt 45, 9.

71 Broughton, *supra* nt 23, 56.

72 The Adaptation Fund (AF) was established in 2001 under the Kyoto Protocol to finance adaptation projects in developing countries that are parties to it. The fund is to be financed with a 2% share of the proceeds from activities within the clean development mechanism (CDM). It will also receive funds from other sources. (The CDM allows countries with emission reductions under the Kyoto Protocol to implement emission-reduction projects in developing countries, and gain emissions credit from it.) The GEF provides secretariat services to the AF, while the World Bank serves as its trustee. It is managed by the Adaptation Fund Board (AFB), under the authority and guidance of the UNFCCC. See

Convention on Climate Change (UNFCCC), developing countries lobbied, through the G77+China, to prevent the GEF from becoming its operating entity. The most frequent justifications invoked were the difficulty in accessing GEF funds, the complexity of its governance structure compared to the establishment of direct access of eligible Parties to Adaptation Funds (AFs), and the desire to 'give developing countries a more direct and equitable voice in how funds are prioritized and spent' by exempting the fund from the decision-making procedures of the GEF.[73] GEF is in competition with many of these budding initiatives for a share of environmental funding.[74]

D. Difficulties in Defining and Calculating 'Incremental' and 'Additional' Costs

As stipulated in the GEF Instrument, grants cover the 'incremental'[75] or 'additional' cost of 'transforming a project with national benefits into one with global environmental benefits'. GEF finances the incremental and additional costs involved in converting a national scale project into a concern that has global environmental benefits.[76] Incremental cost calculations have also been used as preference in project selection. While the concept of incremental cost is an essential element for GEF funding, no proper guidance is provided to Multilateral Environmental Agreements (MEAs) or other interested stakeholders on how to effectively develop proposals on that basis.[77] Historically, GEF's implementing agencies have had difficulty producing a coherent methodology for calculating incremental cost, slowing the rate of project development.[78]

Every project proposal presented to the GEF had to provide a calculation of its estimated incremental costs. Such a concept was problematic from the onset. While useful in political terms, it did not make much sense in practical ones. It has been noted that the concept of incremental costs is fundamentally an international cooperation tool and, as such, should not be used as scientific guidance.[79] As early as the Pilot Phase, Mohammed El-Ashry, then GEF CEO, stated that 'there are many instances where it is difficult to distinguish global and national environmental benefits', just as there are many

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Government of the Republic of South Africa/ Department of Environmental Affairs, *United Nations Framework Convention on Climate Change (UNFCCC) Adaptation Fund*, 2017, *at* <environment.gov.za/projectsprogrammes/donorfunded/unfccc#adap tationfund> (accessed 12 August 2017).

73 Broughton, *supra* nt 23, 55; Oxford Institute for Energy Studies, Müller, B, and Winkler, H, *One Step Forward, Two Steps Back? The Governance of the World Bank Climate Investment Funds* /3, February 2008, *at* <oxfordenergy.org/wpcms/wp-content/uploads/2011/01/Feb-2008 Govern anceoftheWorldBankClimateInvestmentFunds-BenitoM%C3%BCllerandHaraldWinkler.pdf> (accessed on 19 November 2017); Engineering News, Spadavecchia, OS, *New $500m fund to help developing countries adapt to climate change,* 11 December 2007, *at* http://www. engineeringnews. co.za/article/new-500m-fund-to-help-developing-countries-adapt-to-climate-change-2007-12-11 (accessed 19 November 2017).

74 Lattanzio, *supra* nt 12, 11.

75 It is noteworthy that this guideline has been criticized as failing to address 'the underlying political causes of environmental degradation in developing countries'. See DeSombre, *supra* nt 58, 160; See also, Abbott, KW, and Gartner, D, The Green Climate Fund and the Future of Environmental Governance (Earth System Governance Working Paper No. 16. Earth System Governance Project 2011), 5, *at* <https://papers.ssrn .com/ sol3/papers.cfm?abstract_id=1931066> (accessed 22 November 2017).

76 See Congressional Research Service, Lattanzio, *supra* nt 12, 12.

77 Inomata, T, and Cazeau, JW, Post-Rio+20 Review of Environmental Governance within the United Nations System (United Nations, Geneva 2014) 51, *at* <https://www.unjiu.org/en/ reports-notes/JIU%20Products/JIU_REP_2014_4_English.pdf> (accessed 22 November 2017).

78 Lattanzio, *supra* nt 12.

79 Broughton, *supra* nt 23; Labbate, G, "The Incremental Cost Principle and the Conservation of Globally Important Habitats: A Critical Examination" 65 *Ecological Economics* (2008) 216—224.

instances where it is difficult to separate global and national causes of environmental degradation and to determine a global or a national level of action.[80] In a 1998 study, recipient governments 'lodged strong complaints about Incremental Costs, either in terms of its lack of clarity or the process by which it is decided'. Respondents stated that the incremental costs concept was 'meaningless', that it leads to arbitrary and manipulative changes in project activities and that it was so frustrating that people 'do not want to apply to GEF'. Others complained the incremental costs calculations were 'unilaterally determined' by Implementing Agencies.[81]

For example, would recipient nations have cleaned up dumpsites leaching pollutants on their own as part of a national waste management or clean water strategy? Or is the chemical mess dumped by transnational corporations a global problem and the responsibility of donors? The dichotomization of benefits inherent in the incremental costs calculation has continued to fuel tensions between Implementing Agencies and governments to this day. Evaluators have recommended a 'negotiating framework to reach agreement' on the definition and use of the incremental cost concept.[82]

The incremental cost tool, by its nature, is biased towards technological, market-based solutions. It is much easier to quantify benefits from technology transfer projects than from approaches that cannot easily be priced or measured. Projects that emphasize low cost technology or indigenous knowledge, local stewardship or public education all create global environmental benefits (and domestic ones too), but don't fit nicely in the incremental cost formula. Under the new Persistent Organic Pollutants (POPs) focal area, for example, cost effective options, including integrated pest management, are not technically eligible for funding. These techniques, which avoid chemicals, are often low-tech and familiar. The cost of adopting them can be less than the continued use of toxic pesticides. As a result, their incremental costs are negative and technically cannot be funded by the GEF.[83]

Further, technologies are usually directed at proximate rather than root causes of environmental destruction. The GEF funds the conversion from one powerful ozone depleting-substance to a less potent one, but it will not fund a final conversion to ozone-safe alternatives. Nowhere does the GEF address the issues of consumption that fuel the need for these environmental harmful substances. Sustainability to the GEF is viewed as financial sustainability – will the projects survive; will the initiative make money? The assumption that one conserves biodiversity not for the inherent values of species and habitat protection, but to make money from it has caused no end to difficulties for the GEF and done little good for conservation.[84]

E. Unsuccessful History of Leveraging the Private Sector

For compelling reasons, the private sector is of a high priority in addressing global environmental challenges. The private sector dominates the socioeconomic sphere and, therefore, limited public sector resources need to be used most effectively to redirect private sector activities toward environmentally sustainable approaches. Private

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80 *Id,* 69.

81 Horta, *supra* nt 4; The World Bank, Porter, Clemencon, R, Ofosu-Amaah, W and Phillips, M, *Study of GEF's Overall Performance/70-71*, 1 January 1998, *at* <documents.worldbank.org/curated /en/400381468179941343/Study-of-GEFs-overall-performance> (accessed 19 November 207).

82 *Id,* 13; Global Environment Facility. *Second Overall Performance Study of GEF/60*. October 2002, *at* <www.thegef.org/council-meeting-documents/second-overall-performance-study-gef-0> (accessed 19 November 2017).

83 *Ibid.*

84 *Id,* 14.

enterprises, which are the dominant source of economic activity, must be encouraged to pursue commercially viable activities that also generate global environmental benefits. An advantage of the GEF compared with other institutions lies in its ability to provide grant funding that can be targeted to provide much-needed enabling policy support that can reduce investment risks, thereby helping to alleviate systemic barriers to private investment.[85]

However, while GEF has long recognized a need to mobilize investment resources in the private sector, successful collaboration may require a degree of experience and commitment that GEF cannot achieve under its existing structure. The length and uncertainty inherent in the GEF project cycle may make participation less attractive to the private sector, and the organisation's emphasis on government entities at the expense of forming relationships with investors and manufacturers may serve as a further impediment.[86] The Fifth Overall Performance Study of the GEF noted that the GEF's ability to engage the private sector has diminished as a result of the resource allocation system.[87]

V. Positioning the Global Environment Facility for Greater Effectiveness: The Need to Address the Drivers of Environmental Degradation

The GEF is mandated to finance incremental costs, i.e. new and additional funding that would not have been provided by other sources. This guideline has been criticised as failing to address 'the underlying causes and drivers of environmental degradation'.[88] The 2020 vision for the GEF is set to be a champion of the global environment, building on its role as a financial mechanism of several multilateral environmental conventions (MEAs), supporting transformational change, and achieving global environmental benefits on a larger scale. To achieve this vision, the GEF needs to address the drivers of environmental degradation by proactively seeking interventions that focus on the underlying driving forces of global environmental degradation and support coalitions that bring together partnerships of committed stakeholders around solutions to complex environmental challenges.[89]

It has been posited that the GEF can enhance environmental benefits by addressing the drivers of environmental degradation. Environmental degradation drivers arise from the supply and demand of goods and services, which in turn generate environmental pressures that directly affect the state of the environment. To illustrate, efforts to prevent biodiversity loss can happen at multiple points in the causal chain. For instance, rising demand for beef may result in added pressure to clear land for pastures, leading to further deforestation, soil degradation, and biodiversity loss. Focusing more on upstream drivers in this same problem would enable the GEF to deliver cascading global environmental benefits down the causal chain, thereby progressively reducing the impacts of the original driver and increasing the overall benefits of interventions. By addressing environmental degradation at a systemic level, the need for subsequent remedial action – which is often much more expensive, if not impossible – would also be reduced.[90]

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85 Global Environment Facility, *supra* nt 40, 30.
86 Lattanzio, *supra* nt 12.
87 OPS5 Fifth Overall Performance Study of the GEF, *supra* nt 9, 6.
88 Stephan and Zelli, *supra* nt 58, 8; DeSombre, *supra* nt 58, 160.
89 Global Environment Facility, *supra* nt 40, 15.
90 *Id,* 17—18.

One of the most serious criticisms of the GEF's Biodiversity portfolio raised by a 2002 study was that the projects fail to address the underlying causes of biodiversity loss. Conserving an area of biodiversity will have limited long-term impact if economic, political and social issues threatening species and habitats are not addressed concurrently. While the GEF was never designed to address underlying issues, such as the need for land reform, unsustainable pressure on natural resources and global and local market pressures to destroy wildlife, its projects fail in part because these issues are not being addressed elsewhere. The GEF's Governing Council does not challenge the often anti-environmental priorities of its donor governments or the World Bank, the International Monetary Fund (IMF) and the World Trade Organization (WTO). The WTO fosters an export-led development model that puts immense pressure on natural resources in Global South countries. For example, the Structural Adjustment Programmes (SAPs) that was imposed upon the South as conditions for both new loans and debt relief by institutions, including the World Bank and International Monetary Fund call for increased exports to generate foreign exchange to service debt.[91]

Southern countries' greatest exports tend to be raw natural resources including timber, oil and natural gas, minerals, cash crops and fisheries. SAP pressures result in the acceleration of resource extraction and commodity production that are not ecologically sustainable. Deforestation, land degradation and desertification, soil erosion and salinization, biodiversity loss, increased production of greenhouse gases, increase in water-borne disease, the flooding of productive land and air and water pollution are but a few of the long-term environmental impacts that can be traced to the imposition of Structural Adjustment Programmes. In addition, SAPs-induced government cutbacks mean less money for the development and enforcement of environmental regulations, as well as the removal of food and agricultural subsidies that protect the poor. Additionally, a large proportion of GEF spending flows back to the Global North through procurement contracts.[92] In 1997, for example, the value of GEF procurement contracts sourced from all recipient countries was equivalent to what was sourced from the US and UK alone.[93]

Addressing drivers of environmental degradation will help the environmental conventions to better achieve their goals with support from the GEF as their financial mechanism. Conventions and recipient countries recognize that a focus on underlying drivers is critical for their long-term success. For example, the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets (collectively, the Aichi Targets), in reflecting on the status of the previous 2010 targets, both emphasize that 'there has been insufficient integration of biodiversity issues into broader policies,

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[91] Horta, *supra* nt 4, 12; McCormick, J, *Comparative Politics in Transition* (7th ed, Cengage Learning 2010), 426; See News Rescue, *How the IMF-World Bank and Structural Adjustment Programme (SAP) Destroyed Africa*, May 26, 2009, *at* <newsrescue.com/how-the-imf-world-bank-and-structural-adjustment-programsap-destroyed-africa/#axzz4ysHkZZp0> (accessed 10 August 2017); News Rescue, *IMF Forces African Nations to Remove Fuel Subsidie*s, January 1, 2012, *at* <newsrescue.com/imf-forces-african-nations-to-remove-fuel-subsidies/#axzz4ysHkZZp0> (accessed 19 November 2017); Centre for Economic and Policy Research, Naiman, R, and Watkins, N, *A Survey of the Impacts of IMF Structural Adjustments in Africa: Growth, Social Spending, and Debt Relief/1-5,* April 1999, *at* <cepr.net/documents/publications/debt_1999_04.htm> (accessed 19 November 2017); Pambazuka News, Dembele, DM, *The International Monetary Fund and World Bank in Africa: A 'disastrous' record*, September 23 2004, *at* <pambazuka.org/governance/international-monetary-fund-and-world-bank-africa-disastrous-record> (accessed 19 November 2017).

[92] Horta *supra* nt 4, 13

[93] *Ibid*; Global Environment Facility, Summary Report of the Co-Chairs Planning Meeting for the Second GEF Replenishment, March 12 1997, *at* <thegef.org/sites/default/files/council-meeting-documents/C.9.Inf_.6_5.pdf> (accessed 19 November 2017); McCormick, *supra* nt 91; News Rescue, *supra* nt 91; Naiman and Watkins, *supra* nt 91.

strategies, programmes and actions, and therefore the underlying drivers of biodiversity loss have not been significantly reduced'. The strategic plan also noted that among the multiple entry points that need to be pursued to achieve a positive outcome by 2020 is 'action to address the underlying causes of biodiversity loss, including production and consumption patterns, by ensuring that biodiversity concerns are mainstreamed throughout government and society'.[94]

Similarly, reducing Green House Gas (GHG) emissions, for instance, sufficiently to achieve 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' will not be possible without influencing the underlying drivers that stem from the growing demand for energy and without reducing fossil fuel-based energy production in favour of renewable energy. Similarly, in the chemicals and waste area, to ultimately reduce the production and use of harmful chemicals would require a focus on supply chain management and production techniques.[95]

Altering demand toward more sustainably produced goods and services is an important avenue to reducing environmental degradation. Although the GEF has a range of tools at its disposal in this regard, more needs to be done. These tools include certification standards for consumer goods, such as those the GEF supports through the Rainforest Alliance and private sector partners.[96] They also include the introduction of a system of payment for ecosystem services (PES), which corrects distortions that would otherwise lead to unsustainable resource use and depletion of natural capital and incentives that reinforce the value of ecosystem goods and services. The GEF has been a pioneer and has committed significant seed funding to these schemes in several countries. Moreover, innovative financing models, such as partial risk guarantees, can help stimulate demand for more energy-efficient equipment in both households and industries and can facilitate more sustainable production and consumption of goods and services.[97]

Additionally, a key priority for the GEF will be to help change the production of goods and services in a manner that reduces or eliminates adverse impacts on the environment. Although the GEF has made some positive input in this respect, more work remains to be done. GEF's input in this area is comprised of: promoting a range of experiences in the supply of environmentally sustainable goods and services, including introducing standards for electricity consumption in households and industry appliances (as in the GEF's en.Lighten Project), improving agricultural practices to preserve soil health and, thereby, enabling food security (as in the GEF-supported project in Senegal's Groundnut basin), eliminating the use of persistent organic pollutants in economic processes (such as the use of DDT in the production of the pesticide Dicofol in China), and helping to reduce the threat of invasive species in marine ecosystems through strengthened regulation of shipping ballast water. The GEF also aims to continue

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[94] Global Environment Facility *supra* nt 40, 19; Convention on Biological Diversity, *Strategic Plan for Biodiversity 2011–2020*, *at*< cbd.int/sp/default.shtml> (accessed on 19 November 2017); Convention on Biological Diversity, *Aichi Biodiversity Targets*, *at* <cbd.int/sp/targets/default.shtml> (accessed on 19 November 2017). This priority is also reflected in the Aichi Target's Strategic Goal A, 'Address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society.' A number of targets under Strategic Goal B "Reduce the direct pressures on biodiversity and promote sustainable use") support focusing on sustainable production in agricultural production (including fisheries).

[95] GEF 2020-Global Environment Facility, *supra* nt 40, 19; Article 2, UN Framework Convention on Climate Change (1992) A/RES/48/189.

[96] GEF 2020-Global Environment Facility *supra* nt 40, 19.

[97] *Ibid.*

exploring options for working across entire supply chains and focusing on industry-wide approaches.[98]

Critically, addressing drivers of environmental degradation has the potential to deliver integrated solutions. Many global environmental challenges are interlinked and share common drivers. Biodiversity loss, climate change, ecosystem degradation, and pollution often share common drivers and may demand coordinated responses. For example, unsustainable agricultural production contributes approximately one-quarter of global Greenhouse Gas (GHG) emissions. Likewise, it is a leading cause of hypoxia in aquatic systems and it can cause deforestation and habitat destruction, thus, prompting further loss of biodiversity. By targeting key drivers, the GEF can magnify the effects of its investments, making them add up to more than the mere sum of their parts. Interdependence between environmental challenges is an additional reason for considering integrated approaches. For example, ecosystem degradation may happen faster as a result of vulnerabilities created by climate change. Research suggests that combined effects markedly increase the probability that critical thresholds of irreversible change will be crossed faster than predicted for each factor separately.[99]

Conclusion and Future Outlook

The Global Environment Facility (GEF) is today an important factor in the field of environmental governance. It remains the operating entity for the financial mechanisms of a number of Multilateral Environmental Agreements (MEAs), establishes a crucial source of money and technical assistance projects to countries with scarce capacities, and it provides an important learning and meeting ground for all actors involved in the financing of global environmental protection. However, these responsibilities are being overshadowed by the efficiency and financial challenges faced by the GEF, as well as by the blurring of the facility's comparative advantage over other donors. The latter phenomenon is aggravated by the proliferation of initiatives in the international environmental governance field,[100] particularly in relation to international environmental financing.

The main challenge seemingly affecting the GEF today and which appears to take over from the efficiency issue since it emerged in the past couple of years is relating to the definition of the GEF's role in the changing international environmental governance (IEG) architecture. Solving the efficiency issue is part of the answer to this challenge, for the GEF can only be useful if it is efficient enough. In order to be effective and attractive to users,[101] the GEF cannot continue to operate in the same way as it did in the past. It must be more adaptable, flexible and innovative, and that means shedding the legal and institutional rigidities that have constrained it. This, however, is not the complete answer; the question of the GEF's role in today's international environmental governance (IEG) needs to be tackled.[102]

Consequently, GEF's vision for 2020 seeks to address the efficiency challenge and clarify GEF's role in the international environmental governance arena particularly, as it relates to international environmental financing. It states that the 'vision for 2020 is to be a champion of the global environment by creating partnerships and strategically investing in solutions that:

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98 *Id*, 19—21.

99 *Ibid*, 22; Scheffer, M et al., "Early-Warning Signals for Critical Transitions" 461 *Nature International Journal of Science* (2009), 53-59, *at* <nature.com/articles/nature08227> (accessed 19 November 2017).

100 *Ibid,* 95.

101 *Ibid.*

102 *Ibid,* 75.

> A) Address the underlying drivers of global environmental degradation. With an emphasis on driver-focused solutions, we will be able to address the root causes of environmental degradation at local, national and international levels, while still addressing important environmental pressures where critical for the delivery of global environmental benefits. We will give preference to proactive over reactive approaches, with a view to enhancing our impact.
> B) Innovate and achieve global environmental benefits at scale. Our funds should be invested in projects that are highly innovative and have the potential to be scalable across multiple countries and regions, rather than a one-off project in a country. These projects should also aim to stimulate policy, market or behavioural transformations. While working at the individual country level, we will focus on how countries actions can be scaled up to create spill over that have larger regional and global environmental benefits.
> C) Deliver the highest impact, cost-effectively. We must focus on maximizing the global environmental benefits we can create with our funds by identifying cost-effective solutions to global environmental challenges.[103]

Although the 2020 vision of the GEF is laudable for having the potential of repositioning the GEF at the forefront of international environmental financing, it can only be achieved with support from governments at all levels and stakeholders in the field of international environmental governance particularly. This is because it relates to international environmental financing. This paper, therefore, defends the view that political support from governments at all levels, improved financial support from donor countries and organisational and institutional support from other environmental-based institutions and non-governmental organisations should be given to the GEF to enable it to fulfil its mandate of global environmental protection through environmental protection financing. These recommendations, if adopted, will surely strengthen and reposition the GEF as a central player in the field of international environmental financing and help to address the numerous pressing global environmental challenges more effectively.

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[103] Global Environment Facility, *GEF 2020 Strategy Paper for the Global Environment Facility (DRAFT),* 4 September 2013, *at* <thegef.org/documents/gef-2020-strategy-paper-global-environment-facility-draft-0> (accessed 19 November 2017).

Provisional Measures and the *Jadhav* Case

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Keywords
PROVISIONAL MEASURES, *PRIMA FACIE* JURISDICTION, PRESERVATION OF RIGHTS, URGENCY.

Abstract

The *Jadhav* Case is an interesting case which, besides adding to a discernible frequency of provisional measures disputes in international litigation, brings to the fore at least two aspects of particular importance: the evolution of the jurisprudence of the International Court of Justice (ICJ/Court) on the prerequisites for its indication of provisional measures and a noticeable break from the past in India's well-known attitude to adjudication of its disputes by the Court, particularly its disputes with Pakistan. This is not to underestimate the significance of human rights considerations that underlie the case. India's approaching the Court in this case seems to be an act of pragmatism dictated by domestic considerations rather than a general change in its attitude to adjudication of its disputes by the Court. Thus, nothing contrary to international law or jurisdictional bases of the Court may be inferred for or against India from its approaching the Court in this case. While the real motives behind India's Application may have been quite different, this is undoubtedly a positive development in international law, much of whose preoccupation critically remains the peaceful settlement of disputes, as a corollary to the *jus cogens* nature of its prohibition of the threat or use of force in international relations. This is even more important when seen in light of the fact that both India and Pakistan are declared nuclear weapons states with only India having a declared 'no-first-use' policy.

Introduction

The Indian national, Mr Kulbhushan Sudhir Jadhav, was arrested by Pakistan on 3 March 2016.[1] On 25 March 2016, India made the first of its thirteen unsuccessful requests to Pakistan for consular access.[2] Pakistan acknowledged that Mr Jadhav was an Indian national in its *note verbale* of 23 January 2017.[3] On 21 March 2017, Pakistan informed India that consular access to Mr Jadhav would be considered 'in the light of' India's response to its request for assistance in the investigation against him in Pakistan.[4] India protested this on 31 March 2017. On 10 April 2017, Pakistan informed India that Mr Jadhav had been sentenced to death following a Court Martial due to activities of 'espionage, sabotage and terrorism'.[5] On 8 May 2017, India approached the ICJ, alleging persistent violations by Pakistan of the Vienna Convention on Consular

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1 India's Application Instituting Proceedings, 08 May 2017, at 4 [India's Application].

2 *Ibid*.

3 *Ibid*.

4 *Id*, 6.

5 *Id,* Annex: Press Statement by Mr. Sartaj Aziz, Adviser to the Prime Minister on Foreign Affairs on 14 April 2017.

Relations of 24 April 1963 (Vienna Convention).[6] By a letter dated 9 May 2017 addressed to the Prime Minister of Pakistan, the President of the Court, exercising the powers conferred upon him under Article 74(4) of the Rules of Court,[7] called upon the Pakistani Government, pending the Court's decision on the request for the indication of provisional measures, 'to act in such a way as will enable any order the Court may make on this request to have its appropriate effects'.[8] Later, on 18 May 2017, by way of indicating provisional measures, the Court ordered

> 'Pakistan shall take all measures at its disposal to ensure that Mr Jadhav is not executed pending the final decision in these proceedings and shall inform the Court of all the measures taken in implementation of the present order.'[9]

The *Jadhav* Case is an interesting case which, besides adding to a discernible frequency of provisional measures cases in international litigation,[10] testifies to a noticeable political shift in India's strategy to approach the Court in relation to its neighbour Pakistan, which became an independent country after partition of the British India in 1947. The ICJ is no exception to provisional measures, which are a common feature of national and international judicial procedures. Article 41 of the Statute empowers the Court 'to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.' The Court's jurisprudence shows a general consistency in its essential approach with some variations of form in particular cases. Accordingly, Part II discusses the requirement of the existence of a dispute, Part III focuses on the issue of *prima facie* jurisdiction, Part IV deals with the consideration of preservation of rights, Part V is on the question of the risk of irreparable prejudice, Part VI is on urgency, and finally part VII concludes.

I. The Existence of a Dispute between India and Pakistan

The Applicant, India, argued that the dispute submitted to the Court arises out of the interpretation and application of the Vienna Convention and lies within the compulsory jurisdiction of the Court under Article 1 of its Optional Protocol Concerning the Compulsory Settlement of Disputes.[11] During the hearing, India added that the issues of

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[6] ICJ, *Jadhav Case (India v. Pakistan), Provisional Measures*, Order of 18 May 2017, paras 49–56, *at* < icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf> (accessed 19 November 2017) (Jadhav Provisional Measures Order). This was the second time that India approached the Court. See International Court of Justice, *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, ICJ Reports 1972, 46.

[7] Article 74 (4) of the Rules of Court, "the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."

[8] *Jadhav Provisional Measures Order*, para 8.

[9] *Id*, para 61 "[I]t is crucial that such measures should operate directly where the preservation is required", Campbell McLachlan, "The Continuing Controversy over Provisional Measures in International Disputes", *7 International Law FORUM du droit international 5 (2005) 14.*

[10] See, for instance, the *Enrica Lexie* case between India and Italy currently on merits before the Permanent Court of Arbitration.

[11] India's Application, *supra* nt 1, at 1. The provision states: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

violation by Pakistan of the rules of international law led to the dispute.[12] The counsel for India elaborated

> 'disputes have arisen between India and Pakistan when India asserts, and Pakistan presumably would deny, violations of the Vienna Convention. These disputes would relate, if not entirely, substantially to the interpretation of the Vienna Convention and to its application to the facts of the case.'[13]

Pakistan, on the other hand, contended that Article 36 (1) of the Vienna Convention could not have been intended to apply to persons suspected of espionage or terrorism and that there can therefore be no dispute relating to the interpretation or application of that instrument in the present case.[14] The Court ascertained whether, on the date of India's Application, such a dispute existed between the parties.[15] Referring to the Indian position that Mr Jadhav be given consular assistance, and the stand of Pakistan that such assistance would be considered in the light of India's response to its request for assistance, the Court *prima facie* gathered the existence of 'a dispute between Indian and Pakistan as to the question of consular assistance under the Vienna Convention with regard to the arrest, detention, trial and sentencing of Mr. Jadhav.'[16]

Thus, the existence of a dispute was a requirement for the assumption by the Court of its jurisdiction in the case. Inherent in this requirement is some necessity of prior diplomatic negotiations for the identification by the parties of issues of facts and law.[17] If the correspondence between India and Pakistan is anything to go by, there is ample evidence of the fulfilment of the requirement of the existence of a dispute under the Vienna Convention.[18]

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[12] Statement by India's Deputy Agent, Verbatim Record, International Court of Justice, 15 May 2017, para 2.

[13] Statement India's Counsel, Verbatim Record, International Court of Justice, 15 May 2017, para 44.

[14] *Jadhav Provisional Measures Order*, para 24.

[15] *Id,* para 28.

[16] *Id,* para 29.

[17] Rosenne, S, *The Law and Practice of the International Court, 1920–2005* (Kluwer 2006) 1154.

[18] Further, see Permanent Court of International Justice, *Mavrommatis Palestine Concessions (Greece v Britain),* PCIJ Series A, Judgement No 2, 30 August 1924, para 11; Permanent Court of International Justice *Factory at Chorzów (Germany v Poland)* Interpretation of Judgements No 7 and 8, Judgement No 11, PCIJ Series A, paras 10-11; International Court of Justice, *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* ICJ Reports 1962, 328 (Preliminary Objections, Judgement); International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria),* Preliminary Objections, Judgement, ICJ Reports 1998, 297, para 39 and 322, para 109; International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* ICJ Reports 2011 (I), 84, para 30, 94, para 51, 95, para 53 (Preliminary Objectons, Judgement); International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* ICJ Reports 2012 (II), 443–445, paras 50–55; International Court of Justice, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* Preliminary Objections, Judgment of 17 March 2016, para 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase,* Advisory Opinion, ICJ Reports 1950, 74, and paras 71-73); International Court of Justice, *Obligations Concerning Negotiations Relating to the Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India), Jurisdiction of the Court and the Admissibility of the Application*, 5 October 2016, para 38.

II. *Prima facie* Jurisdiction

The standard of determining the requirement of jurisdiction for adjudication of a request for provisional measures is somewhat different, at least less rigorous, than that of determining the requirement of jurisdiction for deciding on the merits.[19] Thus, the Court was willing to indicate provisional measures

> 'only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.'[20]

India had sought to found the jurisdiction of the Court on Article 36(1) of the Statute of the Court and Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes,[21] which accompanies the Vienna Convention, on Consular Relations.

The second limb of the Court's enquiry was whether the dispute between the parties was one over which it might have a subject-matter jurisdiction under Article I of the Optional Protocol.[22] The Court noted that the acts alleged by India were capable of falling within the scope of Article 36(1) of the Vienna Convention, which guarantees the right of the sending State to communicate with and have access to its nationals in the custody of the receiving State,[23] and the right of its nationals to be informed of their rights.[24] The Court considered that the alleged failure by Pakistan to provide the requisite consular notifications with regard to the arrest and detention of Mr Jadhav, as well as the alleged failure to allow communication and provide access to him, appeared to be capable of falling as a subject matter within the scope of the Vienna Convention.[25]

The Court next enquired whether espionage or terrorism afforded any exception to the applicability of the Vienna Convention as Pakistan had alleged that Mr Jadhav was involved in espionage and terrorists activities.[26] The Court found that the Convention contains no such express provisions that excludes from its scope persons suspected of espionage or terrorism.[27] The final issue, having a bearing on the issue of *prima facie* jurisdiction, was of the relevance of the 2008 Agreement between India and Pakistan, [28] which the latter had relied on to argue against the jurisdiction of the Court. The Court was of the view that it need not decide at the provisional measures stage of

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[19] On provisional measures, see generally, Mendelson, M, "Interim Measures of Protection in Cases of Contested Jurisdiction", 46 *British Yearbook of International Law* (1972–1973), 259; Collins, L, "Provisional and Protective Measures in International Litigation", 234 *Recueil des Cours* (1992), 9; Rosenne, S, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2004); Miles, CA, *Provisional Measures before International Court and Tribunals* (Cambridge University Press 2017).

[20] *Jadhav Provisional Measures Order*, para 15; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation),* Provisional Measures, 19 April 2017, para 17.

[21] See http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf (accessed 25 November 2017).

[22] *Jadhav Provisional Measures Order*, para 30.

[23] Sub-paragraph *(a)* and *(c)* of the Vienna Convention.

[24] Sub-paragraph *(b)* of the Vienna Convention.

[25] *Jadhav Provisional Measures Order*, para 30.

[26] India's Application, *supra* nt 1, Annex 2, Communication from the Pakistan Ministry of Foreign Affairs, 23 January 2017.

[27] *Jadhav Provisional Measures Order*, para 32.

[28] Agreement on the Consular Access between the Government of the Islamic Republic of Pakistan and the Government of the Republic of India, 2008, < treaties.un.org/Pages/showDetails.aspx?objid=08000002804b7dde > (accessed 12 November 2017).

the proceedings 'whether Article 73 of the Vienna Convention would permit a bilateral agreement to limit the rights contained in Article 36 of the Vienna Convention.'[29] The Court noted that the 2008 Agreement does not limit those rights.[30]

The requirement of *prima facie* jurisdiction for indication of provisional measures is reasonable in the sense that the parties are not restrained by a court or tribunal when there is 'some plausible likelihood that it will in fact be in a position to deal with the merits of the dispute.'[31] The standard of determining *prima facie* jurisdiction[32] has been greatly influenced by the ICJ's jurisprudence.[33] There is *prima facie* jurisdiction where 'there is nothing which manifestly and in terms excludes the Tribunal's jurisdiction'[34] and where the subject-matter of the dispute relates to the convention's 'interpretation or application', the existence of *prima facie* jurisdiction is reasonably established.[35] Furthermore, while a subsequent agreement, such as the 2008 Agreement, is in principle admissible in the interpretation of a prior agreement,[36] the terms of the 2008

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29 *Ibid*.

30 *Ibid*.

31 Mensah, TA, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)", 62 *ZaöRV* (2002), 44 <zaoerv.de/62_2002/62_2002_1_a_43_54.pdf> (accessed 20 November 2017); ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)* ICJ Reports 1972, 17 August 1972, 30, para 16; International Court of Justice, *Nuclear Tests (Australia v. France)* ICJ Reports 1973, 22 June 1973, 99, para 13; International Court of Justice, *Aegean Sea Continental Shelf (Greece v. Turkey),* ICJ Reports 1976, 11 September 1976, 3 and ICJ, *Military and Paramilitary Activities in and Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1984, 10 May 1984, 1; International Court of Justice, *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* 1 ICJ Reports 1993, 3, para 14; International Court of Justice, *Vienna Convention on Consular Relations (Paraguay v. United States of America)* ICJ Reports 1998, Order of 9 April 1998, 248, para 8; Addo, MK, and Evans, MD, "Vienna Convention on Consular Relations (*Paraguay v. United States of America*) and LaGrand (*Germany v. United States of America),* Applications for Provisional Measures", 48 *International and Comparative Law Quarterly* (1999) 673–681.

32 "[B]efore prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded", *M/V "Saiga" (No. 2)*, ITLOS Case No. 2, Provisional Measures, 11 March 1998, para 29.

33 It has been stated that "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be established." International Court of Justice, *Legality of Use of Force (Yugoslavia v United States of America),* Order of 2 June 1999, ICJ Reports 1999, 2 June 1999, 916, 923, para 20 (*Yugoslavia v US*).

34 Permanent Court of Arbitration (PCA), *MOX Plant Case,* Order No. 3, 24 June 2003, para 14 (*MOX Plant PCA*).

35 International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) Provisional Measures*, ICJ Reports 2008, Order of 15 October 2008, 353, para 117. See also International Court of Justice, *Legality of Use of Force (Yugoslavia v United States of America),* ICJ Reports 1999, 2 June 1999, 916, 923, para 21.

36 On subsequent agreement, see generally International Law Commission Guide, < legal.un.org/ilc/guide/1_11.shtml> (accessed 9 October 2017); International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)* ICJ Reports 2009, 213 and 242, para 64; Murphy, SD, *The relevance of subsequent agreement and subsequent practice for the interpretation of treaties*, (Oxford University Press 2013), 89–90; Simma, B, *Miscellaneous thoughts on subsequent agreements and practice* (Oxford University Press 2013), 47; Alvarez, J, *Limits of change by way of subsequent agreements and practice*, in Treaties and Subsequent Practice, Nolte, G, ed. (Oxford University Press 2013), 130.

Agreement were not found by the Court to restrict, at the provisional measures stage, the rights conferred by the Vienna Convention on Consular Relations.[37]

III. Preservation of the Rights of the Parties

Preservation of the respective rights claimed by the parties during pendency of a decision on the merits of the case is the object of the power of the Court under Article 41 of the Statute.[38] In this respect, the Court needs to be convinced that the rights asserted by the party requesting provisional measures are plausible, i.e. the rights which may subsequently be adjudged by it to belong to either party.[39] As the party requesting provisional measures, India asserted that the rights it is seeking to protect are those provided by paragraph 1 of Article 36 of the Vienna Convention. This provision contains the right of communication and access, the basic principle governing consular protection.[40] Thus, all State parties to the Vienna Convention have a right to provide consular assistance to their nationals who are in prison, custody or detention in another State party and are entitled to respect for their nationals' rights contained therein.[41]

India claimed that its national, Mr Jadhav, was arrested, detained, tried and sentenced to death by Pakistan and that, despite its several requests, India was not given access to him. India pointed out that on 21 March 2017 Pakistan stated that 'the case for the consular access to the Indian national Kulbushan Jadhav shall be considered in the light of India['s] response to Pakistan's request for assistance' in the investigation process concerning him. India argued in this connection that the conditioning of consular access on assistance in the investigation was itself a serious violation of the Vienna Convention.[42] Pakistan contested that it had conditioned consular assistance and averred that the rights invoked by India were not plausible because Article 36 of the Vienna Convention did not apply to persons suspected of espionage or terrorism and because the situation of Mr Jadhav was governed by the 2008 Agreement.[43]

The Court observed that at the provisional measures stage, it is not required to determine definitively whether the rights, which India wishes to see protected, exist. It only needs to decide whether these rights are plausible.[44] The Court considered that, at the provisional measures stage of the proceedings where the parties had advanced no legal analysis on these questions, Pakistan's arguments did not provide a sufficient basis

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37 *Jadhav Provisional Measures Order*, para 33. Further, see generally Merrills, JG, "Interim Measures of Protection and the Substantive Jurisdiction of the International Court", 36(1) *Cambridge Law Journal* (1977) 86–109; Peter, J, and Bernhardt, A, "The Provisional Measures Procedure of the International Court of Justice through US Staff in Tehran*: Fiat Iustitia, Pereat Curia*", 20 *Virginia Journal of International Law* (1980) 557–613, 575 *et seq.*

38 *Jadhav Provisional Measures Order*, para 35.

39 *Ibid.* Further, see International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation),* Order of 19 April 2017, para 63. Further, see Buys, CG, "Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*)", 103 *American Journal of International Law* 294–299 (2009), 296.

40 *Jadhav Provisional Measures Order*, para 38, quoting *LaGrand,* ICJ Reports 2001, 492, para 74.

41 *Jadhav Provisional Measures Order*, para 39.

42 *Id,* para 40.

43 *Id,* para 41.

44 *Id*, para 42. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation),* Order of 19 April 2017, para 64.

to exclude the plausibility of the rights claimed by India.[45] Further, the Court noted that Pakistan did not challenge India's submissions that its national Mr Jadhav was neither afforded access nor informed of his rights of consular assistance.[46] The Court therefore found India's rights to be plausible.[47]

Since provisional measures are properly sought for the preservation of the rights of the parties, the plausibility of those rights becomes a relevant consideration.[48] The requirement of the plausibility of the rights also underlies the ICJ's practice on provisional measures,[49] which means that the rights asserted by the applicant merit judicial recognition.[50] The plausibility requirement is now firmly rooted in the ICJ's jurisprudence on the indication of provisional measures.[51]

Furthermore, in advancing the claim of *restitution in integrum* by declaring that the sentence of the military court violated international law, India had argued that Pakistan was in defiance of basic human rights of an accused which are also to be given effect as mandated under Article 14 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[52] There is no trace in the Order of the Court applying considerations of humanity otherwise than stating that all state parties to the Vienna Convention are entitled to respect for their nationals' rights contained therein.[53] Nonetheless, this is not the first case in which considerations of humanity were affirmed.[54] '[T]he evolving jurisprudence on provisional measures shows a growing tendency to recognise the human realities behind disputes of states.'[55] Recently, in the *Enrica Lexie* Case, both the International Tribunal for the Law of the Sea (ITLOS)[56] and the Arbitral Tribunal[57] took human rights considerations into account in prescribing provisional measures. The Inter-American Court of Human Rights (Inter-American Court) noted that Article 36 of the Vienna Convention serves a dual purpose,

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45 *Jadhav Provisional Measures Order*, para 43.

46 *Id*, para 44.

47 *Id*, para 45.

48 See also Article 290(1) of the United Nations Convention on the Law of the Sea, 1982.

49 International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures*, ICJ Reports 2009, Order of 28 May 2009, 139, 151 (*Belgium v Senegal*). Further, see ICJ, *Certain Activities Carried Out by Nicaragua in Border Area* (*Costa Rica v Nicaragua*), *Provisional Measures Order*, 8 March 2011 paras 53–54 *at* <icj-cij.org/docket/files/150/16324.pdf> (accessed 19 November 2017) ("[T]he Court may exercise this power [to indicate provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible."). But see the separate opinion of Judge Koroma, para 12 *at* < icj-cij.org/docket/files/1 50/16326.pdf > (accessed 19 November 2017).

50 ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai), Provisional Measures Order*, T 33 (July 18, 2011) (declaration of Judge Koroma), *at* <icj-cij.org/docket/files/151/16564.pdf > (accessed 19 November 2017).

51 Cogan, JK, "Current Developments: The 2011 Judicial Activity of the International Court of Justice", 106 *American Journal of International Law* 586 (2012), 599.

52 India's Application Instituting Proceedings, 31.

53 *Jadhav Provisional Measures Order*, para 39. On 10 November 2017, Pakistan decided to arrange a meeting of Mr Jhadav "with his wife, in Pakistan, purely on humanitarian grounds" *at* <mofa.gov.pk/pr-details.php?mm=NTYxMg, (accessed 20 November 2017).

54 ICJ, *Corfu Channel Case (UK v. Albania)* (Merits), ICJ Reports 1949, 4, 22.

55 Higgins, R, "Interim Measures for the Protection of Human Rights", 36 *Columbia Journal of Transnational Law* (1997), 91, 108.

56 *Enrica Lexie (Italy v India) ITLOs Case No. 24, Provisional Measures*, ITLOS Order of 24 August 2015.

57 *Enrica Lexie (Italy v India) PCA Case No. 2015–28, Provisional Measures*, para 132 [Arbitral Tribunal's Order].

> 'that of recognising a State's right to assist its nationals through the consular officer's actions and, correspondingly, that of recognising the correlative right of the national of the sending State to contact the consular officer to obtain that assistance.'[58]

On the basis of the text of the Convention and its preparatory records, the Inter-American Court concluded that Article 36 'endows a detained foreign national with individual rights that are the counterpart to the host State's correlative duties.'[59] The Inter-American Court thus rejected the US argument and found that Article 36 of the Convention concerns the protection of human rights and is part of the body of international human rights law.[60] This does not, however, lead to the conclusion that provisional measures are clearly available for the protection of human rights.[61]

A. Nexus between the Rights and the Provisional Measures

Having established that it had jurisdiction in the case and the rights asserted by India were plausible, the ICJ turned to the question of whether there existed a link between the rights sought to be protected and the provisional measures requested.[62] The Court noted that the provisional measures sought by India consisted of ensuring that the Government of Pakistan would take all measures necessary to prevent Mr Jadhav from being executed before the Court rendered its final decision.[63] Since the Court considered that these measures were aimed at preserving the rights of India and of Mr Jadhav under Article 36(1) of the Vienna Convention, a link existed between the rights claimed by India and the provisional measures it had sought.[64]

The purpose of the preservation of the parties' rights is to prevent any serious prejudice to the rights of either party during pendency of the case on merits.[65] However, there must be a link between the provisional measure(s) requested and the right(s) the requesting party claims to derive from the pending judgment.[66] Also, provisional measures 'should have the effect of protecting the rights.'[67] In other words, any

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[58] The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-American Court of Human Rights, Advisory Opinion No. OC-16/99, para 45 (1999).

[59] *Id*, para 84.

[60] Further, see Aceves, WJ, "International Decisions: The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-American Court of Human Rights, Advisory Opinion OC-16-99", 94 *American Journal of International Law (2000),* 555–563. Further, see generally Allen, FC, "Human Rights and the International Court: The Need for a Juridical World Order", 35 *American Bar Association Journal* (1949), 713–749 .

[61] See for instance Duxbury, A, "Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights", 31 *California Western International Law Journal* 141–176 (2000).

[62] *Jadhav Provisional Measures Order (No 6)*, para 46, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation),* Provisional Measures, Order of 19 April 2017, para 64.

[63] *Jadhav Provisional Measures Order (No 6)*, para 47.

[64] *Id*, para 48.

[65] ICJ, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, ICJ Reports 2003, 102, para 41 and 29.

[66] *Request for Interpretation of the Judgement of 15 June 1962 in the Case Concerning Temple of Preah Vihear (Cambodia v. Thailand),* Provisional Measures, Order of 18 July 2011, para 34.

[67] *Polish Agrarian Reform and the German Minority, Interim Measures of Protection,* Order of 29 July 1933*,* PCIJ Series A/B, No. 58, 175, 177; International Court of Justice, *Passage through the Great Belt (Finland v Denmak),* Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, 12, para 16 (Great Belt ICJ

connection between the rights at issue and the requested provisional measures is not enough.

IV. Risk of Irreparable Prejudice

The ICJ has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings.[68] According to the Court, the mere fact that Mr Jadhav is sentenced to death and might therefore be executed is sufficient to demonstrate the existence of the risk of irreparable prejudice.[69]

The ground of irreparable prejudice to the rights of the parties in the assessment of whether provisional measures are called for is well-founded.[70] On this ground, the ICJ recently rejected the Congo's application[71] as it did not believe that criminal proceedings pending in France risked irreparable prejudice to the Congo's rights.[72] It

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Order). Further, see Essoff, PA, "Finland v Denmark: A Call to Clarify the International Court of Justices Standards for Provisional Measures", 15 *Fordham International Law Journal* (1991–1992), 839–878, 847 *et seq*.

[68] *Jadhav Provisional Measures Order*, para 49. Further, see International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation),* Provisional Measures, ICJ General List 166, Order of 19 April 2017, para 88. For a backgound,on the ICJ and PCIJ practice, see PCIJ, *Denunciation of the Treaty of 2 November 1865 Between China and Belgium (Belgium v China)* 1927 PCIJ Series A, No 8, 7 [(*Belgium v China* PCIJ); International Court of Justice, *Fisheries Jurisdiction (United Kingdom v Iceland; Federal Republic of Germany v Iceland),* Provisional Measures, ICJ Reports 1972, Order of 17 August 1972, 16, paras 21–22 and 22–23, respectively (ICJ Fisheries Jurisdiction); International Court of Justice, *Aegean Sea Continental Shelf (Greece v Turkey),* Provisional Measures, ICJ Reports 1976, Order of 11 September 1976, 11, paras 31–33; International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States v Iran),* Provisional Measures, ICJ Reports 1979, Order of 15 December 1979, 9, 19, 36, 37 (*Hostage Case*); International Court of Justice, *Frontier Dispute (Burkina Faso v Mali)*, Provisional Measures, ICJ Reports 1986, Order of 10 January 1986, 12, 10, para 21; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)),* Provisional Measures, ICJ Reports 1993, Order of 13 September 1993, 18, 19, 24, paras 3, 32 and 52; Oda, S, "Provisional Measures: The Practice of the International Court of Justice", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Robert Jennings* (Cambridge University Press 1996), 542; *LaGrand (Germany v United States of America) Provisional Measures*, ICJ Reports 1999 (I), Order of 3 March 1999, 9, para 22 (LaGrand); Rosenne *supra* nt 17; International Court of Justice, *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning Temple of Preah Vihear (Cambodia v Thailand),* Provisional Measures, Order of 18 July 2011; International Court of Justice, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures*, ICJ Reports 2011, Order of 8 March 2011, 6; Uchkunova, I, "Provisional Measures before the International Court of Justice", 12 *The Law & Practice of International Court and Tribunals* (2013), 391.

[69] *Jadhav Provisional Measures Order*, para 53.

[70] Permanent Court of International Justice, *Denunciation of the Treaty of 2 November 1865 Between China and Belgium (Belgium v. China)* 1927 PCIJ Series A, No. 8, 7; International Court of Justice, *Fisheries Jurisdiction (United Kingdom v Iceland; Federal Republic of Germany v Iceland) (Provisional Measures)*, ICJ Reports 1972, Order of 17 August 1972, 16, paras 21–22 and 22–23 (ICJ Fisheries Jurisdiction); International Court of Justice, *Frontier Dispute (Burkina Faso/Mali),* Provisional Measures, ICJ Reports 1985, Order of 30 December 1985, 10, para 21. See also Sztucki, J, "Case Concerning Land and Maritime Boundary (Cameron v Nigeria): Provisional Measures Order of 15 March 1996", 10 *Leiden Journal of International Law* (1997) 341–358, 352 *et seq.*; Hayashi, M, "Prescription of Provisional Measures by the International Tribunal for the Law of the Sea", 13 *Tulane Environmental Law Journal (2000)* 361–385 , 382; Kempen, B, and He, Z, "The Practice of the International Court of Justice on Provisional Measures: The Recent Development", 69 *ZaöRV* (2009) 919–929, 921.

[71] International Court of Justice, *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Provisional Measure, ICJ Reports 2003, Order of 17 June 2003, 102, para 41 (*Congo v France*).

[72] Further see *ICJ Fisheries Jurisdiction*, *supra* nt 68, 16.

was found to be central by the Annex VII tribunal in the *MOX Plant* Case.[73] Even quasi-judicial bodies have required irreparable prejudice for the indication of provisional measures.[74] A link must be established between the alleged rights, the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case.[75] Relatedly, there is evidence of varying practice on taking provisional measures to prevent aggravation or extension of the dispute.[76] However, the 'notion of aggravation seems to include a broader category of conduct than that covered by the notion of irreparable harm.'[77] The Court in this case was expressly concerned with irreparable prejudice and thus had required provisional measures to regulate a narrower category of conduct. This seems to be quite reasonable if understood *ratione temporis* in jurisdictional terms.

V. Urgency

Yet another critical consideration before the Court was urgency. The Court noted considerable uncertainty about a decision on appeal and when Mr Jadhav could be executed. Referring to Pakistan's statement that Mr Jadhav's execution would probably not take place before the end of August 2017, the Court inferred that his execution could take place at any moment thereafter and before the Court has given its final decision. Further, in the absence of any assurance from Pakistan that Mr Jadhav will not be executed before the Court has rendered its final decision, the Court was satisfied that there was urgency in this case.[78] In doing so, the Court clarified, it merely acted as an adjudicator of the rights between states and not 'as a court of criminal appeal.'[79]

Provisional measures are necessary 'if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken.'[80] However, the consideration of urgency has been stated, not in Article 41 of the ICJ Statute, but the Court's Rules.[81] ICJ Judges have formally introduced urgency,[82] although the ICJ is not

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[73] *Order No. 3*, Permanent Court of Arbitration, Order of 24 June 2003, para 58.

[74] The Rule on provisional measures of the Human Rights Committee speaks of avoiding 'irreparable damage to the victim of the alleged violation' (Rule 92/Rule 86 old). Similarly, the Rule 108(1) of the Rules of Procedure of the Committee against Torture (CAT) and Article 5 of the Optional Protocol to the Women's Convention speak of avoiding irreparable damage to the victim or victims of the alleged violations. The Committee on the Elimination of Racial Discrimination (CERD) under its Rule 94(3) of Rules of Procedure refers to avoiding 'possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation'. The African Commission also speaks of avoiding irreparable damage 'to the victim of the alleged violation'.

[75] International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) Provisional Measures*, I.C.J. Reports 2008, Order of 15 October 2008, 353, para 118.

[76] Permanent Court of International Justice, *Electricity Company of Sofia and Bulgaria, Interim Measures of Protection,* PCIJ Series A/B, Order of 5 December 1939, 194, 199; International Court of Justice, *Armed Activities on the Territory of the Congo (DRC v Uganda), Provisional Measures,* ICJ Reports 2000, Order of 1 July 2000, 111, para 44; ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay),* Provisional Measures, ICJ Reports 2006, Order of 13 July 2006, 113, paras 49–50.

[77] Palchetti, P, "The Power of International Court of Justice to Indicate Provisional Measures to Prevent the aggravation of a Dispute", 21 *Leiden Journal of International Law* (2008) 623-642, 628.

[78] *Jadhav Provisional Measures Order*, para 54.

[79] *Id*, para 56.

[80] *Great Belt ICJ Order*, *supra* nt 67, para 23.

[81] Article 74 provides, "The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency."

[82] Rosenne, *supra* nt 19, 135.

an exceptional institution requiring it.[83] Urgency relates to the imminent irreparable prejudice because 'if no irreparable prejudice is imminent[,] there is no urgency'.[84] Thus, the ICJ recently rejected the Congo's application, as noted above.[85] Also, irrespective of the formulations of the relevant legal provisions, international courts and tribunals have required a linkage between urgency and a certain nature of harm to the parties' rights for the indication of provisional measures.[86] The ICJ requires that a request for the indication of provisional measures be submitted in good time.[87]

Conclusions

The justification of guarding the rights of one party by the action of another party pending adjudication of the case on merits remains a relevant consideration in the administration of justice, and to that end, provisional measures have been reasonably termed as a general principle of law.[88] However, it is of late that provisional measures have become a conspicuously more discernible feature in the practice of judicial settlement of international disputes, perhaps due mainly to the ICJ's ruling that they have binding effect.[89]

The *Jadhav* Case is an interesting case currently under litigation between India and Pakistan before the Court. While neither provisions of law nor issues of facts would necessarily set this case apart from other cases involving provisional measures, it nevertheless brings to the fore at least two aspects of particular importance. First, the evolution of the Court's jurisprudence on the prerequisites for its indication of provisional measures, and second, a significant break from the past in India's attitude to adjudication of its disputes by the Court, particularly its disputes with Pakistan. This is not to underestimate the significance of human rights considerations that evidently underlie the case (as more recently in the *Enrica Lexie* Case between India and Italy).

Contemporary developments in judicial settlement of international disputes have influenced the evolution of the Court's jurisprudence on provisional measures which has expressly required its *prima facie* jurisdiction, something which is to be found more discernible in the jurisprudence of ITLOS and the Permanent Court of Arbitration (PCA) for being stated in the 1982 United Nations Convention on the Law of the Sea and not in the ICJ's jurisprudence for being expressly absent as a requirement from the text of the relevant Article 41 of its Statute. Indeed, the Rules of the Court are also without any express reference to the requirement of *prima facie* jurisdiction. The point is not whether a finding of *prima facie* jurisdiction is any more than a non-definitive

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[83] See for instance, Article 290(5) of the United Nations Convention on the Law of the Sea, 1982. Further, see Polymenopoulou, E, "African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures 25 March 2011", 61 *International and Comparative Law Quarterly* (2012), 767–775.

[84] Zimmerman, A, et al. eds., *The Statute of the international court of justice: A commentary* (2006), 940. See also Rosenne, *supra* nt 19, 136.

[85] *Congo v France, supra* nt 65 and *supra* nt 71.

[86] *Id*, para 35; *MOX Plant PCA*, *supra* nt 34, para 58; Permanent Court of Arbitration, *Indus Waters Kishenganga Arbitration (Pakistan v India),* Interim Measures, paras 141–45 23 September 2011, *at* <pcacases.com/web/sendAttach/1682> (accessed 19 November 2017); Ghandhi, S, "International Court of Justice—Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Provisional Measures Order of 15 October 2008", 58 *International and Comparative Law Quarterly* 713–725 (2009), 724.

[87] ICJ, *LaGrand (Germany v United States of America)* Provisional Measures, ICJ Reports 1999 (I), Order of 3 March 1999, 9, para 19.

[88] Jiménez de Aréchaga held in the *Aegean Sea Continental Shelf case* ICJ Rep 1976, 3, 15-16.

[89] ICJ, *LaGrand (Germany* v *United States of America)* (Judgment) ICJ Reports 2001, 506, para 109.

finding and the Court remains free not to exercise its jurisdiction even where it was not qualified as *prima facie* when found by the Court.

India's approaching the Court in the *Jadhav* Case seems to be an act of pragmatism dictated by domestic considerations rather than a general change in its known position on adjudication of its disputes by the Court. Thus, nothing contrary to international law and jurisdictional bases of the Court may be inferred for or against India from its approaching the Court in this case. While the real motives behind India's Application may have been different, this is undoubtedly a positive development in international law much of whose preoccupation critically remains the peaceful settlement of disputes as a corollary to the *jus cogens* nature of its prohibition of the threat or use of force in international relations. This is even more important when seen in light of the fact that both India and Pakistan are declared nuclear weapons states with only India having a declared 'no-first-use' policy.

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The Global Approach to Migration and Mobility

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Keywords
EXTERNALIZATION; EU MIGRATION POLICY; GAMM; HUMAN RIGHTS

Abstract

Since the Treaty of Amsterdam, the EU has developed several instruments delineating cooperation with third countries in the management of migration, borders and asylum in the so-called Global Approach to Migration and Mobility (GAMM). Under the 'more for more' mechanism, the EU tries to persuade third countries to strengthen their border controls, restrict their visa policy and readmit irregular migrants with incentives such as trade benefits, visa facilitation or financial support. In its Partnership Framework of 2016, the Commission announced a more pro-active approach by shifting its emphasis from the 'more for more' to the 'less for less' mechanism, including leverages and tools of all other policy areas. This article analyses the overall objectives of the GAMM (which are promoting fundamental rights and achieving an equal partnership) and the content of its four pillars. While elaborating on the potential impact on the policies in third countries and the human rights of migrants, it concludes that due to the paradoxical objectives, the cooperation has the potential to create counterproductive effects and an incoherent foreign policy. The absence of criteria on human rights for the selection of partner countries as well as the lack of a mechanism on monitoring or suspension of such cooperation lowers the chance of an adequate response in case of human rights violations. With these considerations in mind, the article explores the content and impact of the EU-Turkey deal and answers the question if it serves as a blueprint for a new generation of readmission agreements with other countries. The author concludes that due to the lack of mutual benefits and the differences in human rights standards and practices, transferring the responsibility of refugees to third countries will not prove effective and compliant with EU standards.

Introduction

During the last decades, the EU and its Member States have been struggling to 'reap the benefits and address the challenges deriving from migration', leading to a parallel development of internal and external migration policies.[1] Apart from developing common EU standards on admission and residence of third country nationals, the EU established the Global Approach to Migration and Mobility in an attempt to create a comprehensive approach to migration by involving third countries and other policy areas. However, the increasing number of arrivals of refugees in 2015 has fuelled the discussion on the effectiveness of the fight against irregular migration and the role of

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1 European Union, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, 13 May 2015, COM (2015) 240, *at* <ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf > (accessed 19 November 2017).

third countries as an indispensable link in the chain. This rethinking has led to the 'New Partnership Framework with Third countries', in addition to the GAMM framework.[2] This article sheds light on the evolution and impact of the external dimension and how it contributes to a coherent and comprehensive EU migration policy. Based on experiences with the GAMM framework, it analyses whether the cooperation with third countries on migration benefits the EU, partner countries and migrants alike.

I. Towards a Common European Asylum System

The abolition of internal border controls reinforced the need for EU Member States to create a common policy on asylum and migration. With the Treaty of Amsterdam, the EU has gained competence on establishing binding rules on border controls and the entry of third country nationals, as well as their residence rights and return.[3] The most visible strategy is the development of a European Common Asylum System, which includes standards on all stages of the asylum process: the asylum procedure, criteria for defining who is entitled to international protection, and which (social) rights are associated with the protection status. This harmonisation process was meant to prevent the need for secondary movements of asylum seekers within the EU, better known as 'asylum shopping'. The previously concluded Dublin Convention, which determined that an asylum application is only examined by one Member State, proved not to be effective as long as the chances for asylum remained so different in each country.[4] The EU standards go beyond the Member States' international obligations towards asylum seekers and refugees. In particular, the very precise and detailed procedural guarantees for asylum seekers, such as an interview, legal aid, and well-trained staff, were not laid down before in Conventions or other binding instruments. The reception conditions offer an additional important safeguard for migrants and asylum seekers alike. The added value of the Qualification Directive when compared to the Refugee Convention and the European Convention on Human Rights is that beneficiaries of international protection are entitled to a residence permit and a (almost) uniform package of rights. Although the Common European Asylum System is relatively young (the first Directive was adopted in 2004), the need for gradual harmonisation has already led to many revisions. Mid-2016, the Commission proposed to replace the Procedures Directive and the Qualification Directive by regulations COM (2016)467 and COM(2016)466. The current political climate around refugees and migrants, however, makes it hard for EU Member States to agree on a uniform policy and practice as well as on internal rules on solidarity. Since the sudden increase in the number of refugees in 2015, the prevention and combat of irregular migration to the EU is one of the scarce areas where Member States find a common ground rather easily. This may have contributed to the increasing attention on ways to avoid that refugees and irregular migrants manage to cross the EU external borders.

Parallel to the development of EU safeguards for asylum seekers and refugees, the

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2 European Union, European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, 7 June 2016, COM (2016) 385, *at* <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0385> (accessed 19 November 2017).

3 Article 62 and 63, European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (2012), C326/01.

4 The Dublin Convention was concluded outside the EU framework and entered into force in 1997 (Pb C 254, 19 August 1997). The first Dublin Regulation under the EU framework was Regulation 343/2003, the current one is Regulation 604/2013, but an amendment proposal is under negotiation.

EU also strengthened its policies in combating and preventing irregular migration. With that aim, it established a strict visa policy and a limited set of conditions for crossing the external borders of the EU and promoted the enforcement of this common border policy by strengthening the powers and means of Frontex. The EU has also involved private actors by sanctioning carriers for bringing in undocumented migrants into the EU and obliging Member States to sanction smuggling and supporting irregular residence.[5] As the EU legislators have not recognised asylum as a ground for issuing a visa, the combination of all these measures has made it difficult if not impossible for refugees to travel to the European territory in a safe and regular way. As a result, their movements to a safe haven in Europe have become longer, more perilous and expensive, bearing in mind that fortressing has pushed up the price of smuggling. This parallel development leads to the cynical conclusion that the protection standards in the EU have reached a top level, but that they only apply to refugees who first had to risk their lives to reach and enter the territory of the EU. A main reason for this is that the EU standards do not apply at the embassies of the Member States, or anywhere outside the EU.[6]

II. The Shaping of the External Migration Policy

Besides these new legal instruments and enforcement strategies to reduce the number of irregular migrants, the EU is developing strategies to persuade countries outside the EU to cooperate in curbing irregular migration to the EU. If neighbouring countries could be convinced to strengthen their border controls with the EU, it would prevent refugees from invoking the rights they have on EU territory. This is why the cooperation with third countries initially had its focus on border controls and readmission agreements.

A. Return to Home Countries

The external dimension of migration policy is not an invention of the EU: since the nineties, a comprehensive cooperation has been developed by individual EU Member States with countries of transit and origin.[7] They started negotiating readmission agreements with Central and Eastern European countries with a view to decreasing the immigration movements emerging at that time to the wider European region.[8] Readmission agreements set out that, upon application by the requesting state, without any further formalities than those specified in the agreement, the requested state must readmit any person who does not or no longer fulfils the entry or residence conditions applicable in the territory of the requesting state, on the condition that it can be proved or indicated by *prima facie* evidence that the person concerned is a national of the requested state. This implies that the sending state has first established the absence of a residence

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5 Directive 2001/51/EC of the Council of the European Union of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L187; Directive 2002/90/EC of the Council of the European Union of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L328; See European Parliament, policy department C: Citizens' Rights and Constitutional Affairs, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, 28 January 2016, *at* < europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf> (accessed 21 November 2017).

6 Article 3(2) of the Procedures Directive 2013/32 excludes the application on asylum requests made on representations of the EU Member States, Article 3 (1) of the Dublin Regulation only obliges Member States to examine asylum requests made at the border or in their territory.

7 Roig, A and Huddleston, T, "EC readmission agreements: A Re-evaluation of the Political Impasse" *9*(3) *European Journal of Migration and Law* (2007) 363-387.

8 Lavenex, S, *Safe third countries: extending the EU asylum and immigration policies to Central and Eastern Europe* (Central European University Press 1999), 76-82, 89.

right, thereby respecting its obligations deriving from international law, notably the Refugee Convention and the European Convention on Human Rights (ECHR), but also from EU law. Expulsion is therefore only admissible after the person has had the possibility to exercise his right to appeal, in accordance with articles 13 ECHR and 47 of the Charter on Fundamental Rights.[9]

Although countries have an obligation under international law to readmit their own citizens, it frequently occurs that a country of origin does not honour this obligation.[10] A readmission agreement aims to facilitate and expedite this return and, although the agreements themselves are silent on compensation, they are often accompanied by incentives for countries of origin to sign and cooperate. These incentives can be related to other migration areas, such as visas (for study and business), but also to other policy fields, such as development aid or trade preferences. With the Europeanisation of migration policies, the Justice and Home Affairs Council started to explore the possibility for the EU to use beneficial agreements in fields under EU competition and to extract cooperation from third countries on controlling migration and readmitting migrants.[11] Already before the EU had gained a formal competence on readmission with the Amsterdam Treaty (1999)[12], the Council linked objectives in the field of asylum and migration to other policy fields by incorporating readmission clauses into Community and mixed agreements.[13] Since 2000, partnership and cooperation agreements between the European Union and third countries, notably article 13 of the Cotonou Agreement, contain clauses, which demand that the parties readmit their own citizens.[14] The Treaty of Lisbon allows the EU to integrate Justice and Home Affairs issues more systematically into its foreign policy.[15] Readmission agreements negotiated under this Treaty have to be ratified by the European Parliament (Article 216). As they are not so-called 'mixed agreements', they consequently do not require separate ratification by member states' governments or parliaments. However, after the conclusion, the readmission agreements are put at the disposal of and implemented by Member States.[16]

While attributing the necessary competences in this field to the European level (shifting up), the Member States aimed to perform more powerfully in 'shifting out':

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9 ECtHR, *Gebremedhin v France*, 25389/05, 26 April 2007.

10 See Article 12.4 of the UN International Covenant on Civil and Political Rights and Protocol No. 4 to the ECtHR, Article 3, para 2.

11 Council of the European Union, PRES/93/202, 25 November 1993 and European Commission, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*. COM (94) 23 final, 23 February 1994, para 114.

12 This competence was derived from the term 'repatriation' in Article 63(3)(b) TEC, see Coleman (2009), 74.

13 Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009) 22; Council Doc. 12509/95, 8 December 1995 and 4272/96, 22 January 1996.

14 The Cotonou Agreement between the European Union and ACP (African, Caribbean and Pacific) countries was signed in 2000. Its Article 13 contains a standard readmission clause, which provides that every state party '*shall accept the return of and readmission of any of its nationals who are illegally present on the territory*' of another state party '*at that State's request and without further formalities*'. This text also makes provision for the possibility of adopting '*if deemed necessary by any of the Parties, arrangements for the readmission of third-country nationals and stateless persons*'.

15 The TFEU contains more explicit competences: Article 78(2)(g) provides a basis for concluding partnership and cooperation with third countries on asylum, Article 79(3) confers powers on the Union to conclude mobility partnerships and readmission agreements, taking shape in bilateral as well as multilateral cooperation. Article 8 TEU provides a general mandate to the EU to '*develop a special relationship with neighbouring countries'*.

16 Article 63(3)(b), European Union, Consolidated version of the Treaty of the European Union (2002) 12002E/TXT.

through a 'pooling of sovereignty', the EU has a stronger negotiating leverage than the individual Member States.[17] It allowed the Member States to make use of the Community's external powers in fields such as trade and development and their substantial accompanying budgets to serve their interests in the field of readmission.[18] Under the 'more for more' principle, negotiations with third countries on migration control include various positive incentives for transit countries (for example, trade benefits, visa liberalisation and direct financial support) to let them strengthen their border controls, restrict their visa policy and readmit irregular migrants.[19] Regarding countries of origin, the EU offers incentives not only to ensure actual returns, but also a decrease in the number of irregular departures to the EU through a variety of measures, such as improving the labour market or combatting smuggling and trafficking.

B. Return to Transit Countries

The most problematic issues deriving from the cooperation on readmission, however, do not concern the return of migrants to their home country; rather, they focus on readmission through a transit country which extended beyond the narrow meaning of repatriation as meant in Article 63(3)(b) of the Treaty of Amsterdam. EU Member States have increasingly shifted their focus to transit countries, especially to those sharing their borders with EU territory. The EU thus envisages creating a 'buffer zone' around its territory by committing its neighbouring countries to readmit migrants who have passed through them on their way to the European Union. Unlike countries of origin, a transit country does not have any legal obligation to readmit migrants simply because they have transited its territory, with or without permission. This is why the need for adequate compensation has gained importance. Not only the negotiations, but also the consequences of readmission agreements with transit countries turn out to be complicated. Considering that countries normally wish to readmit as few migrants as possible, the likely result is that those transit countries restrict their incoming and outgoing migration from neighbouring countries and to the European Union. This policy, which appears to be aimed at the prevention of applying a readmission agreement, is perhaps the actual result that finds most favour among the Member States. However, such implications also lead to at least three human rights concerns related to readmission agreements.

Firstly, although the agreements will reduce the chances for migrants to invoke human rights in the EU, readmission agreements do not include any guarantee that the transit country has a sufficient protection regime in place for asylum seekers. EU Member States invest gradually more in the asylum systems of their neighbouring countries, but readmission itself does not depend on their performances in this area. EU officials are rather reluctant to negotiate with third countries on human rights in the context of readmission agreements since the EU is the requesting party. They prefer to introduce the issue of human rights in connection with negotiations on visa rules or other instruments, whereby the EU offers incentives for which they can claim human rights

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[17] Lahav, G, and Guiraudon, V, "Comparative perspectives on border control: away from the border and outside the state" *in* Andreas, P and Snyders, T, eds, *The Wall around the West: State Borders and Immigration Controls in North America and Europe. Lanham* (Rowman and Littlefield Publishers 2000), 55-79.

[18] Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), 55; Noll, G, *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, (Martinus Nijhoff Publishers 2000), 206.

[19] See eg. the prominent references on migration and border controls "Implementation of the European Neighbourhood Policy Partnership for Democracy and Shared Prosperity with the Southern Mediterranean Partners Report", European Commission, doc. SWD (2015) 75 final, 25/03/15.

protection.[20] Safeguarding human rights could therefore be facilitated by negotiations on different topics at the same time, including readmission.

The second human rights implication relates to curtailing migration into transit countries from non-EU neighbouring states. This indirect effect of a readmission agreement may lead to migrants becoming stranded in a transit country with possibly fewer protection guarantees than offered by the partner country itself. With such countries, the EU may not have established any arrangement about access to an asylum system or rights of refugees. As an ultimate consequence, migrants may face obstacles in fleeing persecution or violence in their own country. Apart from protection concerns, this concern also shows that the chain effect can severely harm migrants' and asylum seekers' mobility opportunities, especially those from less wealthy countries.

Third, a readmission agreement obliges a transit country to readmit an undocumented migrant from the EU. However, it does not grant the means to satisfy basic needs, such as the right to housing, health care, primary education, work or social welfare. Partner countries of the EU tend to conclude readmission agreements themselves with other transit countries with a view to immediately transfer the responsibility for migrants readmitted from the EU.[21] This potential chain of transit poses a threat to the principle of human dignity as enshrined in international law, in particular if the migrant is unable to return to his home country.[22] The latter is likely to be the case: if there were no obstacles to reach the country of origin, why would the EU Member State then have returned the migrant to a transit country? When I presented my report on readmission agreements to high officials of the Member States of the Council of Europe, the countries from the receiving side expressed their dissatisfaction with the readmission obligations and clarified that their country would not offer any rights or services to the readmitted migrants.[23] This response reveals that the negotiators did not discuss or take into account the interests of the migrants subject to this cooperation since they did not coincide with the national interests the treaty parties defended in the first place. Bearing in mind the risk of a (legal) limbo situation occurring for the returnee in a transit country, the European Commission urged Member States to always give priority to returning undocumented migrants to their country of origin.[24] It is not clear to what extent the Member States comply with this principle. They at least did not follow up the

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[20] Council of Europe, Committee on Migration, Refugees and Population, Strik, T, REPORT: *Readmission agreements: a neutral mechanism or a threat to irregular migrants?*, Doc. 12168, 16 March 2010, *at* <refworld.org/pdfid/4bdadc1c3.pdf> (accessed 19 November 2017).

[21] Centre for European Policy Studies, Balzacq, T, REPORT: *The External Dimension of EU Justice and Home Affairs: Tools, Processes, Outcomes*. Doc. 303, September 2008, *at* <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.504.4430&rep=rep1&type=pdf> (accessed 19 November 2017); Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), paragraph 3.2.3.. For this reason, many readmission agreements include a clause that the obligations regarding non-citizens are only applicable after a number of years after the conclusion of the agreement. See Article 24 (3) of the readmission agreement between the EU and Turkey, OJ L 134/3, 7 May 2014.

[22] McCrudden, C, "Human dignity and judicial interpretation of human rights" 19(4) The European Journal of International Law (2008) 655-724. See the UDHR, preamble and Article 1, but more concretely related to social rights Article 22 and 23.

[23] Council of Europe, Committee on Migration, Refugees and Population, Strik, T, REPORT: *Readmission agreements: a neutral mechanism or a threat to irregular migrants?*, Doc. 12168, 16 March 2010, *at* <refworld.org/pdfid/4bdadc1c3.pdf> (accessed 19 November 2017).

[24] European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011, recommendation no. 8: *"(…). In those cases (of readmission of third country nationals, TS) the EU should also explicitly state that, as a matter of principle, it will always first try to readmit a person to his/her country of origin. The EU should also focus more its readmission strategy towards important countries of origin."*

Commission's advice to be reticent to include third country nationals in readmission agreements, given that the need for more incentives would complicate the negotiations substantially.[25]

III. Global Approach to Migration and Mobility

Statistics on the number of returns enforced with the help of readmission agreements are hard to obtain because to the extent that states assemble and publish statistics, the number of returns is not broken down by the number of those enforced under the readmission agreements. However, the available evaluations show that the actual use of readmission agreements remains rather scarce, related to arduous and time-consuming implementation (for instance, lack of evidence is perceived as an obstacle), apart from lack of willingness of the contracting parties or individual migrants.[26] Their mere existence, however, seems to serve as a catalyst for informal readmission practices, especially at the border.[27] Despite this limited success, Member States perpetuate their approach of concluding readmission agreements as a main instrument of migration management and find an explanation for this practice in their preventive effects. The complications surrounding readmission agreements have fuelled Member States' ambition to have more migration policy instruments at their disposal and offer incentives from other policy areas to gain actual cooperation from third countries. Numerous policy, legal and financial instruments have been developed, delineating cooperation with third countries in the management of migration, borders and asylum under the umbrella of a so-called 'Global Approach to Migration and Mobility' (GAMM). Apart from readmission agreements, these instruments include visa facilitation agreements, mobility partnerships and common agendas on migration and mobility, high level dialogues, joint declarations and several financial frameworks.[28] The Global Approach to Migration (GAM), established in 2005, aimed to address the root causes of migration and prioritise the rights of migrants instead of the security concerns of the Member States. In 2011, the EU inserted the term 'Mobility'. GAMM serves as a framework for dialogue and cooperation with third countries in the field of migration and development. Its structure, meant to safeguard a coherent internal and external migration policy, is characterised by four pillars, which the Commission considers to be 'equally important'.[29] These pillars are: 1) Better organizing legal migration and fostering well-managed mobility, 2) Preventing and combating irregular migration, 3) Maximising the development impact of migration and 4) Promoting international protection and enhancing the external

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[25] European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011, recommendation no. 8: "*The current approach should be revised. As a rule, future negotiating directives should not cover third country nationals, hence there would not be a need for important incentives. Only in cases where the country concerned, due to its geographical position relative to the EU (direct neighbours, some Mediterranean countries) and where exists a big potential risk of irregular migration transiting its territory to the EU, the TCN clause should be included and only when appropriate incentives are offered. (…)".*

[26] Coleman (2009) para 3.2.1; Strik (2010) para 24-26; Carrera (2016) chapter 4; European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011, para 2.

[27] Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers2009), 60, 319.

[28] CEPS, Carrera, S *et al*, *The EU's response to the refugee crisis. Taking stock and setting policy priorities*, 16 December 2015, CEPS Essay No. 20, *at* <ceps.eu/publications/eu's-response-refugee-crisis-taking-stock-and-setting-policy-priorities> (accessed 19 November 2017).

[29] European Union, European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, *The Global Approach to Migration and Mobility*, COM (2011)743, 18 November 2011.

dimension of asylum. The pillars intersect on the following two principles: first, the notion of a mutual beneficial partnership with non-EU partner countries based on equality and, second, the principle that the GAMM should be migrant-centred, since 'the migrant is at the core of the analysis and all action and that he must be empowered to gain access to safe mobility'. From this perspective, the human rights of migrants are marked as a cross-cutting issue, with the aim to strengthen 'respect for fundamental rights and the human rights of migrants in source, transit and destination countries alike'.[30] These two principles emphasise the overall aim of the GAMM to create a win-win-win situation, with benefits for EU member states, partner countries, and migrants.

One may question whether the notion of equality reflects the reality of the negotiating parties. On the one hand, the EU leverage represents a lot of power, which may lead to countries with a weaker bargaining position being 'exploited' by the returning countries. On the other hand, the Member States are the requesting party and are dependent on the cooperation of third parties, which creates opportunities for third countries to demand benefits. Their economic situation is one of determinants for their autonomy towards the EU. In any case, it is clear that the negotiating parties have different interests, which are not always easy to reconcile. In particular, the conditionality angle has raised the question of whether the dialogues truly offer 'genuine and equal partnerships'.[31] Where both negotiating parties at least have to find an agreement, the migrant as a third party is not present at the negotiation table. Their fate and rights depend on the responsibilities that the parties take. How does the EU manage to prevent or resolve tensions between those interests? The answer differs for each pillar.

V. Organising and Facilitating Legal Migration and Mobility

The M of 'Mobility' was added to connect the GAM with the EU visa policy for short stays and national policies concerning long stays.[32] The aim of this pillar is to cover all forms of mobility and to ensure conditionality between visa facilitation (or exemption) and labour migration, on the one hand, and the partner country's performance on asylum, border management and irregular migration, on the other hand. The functioning of visa facilitation as an incentive for third countries to cooperate in combatting irregular migration contradicts with its initial aim to regulate migration. It requires that Member States voluntarily give up their discretion on admission policies, since the issuance of short-term visas to migrants such as researchers, business people or students remains a matter of national sovereignty. The EU leverage, therefore, strongly depends on the 'levers' or 'carrots' that Member States are prepared to offer to the countries concerned. However, most of them apply a restrictive visa policy and practice shows that they are not ready to subordinate their discretion to achieving effective EU agreements. As far as Member States show commitments, they are vaguely formulated or based on pre-existing programmes and initiatives. European Commission officials, therefore, complain that the success of Mobility Partnerships is severely constrained by the unwillingness of the

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[30] Strik, T. "The external dimension of EU migration policy and the functioning of the conditionality mechanism in partner countries" Revista del Ministerio de Empleo y Seguridad Social 130 (2017) 45-71.

[31] Carrera, S, Den Hertog, L and Parkin, J, "The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?"15(4) *European Journal of Migration and Law* (2013) 23.

[32] European Union, European Commission*, Communication from the Commission to the European Parliament, the Council, the European Econimic and Social Committee and the Committee of the Regions, dialogue for migration, mobility and security with the southern Mediterranean countries*, COM (2011) 292 final, 24 May 2011.

Member States.[33] If they do not perform, third countries cannot be expected to offer their loyal cooperation. Thus, the 'shifting up' strategy of the GAMM remains a theoretical exercise, as in reality the states retain their sovereignty and are far from keen to widen legal channels.

Another constraining factor is that the EU mobility and migration policy primarily aims at meeting the evolving needs of the EU labour market. Legal migration opportunities are limited to highly skilled labour migrants,[34] mostly in the context of temporary or circular migration. Cholewinski concludes that this Eurocentric utilitarian approach to migration management creates a contradiction between 'rights' and 'numbers', where more open admission policies seem to inevitably result in fewer rights being protected.[35] This tendency once again questions the intended equality between countries and also reveals the absence of a coherent approach to integration and migrants' rights.

VI. Preventing and Reducing Irregular Migration and trafficking in Human Beings

The EU policy on fighting irregular immigration, strengthening border controls and ensuring readmission is the most developed pillar of the GAMM. As described before, a number of instruments of the Common European Asylum System, including carrier sanctions, Frontex (replaced in 2016 by the European Border and Coast Guard) and the digitalisation of border controls have resulted in a shifting European external border and exclusion mechanisms at several stages of immigration: from pre-departure to post-arrival.[36] The growing perception of irregular immigration as a security risk[37] is reflected by the expanding access to migration-related data bases for the purpose of crime control and security. This development can further be observed in the increasing role of surveillance technologies and private security companies in European border policies, thus, contributing to the externalisation of EU border management. The most important factor, however, is the EU's support of neighbouring countries in their border control and the fight against smuggling. Many scholars question the effectiveness of this enhanced border control, pointing to the risk that this creates new markets for smuggling. While perceiving migrants merely as a security risk, their agency, interests and rights tend to be overlooked. As migrants will try other avenues to reach their destination, smuggle trajectories will shift and, in many cases, become longer, more dangerous, and more expensive. Outsourcing enforcement on trafficking to Libya raises the danger of abuses of

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[33] Hampshire, J. (2013), Speaking with one voice? The European Union's global approach to migration and mobility and the limits of international migration cooperation, Journal of Ethnic and Migration Studies, volume 42, 4, 571-586.

[34] European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, García Andrade, P, Martín, I, Mananashvili, S, STUDY: 'EU Cooperation with Third Countries in the Field of Migration', October 2015, PE 536.469, *at* <heuroparl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> (accessed 19 November 2017).

[35] Cholewinski, R, "Labour Migration, Temporariness and Rights", *in* Carrera, S, Guild, E and Eisele, K, eds, *Rethinking the Attractiveness of EU Labour Immigration Policies. Comparative Perspectives on the EU, the US, Canada and beyond* (Centre for European Policy Studies 2014), 22-28.

[36] Den Heijer, M, "Europe beyond its borders: refugee and human rights protection"*, in* Ryan, B and Mitsilegas, V, eds, *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhof Publishers 2010), 163-194.

[37] Carling, J and Hernández-Carretero, M*, "*Protecting Europe and protecting migrants? Strategies for managing unauthorized migration from Africa" 13(1) British Journal of Politics and International Relations (2011) 42-58; Léonard, S, EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices. 19(2) European Security (2010) 231.

migrants: in past years, international agencies and rights groups have documented the horrific treatment of migrants in detention in Libya, including torture, sexual abuse, and outright enslavement. Signals that Italy pays Libyan militias that were first engaged in smuggling and trafficking themselves to stop irregular migration will increase the risk that migrants end up in the hands of criminals. Furthermore, it empowers and enriches them, enabling the militia to buy more weapons and, more so, to undermine the fragile but internationally recognised authorities in Libya. Such business inevitably turns out to be counterproductive since it makes the EU vulnerable to blackmail and, thus, to pay an endless stream of money to prevent the smugglers from taking up their activities again. This is not the first time that Italy and Europe are engaged in doubtful arrangements to prevent smuggling: until his death, Colonel Gaddafi struck deals with the Europeans for funding to crack down on trafficking. The migrant flow has, thus, long been a way for Libya to ensure aid and legitimacy from Europe.

VII. Promoting International Protection and Enhancing the External Dimension of Asylum Policy

This pillar is based on the assumption that enhanced protection in the region will reduce the (need for) forced migration to the EU. A comprehensive approach requires that investments in border control and sustainable protection are made simultaneously. After all, measures on border controls can have an immediate impact, while improvement of protection standards need long-term measures, such as capacity building, asylum legislation, and safeguards that refugees are not denied entrance. Paradoxically, evaluators conclude that human rights and reception are improved and supported on an *ad hoc* basis, whilst cooperation and funding of border controls is a structural matter.[38] The international community, including the EU and its Member States, is notorious for underperforming when it comes to funding the reception of refugees in their home regions. Organisations like the UNHCR assert that only a fraction of total funds required have ever been received and that humanitarian operations in the region are chronically underfunded.[39] As long as the countries in the region are incapable of absorbing the overwhelming bulk of the refugee population (like Jordan and Lebanon in the case of Syrian refugees), asylum seekers will continue taking great risks to reach Europe.

An absence of any issue-linkage would mean that migrants, including refugees, are stranded in a transit country without being able to turn to protecting authorities. Amnesty International reported that 'the demands being placed on third countries to prevent irregular departures to Europe put refugees, asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, *refoulement*, and ill-treatment'.[40] The focus on border controls in third countries may also impede the inflow of refugees coming from neighbouring countries who need temporary protection against suddenly escalating violence at home. The end to these life-saving short-term border crossings due to more rigid boundary regimes may be unintended; nevertheless, this undermines the

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[38] European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, García Andrade, P, Martín, I and Mananashvili, S, STUDY: 'EU Cooperation with Third Countries in the Field of Migration', October 2015, PE 536.469, *at* <heuroparl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> (accessed 19 November 2017).

[39] UNHCR, UNDP*, Lack of funding putting help for Syrian refugees and hosts at risk, as Brussels Syria Conference set to open*, 4 April 2017, *at* <unhcr.org/news/press/2017/4/58e340324/lack-funding-help-syrian-refugees-hosts-risk-brussels-syria-conference.html> (accessed 19 November 2017).

[40] Amnesty International, *The human cost of Fortress Europe. Human Rights violations against migrants and refugees at Europe's borders*, 9 July 2014, *at* <amnesty.org/en/documents/EUR05/001/2014/en/> (accessed 19 November 2017).

aimed enhancement of asylum protection. Without integrating the fight against irregular migration with enhancing regional protection, the GAMM itself may even contribute to protracted refugee situations.[41]

This raises questions about the norms applied by the EU in its foreign policy concerning protection and human rights. One would expect that after having agreed on internal common standards, the EU would use these as a reference in their external negotiations on migration as well. However, their impact is far from clear. The majority of countries the European Union is pursuing partnerships with does not (yet) have systems for handling migrants and asylum seekers or even have a notorious human rights track record.[42] Criteria for entering into cooperation on migration regarding protection standards are absent and so are human rights standards that a partner country is required to apply towards refugees and other migrants.[43] This lack of standards also complicates the employment of independent and objective evaluation systems on questions of lawfulness and the guarantee of effective access to remedies in cases of alleged violations of fundamental rights.[44] Furthermore, a suspension mechanism is lacking for situations where a transit country would fall short of crucial standards. Apart from the lack of conditionality on this issue, any other policy or strategy on how to sustainably strengthen human rights through cooperation on migration and how to reconcile a conflict of interests between human rights and border controls is failing.

The United Nations Special Rapporteur on the human rights of migrants has criticised GAMM for:

> 'lack[ing] transparency and clarity in the substantive contents of its multiple and complex elements. Additionally, many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation. Nonetheless, the European Union has continued to use the Approach to promote greater 'security'. There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies.'[45]

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41 Institute for Public Policy Research, Cherti, M and Grant, P, *The myth of transit: Sub-Saharan migration in Morocco*, 14 June 2013, *at* <ippr.org/publications/the-myth-of-transit-sub-saharan-migration-in-morocco> (accessed 19 November 2017).

42 Roig, A and Huddleston, T, "EC readmission agreements: A Re-evaluation of the Political Impasse" 9(3) *European Journal of Migration and Law* (2007) 363-387.

43 Trauner, F and Carrapiço, H, "The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification" 17(2) *European Foreign Affairs Review* (2012) 1-18.

44 CEPS, Carrera, S, *The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean: Filling the Gaps in the Global Approach to Migration*, 16 June 2011, *at* <ceps.eu/system/files/book/2011/06/No%2041%20Carrera%20on%20EU%20Dialogue%20with%20SoMed%20edited%20final.pdf> (accessed 19 November 2017); Cassarino, J, *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area* (Middle East Institute 2010); European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, García Andrade, P, Martín, I and Mananashvili, S, STUDY: 'EU Cooperation with Third Countries in the Field of Migration', October 2015, PE 536.469, *at* <heuroparl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU(2015)536469_EN.pdf> (accessed 19 November 2017).

45 UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants: Banking on*

VIII. Maximising the Development Impact of Migration and Mobility

This pillar has the primary focus on the interests of partner countries and aims to ensure that countries of origin, rather than losing brains and capacities, will benefit from their citizens' emigration. It would have offered an opportunity to compensate the partner countries and to create a genuine equal partnership, but the pillar includes the least binding measures, whose implementation is left to the Member States or respective EU funds. The permissive stance the EU takes in this regard reveals that it fails to truly recognise that only mutual beneficial agreements will prove effective. There are different perceptions of the manner in which emigration affects the economy of the countries of origin. Scholars and politicians mainly regard migration as a powerful motor for development, referring to migrants' remittances to the home communities that outweigh the budget of development aid (often estimated as three times higher),[46] diaspora's involvement in the development of their countries of origin, and migrants' return movements. Governments of developing countries, however, express their concerns about the persistent risk of 'brain drain', implicating that highly skilled people of a domestic economy are moving abroad.[47] Achieving the objectives formulated under this pillar needs at minimum a common understanding of the current and aimed impact of migration, as well as a common sense of urgency. To grow mature, the pillar needs a binding and sustainable policy and a firm linkage with the first pillar on enhancing legal migration and mobility.

IX. The GAMM: a Truly Comprehensive Approach?

This brief analysis shows that in order to avoid incoherencies between the different GAMM objectives and programmes, their implementation needs a comprehensive approach. One of the advantages would be that it forces the EU to ensure coherence with its values and principles and, therefore, to address the human rights concerns as mentioned before. Apart from the right to asylum (Article 18) and the prohibition of non-refoulement (Article 19), the EU Charter on Fundamental Rights also covers the right to human dignity in Article 1.

There is, however, a broad consensus that the policy falls short of comprehensiveness. Scholars argue that the actual policy implementation of GAMM has been clearly biased in favour of the fight against irregular migration and ensuring of return migration by means of readmission agreements.[48] The European Commission also acknowledges that 'more work needs to be done to make sure that the Migration Partnerships are being implemented in a balanced manner, i.e. better reflecting all four thematic priorities of the GAMM, including more actions with regard to legal migration, human rights and refugee protection'.[49] Theoretically, frameworks such as Mobility Partnerships are perfectly shaped to safeguard such a balance, including commitments by

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mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants, 8 May 2015, A/HRC/29/36, *at* <refworld.org/docid/5576e3ba4.html> (accessed 21 November 2017).

46 Eigen-Zucchi, C, Ratha, D and Plaza, S , *Migration and Remittances Fact book 2016: Third Edition*, (World Bank Publications 2016), page v.

47 Adepoju, A, Van Naerssen, T, and Zoomers, A, eds, *International Migration and National Development in Sub-Saharan Africa. Viewpoints and Policy Initiatives in the Countries of Origin* (Brill 2008).

48 Parkes, R. (2009). EU mobility partnerships: A Model of Policy Coordination?, *European Journal of Migration and Law*, *11*(4), 327-345.

49 European Union, European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Report on the implementation of the GAMM 2012-2013*, COM (2014) 96, 21 February 2014.

all actors involved. As these commitments are rather abstract, the real balance depends on implementation. During my fieldwork for the Council of Europe, European officials admitted the current imbalance, clarifying that the EU is hesitant to impose conditions on human rights safeguards since it lacks the leverage to do so, even in multifaceted instruments. This can be explained by the EU's adherent priority to border controls and readmission, on the one hand, and, on the other hand, Member States' reluctance to offer incentives in areas of their competences, such as visas.[50] In these circumstances, the EU remains cautious in demanding certain human rights improvements, but also in criticising partner countries for alleged human rights violations, in order to sustain their cooperative attitude. Expressing severe criticism on human rights violations by partner countries would further expose the EU to allegations that it deliberately puts migrants at risk by continuing its cooperation. At the same time, we may conclude that hesitations by partner countries to agree on human rights safeguards actually confirm the need to negotiate with them.

This broadly recognised imbalance in the current GAMM implementation poses a threat to the claim that partnerships on migration will produce win–win–win situations that will benefit the EU, partner states and the migrants themselves.[51] The notion of a migrant-centred approach may easily be subject to divergent interpretation since it has not been clearly defined in the policy documents. There is already a considerable difference between the understanding of NGOs and the Commission. Where the Commission states that 'a migrant-centred approach is about empowering migrants and ensuring their access to all relevant information about the opportunities provided by legal migration channels and the risks of irregular migration', migrant and development NGOs stress the importance of incorporating the protection of migrants' rights and their active participation in debates and decision-making.

X. Partnership Agreements: Towards Less for Less

Although these experiences create plenty of reasons for concerns and further analyses, the EU seems determined to continue the path of externalisation without thorough evaluation. The 'European Agenda on Migration' (EAM), formulated in light of Europe's migration crisis in 2015, confirms the strengthening of the outward, external emphasis of the EU's migration policy but is still based on the GAMM.[52] The Commission seems to increasingly focus on the lack of cooperation by partner countries, having launched proposals to enhance their willingness to cooperate. This rather one-sided approach contrasts with its evaluation of the readmission agreements of 2011, where it urged the Member States to review their policies and priorities.[53]

The perception of partner countries as the 'black sheep' of the external dimension is reflected in the most recent initiative of the previously mentioned 'New Partnership

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[50] Council of Europe, Committee on Migration, Refugees and Population, Strik, T, REPORT: *Readmission agreements: a neutral mechanism or a threat to irregular migrants?*, Doc. 12168, 16 March 2010, *at* <refworld.org/pdfid/4bdadc1c3.pdf> (accessed 19 November 2017); Strik, T, *supra* nt 30.

[51] CEPS, Carrera, *supra* nt 44; Lavenex, S and Kunz, R, "The Migration-Development Nexus in EU External Relations" 30(3) *Journal of European Integration* (2008) 439–457; Lavenex, S and Uçara, EM, "The External Dimension of Europeanization: The Case of Immigration Policies" 39(4) *Cooperation and Conflict* (2004) 417- 443.

[52] European Union, European Commission, *Communication from the Commission to the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda on migration,* COM (2015) 240, 13 May 2015.

[53] European Union, European Commission, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements*, COM (2011)76, 23 February 2011.

Framework' with third countries.[54] This framework aims to adopt tailor-made 'compacts' with priority partner countries in which all instruments, tools and leverage are put together 'to better manage migration in full respect of our humanitarian and human rights obligations'. Here, the principle of conditionality has been put at the centre of the policy, implying that the economic support for third countries depends on their performance on readmission and border control. The Commission considered a more proactive approach to third-country cooperation with a view to 'stemming the flow of irregular migrants' by not only offering a positive incentive for behaviour, but also by applying negative incentives. The 'more for more' principle would therefore be complemented with the 'less for less' principle and strengthened by the use of all EU policy areas, with the exception of humanitarian aid.[55] The EU has put this approach to the test while negotiating with 16 priority countries on a country package.[56] This framework is also built on the GAMM pillars; however, expressing that 'a solution to the irregular and uncontrolled movement of people is a priority for the Union as a whole'. This explicit prioritisation is likely to further increase the potential tensions with the claimed equality of the four pillars, but also with the aim of a coherent and effective EU foreign policy if it leads to a subordination of all other policy objectives. The EU's foreign policy has to serve a whole range of objectives, such as the promotion of peace and stability, economic growth, social upward mobility, and other development goals, such as combating poverty, illiteracy, and good governance, including human rights and the rule of law. Furthermore, the EU aims to foster its cooperation with third countries on other areas like trade, energy and environment. In the end, all these objectives serve the mutual interest of peace and welfare at the global level. They may not always be supportive to the objectives of EU's migration policy, but have their own value and targets. Some of these objectives may even contradict the EU migration agenda, as development may initially lead to more mobility instead of stemming migration. On the other hand, withholding aid funding as a sanction on non-cooperation on border control will affect the poorest people and therefore the aim of combating poverty. Will the EU manage to combine the prioritisation to migration with safeguarding a coherent foreign policy, with regard to its divergent objectives as well as the impact of its external actions? And if not, at what cost will the EU push its migration objectives?

XI. The EU-Turkey Deal: Blueprint for a New Generation of Readmission Agreements?

Despite numerous developments and policies on external migration policy, the traditional readmission agreement still serves as a core instrument of the external dimension of EU migration policy. Through the years, the agreement has kept up with the times by changing character when it extended the target group from 'own nationals' to 'third country nationals' (from countries of origin to transit countries) and when the EU gained the competence to conclude agreements. The most recent development is the shift in the stage of readmission: instead of status determination prior to expulsion and only rejected asylum seekers and irregular migrants being expelled, states now aim to shift out protection seekers to a transit country as early as possible in the procedure on

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[54] European Union, European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment on establishing a new Partnership Framework with third countries under the European Agenda on Migration,* COM (2016) 385, 7 June 2016, para 2-3.

[55] *Ibid*.

[56] *Ibid*. These selected countries are Ethiopia, Eritrea, Mali, Niger, Nigeria, Senegal, Somalia, Sudan, Ghana, Ivory Coast, Algeria, Morocco, Tunisia, Afghanistan, Bangladesh and Pakistan.

the basis of a 'safe third country' concept.[57] With this move, EU Member States hand over the responsibility for determining the need for protection and (if needed) the granting of it. If this concept is applied, the asylum claim is only examined on its (in)admissibility, not on the substance by a Member State.

The EU-Turkey statement of March 2016 is the first instrument, which has explicitly laid down this transfer, despite the many doubts if Turkey can be labelled as a safe third country due to its application of the geographical limitation of the Refugee Convention to Europe, its deficiencies in the asylum procedure, and the limited rights of recognised refugees.[58] By taking away the guarantee that the person to be readmitted is not in need of protection, this shift has significantly raised the human rights concerns. The EU-Turkey statement nevertheless does not impose explicit requirements to improve its protection system, to grant the returnee access to an asylum procedure in accordance with international law, and to grant refugees all the rights enshrined in the Refugee Convention. The Statement promises that the returns of migrants from Greece to Turkey 'will take place in full accordance with EU and international law, thus, excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement.[59] That the Turkish authorities do not necessarily share the interpretation of international standards by the EU was confirmed by judgments of the European Court of Human Rights, convicting Turkey of violating Article 3 ECHR as well as many reports from authoritative human rights organisations.

The 'safe third country' concept is laid down as an option in the EU Asylum Procedures Directive, but in the draft Asylum Procedures Regulation, which is currently under negotiation, the Commission has proposed it as an obligation for Member States.[60] At the same time, the proposal includes more flexible criteria for the definition of a safe third country and, for the conclusion, that the refugee has a genuine link with the third country.[61] Although the Greek judges have showed their hesitance to apply the safe third country concept to Turkey (many asylum claims are examined on the merits and returns are postponed until the Greek Supreme Court has taken a final decision), the EU considers the EU-Turkey statement to be a success as it has stopped the mass arrivals on EU territory. It is telling that the EU is not motivated to seriously monitor the situation of asylum seekers and refugees in Turkey. Once again, the preventive effects seem more relevant than the actual returns.

Since the number of departures from Libya has increased in previous years, the Member States are keen to adopt the same formula as agreed with Turkey in its relations with North African countries. Libya is known as a transit route for human trafficking and

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[57] Coleman, N, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009), 18.

[58] Zoeteweij, MH and Turhan, O, "Turkey's Role in EU Migration Law and Policy: Turkeys voting for Christmas" *in* Grütters, C, Mantu, S, and Minderhoud, P, eds, *Migration on the Move* (Brill 2017). Council of Europe, EU-Turkey Statement of 18 March 2016, Press release of the General Secretariat of the Council, no. 144/16 of 18 March 2016; Peers,S, "The final EU/Turkey refugee deal: a legal assessment", EU Law Analysis, 18 March 2016, *at* <eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html> (accessed 5 September 2017).

[59] Council of Europe, EU-Turkey Statement of 18 March 2016, Press release of the General Secretariat of the Council no. 144/16 of 18 March 2016, *at* <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed 19 November 2017).

[60] Article 38 of Directive 2013/32, and Article 45 of the draft Regulation, COM (2016) 467.

[61] The Commission proposes to lift the requirement of ratification of the relevant international conventions by the third country, and to establish a genuine link if the refugee has travelled through the third country or if this country is located near the country of origin. At the moment this is not sufficient, as a certain period of residence is required.

contraband, but is also captured by complex political, territorial, social and tribal divisions. The EU has recently invested in capacity building and training of Libyan Coast Guards in order to prevent irregular departures from the Libyan territory to the European Union.[62] The absence of a functioning legal framework or effective institutions makes cooperation and migration management considerably challenging and exposes migrants to great peril. It is widely recognised that migrants in Libya are currently extremely vulnerable to arbitrary detention, ill-treatment, and even slavery and that they suffer from a lack of access to medical care and legal aid. [63] As a clear distinction between the authorities and the persecutors is failing, migrants intercepted at sea by the Libyan coastguard are not necessarily safe simply because of the risk of being returned to the ill treatment they managed to escape.

The constraints on formal cooperation with Libya due to its poor human rights record have put pressure on its neighbouring countries. The Tunisian government, however, is reluctant to sign a readmission agreement as it perceives the acceptance of large numbers of third country nationals as a threat to its fragile democracy, which is already challenged by terrorism and poor economic prospects. The EU seems prepared to link its support for Tunisia's fight against terrorism to a deal on migration control and readmission, thereby subordinating anti-terrorism and seriously disregarding the Tunisian government's legitimate fears.[64] In response to the Mobility Partnership with Tunisia, NGOs pointed at the lack of effective asylum legislation and adequate reception capacity, concluding that Tunisia does not qualify as 'safe'.[65] This conclusion applies in general to all North African countries. Notwithstanding the persistent human rights concerns towards refugees in Turkey, this country is still bound by more and higher standards in comparison to North African countries. As a member of the Council of Europe, it has to comply with the obligations of the European Convention on Human Rights, including Articles 3 (prohibition of torture and refoulement) and 13 (the right to an effective remedy). In the realm of the EU accession process, Turkey has agreed to align its legislation with the Common European Asylum System. Where Turkey already

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[62] Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), OJ L 162/18, 21 June 2016. See also the European Union, "Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route", press release no. 43/17, 3 February 2017, *at* <reliefweb.int/report/libya/malta-declaration-members-european-council-external-aspects-migration-addressing> (accessed 19 November 2017).

[63] See UNHCR, "Libya: Refugees and migrants held captive by smugglers in deplorable conditions", 17 October 2017, *at* <http://www.unhcr.org/news/briefing/2017/10/59e5c7a24/libya-refugees-migrants-held-captive-smugglers-deplorable-conditions.html>; High Commissioner for Refugees Calls Slavery, Other Abuses in Libya 'Abomination' That Can No Longer Be Ignored, while Briefing Security Council", 28 November 2017, *at* <https://www.un.org/press/en/2017/sc13094.doc.htm>; UN Supported Mission in Libya and UN Human Rights Office of the High Commissioner, *Detained and Dehumanised'. Report on human rights abuses against migrants in Libya*, 13 December 2016, *at* <ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf> (accessed 19 November 2017); Médicins sans Frontiers, *MSF Warns of Inhumane Detention Conditions in Libya as EU Discusses Migration*, 2 February 2017, *at* <doctorswithoutborders.org/article/msf-warns-inhumane-detention-conditions-libya-eu-discusses-migration> (accessed 19 November 2017).

[64] In its renewed action plan on a more effective return policy, the European Commission has identified Tunisia as a priority country to conclude a readmission agreement, see European Union, European Commission, *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – a renewed action* plan, COM(2017)200, 2 March 2017.

[65] FIDH *et al*, *Tunisia-EU Mobility Partnership: marching towards the externalisation of borders*, 17 March 2014, *at* <https://www.fidh.org/en/region/north-africa-middle-east/tunisia/14960-tunisia-eu-mobility-partnership-marching-towards-the-externalisation-of> (accessed 19 November 2017).

has an asylum system in place, despite its deficiencies, Tunisia and Egypt have to build such a system from scratch, which is obviously not their top priority. Similarly, in its analysis of the EU–Morocco mobility partnership, the Euro-Mediterranean Human Rights Network (EMHRN) expressed its 'fears that actions to combat irregular migration immigration will be prioritised and implemented at the expense of other themes included in the Partnership and, more worryingly, at the expense of the rights of migrants and refugees'.[66] In a confidential European External Action Service (EEAS) document released by Statewatch, the service recognised that the situation of migrants and refugees (estimated to be one million) remains highly vulnerable and even pointed to the risk of more Egyptians being forced to migrate.[67] EEAS further expressed that 'important concerns about ensuring protection, livelihoods and access to services for refugees and migrants in Egypt, as well as ensuring the creation of fully-fledged asylum and migration management systems compliant with international conventions and human rights' continue to persist.

The experiences with the GAMM teaches that cooperation on migration tends to focus primarily on border controls, refugees may become stranded in transit countries without being able to find protection and safety there. Compliance with the European Convention and the Refugee Convention as well as sufficient support from the EU to uphold these standards should therefore be the minimal precondition for entering into cooperation on border controls. As third countries may also lack the willingness to comply with these standards in an attempt to avoid becoming responsible for more migrants, the EU should establish ways to monitor the human rights in place.

Apart from these human rights concerns, enforcement of combatting irregular migration cannot be taken for granted in case of a lacking compensation policy. It is therefore crucial for the EU to take into account the enormous benefits from remittances sent home, following from legal but also irregular migration which can not easily be compensated with funding or trade benefits alone. Thus, in the absence of serious offers to create legal migration channels and as long as there is a market for irregular labour migrants, automatic compliance with the enforcement of combatting irregular migration cannot be taken for granted. Some governments, street-level bureaucrats or local authorities even draw direct benefits from organised irregular migration, especially if they are susceptible to corruption.[68] A general prevalence of corruption and a lack of political will to control it often go hand in hand.[69] These circumstances may discourage governments to cooperate on migration with the EU or otherwise encourage them towards non-compliance with agreed partnerships. Anti-corruption policy and a resilient rule of law system are necessary conditions also in avoiding the potential use of irregular migration as an incentive to ensure that the money keeps coming.

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66 EMHRN, *Analysis of the Mobility Partnership signed between the Kingdom of Morocco, the European Union and nine Member States on 7 June 2013,* February 2014.

67 Statewatch, *European External Action Service "non-paper": how can we stop migration from Egypt?* 30 December 2016, *at* <statewatch.org/news/2016/dec/eu-eeas-egypt.htm> (accessed 21 November 2017).

68 OECD, *Corruption and the smuggle of refugees*, October 2015, *at* < oecd.org/corruption/Corruption-and-the-smuggling-of-refugees.pdf> (accessed 21 November 2017).

69 UNODC , *Corruption and the smuggling of migrants*, Vienna 2013, *at* < unodc.org/documents/human-trafficking/2013/The_Role_Of_Corruption_in_the_Smuggling_of_Migrants_Issue_Paper_UNODC_2013.pdf> (accessed 21 November 2017).

Conclusion

The external dimension of EU migration policy is characterised by many ambiguities. The aim to embed policy in a comprehensive foreign policy does not match with the EU's actual appreciation of migration as a top priority. In particular, the conditionality principle and the less-for-less regime impede the development of an independent balancing of the different interests at play. Within such a one-sided approach, other objectives of EU external policy such as regional stability and cooperation, rule of law, peace and security, and economic growth risk not coming into the picture. If programmes in these policy fields are made dependent on the fight against irregular migration, the EU also undermines the effectiveness of its own common foreign policy.[70] The principle of equality and the aim to conclude mutually beneficial agreements also suffer from an emphasis on irregular migration. This relates to the weaknesses in the multi-level structure of the GAMM since the underperformance by the EU in the realm of positive incentives is due to its dependence on national decision-making. Considering that Member States have shifted competences to the EU in order to enhance their leverage, they should realise that such a transfer does not dismiss them from offering benefits in exchange for cooperation. After all, the external dimension is still a matter of mixed competences. Despite official commitments in agreements and partnerships, most of the implementation decisions depend on the national policy priorities and the national will regarding the level of funding or deploying personnel. If most Member States prefer to support return programmes instead of protection programmes, it is difficult to fully compensate this imbalance at the EU level. National politicians may be caught between a rock and a hard place: between the need to conclude effective deals and the pressure from the political arena not to give in on more legal migration. However, at both the EU and the national level, awareness is lacking of the fact that the external dimension can only become effective if all interests of the partner countries are taken seriously, including the reasons for their hesitation or reluctance. Furthermore, concluding deals with fragile and non-resilient states carries the risk of abuse or non-compliance since irregular migration to Europe may serve as part of a survival strategy.

Even more difficult than concluding and implementing mutually beneficial agreements is to ensure that the interests of migrants are served as well. Their interests are obviously not prioritised by either of the negotiating parties, which is visible in their implementation practices. This is at odds with the principle of a migrants-centred GAMM, the equality of the four GAMM pillars and a coherent EU (human rights) policy. Even so, disregarding the interests of migrants also implies underestimating their agency, which is fatal for achieving an effective policy. If their rights and needs are not served, they will vote with their feet and find another way. Reducing irregular migration cannot be achieved by simply raising the pressure on transit countries. Even if they fund capacity building in these countries, Member States should be prepared to resettle a fair share of the number of stranded refugees. The current political deadlock on resettlement and relocation in Europe is far from promising. Instead, the development towards an obligatory application of safe third country concepts is likely to further narrow access to protection in Europe and to set the goals so high for the partner countries that they are bound to fail.

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[70] These aims are: - to safeguard the EU's values, fundamental interests, security, independence and integrity; -to consolidate and support democracy, the rule of law, human rights and the principles of international law; -to preserve peace, prevent conflicts and strengthen international security; -to assist populations, countries and regions confronting natural or man-made disasters.

The present experiences with the GAMM system call for a serious reflection on how to avoid unintended or even opposite effects and how to better reach coherency and comprehensiveness as well as equality and compliance with human rights. As the principles attached to the policy have proven to be preconditions for its effectiveness, it is puzzling that the externalisation just charges ahead like a runaway train without seriously evaluating how to meet these principles in practice. The EU has no choice when it comes to taking due regard of the interests of all parties, even if it only were to pursue its own interests.

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