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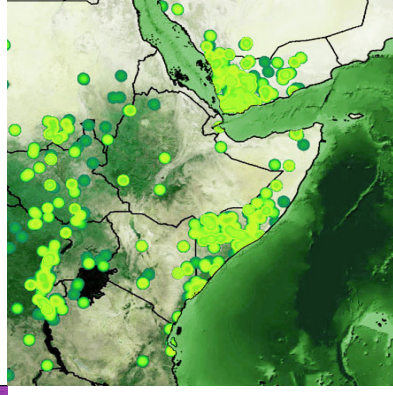
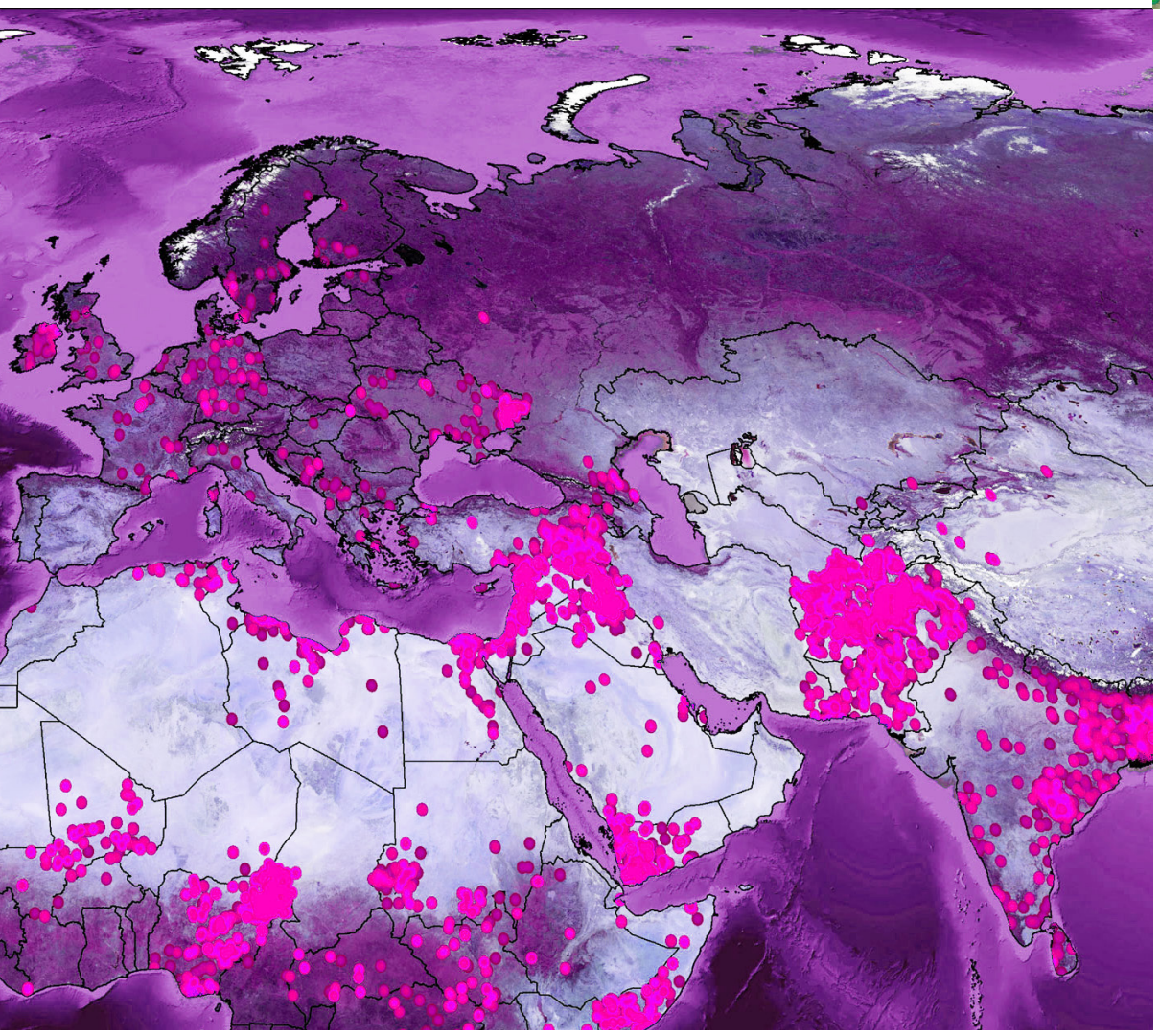
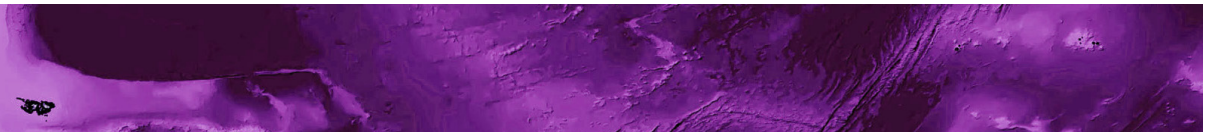




VOLUME 6 / ISSUE 1 / 2018

Terrorism and International Law



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PRESIDENT'S NOTE

Dear reader,

I am proud to introduce Issue 1 of Volume 6 of the *Groningen Journal of International Law*. As before, this issue is readily available for free on our website at <https://grojil.org> and <https://ugp.rug.nl/grojil> and will become available through various other channels soon.

As previous issues, *GroJIL* 6(1) is divided into multiple parts with the first part focusing on the theme of this issue: Terrorism and International Law. This first section opens with a submission from Veronika Bílková, who discusses challenges in international law related to the definition of foreign terrorist fighters, the construction of foreign terrorist fighters-related offences, and the impact on human rights. In the next article, Pablo Antonio Fernández-Sánchez analyses legal and customary bases of the exercise of universal jurisdiction for crimes classified as terrorism. In the third submission, Jackson Nyamuya Maogoto seeks to determine whether the right to self-defense of Article 51 of the UN Charter is limited in scope through a nexus to 'armed attack' in the context of state-sponsored terrorism. The following contribution from Marcin Marcinko establishes in how far existing legal counter-terrorism measures provided for in UN conventions form a coherent and uniform system and if they have served as a basis for the development of a universal treaty-based model of combating terrorism. Finally, in contributing towards closing the 'intangible technology transfer' gap, Katja L.H. Samuel & Cassius Guimarães Chai identify gaps relating to technology transfers between terrorist groups and organized criminal groups within existing legal frameworks, what their implications are, and what can be done to address them.

As in the past, the second part of *GroJIL* 6(1) publishes open submissions relating to a variety of topics. First, Maria A. Gwynn reflects on different approaches of host countries to investments in investment disputes, particularly in the South American region, and addresses the relevance of the multilateral reform efforts of the international investment framework to find a balance between the interests of States and foreign investors. The next submission from Marcelo Lozada Gómez & Paola Acosta Alvarado examines interventions by national judges in the interpretation and enforcement of international law to explain the intervention of national judges in Latin America regarding foreign investment law enforcement, and they remark on the future role of national judges in the interpretation of national and international law. The next article by Nwafor Ndubuisi & Mukoro Benjamin Onoriode takes a critical view on the ICC's focus on Africa and explains the Court's afrocentrism by analysing the provisions of the Rome Statute itself rather than exclusively relying on political explanations. In the fourth article, Stephanie Theodotou assesses the effectiveness of the current fragmented legal framework for corporate liability and compensation for oilspills from the perspective of the response to the *Deepwater Horizon* oil spill and argues why an international regime is needed to close existing gaps. In the last article of this section, Elliot Winter puts forward that autonomous weapons could be programmed with utilitarian values to act in compliance with proportionality under humanitarian law as both are expressions of the same concept. His article envisions that the use of these weapons could even raise the standard of protection of those caught up in armed conflict.

Lastly, the third and final section features the winning submission of the annual *GroJIL* Student Writing Competition. After extensive deliberation on multiple strong contenders, the article submitted by Louis Koen and Brooke Hanson on 'The Obligation on an Intervening State to Respect the Host State's IHL and IHRL Obligations in an Intervention by Invitation' came out on top. Congratulations to both on their impressive paper.

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On the organisational side, this year has seen a steady continuation of the growth initiated by the Journal during the previous academic year. *International Law Under Construction*, the Journal's blog, has seen a continued output with more than 20 blog posts in its first full year that have reached our audience of academics and students across a variety of social media platforms. The PR Committee organised a workshop in April where speaker Francis Sakwa, a Kenyan human rights activist, discussed the tools and challenges of human rights grassroots activism in practice.

Perhaps the biggest development is the number of peer-reviewed articles in this issue. Additionally, the percentage of peer-reviewed articles in the next issue of the current volume is projected to increase even further. The *GroJIL* is working hard to fully transition to a peer-reviewed Journal. In the future, a newly instituted Editorial Board, consisting mainly of PhD students, will make an initial assessment of manuscripts before academics will review the submissions the *GroJIL* receives. We hope that this approach will further raise the standards of the Journal while allowing doctoral candidates to actively participate in the world of academic publishing. The current Editorial Board, which has always had editorial responsibilities in addition to its various organisational tasks that keep the Journal operational on a day-to-day basis, will appropriately be renamed the Executive Board. The Executive Board will still maintain editorial oversight, but this reorganization allows it to focus more on the executive parts of its responsibilities and direct future growth and development of the Journal.

As always, the end of the academic year brings with it the departure of some of our fellow students at the Journal. I would like to take this moment on behalf of the organisation and thank them for their efforts and wish them all the best of luck in their future endeavours. The major advancements made by the Journal would not have been possible without your dedication and commitment.

Finally, I want to thank the Editing Committee for their incredible work on this issue and everyone else involved with the Journal for their efforts, and last but not least, the Department of Transboundary Legal Studies 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 board@grojil.org.

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Open Submissions

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Foreign Terrorist Fighters and International Law

Veronika Bílková*

Keywords
FOREIGN TERRORIST FIGHTERS; HUMAN RIGHTS; INTERNATIONAL LAW; TERRORISM; UN SECURITY COUNCIL

Abstract

The phenomenon of foreign fighting is not new. What is however unprecedented about it today is, in addition to its scale, the fact that it is more and more often conceptualized through the prism of the fight against terrorism. Attention has been turned from the situation at the battlefield to that in the countries of origin. The regulation no longer falls under the laws of armed conflict but under international criminal law or, even, under an emerging international counter-terrorism law. And foreign fighters have become foreign terrorist fighters. These developments may seem relatively insignificant; however, they represent a paradigmatic shift. And this shift comes with a price. The concept of foreign terrorist fighters and the international legal regulation applicable to it, stemming primarily from the UN Security Council Resolutions 2178 (2014) and 2396 (2017), give rise to legal challenges. The paper discusses three such challenges pertaining to the definition of foreign terrorist fighters, the construction of foreign terrorist fighters-related offences and the impact on human rights. The main message that the paper seeks to impart is to caution against an excessive 'terror-isation' of international life which, even if motivated by laudable purposes, has problematic consequences, thus constituting of itself a threat to the values that it is supposed to protect.

Introduction

Foreign fighting is not a new phenomenon.[1] Crusaders in the Middle Ages and members of the International Brigades during the Spanish Civil War are but two examples of large groups of individuals leaving their country of origin to take an active part in an armed conflict abroad. Attempts to use legal instruments, including those of international law, to outlaw or regulate foreign fighting, or some forms thereof, are not new either. Treaty provisions and specialised treaties directed against mercenarism, introduced in the second half of the 20th century, provide an example. What is however new and unprecedented about foreign fighting today is firstly, the scale of the phenomenon, and secondly, the fact that the phenomenon is more and more often conceptualised through the prism of the fight against terrorism. As to the scale, it is estimated that as much as 30.000 individuals originating from over 100 countries have over the past years gone to

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1 See Galperin Donnelly, M, Sanderson, TM, Fellman, Z, REPORT: *Foreign Fighters in History,* Washington, 1 April 2017, *at* <csis-prod.s3.amazonaws.com/s3fs-public/publication/171220_history_foreign_fighter_project.pdf?0BW8DQ8MqR5e30PtnhLdqmke8NhDQcCt> (accessed 22 April 2018); Flores, M, "Foreign Fighters Involvement in National and International Wars: A Historical Survey" *in* De Guttry, A, Capone, F, Paulussen, C, eds, *Foreign Fighters under International Law and Beyond* (Asser/Springer, 2016) 27.

join ISIS and its associated groups alone.[2] Thousands of other individuals have left their country to take part in armed conflicts or internal disturbances in other parts of the world (Eastern Ukraine, Afghanistan, Nigeria, etc.).

The conceptualisation of the phenomenon has undergone changes as well. Attention has been turned from the situation at the battlefield to that in the countries of origin. The regulation no longer falls under the law of armed conflict but under international criminal law or, even, under an emerging international counter-terrorism law. And foreign fighters have become foreign terrorist fighters. These developments may seem relatively unimportant and mostly technical in nature. Yet, in reality, they represent a paradigmatic shift. And this shift comes at a price. The concept of foreign terrorist fighters, which is introduced in the first section of this paper, and the international legal regulation applicable to it, the object of the second section, give rise to legal challenges. The third section discusses three such challenges pertaining to the definition of foreign terrorist fighters, the construction of foreign terrorist fighters-related offences and the impact on human rights. The main message that the paper seeks to impart is to caution against an excessive 'terror-isation' of international life which, even if motivated by laudable purposes, may have problematic consequences, thus constituting of itself a threat to the values that it is supposed to protect.

I. From Foreign Fighters to Foreign Terrorist Fighters

The concept of foreign terrorist fighters emerged from that of foreign fighters in the mid-2010s. While the two concepts may appear virtually identical at first sight, there are important differences between them. These differences relate both to the content of the concepts and to their legal status. *Foreign fighter* is not a legal term of art. It is absent from treaties and other instruments of international law, including those regulating armed conflicts such as the 1949 Geneva Conventions and the 1977 Additional Protocols. Despite that, the term has been regularly invoked in scholarly literature.[3] In its broadest meaning, it denotes all persons who participate in an armed conflict taking place outside their country of origin and who do so while not serving in the armed forces of this country – either because the country is not involved in the relevant armed conflict or because they join armed forces of a different entity. Thus, foreign fighters are *foreign,* since they operate outside their country of origin (nationality or residence), and they are *fighters,* because they join armed forces taking part in an armed conflict.

Scholars usually embrace a more restrictive definition. For David Malet, foreign fighters are 'noncitizens of conflict states who join insurgencies during civil conflicts'.[4] Building on this definition, Thomas Hegghammer identifies four defining features of foreign fighters. They are persons who: 1) have joined, and operate within the confines of an insurgency, 2) lack citizenship of the conflict state or kinship links to its warring factions, 3) lack affiliation to an official military organization, and 4) are unpaid.[5] In a conference paper co-authored by Jeff Cogan, Hegghammer partly modifies this approach, concluding that '[t]he distinguishing features of foreign fighters are that (a) they are not

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2 Schmid, AP, "Foreign (Terrorist) Fighter Estimates: Conceptual and Data Issues," *The International Centre for Counter-Terrorism – The Hague* 6, no. 4 (2015) 1.

3 See, for instance, Malet, D, *Foreign Fighters: Transnational Identity in Civic Conflicts* (Oxford University Press, 2013); Li, DA, "Universal Enemy? 'Foreign Fighters' and Legal Regimes of Exclusion and Exemption Under the 'Global War on Terror'," 41(2) *Columbia Human Rights Law Review* (2010) 355.

4 Malet, D, supra nt 3, 9.

5 Hegghammer, T, "The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad," 35(3) *Quarterly Journal: International Security* (2010/2011) 53.

overtly state sponsored; (b) they operate in countries which are not their own; (c) they use insurgent tactics to achieve their ends; and (e) their principal motivation is ideological rather than material reward'.[6] On her turn, Sandra Kraehenmann defines a foreign fighter as 'an individual who leaves his or her country of origin or habitual residence to join a non-state armed group in an armed conflict abroad and who is primarily motivated by ideology, religion, and/or kinship'.[7]

These definitions concur with the broader understanding of foreign fighters in that foreign fighters have to be foreigners and have to join a party to an armed conflict. Yet, they add certain other elements that narrow the concept down. The first element pertains to the *affiliation.* For Malet, Hegghammer and Cogan, and Kraehenmann, foreign fighters have to fight in the armed forces of a non-state armed group. Individuals who join the armed forces of a foreign state would thus be excluded from the definition. This may create difficulties in case of entities which exercise a longer-term control over a certain portion of territory but are not generally recognized as states, such as ISIS or separatist entities in Eastern Ukraine, as their status would not be completely clear. The same applies in armed conflicts where it is not fully clear which side represents the legitimate government and/or which armed groups act independently and which are, on the contrary, directly controlled by a state. Thus, the affiliation element, though often adhered to, has not secured general consensus and some scholars prefer to do away with it.[8]

The second element relates to the *motivation* of foreign fighters. They should be unpaid or, at least, their primary motivation should not be material profit. That makes them different from mercenaries, who are 'motivated to take part in the hostilities essentially by the desire for private gain'.[9] The perceived need to draw a line between those who fight for money and those who fight for other, immaterial reasons, stems from the conviction that the two groups pose different challenges. As Simon Chesterman notes, 'mercenaries are seen as threats in the states to which they travel, while foreign fighters are primarily deemed threats by the states to which they might return'.[10] In this perspective, mercenaries are relatively rational actors who simply go where the money is and for whom fighting is just a way to make a living. Foreign fighters, on the contrary, are fanatics who fight for their, mostly perverted, ideals and who may want to import these ideals, and the fight, back to their country of origin. In reality, however, the distinction is often not that clear-cut. People join armed groups for various motives. These motives, moreover, might be difficult to decipher, since foreign fighters are not always willing to unveil them. Some of them may not even be fully aware of these motives themselves. For this reason, the motivation element is, again, not generally accepted.[11]

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6 Colgan, J, Hegghammer, T, "Islamic Foreign Fighters: Concept and Data," *Paper presented at the International Studies Association Annual Convention, Montreal* (2011) 6.

7 Kraehenmann, S, "Academy Briefing No. 7: Foreign Fighters under International Law" *Geneva Academy of International Humanitarian Law and Human Rights* (2010) 61.

8 See De Guttry, A, Capone, F, Paulussen, C, "Introduction" *in* De Guttry, A, Capone, F and Paulussen, C, eds, *Foreign Fighters under International Law and Beyond* (Asser/Springer, 2016), 2.

9 Article 47, International Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1977) 1125 UNTS 3.

10 Chesterman, S, "Dogs of War or Jackals of Terror? Foreign Fighters and Mercenaries in International Law" 18(5) *International Community Law Review* (2016) 390, 389.

11 For instance, in his 2014 Report on the protection of human rights and fundamental freedoms while countering terrorism, the UN High Commissioner for Human Rights notes that although the primary

Some scholars further narrow down the definition of foreign fighters by excluding from it those who fight due to their kinship with one of the armed factions. Despite the link to the motivation element, this exclusion seems to have more to do with the fact that fighting kins are not considered as truly foreign to the conflict. They have, as Hegghammer puts it, 'a preexisting stake in the conflict'.[12] Kinship however can be based on various criterions (ethnicity, religion, ideology, etc.) and most foreign fighters would probably meet at least one of them. It is therefore more common to determine the 'foreignness' of foreign fighters merely in light of their formal legal status, i.e. their citizenship or habitual residence. Fighting due to the links of kinship is then put at pair with fighting for any other immaterial reasons such as ideology, religion, or personal search for identity.

As noted above, the term foreign fighter is not a legal term of art. Foreign fighters do not have any special status under international law. Nor are there any legal consequences automatically resulting from becoming a foreign fighter. The situation may be different under domestic law. Some national legal orders know a special offence of serving in foreign armed forces. This offence, however, is often qualified. In the United States, for instance, enlistment with the intent to serve in armed hostility is an offence only when the enlistment occurs 'within the US or in any other place subject to the jurisdiction thereof' and the person intends to engage in hostilities against the US.[13] In the Czech Republic, the offence of serving in foreign military forces is only applicable to Czech citizens who serve in the military or armed forces of another State, not to those serving in the armed forces of a non-state actor.[14] In yet other countries, it is not the enlistment as such but, rather, the recruitment for the service in a foreign military organization which is criminalized.[15] In all these cases, the regulation is strictly domestic and there is no similar regulation at the international level.

In the mid-2010s, the concept of foreign fighters was complemented by that of *foreign terrorist fighters***.** The latter is meant to be a legal term of art and to entail legal consequences. The concept was introduced in the UN Security Council Resolutions 2170[16] and 2178,[17] which were adopted unanimously on 15 August and 24 September 2014 respectively, under Chapter VII of the UN Charter. The two resolutions aim at preventing the movement of individuals from the country of origin to the areas dominated by ISIS and similar entities. Such individuals are labelled as foreign terrorist fighters or, sometimes, simply terrorists. Resolution 2178, which was tabled by the US and sponsored by a large group of more than 120 states from all continents, is particularly important, because it provides a definition of foreign terrorist fighters both in its preamble and in its text. Under this definition, foreign terrorist fighters are 'individuals who travel or attempt to travel /…/ to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist

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motivation of foreign fighters is ideology or religion, they *'*may also be motivated by payment*'*. UNGA Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism,* 19 December 2014, A/HRC/28/28, 1.

12 Hegghammer, supra nt 5.

13 §2390 of 18 US Code.

14 §321 of the Criminal Code of the Czech Republic.

15 §109h of the Criminal Code of Germany.

16 UNSC, *Threats to international peace and security caused by terrorist acts,* 15 August 2014, S/RES/2170 (2014).

17 UNSC, *Threats to international peace and security caused by terrorist acts,* 24 September 2014, S/RES/2178 (2014).

acts or the providing or receiving of terrorist training'.[18] This definition serves as the basis for the whole regime against foreign terrorist fighters and is taken over by most other instruments.

Although foreign terrorist fighters may at first sight appear to be almost identical to foreign fighters, the only element that the two concepts truly share is the foreignness – in both cases, they are individuals who operate outside their country of origin. One could expect that another shared element would be that of fighting, i.e. taking part in an armed conflict. Yet, this is not the case. For an individual to qualify as a foreign terrorist fighter, participation in and, in fact, the existence of an armed conflict are not required. This is made clear by the definition in the preamble to Resolution 2178 which reads as quoted above but adds 'including in connection with armed conflict'. The presence of an armed conflict is thus possible but not necessary. Foreign terrorist fighters, who should better be labelled as foreign terrorists *tout court,* do not have to fight. They have to perpetrate, plan, prepare or participate in terrorist acts or provide or receive terrorist training. More exactly, it suffices if they travel, or attempt to travel, for the purpose of engaging in one of these activities. For foreign terrorist fighters, the element of fighting is replaced by that of engaging in terrorist activities. And the status is acquired already in the preparatory phase, prior to any such engagement and regardless of whether the individual in the end commits, or attempts to commit, any terrorist act.

Moreover, the definition of foreign terrorist fighters does not contain the additional elements linked to the affiliation and motivation. Although most foreign terrorist fighters associate themselves with non-state entities such as ISIS (rightly labelled as the 'Un-Islamic Non-State' by the former UN Secretary General Ban Ki-Moon[19]), this does not necessarily have to be so. Terrorist acts can be committed not only on behalf, or with the support, of a non-state entity but also on behalf, or with the support, of a state. Thus, although the affiliation element may be *de facto* present in the vast majority of cases, it is not required *de jure.* The situation is similar with respect to the motivation element. This element is absent from the definition, which applies to individuals regardless of whether they travel to engage in terrorist acts out of material or immaterial considerations. At the same time, it is often assumed that foreign terrorist fighters are led, or rather misled, by extremist ideologies, stressing that this is what makes them different from mercenaries, members of private military companies, or volunteers.[20] Thus, the motivation element, although not required legally, is also often present in practice.

The concept of foreign terrorist fighters, while at first sight almost identical to that of foreign fighters, is therefore quite different from it. It is different in its content. Whereas *foreign fighters* are individuals who engage in an armed conflict outside their country of origin, supporting a non-state party to this conflict and acting out of immaterial reasons, *foreign terrorist fighters* are individuals who travel, or attempt to travel outside their country of origin, with the purpose of engaging in terrorism. The two concepts also differ in their status and aspirations. Whereas that of foreign fighters serves as a merely descriptive category, that of foreign terrorist fighters has prescriptive ambitions – it is meant to be a legal term of art and to entail legal consequences. What these consequences are will be discussed in the next section.

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[18] UNSC, supra nt 17 para 8 of the preamble and paras 5 and 6(a).

[19] UNSC, *Threats to international peace and security caused by terrorist acts*, 24 September 2014, S/PV.7272, 3.

[20] UN Office on Drugs and Crime, *Foreign Terrorist Fighters. Manual for Judicial Training Institutes South-Eastern Europe* (2017) 3.

II. Legal Regime Applicable to Foreign Terrorist Fighters

The legal regime applicable to foreign terrorist fighters stems primarily from Resolution 2178 and several other resolutions adopted by the UN Security Council. This by itself is rather unusual. The Security Council was not created to legislate. Yet, this is exactly what it does in Resolution 2178. It is true that in some of its parts, the Resolution merely 'recalls' existing obligations or 'encourages' states to act in a certain way, thus 'not creating new obligations but merely suggesting States behave in a given manner'.[21] In other parts, however, for instance when introducing the concept of foreign terrorist fighters, coining its definition and imposing upon states the obligation to criminalize certain acts related to this phenomenon, the Security Council 'decides' under Chapter VII of the UN Charter, thus establishing general legal rules which clearly apply beyond the current situation in the Middle East.

It is not the first time when the UN Security Council does not limit its attention to a concrete case, but adopts a general approach, focusing on a certain phenomenon rather than some manifestation thereof. Over the past two decades, it has done so repeatedly, mostly with respect to terrorism (Resolution 1373 of 2001, Resolution 1540 of 2004, etc.).[22] Resolution 2178, however, as Martin Scheinin rightly notes, goes one step further, as 'it imposes new legislative obligations upon Member States, without the existence of preceding treaty adopted by the General Assembly, and there is no way states could regularize the legal basis for their action by ratifying a treaty'.[23] The large number of states which sponsored Resolution 2178, the unanimity in the adoption of this resolution and the absence of any substantive opposition to it seem nonetheless to suggest that in this case, the Security Council might have been successful in following the recommendation formulated by Stephan Talmon and 'to legislate only to an extent that reflects the general will of the member states'.[24] While this does not make the legislative efforts of the Council legally uncontroversial, it at least indicates that these efforts are not clearly unlawful.

Resolution 2178 follows on Resolution 2170, which was the first to use the term 'foreign terrorist fighters'. Resolution 2170 focuses specifically on the situation in the Middle East, in territories controlled by ISIS, Al-Nusrah Front and affiliated entities. It refers to foreign terrorist fighters in several places, but it does not concentrate on these fighters only, dealing with other issues such as terrorism financing as well. Having expressed its regret 'at the flow of foreign terrorist fighters' to the region and at 'the scale of this phenomenon',[25] the Security Council demands that 'all foreign terrorist fighters

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[21] De Guttry, A, "The Role Played by the UN in Countering the Phenomenon of Foreign Terrorist Fighters" *in* De Guttry, A, Capone, F and Paulussen, C, eds, *Foreign Fighters under International Law and Beyond* (Asser/Springer, 2016), 275.

[22] See Hinojosa Martinez, LM, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits," 57 *International and Comparative Law Quarterly* (2008) 333.

[23] Scheinin, M, *A Comment on Security Council Resolution 2178 (Foreign Terrorist Fighters) as a "Form" of Global Governance,* 6 October 2014, *at* <justsecurity.org/15989/comment-security-council-res-2178-foreign-fighters-form-global-governance/> (accessed 23 May 2018). See also Scheinin, M, *Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters,* 23 September 2014, *at* <justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/> (accessed 22 April 2018).

[24] Talmon, S, "The Security Council as World Legislator," 99 *American Journal of International Law* (2005) 193, 184.

[25] UNSC, supra nt 16 para 12 of the preamble.

associated with ISIL and other terrorist groups withdraw immediately'.[26] The Council declares itself ready to consider listing anyone participating in the activities of such terrorist groups on the Al-Qaeda sanction list. It further calls upon states to take national measures to repress the flow of foreign terrorist fighters to the Middle East and to bring those fighters to justice. It also encourages states to 'engage with those within their territories at risk of recruitment and violent radicalisation to discourage travel to Syria and Iraq for the purposes of supporting or fighting for ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida'.[27]

Resolution 2178, although also making repeated references to the situation in the Middle East and to the ISIS, is drafted in more general terms. As Andrea de Guttry notes, '[t]he scope of the Resolution is […] universal and its application is not restricted to a given area or to a given armed conflict'.[28] Moreover, Resolution 2178 concentrates specifically, and virtually exclusively, on foreign terrorist fighters. The Security Council first condemns 'the violent extremism, which can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters' and demands that 'all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict'.[29] It then recalls that states have the obligation to bring to justice those participating in the financing, planning, preparation or perpetration of terrorist acts. It further asks states to 'prevent and suppress the recruiting, organizing, transporting or equipping' of foreign terrorist fighters, and 'financing of their travel and of their activities'. [30]

To achieve this aim, states shall establish as criminal offences, subject to prosecution and penalisation in a manner duly reflecting their seriousness, three acts. The first is that of being a foreign terrorist fighter, i.e. to 'travel or attempt to travel to a State other than the States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training'. The other two consist of the financing of the travel of foreign terrorist fighters[31] and of the wilful organization, or other facilitation, including acts of recruitment, of this travel.[32] Furthermore, the resolution underscores the importance of countering violent extremism, which can be conducive to terrorism and to the mobilisation of foreign terrorist fighters, and encourages states to develop strategies in this respect and to engage local communities and civil society when doing so. Finally, the resolution incites states to improve international and regional cooperation to prevent the travel of foreign terrorist fighters and to share information and best practices related to this phenomenon. It also confirms the readiness of the UN Security Council to include foreign terrorist fighters – here only those travelling to the Middle East – to the Al-Qaeda

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[26] UNSC, supra nt 16 para 7.
[27] UNSC, supra nt 16 para 9.
[28] De Guttry, supra nt 21 273.
[29] UNSC, supra nt 17 para 1.
[30] UNSC, supra nt 17 para 5.
[31] UNSC, supra nt 17 para 6(b): "The wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training."
[32] UNSC, supra nt 17 para 6(c): "The wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training."

sanction list, and requests several international organs (Interpol, UN Counter-Terrorism Committee, etc.) to help states in countering the phenomenon of foreign terrorist fighters.

Resolution 2178 has been supplemented by subsequent resolutions and by other international instruments. Since 2014, the UN Security Council has adopted more than ten resolutions referring to foreign terrorist fighters. Most of them do so in a rather cursory way, mentioning the concept only it their preamble.[33] Some, however, go more to depth, restating existing obligations or introducing new ones.[34] Particularly interesting are Resolutions 2368[35] and 2396,[36] adopted on 20 July and 21 December 2017 respectively. These two resolutions extend the focus from individuals leaving the country of origin to join terrorist organizations abroad to those returning from abroad. The resolutions reflect the factual development in the Middle East, where individuals were first heading in the first half of the 2010s and from where they have started to return after the defeat of ISIS in 2017-2018. However, similarly as Resolution 2178, Resolutions 2368 and, especially, 2396 introduce general rules, which are not territorially limited to the Middle East.

Resolution 2368, which is certainly one of the longest resolutions ever adopted, expresses concerns over 'foreign terrorist fighters leaving zones of armed conflict, returning to their countries of origin, transiting through, travelling to or relocating to or from other Member States'.[37] It calls upon states to address this phenomenon and to cooperate and share information and best practices when doing so. Resolution 2396 is, to a large extent, a counterpart to Resolution 2178. Tabled by the US, sponsored by a group of some 70 states from several continents and voted unanimously, it establishes a legal regime applicable to foreign terrorist fighters returning to their countries of origin or relocating to third states (returnees and relocators[38]). The resolution does not contain a definition of returnees and relocators though. Such a definition is considered unnecessary, because the instrument simply applies to foreign terrorist fighters, defined in Resolution 2178, who return to their countries of origin or travel to relocate to a third country. Rather than pertaining to two different phenomena, Resolutions 2178 and 2396 thus deal with two different sides of the same coin, the former focusing on individuals leaving their country of origin to engage in terrorism (foreign terrorist fighters), the latter on individuals returning to those countries after such an engagement (returnees and relocators).

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[33] See UNSC, *Threats to international peace and security,* 19 December 2014, S/RES/2195 (2014), para 19 of the preamble and para 22; UNSC, *Threats to international peace and security caused by terrorist acts,* 20 November 2015, S/RES/2249 (2015), para 5 of the preamble; UNSC, *Middle East (Syria),* 22 December 2015, S/RES/2258 (2015), para 7 of the preamble; UNSC, *The situation in the Middle East (Syria),* 17 November 2016, S/RES/2319 (2016), paras 5 and 7 of the preamble; UNSC, *Threats to international peace and security caused by terrorist acts,* 24 May 2017, S/RES/2354 (2017), para 14 of the preamble; UNSC, *Threats to international peace and security*, 21 September 2017, S/RES/2379 (2017), para 3 of the preamble; UNSC, *The situation in the Middle East,* 19 December 2017, S/RES/2393 (2017), para 7 of the preamble; UNSC, *Threats to international peace and security caused by terrorist acts,* 21 December 2017, S/RES/2395 (2017), paras 12 and 24 of the preamble.

[34] See UNSC, *Threats to international peace and security caused by terrorist acts: Aviation security,* 22 September 2016, S/RES/2309 (2016), para 8; UNSC, *Threats to international peace and security caused by terrorist acts,* 12 December 2016, S/RES/2322 (2016), paras 3, 5, 16, 19 and 20.

[35] UNSC, *Threats to international peace and security caused by terrorist acts,* 20 July 2017, S/RES/2368 (2017).

[36] UNSC, *Threats to international peace and security caused by terrorist acts,* 21 December 2017, S/RES/2396 (2017).

[37] UNSC, supra nt 35 para 38 of the preamble.

[38] See US Mission to the United Nations, *Fact Sheet: Resolution 2396 (2017) on Foreign Terrorist Fighters (Returnees and Relocators),* 21 December 2017.

Resolution 2396 calls upon states 'to assess and investigate suspected individuals whom they have reasonable grounds to believe are terrorists, including suspected foreign terrorist fighters' and 'to develop and implement comprehensive risk assessments for those individuals, and to take appropriate action, including by considering appropriate prosecution, rehabilitation, and reintegration measures'.[39] Despite the call for prosecution, no new criminal offences are introduced. Resolution 2396 merely recalls the offences established by Resolution 2178. In her speech at the Security Council, the US representative identified four main measures introduced by Resolution 2396.[40] The first relates to the detection and disruption of terrorist travel across borders. States are asked to develop and implement systems to collect biometric data, and to develop watchlists or databases of known and suspected terrorists, including foreign terrorist fighters. Secondly, the resolution 'recognizes the need to counter this threat /of terrorism/ in a tailored, nuanced way'.[41] Thirdly, states have to cooperate and to share information and best practices. Fourthly, the resolution 'boosts the UN own work addressing the foreign terrorist fighter threat'.[42]

Instruments relating to foreign terrorist fighters have been adopted outside the UN framework as well, mostly to facilitate the implementation of Resolution 2178.[43] This is the case of the *Additional Protocol to the Convention on the Prevention of Terrorism*, [44] adopted within the Council of Europe on 22 October 2015 and entered into force on 1 July 2017. The Protocol supplements the *Council of Europe Convention on the Prevention of Terrorism*[45] adopted on 16 May 2005. Although the term 'foreign terrorist fighters' is not used in the text, the preamble of the Protocol quotes the definition of foreign terrorist fighters present in Resolution 2178. The Explanatory Report explicitly confirms that 'the main objective of the Additional Protocol should be to supplement the […] Convention with a series of provisions aimed at implementing the criminal law aspects of UNSCR 2178'.[46] When compared to Resolution 2178, the Protocol is less comprehensive. It focuses solely on the criminal law aspects of the foreign terrorist fighter phenomenon.

By virtue of Articles 2-6 of the Protocol, states are requested to criminalize five acts. Three are taken over from Resolution 2178 – travelling abroad for the purpose of terrorism, funding travelling abroad for the purpose of terrorism, and organising or

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[39] UNSC, supra nt 36 para 29.

[40] UNSC, *Threats to international peace and security caused by terrorist acts*, 21 December 2017, S/RES/PV.8148, 3.

[41] Ibid.

[42] Ibid.

[43] Global Counterterrorism Forum, REPORT: *The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon,* 19 September 2014, *at* < thegctf.org/documents/10162/140201/ 14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf> (accessed 22 April 2018): There are also soft law instruments on foreign terrorist fighters. Particularly worth mentioning is *The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon,* which was adopted on 23 September 2014, one day before the adoption of Resolution 2178, by the Global Counterterrorism Forum, an informal multilateral platform launch in 2011 and chaired by Morocco and the Netherlands. The Memorandum contains 19 instances of good practices, which "are intended to inform and guide governments as they develop policies, programs, and approaches to address the FTF phenomenon" (1).

[44] *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*, CETS No.217. By 31 March 2018, the Additional Protocol has secured 12 ratifications and 29 signatures, including the signature by the European Union.

[45] The Convention requests to criminalize public provocation to commit a terrorist act, recruitment for terrorism, and training for terrorism.

[46] Council of Europe, *Draft Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (2015) CETS 217 para 5.

otherwise facilitating travelling abroad for the purpose of terrorism. Two other acts, participating in an association or group for the purpose of terrorism and receiving training for terrorism, go beyond the scope of the resolution, though they are linked to the phenomenon of foreign fighters as well. Apart from an article on the exchange of information, the Protocol does not contain any provisions on the implementation. Here, the provisions of the Convention apply in a subsidiary way.[47] The Convention regulates all the important issues relating to criminal prosecution, such as jurisdiction, extradition or the rights of victims. It enshrines the *aut dedere, aut judicare* principle and establishes the duty to investigate. The only provision of the Convention which is inapplicable under the Protocol is Article 9 dealing with ancillary offences. It is, so because acts to be criminalized under the Protocol are in themselves ancillary in nature.[48]

Within the European Union, Resolution 2178 has been implemented through the *Directive 2017/541 of 15 March 2017 on Combating Terrorism.*[49] In its preamble, the Directive notes that '[i]ndividuals referred to as "foreign terrorist fighters" travel abroad for the purpose of terrorism. Returning foreign terrorist fighters pose a heightened security threat to all Member States'.[50] It then stresses that '[c]onsidering the seriousness of the threat […], it is necessary to criminalise outbound travelling for the purpose of terrorism […]',[51] adding however, in a somewhat ambiguous way, that '[i]t is not indispensable to criminalise the act of travelling as such'.[52] The operative part of the Directive contains a list of offences that the EU members have to criminalize. Among them are travelling for the purpose of terrorism; organising or otherwise facilitating travelling for the purpose of terrorism; and financing of terrorism.[53] The definitions of these offences, which are also provided, differ to some extent from those in Resolution 2178 and the Protocol. Most importantly, the first offence also includes travelling 'for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group'.[54]

III. Legal Challenges Posed by Foreign Terrorist Fighters

The concept of foreign terrorist fighters and the legal regime built around it give rise to several legal challenges.[55] One, related to the legislative nature of Resolution 2178, has already been mentioned. This challenge has to do with the division of powers among the UN organs, as well as between the UN and its Members States and with the principles of the rule of law as applicable at the international level. Moreover, it may also have an impact on human rights, especially were it to be found that Resolution 2178 or any other

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47 See Article 9 of the Additional Protocol.

48 As the Explanatory Memorandum makes it clear, states remain free to introduce ancillary offences. If they do so, however, they should be cautious not to run into absurd, and legally controversial, situations, when people would be prosecuted for an attempt to attempt to travel to attempt to commit a terrorist act. COD-CTE (015) 3 final, *Draft Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism,* 26 March 2015, para 48.

49 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

50 Directive (EU) 2017/541, supra nt 49 para 4.

51 Directive (EU) 2017/541, supra nt 49 para 12.

52 Directive (EU) 2017/541, supra nt 49 para 12.

53 Directive (EU) 2017/541, supra nt 49 Article 9-11.

54 Directive (EU) 2017/541, supra nt 49 Article 9(1).

55 See Capone, F, "Countering "Foreign Terrorist Fighters": A Critical Appraisal of the Framework Established by the UN Security Council Resolutions," 25 *Italian Yearbook of International Law* (2016) 227.

resolution on foreign terrorist fighters impose direct obligations on individuals. That is what Anne Peters, analysing Resolution 2178, claims might be the case. She argues that the Security Council is in the position to legislative for individuals, because 'the UN Charter, which enjoys a special legal quality […] endows the Security Council with a special authority that […] also is effective *erga omnes* vis-à-vis individuals'.[56]Although Peters concludes that this authority has not been deployed in resolution 2178, which 'is not itself the basis for criminalising the behaviour it seeks to suppress',[57] the potential is there and where it to materialise, the principle of legality would apply.

While the UN Security Council resolutions on foreign terrorist fighters are not directly binding on individuals, there is no doubt that those adopted under Chapter VII are, in parts formulated as decisions, binding on states. In addition to the general question of legislative powers, there are more specific issues related to the content of Resolution 2178 and of other instruments on foreign terrorist fighters. These issues pertain, primarily, to the definition of foreign terrorist fighters, to the construction of foreign terrorist fighters-related offences to be criminalized at the national level, and to the potential impact of the regulation on human rights. These three issues are interlinked. For the purpose of this analysis, they will nonetheless be dealt with separately as much as this is possible. The list of challenges is not meant to be an exhaustive one, as there are certainly other issues at stake (e.g. the relationship with international humanitarian law).

A. Definition of foreign terrorist fighters

The definition of foreign terrorist fighters, to recall, is provided for in Resolution 2178. Under this Resolution, foreign terrorist fighters are 'individuals who travel or attempt to travel […] to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training'.[58] This definition is taken over by other instruments on foreign terrorist fighters, such as the Protocol, and is also used as the basis for defining other concepts, in particular that of returnees and relocators. The EU, as we established above, elaborates on the final part of the definition, adding 'the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group'.[59]

At first sight, the definition may seem rather clear. Yet, as is often the case, the devil is in the detail, this time in the reference to terrorist acts. Nowhere in Resolution 2178 is this term defined. The European instruments score better in this respect. The *Convention on the Prevention of Terrorism,* which the Protocol supplements, defines terrorist acts by reference to 'any of the offences within the scope of and as defined in one of the treaties listed in the Appendix' (Article 1). The Appendix contains the list of 12 sectorial counter-terrorist treaties adopted at the universal level in 1970-2005. The EU Directive contains an updated EU definition of terrorism, which combines a long list of violent acts which, when committed with the aim of '(a) seriously intimidating a population, (b) unduly compelling a government or an international organisation to perform or abstain

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[56] EJIL: Talk!, Peters, A, *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I*, 20 November 2014, *at* <ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/> (accessed 23 May 2018).

[57] EJIL: Talk!, Peters, A, *Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part II*, 21 November 2014, *at* <ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/> (accessed 23 May 2018).

[58] UNSC, supra nt 17 para. 8 of the preamble and paras 5 and 6(a).

[59] Directive (EU) 2017/541, supra nt 49 Article 9(1).

from performing any act; or (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization',[60] qualify as a terrorist offence. Yet, the Protocol and the Directive only apply in the regional framework and most states are thus solely bound by Resolution 2178.

Some authors commenting on this resolution claim that the absence of the definition of terrorism is not really a problem. De Guttry, for instance, considers that the definition of foreign terrorist fighters 'reflects, to some extent, already-existing definitions proposed by the scientific community'.[61] He then makes references to the definitions of terrorism proposed by certain scholars, for instance, Bruce Hoffman.[62] Since, however, the definition of foreign terrorist fighters provided for in Resolution 2178 merely refers to terrorist acts without trying to define these acts or terrorism as such, it is unclear how it could reflect any (academic or other) definition of terrorism. Peters takes a more nuanced approach. She submits that '[a]rguably, an international common ground on the notion of "terrorism" has already emerged',[63] finding its expression in the UN Security Council Resolution 1566,[64] adopted on 8 October 2004. In Peters' view, 'the reference, in res. 2178, to "terrorism" and "terrorist acts", is sufficiently clear so as to prohibit terrorist acts'.[65] Kai Ambos goes one step further, claiming that the definition of terrorism contained in Resolution 1566 'is, in essence, the definition of international terrorism recognised by customary international law, which also forms the basis for a UN draft treaty of 2010 and is referred to in international jurisprudence /…/'.[66]

Resolution 1566 is invoked by other authors as well. Scheinin opines that '[w]hile SCR 1566 may not be a perfect definition of terrorism, it nevertheless is the best that the Security Council has said in the matter'.[67] Scheinin, however, does not seem to be fully convinced that this definition is customary in nature and that, as such, it applies automatically in the absence of an express reference to it.[68] He therefore laments that Resolution 2178

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60 Directive (EU) 2017/541, supra nt 49 Article 3(2).

61 De Guttry, supra nt 21 270-271.

62 Hoffman, B, *Inside Terrorism,* (Revised and Expanded Edition, Columbia University Press 2006), 40.

63 Peters, supra nt 56.

64 UNSC, *Threats to international peace and security caused by terrorist acts,* 8 October 2004, S/RES/1566 (2004). Resolution 1566 defines terrorist acts as "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature" (para 3).

65 Peters, supra nt 56.

66 EJIL: Talk!, Ambos, K, *Our terrorists, your terrorists? The United Nations Security Council urges states to combat "foreign terrorist fighters", but does not define "terrorism"*, 2 October 2014, *at* <ejiltalk.org/our-terrorists-your-terrorists-the-united-nations-security-council-urges-states-to-combat-foreign-terrorist-fighters-but-does-not-define-terrorism/> (accessed 23 May 2018).

67 Scheinin, *Back to post-9/11 panic?,* supra nt 23.

68 This reflects the position that Scheinin took in his 2005 report to the Commission on Human Rights that he drafted as the first Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, see UN Economic and Social Council, Scheinin, M, REPORT: *Promotion and Protection of Human Rights. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,* Doc E/CN.4/2006/98, 28 December 2005, *at* <undocs.org/en/E/CN.4/2006/98> (accessed 22 April 2018):

> imposes upon all Member States far-reaching new legal obligations without any effort to define or limit the categories of persons who may be identified as 'terrorists' by an individual state. This approach carries a huge risk of abuse, as various states apply notoriously wide, vague or abusive definitions of terrorism, often with a clear political or oppressive motivation.[69]

This view is shared by others. Bibi Van Ginkel notes that Resolution 2178 'certainly does not define what terrorism means. It once again leaves it to states to decide and identify who falls under this category. […] It is a missed opportunity that the Security Council […] did not refer to resolution 1566 in which it came up with a definition of terrorism […]'.[70] Letta Tayler notes that Resolution 2178 'does not set limitations on what "terrorism" means. This omission allows governments to criminalize as "terrorist acts" an array of internationally protected activities'.[71] Even Ambos, despite his view that the definition of terrorism in Resolution 1566 is customary, opines that 'Resolution 2178 […] ultimately leaves it up to each UN member state to apply the measures called for to those individuals defined as "terrorist" by that respective state itself'.[72]

There is no doubt that with the increased attention paid to the fight against terrorism in the past decades, especially since 11 September 2001, common legal standards have started to emerge in this area. It is also true that over this period, several instruments have introduced definitions of terrorism and that those definitions largely overlap.[73] The instruments encompass, in addition to Resolution 1566, the UN General Assembly Resolution 49/60 of 1994,[74] the 1999 *International Convention for the Suppression of the Financing of Terrorism*[75] and the *Draft Comprehensive Convention on International Terrorism.*[76] In 2011, moreover, the Special Tribunal for Lebanon (STL), in its decision on

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[69] Scheinin, *Back to post-9/11 panic?,* supra nt 23.

[70] International Centre for Counter-Terrorism, Van Ginkel, B, *The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach*, 4 November 2014, *at* <icct.nl/publication/the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/> (accessed 23 May 2018).

[71] Tayler, L, "Foreign Terrorist Fighter" Laws. Human Rights Rollbacks Under UN Security Council Resolution 2178," 18(5) *International Community Law Review* (2016) 455.

[72] Ambos, supra nt 66.

[73] See also Saul, B, *Defining Terrorism in International Law,* (Oxford University Press, Oxford, 2006).

[74] UNGA, *Measures to eliminate international terrorism,* 9 December 1994, A/RES/49/60. In its par. I(3), the Resolution refers to "/c/riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes".

[75] UNGA, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999. The Convention was adopted by the UN General Assembly Resolution 54/109 of 9 December 1999 and it entered into force on 10 April 2002. By 31 March 2018, it had 188 State parties. In its Article 2(1)(b), the Convention defines as terrorism, for the purposes of financing of terrorism, "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". Many of the provisions of this Convention have been made binding on all States by means of the UN Security Council Resolution 1373. The definition of terrorism contained in the Convention is, however, not mentioned in Resolution 1373.

[76] Letter dated 96/11/01 from the Permanent Representative of India to the United Nations addressed to the Secretary-General, *Draft Comprehensive Convention on International Terrorism,* 11 November 1996, A/C.6/51/6. Draft Article 2 stipulates that "[a]ny person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a

the applicable law, held that 'a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element'.[77] It is the STL decision that Ambos invokes when speaking about the customary definition of terrorism referred to in international jurisprudence.[78]

For a definition to emerge under customary law, there would need to be, as the STL recalls, a general *opinio juris* in the international community, accompanied by a practice consistent with such an *opinio.* The general *opinio juris* would need to relate both to the binding nature of the definition and to its constitutive elements. Yet, a closer look at the definitions present in international instruments reveals that these definitions are not completely identical. First, the definitions differ in their descriptions of both the *actus reus* (e.g. some limit terrorist acts to acts directed against civilians, others do not) and *mens rea* (e.g. some require specific motivation, others do not). Secondly, there are the well-known disagreements over the personal scope of application of the definition. Individuals acting on behalf of states, especially as members of their armed forces, and those acting on behalf of national liberation movements are the main groups that, in some views, should not be subject to the definition, because their acts are adequately covered by other norms of international law (especially norms of international humanitarian law).

Thirdly, the application of the definition in times of armed conflict remains uncertain. The STL recognizes this uncertainly when stating that 'while the customary rule […] so far only extends to terrorist acts in times of peace, a broader norm that would outlaw terrorist acts during times of armed conflict may also be emerging'.[79] Whether this broader norm, encompassing a definition of terrorist acts committed in times of armed conflict, would be identical to the peace-time definition, is not clear but the provisions on terrorism in the instruments of international humanitarian law and the references to this law in counter-terrorist instruments suggest that it does not necessarily need to be so.[80] Since foreign terrorist fighters typically operate in times of armed conflict, this element would merit closer consideration.

Fourthly, the definitions do not serve identical purposes. The STL focuses on terrorism as a crime under international law, alongside such crimes as genocide, crimes against humanity, war crimes and the crime of aggression. The resolutions and treaties, on their turn, seek to coordinate and harmonize inter-State cooperation in the prevention and suppression of terrorism as a transnational crime. Peters argues that Resolution 2178 could not serve as 'the basis for criminalising the behaviour it seeks to suppress', [81] i.e.

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place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".

77 Special Tribunal for Lebanon, *Interlocutory Decision On The Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging,* TL-11-01/I/AC/R176 *bis*, 16 February 2011, para 85.

78 Ambos, supra nt 66.

79 Special Tribunal for Lebanon, supra nt 77 para 107.

80 See Bianchi, A, Naqvi, ,Y, *International Humanitarian Law and Terrorism* (Hart, 2011).

81 Peters, supra nt 57.

acts of foreign terrorist fighters, because it 'resembles the classic suppression conventions'.[82] The same holds for the resolutions and treaties proposing a definition of terrorism. While it could be expected that the definitions of terrorism as a transnational crime and as an international crime should be similar, if not identical, with the latter emerging on the basis of the former by adding the individual criminal responsibility element, this cannot be taken for granted. Moreover, the STL claim that terrorism is an autonomous crime under international law has been contested exactly on the grounds that there is still no customary definition of terrorism even within international criminal law in the broad sense, as applicable to transnational crimes.

The survey of domestic legal orders reveals that the national practice in this area is not uniform either.[83] In fact, scholars, non-governmental organizations and UN experts have repeatedly lamented the plurality of the definitions of terrorism that states, and sometimes different institutions within a state, use.[84] It might certainly be possible to argue that an international definition of terrorism exists but some states deviate from it, either violating the common international standard or assuming the position of a persistent objector. Yet, the number of such states, together with the plurality and diversity of definitions at the international level, suggests that this common standard might simply not exist in the first place. In this situation, the fears expressed as to the potential divergence in the interpretation of the concept of foreign terrorist fighters, which builds on the concept of terrorism, are well warranted and it is to be regretted that the Security Council failed to incorporate a definition of terrorism, or refer to the definition present in Resolution 1566, in its instruments on foreign terrorism fighters.

B. Construction of the foreign terrorist fighters-related offences

Resolution 2178 and the subsequently adopted instruments seek to harmonize, and make work, criminal prosecution of foreign terrorist fighters. To achieve this aim, they impose on states the obligation to first criminalise and penalise certain foreign terrorist fighters-related offences, and then to prosecute, or extradite for the purpose of prosecution, individuals suspected of having committed some of those offences. Resolution 2178 and the Protocol concentrate primarily on acts that have to do with the travel, and preparation for the travel, from the country of origin. The newer instruments, especially Resolution 2396, expand the focus to individuals returning to this country or relocating to a third state, though it could be argued that this element has been present in the regulation from the beginning[85] and that it has merely become more prominent over the past couple of years due to the developments of the factual situation in the Middle East.

Although the two processes – leaving the country and returning to it – are closely interlinked, representing two stages in the life-cycle of a foreign terrorist fighter, the approach to their criminalisation differs. For the former situation (travel), the instruments introduce new criminal offences that states have to incorporate into their domestic legal orders. For the latter situation (return), they do not do so, merely calling upon states to prosecute returners and relocators based on already existing provisions of their legal

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82 Peters, supra nt 57.

83 See Setty, S, "What's in a Name? How Nations Define Terrorism Ten Years after 9/11" 33(1) *University of Pennsylvania Journal of International Law* (2011) 1; Schmid, A, "Terrorism - The Definitional Problem" 36(2) *Case Western Reserve Journal of International Law*, (2004) 375.

84 See Webber, D, *Preventive Detention of Terror Suspects: A New Legal Framework,* (1st ed, Routledge, 2016) 6; Tayler, supra nt 71; Scheinin, supra nt 68 para 27.

85 Resolution 2178 also speaks about the need to "develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters". UNSC, supra nt 17 para 4.

orders. The rationale for this differentiated approach is quite simple. Most states have traditionally had legal tools to prosecute those who engaged in armed conflicts or terrorist activities abroad. At the same time, they might not have tools to use against those who merely prepare or contemplate such an engagement, or these tools (ancillary offences in most cases) might not be specific or strong enough. That, coupled with the developments on the grounds, also explains why the international regulation first and foremost focuses on departing foreign terrorist fighters rather than on returnees and relocators.

In both cases, however, the regulation is legally problematic. As to the departing foreign terrorist fighters, the acts to be criminalized and prosecuted are, as we saw above, all carried out prior to the moment when, and regardless of whether, an individual commits any terrorist act. Travelling to a foreign country, financing such travelling and organizing it are in themselves perfectly lawful activities. Most of us regularly engage in them and that certainly does not turn us into foreign terrorist fighters. What turns individuals foreign terrorist fighters, or into those supporting them, is the specific purpose of the activity. As the Explanatory Report to the Protocol states, 'the real purpose of the travel must be for the perpetrator to commit or participate in terrorist offences, or to receive or provide training for terrorism'.[86] Foreign terrorist fighters have to act intentionally, and unlawfully, to achieve this purpose. Those financing their travel or organizing or otherwise facilitating it, have to act wilfully, i.e. they need to know that their support goes to an individual who intends to travel for the purpose of terrorism.

Establishing that these elements are present is not always an easy task. First, as the Counter-Terrorism Committee in its 2014 report noted, 'few foreign terrorist fighters reveal their plans before leaving'.[87] Some of them, moreover, may not be fully sure what these plans are. Pushed by the outrage at the events in the target countries and the empathy with victims of these events, by their adherence to the general tenets of the ideology promoted by the group they intend to join, or simply by a search for identity and belonging – the three main motivations which, according to scholars,[88] are behind the foreign /terrorist/ fighters phenomenon –, these individuals are not likely to have an involvement in terrorism as the main purpose, or even one of the purposes, of their travel. Some probably accept that such involvement will occur, meeting at least the conditions of a *dolus eventualis.* Others may not even cross this threshold. The same applies to those financing and organizing the travel. Some know very well whom they support and they intend to do so. Others probably either do not know or seek to help for other purposes (family ties, etc.). Distinguishing between the two categories is not always easy.

This may lead to dangerous shortcuts. The purpose may get deduced not from the intentions of a concrete individual but from the nature of the entity this individual decided to join. It is assumed that, if an individual decided to join a terrorist organization, then clearly s/he intended to, in the words of Resolution 2178, 'perpetrate, plan, prepare or participate in terrorist acts or provide or receive terrorist trainings' or, as

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[86] COD-CTE (015) 3 final, *Draft Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism,* 26 March 2015, para 48.

[87] UNSC, *Preliminary analysis of the principal gaps in Member States' capacities to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder their abilities to stem the flow of foreign terrorist fighters pursuant to Security Council resolution 2178 (2014),* 12 November 2014, S/2014/807, para 7.

[88] Frenett, R, Silverman, T, "Foreign Fighters: Motivations for Travel to Foreign Countries" *in* De Guttry, A, Capone, F and Paulussen, C, eds, *Foreign Fighters under International Law and Beyond* (Asser/Springer, 2016), 63.

a minimum, had to know that this is the highly likely outcome of his/her joining the organization and had to accept this outcome in principle. This assumption has serious flaws. It presupposes that there is a general consensus as to which entities qualify as terrorist organizations and that this consensus is known to, and shared by, individuals joining the entities. Yet, neither of these presumptions is necessarily true. The international community is divided not only with respect to the definition of terrorism but also, and probably even more, with respect to which entities are terrorist and which are not. There is neither a common definition of terrorist groups or organizations,[89] nor a comprehensive list of all such entities.

Even in the absence of such attempts and despite the general uncertainty linked to the concept, it is possible to say that there is a broad agreement across the international community that certain entities qualify as terrorist organizations. This is the case of entities which have been labelled as terrorist by the UN Security Council, such as ISIS, Al-Qaeda and, possibly, other entities included in the sanction list established under Resolutions 1267/1989/2253.[90] It could be argued that even in these cases, individuals joining the ISIS or any other of the entities need not necessarily be aware of the fact that these entities have been designated as terrorist organizations. They may also consider this designation as erroneous and unjust. Finally, they may be aware of the designation but may decide to join the relevant entity *despite*, rather than *because* of its involvement in terrorism. Due to the extreme nature of ISIS and ISIS-related entities and the wide-spread knowledge of this nature, however, such arguments could hold, if at all, only in very atypical and exceptional circumstances.[91]

The situation is more complicated with regard to entities that have not been designated as terrorist organizations by the UN Security Council. There are numerous organizations and groups listed as terrorist in some countries but not in others.[92] One recent example is that of the Kurdish People's Protection Units (YPG) operating in Syria. The YPG is considered as a terrorist organization in Turkey but not necessarily in EU countries. There have already been cases of individuals who travelled from the EU to join the YPG forces fighting against ISIS, and were prosecuted and sentenced in Turkey as foreign terrorist fighters on account of their activity.[93] Furthermore, some countries do not even have a list of terrorist organizations and there is thus no *a priori* indication,

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89 Directive 2017/541, supra nt 49, defines a terrorist group as "a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences" (Article 2(3)).

90 See UNSC, *Threats to international peace and security caused by terrorist acts,* 20 November 2015, S/RES/2249 (2015).

91 See NL Times, Pieters, J, *Jail Time for Arnhem Terror Suspects,* 15 June 2016, *at* <nltimes.nl/2016/06/15/jail-time-arnhem-terror-suspects> (accessed 23 May 2018). In June 2016, two men from the Netherlands, who had been arrested close to the border between Turkey and Syria, were sentenced to three and two years in prison, respectively, for an attempt to join a terrorist organization, as they had allegedly intended to join ISIS. The men claimed that they had travelled to Syria to help save victims of the civil war, not to engage in terrorism. The court did not find this explanation credible.

92 See the comparative table of the national lists compiled on Wikipedia, *List of designated terrorist groups,* online *at* <en.wikipedia.org/wiki/List_of_designated_terrorist_groups#cite_note-eur-lex.europa.eu-10> (accessed 23 May 2018).

93 See Czech Radio, Willoughby, I, *Czech Couple Involved With Kurdish Group Facing Terror Charges in Turkey,* 16 November 2016, *at* <radio.cz/en/section/curraffrs/czech-couple-involved-with-kurdish-group-facing-terror-charges-in-turkey;> (accessed 23 May 2018); Czech Radio, Velinger, J, *Turkish Court Sentences Czechs to More Than Six Years in Prison,* 2 August 2017, *at* <radio.cz/en/section/curraffrs/turkish-court-sentences-czechs-to-more-than-six-years-in-prison> (accessed 23 May 2018).

whether by joining an entity, individuals undergo a risk of criminal prosecution or not. Deducing the specific intent to engage in terrorism from the nature of this entity – a nature, which is moreover to be established *ex post facto* in the judicial proceedings – is thus problematic and risks running counter to the principle of legality.

It would seem that this problem does not arise in the prosecution of returnees and relocators.[94] Here, the international instruments do not request states to introduce new criminal offences, inciting them merely to use the already existing provisions. Depending on the concrete circumstances of the case and the relevant domestic legal order, returnees and relocators may be prosecuted, as far as the activities carried out abroad are concerned,[95] for murder or causing of serious bodily harm or an attempt thereof, the service in foreign armed forces or the membership in a criminal organization. Yet, when seeking to hold returnees and relocators accountable for these crimes, states may encounter legal and practical difficulties. The offence of serving in foreign armed forces often applies only to those who have joint armed forces of foreign states, as opposed to a non-state actor. Foreign terrorist fighters do not always commit violent crimes and when they do, it might be difficult to secure evidence due to the messy environment in which they operate. Due to these difficulties, states may again opt for an easy option and prosecute returnees and relocators for terrorism or for the membership in, or support of, a terrorist organisation. Then, similar problems as those described above would arise, though for individuals who have actually joined ISIS or a similar entity, it might be even harder to argue that they were unaware of the nature of such an entity.[96]

This subsection is obviously not meant to say that foreign terrorist fighters should not be held accountable for acts they carried out while abroad or they intend to carry out once there. It simply seeks to draw attention to the fact that, as Amnesty International and the International Commission of Jurists noted in their joint commentary on the Additional Protocol, new instruments focus 'on criminalizing ancillary offences arising from conduct which to varying extents is distant from the principal offence ("terrorist

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[94] See International Centre for Counter-Terrorism, Mehra, T, *Bringing (Foreign) Terrorist Fighters to Justice in a Post-ISIS Landscape Part II: Prosecution by Foreign National Courts*, 12 January 2018, *at* <icct.nl/publication/bringing-foreign-terrorist-fighters-to-justice-in-a-post-isis-landscape-part-i-prosecution-by-iraqi-and-syrian-courts/>; (accessed 23 May 2018); Bakker, E, Paulussen, C, Entenmann, E, "Returning Jihadist Foreign Fighters. Challenges Pertaining to Threat Assessment and Governance of this Pan-European Problem," 25(1) *Security and Human Rights,* Vol. 25, (2014) 11.

[95] Returnees and relocators may also face charges with regard to activities carried out after their return to the country of origin or their relocation to a third country. Here, the range is potentially even broader, encompassing *inter alia* – again depending on the concrete circumstances and the legal framework – murder or causing of serious bodily harm or an attempt thereof, the membership in a criminal organization, incitement to violence or spreading political or religious hatred. The threat that returnees and relocators may continue to engage in crimes after their return or relocation, is one of the main reasons why this category is paid such attention by the international community. At the same time, the legal framework applicable here is identical for former foreign terrorist fighters and for any other perpetrators.

[96] See NL Times, Pieters, J, *Dutch Jihadist Sentenced to Six Years in Prison, In His Absence*, 4 April 2018, *at* <nltimes.nl/2018/04/04/dutch-jihadist-sentenced-six-years-prison-absence> (accessed 23 May 2018). In March 2018, a court in Rotterdam, the Netherlands, convicted a Dutch jihadist, Marouane B., to six years in prison on account of terrorism for having joint the ISIS forces in Syria. A year earlier, the man had sent an open letter to Dutch media in which he had claimed that he joined the ISIS forces not for purpose of terrorism but to protect people from the Assad regime. The trial took place in absentia, as Marouane B. has not returned to the Netherlands yet.

offence") and is therefore more difficult to identify with certainty'.[97] This, together with the elusive nature of the concept of terrorism and the absence of an international definition thereof, makes the regulation open for diversified use and, potentially, misuse. Due to the uncertainties linked to the interpretation and application of new offences, the principle of legality requiring that laws be clear and accessible, is also at stake. That brings us to the third challenge, which pertains to the impact that the new regulation on foreign terrorist fighters may have, or has already had, on human rights.

C. Impact on human rights

Resolution 2178 stresses that 'Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law […]'.[98] It adds that 'respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort'.[99] The same appeal is repeated, often word for word, in the subsequent resolutions on foreign terrorist fighters, including Resolution 2396.[100] The Protocol also invokes human rights in several instances, most notably in its Article 8 under which '[e]ach Party shall ensure that the implementation of this Protocol, including the establishment, implementation and application of the criminalisation under Articles 2 to 6, is carried out while respecting human rights obligations'. As an integral part of international law, human rights law would be applicable even in the absence of explicit references to it.

The application of human rights law is one thing, the compliance with this law is another. Over the years, concerns have been raised by scholars[101] and non-governmental organisations[102] with respect to this latter issue. Some of these concerns pertain to the definition of foreign terrorist fighters and the construction of the foreign terrorist fighters-related offences, dealt with in the previous subsections. Here, the principle of legality, as enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPS) or Article 7 of the European Convention on Human Rights (ECHR), is particularly at stake, due to the uncertainties surrounding the definition of terrorism and the difficulties implied in establishing the specific purposes of the acts carried out by individuals suspected of being foreign terrorist fighters. To quote once again a joint submission by the Amnesty International and the International Commission of Jurists, 'the absence of any such specific definitions /of terrorism/ raise the concern that […] states may create broadly-defined criminal offences that fail to satisfy the principle of legality, and that they may apply wide or vague or politicized definitions, including of terrorism, with a risk of abusive, arbitrary or discriminatory application'.[103]

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97 Submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism (CODEXTER), *Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism,* 7 April 2015, IOR 60/1393/2015.

98 UNSC, supra nt 17 para 7 of the preamble.

99 UNSC, supra nt 17 para 7 of the preamble.

100 UNSC, supra nt 36 para 7 of the preamble.

101 See Tayler, L, supra nt 71; Limbada, Z, Davies, L, "Addressing the Foreign Terrorist Fighter Phenomenon from a Human Rights Perspective" 18(5) *International Community Law Review* (2016) 483; Ambos, supra nt 66.

102 See Tayler, L, supra nt 71*; Submission of Amnesty International and the International Commission of Jurists,* supra nt 97.

103 Amnesty International, *Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism,* 6 March 2015, point 1.1.

Other concerns, closely linked to the previous ones, pertain to the fair trial guarantees, or the absence thereof, in the trial of foreign terrorist fighters. These guarantees are listed in Article 14 ICCPR and Article 6 ECHR. They include, *inter alia,* the right to a fair and public hearing, the presumption of innocence and the right to examine, or have examined, witnesses. So far, only a handful of trials involving foreign terrorist fighters or returnees and relocators have taken place, although these trials are geographically spread across numerous countries (Australia, Belgium, Canada, the Czech Republic, Hungary, the Netherlands, Turkey, the United Kingdom, etc.). Most of the trials do not seem to have given rise to suspicions of procedural irregularities. At the same time, such irregularities have been repeatedly found in trials concerning terrorist suspects more generally. Reports show that terrorist suspects have been tried by bodies lacking independence and impartiality, have not been duly informed about charges against them, have been denied access to crucial evidence on account of the state secrecy, could not freely choose their counsel, or have evidence obtained in breach of human rights or domestic law used against them.[104] Since trials against foreign terrorist fighters are a form of trials with terrorist suspects, the same irregularities are not unlikely to affect them as well.

Other concerns relate to the limitations that states have imposed on various human rights in connection with their attempts to prevent and repress foreign terrorist fighters. Resolution 2178 requests states 'to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization /…/, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters'[105] and to 'prevent and suppress the recruiting, organizing, transporting or equipping'[106] of foreign terrorist fighters. Although the resolution simultaneously stresses that states have to act in accordance with their obligations under human rights law, this call has not always been heard and respected. Since a comprehensive overview of limitations imposed on human rights in this context has been provided elsewhere,[107] the following paragraphs provide just examples of such limitations, without any claim to completeness.

First of all, when faced with the threat of terrorism, states frequently resort to emergency legislation. They may also derogate from human rights treaties, with respect to a range of human rights (liberty and security, fair trial, privacy, freedom of expression,

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[104] See UNGA, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* 6 August 2008; UN Counter Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism,* October 2014, CTITF, A/63/223; Ambos, K, Poschadel, A, "Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorists Detained in Guantánamo Bay," 9(4) *Utrecht Law Review* (2013) 109; Saul, B, "Criminality and Terrorism" *in* Salinas de Frías, A, Samuel, K, White, ND, eds, *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford, 2012) 133; Hoffman, P, "Human Rights and Terrorism" 26(4) *Human Rights Quarterly* (2004) 932.; Human Rights Watch, *Morocco: Terror Convictions Upheld for 35, Including Political Figures*, 28 July 2010, *at* <hrw.org/en/news/2010/07/28/morocco-terror-convictions-upheld-35-including-political-figures;> (accessed 23 May 2018); International Federation for Human Rights, *Syria: Opening of the trial against detained human rights defenders Mazen Darwish, Hussein Ghrer and Hani Al-Zitani for terrorism*, 28 March 2014; , *at* <fidh.org/IMG/article_PDF/article_a15037.pdf> (accessed 22 April 2018); The Guardian, *Maldives prosecutor general to appeal against ex-president's conviction*, 24 July 2015, *at* <theguardian.com/world/2015/jul/24/maldives-prosecutor-general-appeal-against-mohamed-nasheed-conviction> (accessed 23 May 2018).

[105] UNSC, supra nt 17 para 4.

[106] UNSC, supra nt 17 para 5.

[107] Tayler, supra nt 71.

freedom of movement etc.). Since 2014, at least eight countries have enacted emergency laws invoking, in one way or another, the threat of terrorism. These are Egypt, Ethiopia, France, Malaysia, Mali, Tunisia, Turkey and Ukraine. France, Turkey and Ukraine have also formally derogated from the ICCPR and the ECHR. Although none of the emergency regimes has been triggered specifically by foreign terrorist fighters, these fighters, due to their link to terrorism, would be subject to them. For instance, Turkey declared a state of emergency and derogated from the ICCPR and the ECHR after an unsuccessful coup d'etat which took place on 15 July 2016.[108] The derogation is extensive and concerns a wide range of human rights (freedom and security, privacy, freedom of expression, freedom of assembly, a fair trial, the right to vote and take part in public affairs, etc.). The exceptional measures are still in force at the time when the first trials with foreign terrorist fighters take place in Turkey and they lower the procedural standard for these trials as well as the general standard of the protection of human rights in the country.

States have imposed limitations on human rights in connection with foreign terrorist fighters both during the state of emergency and outside it. The limitative measures include, among others, travel bans, the revocation of citizenship, preventive detention and intrusions into privacy.[109] Travel bans have been recently enacted in Austria, Australia, Azerbaijan, Belgium, Denmark, Egypt, France, Israel, Italy, Malaysia, the Netherlands, New Zealand, Tajikistan, Tunisia, and the UK. Although the concrete form differs, the measure typically entails suspension of passports and IDs for individuals suspected of intending to become foreign terrorist fighters. The right to freedom of movement and to leave one country, including one's own, enshrined in Article 12 ICCPR and Article 2 of Protocol 4 to the ECHR, is at stake here. It is not an absolute right and can be limited but only within the confines prescribed by law and to the extent necessary to achieve a legitimate purpose (e.g. national security or the prevention of crime). Travel bans may be justified but they have to meet these conditions and not to interfere with other protected rights. Yet, this seems to be the case in some countries. For instance, Egypt and Tunisia have issued general bans to travel to the Middle East applicable to men under 35 or 40. Australia criminalizes travel to a 'declared area where terrorist organizations engage in hostile activity'[110] and it is up to the individual to prove that they had a legitimate reason to travel to such an area, thus shifting the burden of prove.

The right to citizenship is guaranteed in Article 15 of the Universal Declaration of Human Rights. Depriving individuals of citizenship if such a measure would result in statelessness could also run contrary to the 1954 *Convention on the Reduction of Statelessness* and, arguably, customary international law. Over the past years, it has become common to include the revocation of citizenship among the sanctions foreseen for individuals engaged in terrorism, including foreign terrorist fighters. Austria, Australia, Bahrain, Belgium, Canada, and the UK are some of the countries using this tool.[111] In most of these countries, the sanction can only be applied to individuals with dual citizenship. This is not in itself a violation of international standards, as long as the sanction is imposed in a regular judicial process and does not result in a *de facto* statelessness. In

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[108] CoE, *Declaration contained in a letter from the Permanent Representative of Turkey,* 21 July 2016; UN Secretariat, *Notification under Article 4(3),* 2 August 2016, C.N.580.2016.Treaties-IV.4.

[109] Tayler, supra nt 71.

[110] Section 119.2 of the Criminal Code of Australia.

[111] See Amnesty International, *Arbitrary Deprivation of Citizenship,* Seminar Held on 31 October 2016, Amnesty International, 2017.

some countries, however, the dual citizenship condition is not present. There are also allegations that the measure is used as a means to remove dissidents and human rights activists from the country.[112]

Preventive detention is another measure, which has become increasingly popular in the fight against terrorism.[113] The notion refers to the detention, which occurs before or even without charge to control a person who is, typically, considered to constitute a threat to the society. The right to freedom and security, enshrined in Article 9 ICCPR and Article 5 ECHR, allows for preventive detention but only under strict conditions. As the UN Human Rights Committee held in 1982, '[i]f so-called preventive detention is used, for reasons of public security, […] it must not be arbitrary, and must be based on grounds and procedures established by law […], information of the reasons must be given […] and court control of the detention must be available […] as well as compensation in the case of a breach […]'.[114] Prevention detention has been used in Australia, Canada, France or the UK, with respect to departing foreign terrorist fighters – to prevent them from leaving, as well as to returnees and relocators – to prevent them from engaging in violent acts upon their return or relocation. There is a risk that the detention will be based on the group rather than the individual threat assessment and will entail departures from the conditions set by the Committee (grounds not communicated due to the protection of state secrecy, judicial control unavailable or delayed, etc.).

The right to privacy, enshrined in Article 17 ICCPR and Article 6 ECHR, has suffered considerable restrictions over the past years. Some of these restrictions are even explicitly foreseen by international instruments on foreign terrorist fighters. For example, Resolution 2178 calls upon states to require airlines operating in their territory to provide advance passenger information (API), i.e. data collected from government-issued passport or other official documents.[115] Such a measure of itself may be fully compatible with the right to privacy and the protection of personal data, which, again, are not absolute rights. Yet, concerns have been expressed as to the potential retention of the personal data, their use for other purposes than national security and their disclosure to third parties.[116] The right to privacy is also at stake in connection with the extended powers of the police and intelligence services allowing them to monitor private communications, and with some of the measures indicated above such as preventive detention. Thus, although Resolution 2178 stresses the importance of human rights, it introduces a regime which may lead to, and justify, disrespect of these rights.

Concluding Remarks

Resolution 2178 repeatedly invokes the threat posed by foreign terrorist fighters noting that these fighters 'increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin, the States they transit and the States to which they travel […]'.[117] This phenomenon is nowadays mostly connected with the

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[112] The Washington Post, *Bahrain is stripping dissidents of their citizenship, and the U.S. is silent,* 8 July 2017, *at* <washingtonpost.com/world/middle_east/bahrain-is-stripping-dissidents-of-their-citizenship-and-the-us-is-silent/2017/07/08/3ad347d0-5154-11e7-91eb-9611861a988f_story.html?noredirect=on&utm_term=.0d508bc52fa3> (accessed 23 May 2018).

[113] See Webber, supra nt 66.

[114] UN HRC, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons),* 30 June 1982, para 4.

[115] UNSC, supra nt 17 para 9.

[116] UNSC, *Gaps in the use of advance passenger information and recommendations for expanding its use to stem the flow of foreign terrorist fighters,* 26 May 2015, S/2015/377, para 44.

[117] UNSC, supra nt 17 para 10 of the preamble.

conflict with ISIS, yet it is certainly not limited to this, or any other particular region. That is the reason why the UN Security Council, while responding primarily to the events in the Middle East, has decided to deal with foreign fighting in a general way, without any temporal and territorial limits. Although this approach might be problematic, with the Security Council assuming the role of legislator that the UN Charter does not confer on it, the international community has, at least in the area of counter-terrorism, so far refrained from contesting it in any serious manner. States have started to implement the obligations stemming from Resolution 2178 and other resolutions either directly, or through regional instruments. There are still gaps in the implementation.[118] These gaps, however, seem to have more to do with the factual capacity of states to abide by new obligations than with their readiness to accept these obligations.

This is not all that surprising and all that positive as one might think. Due to the reference to the still undefined concept of terrorism, the definition of foreign terrorist fighters remains imprecise and open to the creative (re)interpretation at the national level. The foreign terrorist fighters-related offences that Resolution 2178 requests states to criminalise and prosecute are construed in such a way as to leave, again, large discretion to national organs to decide whom they wish to qualify and prosecute as foreign terrorist fighters. Even states seeking to implement and apply the new regulation in good faith may in this situation get over the line and depart from the principle that any counter-terrorist measures have to comply with international law, including human rights law. The regime built around the concept of foreign terrorist fighters thus risks becoming of itself a threat to the values that it is supposed to protect. And since respect for human rights is an integral part of any successful counter-terrorist strategy, it also risks jeopardising its own purposes. The international community, with the UN Security Council in the lead, would thus do well to reconsider the contours and the content of the new regime and to ponder whether the 'terror-isation' of international law that we have witnessed over the past years is a solution to the problem of terrorism or rather, and increasingly, a part of this problem.

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[118] UNSC, supra nt 87 para 7.

Universal Jurisdiction and Terrorism

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Keywords
UNIVERSAL JURISDICTION, TERRORISM, WAR CRIMES, CRIMES AGAINST HUMANITY, PERSECUTION, REPRESSION

Abstract

Universal jurisdiction has a relatively long history. There is evidence from the seventeenth century of recourse to this legal institution as a means of avoiding the existence of areas of impunity. State practice, however, is quite recent, emerging from the concepts of war crimes and crimes against humanity. Regardless of how they are classified or categorised, it is within this framework that terrorist acts need to be viewed. The issue of the exercise of universal jurisdiction for crimes classed as terrorism arises when they are qualified by taking into account certain specific acts, such as serious violations of IHL, illegal seizure of aircraft, hostage-taking, kidnapping, acts committed with bombs, etc. Most treaties therefore provide for application of the principle of *aut dedere aut judicare* as a corollary to universal jurisdiction. However, conventional law, general or specific, is not the only basis for the exercise of universal jurisdiction in the case of terrorism offences. The customary basis is also very important, as are the unilateral acts of states when they legislate or pass judgement taking this framework — conventional or not— into account. The purpose of this article is to analyse all such aspects.

Introduction

Any discussion of terrorism must start by addressing the difficulty of identifying the actual subject of debate, given that there is no legal definition of terrorism. One might even speak of 'terrorisms'[1] or, as Antonio Cassese puts it, a multifaceted criminal notion.[2] In order to tackle the question of terrorism and universal jurisdiction, we will necessarily have to delimit those terrorist acts to which we are going to refer, given that universal jurisdiction for possible criminal prosecution of such terrorist acts will be dependent on the nature of those acts. Terrorism, even where it is a category of criminal offense, is not always accompanied by a specific typology. The criminalization of terrorism has been the

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1 Di Filippo, M, "The definition(s) of Terrorism in International Law" *in* Saul, B, ed, *Research Handbook on International Law and Terrorism*, (Edward Elgar 2014), 3–19.

2 Cassese, A, "The Multifaceted Criminal Notion of Terrorism in International Law", (4)5 *Journal of International Criminal Justice* (2006) 933.

subject of much work in the recent history of international law. However, it has yet to achieve the status it enjoys in some domestic legal orders,[3] despite attempts at definition.[4]

For its part, universal jurisdiction is an international legal institution sufficiently understood by experts[5] but with little experience in state practice. Using Kennett C. Randall's definition, the International Law Association has stated that:

> Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.[6]

Universal jurisdiction, therefore, is based fundamentally on the existence of the power to judge cases of international concern. Clearly, terrorism —in all its forms— may involve such cases.

For this reason, internal legal systems establish a division between courts. This differentiation of competences admits a specific domestic judge, without any relationship to the offences committed abroad, by and against foreign nationals. The Spanish National Court, for example, is the only court with competence in matters of terrorism. This competence has been defined within the framework of universal jurisdiction as

> a principle derived from international law that, based on a supranational interest, enables the domestic courts to exercise, on behalf of the international community, criminal jurisdiction for the prosecution of certain international crimes of first and second degree, regardless of the nationality of the victims and victimizers and the place where they were committed.[7]

We need to define the legal nature of universal jurisdiction linking it with terrorism as a crime under international law. There are certain conventional aspects that justify the application of universal jurisdiction for terrorist acts within the framework of International Humanitarian Law, such as war crimes. However, there are also cases when those terrorist acts may be classified as crimes against humanity. It is easier to find this possible application of universal jurisdiction in the conventional framework of present treaties that specifically provide for terrorist acts, albeit with limitations. However, it is not exclusively confined to the conventional field, given the diverse nature of both universal jurisdiction and the international crime itself which results from the commission of terrorist acts. There are sufficient legal grounds of customary nature and state practice in this area to justify its application. Argentina, Belgium and Spain, to

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3 See a brief history of the efforts to criminalize terrorism in Margariti, S, *Defining International Terrorism – between State Sovereignty and Cosmopolitanism* (Springer, Asser Press, The Hague, 2017), 112-124.

4 Sau, B, "Definition of "Terrorism" in the UN Security Council: 1985-2004", 4(1) *Chinese Journal of International Law* (2005) 141, 141–166.

5 Cherif Bassiouni, M, "The History of Universal Jurisdiction and Its Place in International Law", *in* Stephen Macedo, ed, *Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004), 39–63.

6 International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, London, 2000, 2.

7 Spanish National Court, *Amal Hag-Hamdo Case*, 15 December 2017, second legal basis, <webcache.googleusercontent.com/search?q=cache:FFRnjkUqM_wJ:https://confilegal.com/wp-content/uploads/2017/12/Sentencia-Sala-Apelaciones-rechaza-querella-Siria1.doc+&cd=2&hl=es&ct=clnk&gl=it> (accessed 21 April 2018).

mention but a few,[8] have contributed enormously to the practice of universal jurisdiction and can serve as a basis for analysing practice and making a compendium of internal regulations that allow national courts to assume specific competences for the exercise of universal jurisdiction in this matter.

Like any legal institution, universal jurisdiction needs to be constructed; its boundaries need to be delineated and its content, limits and scope established. In short, it is necessary to enhance the competence of states to exercise universal jurisdiction.[9] This essay is not intended to enter into greater detail here on the conceptual levels of competence and jurisdiction, among other reasons, because there is already extensive legal literature on both aspects. I shall nonetheless take account of the particularities of these concepts in international law, since, as Professor Sánchez Legido states in his magnificent treatise on universal jurisdiction, these notions are polysemous. As he says 'one must clarify that, in the context of 'universal jurisdiction', the notion of jurisdiction alludes to a core of problems related to the projection of state competences in space'.[10] Moreover, the incursion of domestic law into this legal institution has led to talk of universal criminal and civil jurisdiction, as a corollary to that incursion, given that for international law that dichotomy was not necessary; international law always refers to reparation or satisfaction, whereas here we are talking about criminal sanctions or civil compensation, as if it were internal law. Does this mean that the two areas have become permeable to one other? And will this permeability be projected on the crime of terrorism which suffers from the same endogenous problems?

The methodology, then, is not simple; one must resort to more theoretical aspects, such as the legal nature of the institution and the establishment of standard and practice — both international and national. In this case, the Spanish experience is very useful for the formation of universal jurisdiction in the context of terrorist acts and this is the focus of this essay's contribution. I shall use a systematic methodology that will enable integration of the applicable legal norms. I shall also draw on primary sources, backed by international and national jurisprudence (from national courts that have already ruled on this matter) and secondary doctrinal sources that allow me to verify the initial hypothesis. Let us now turn to an analysis of these points, in the hope that the results will cast some light on a legal institution that is as much admired as it is reviled.

I. The Conventionality of the Crime of Terrorism as a War Crime and the Exercise of Universal Jurisdiction

The concept of terrorism has proved impossible to define at an international level and very difficult to specify at a regional level [11]. At national level, each state has defined the concept by incorporating different and even disparate elements. This has led to legal difficulties, *inter alia* with regard to the exercise of extradition.[12]

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[8] Other states have also addressed the regulation and practice of these issues. See, by way of example, Venezuela: Amnistía Internacional, *Venezuela, La lucha contra la impunidad a través de la jurisdicción universal* (Editorial Amnistía Internacional, 2010).

[9] For an excellent and highly-detailed work on universal jurisdiction, see Inazumi, M, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005).

[10] Sánchez Legido, A, *Jurisdicción universal penal y Derecho Internacional* (Editorial Tirant Lo Blanch 2003), 21.

[11] See different definitions and versions in Duffy, H, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2005), 17-46.

[12] In federal American law alone, twenty-two different definitions have been found. See Maggs, GE, *Terrorism and the Law: Cases and Materials* (George Washington University Law School 2005), 1.

I shall not draw the same distinction as Professor Norberg between international and transnational crimes[13] given that for the moment, this difference is not relevant to my analysis. I shall instead consider terrorism as a crime of international law, which may therefore be included among crimes eligible for the exercise of universal jurisdiction. Nor shall I consider terrorism as 'national' or 'international', since no such differentiation is made with regard to the legal right protected under international law. At most, one must accept the framework of competence of the jurisdiction, before coming to universal jurisdiction.[14]

As Luz E. Nagle notes, 'The practices and customs of states regarding terrorism are inconsistent, and the rules applied to terrorism are yet to be settled through the "general assent" of nations'.[15] As the ICRC recognizes:

> The current code of terrorist offences comprises 13 so-called 'sectoral' treaties'[16] adopted at the international level that define specific acts of terrorism.[17] There is also a draft Comprehensive Convention on International Terrorism that has been the subject of negotiations at the UN for over a decade. As has been calculated, the treaties currently in force define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of 'bombs' or nuclear materials and two crimes concerning the financing of terrorism'.[18]

The first international treaties to make mention of terrorism and terrorist acts were within the framework of International Humanitarian Law. In effect, Art. 33 of the IV Geneva Convention 1949 states that '[c]ollective penalties and likewise all measures of intimidation or of *terrorism* are prohibited' (emphasis added). Art. 4.2 d) of Additional Protocol II prohibits 'acts of terrorism' at all times and in all places; and Art. 13-2 also includes a prohibition on 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population'. This framework of prohibitions entails the commission of war crimes.

In the law of armed conflicts, especially in the context of non-international armed conflicts, a problem is created by the broad scope often given to the concept of terrorism. Therefore, as the ICRC recognizes, 'the term 'terrorist act' should be used, in the context of an armed conflict, only in relation to the few acts specifically designated as such under IHL treaties, and should not be used to describe acts that are lawful or not prohibited by IHL'.[19] Moreover, the ICRC goes on to say,

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[13] Norberg, N, "Terrorism and International Criminal Justice: Dim Prospects for a Future Together" 8(1) *Santa Clara Journal of International Law* (2009) 5.

[14] See, in this regard, Nagle, L E, "Terrorism and Universal Jurisdiction: Opening a Pandora's Box?", 27(2) *Georgia State University Law Review* (2011) 13.

[15] Nagle, L, E, "Should Terrorism Be Subject to Universal Jurisdiction?", 8(1) *Santa Clara Journal of International Law* (2010) 91.

[16] There are currently 18 treaties at universal level.

[17] See all existing multilateral treaties on the subject at <treaties.un.org/doc/source/titles/english.pdf> (accessed 21 April 2018) .

[18] ICRC, 31st International Conference of the Red Cross and Red Crescent Geneva, Switzerland 28 November – 1 December 2011, REPORT: *International Humanitarian Law and the challenges of contemporary armed conflicts*, October 2011, *at* <icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (accessed 21 April 2018) 48–49 (footnotes not in original).

[19] *Ibid,* 51.

> While there is clearly an overlap in terms of the prohibition of attacks against civilians and civilian objects under both IHL and domestic law, it is believed that, overall, there are more disadvantages than advantages to additionally designating such acts as 'terrorist' when committed in situations of armed conflict (whether under the relevant international legal framework or under domestic law). Thus, with the exception of the few specific acts of terrorism that may take place in armed conflict, it is submitted that the term 'act of terrorism' should be reserved for acts of violence committed outside of armed conflict.[20]

Sassòli argues that these articles are irrelevant to an analysis of terrorism, since they do not reflect the way in which terrorist acts are generally presented. He considers that the perpetrators of terrorist acts do not usually target the people under their power, do not seek to force their (potential) victim to refrain from doing an act and do not act in response to a hostile act.[21] He, therefore, considers acts directed against the persons in the hands of perpetrators of terrorist acts and terrorist acts directed against the civilian population to be two different things. However, this article contends that such distinction would lead us to the absurd position of not considering hostage-taking or torture to be terrorism, for example, even when their aim is to terrorize. In any case, the Tribunal for the Former Yugoslavia has not applied this distinction, detailing the customary character of the rule, which goes beyond the conventional norm itself. [22]

I do appreciate the problem Sassòli highlights; on occasions, in the context of an armed conflict, there may be a legitimacy that would not arise in a situation of non-armed conflict. For example, when an attack is directed against military installations, the classification of the action will differ depending on whether or not an armed conflict existed at the time. While this is certainly true, the classification of the crime is the responsibility of the courts, based on all the variables of the case and the circumstances in which it occurs. In the framework of IHL, not only have these criminal conducts been punished, but the right to exercise universal jurisdiction has been established, since the obligation to try or extradite has been established and no criminal jurisdiction has been excluded. Therefore, the corollary to this obligation *aut dedere aut judicare* and the obligation not to exclude any other criminal jurisdiction is the conventional possibility of using universal jurisdiction. At heart, as Thomas W. Simon states, 'Universal Jurisdiction gives effect to the obligation *erga onmes* to prosecute universal prohibitions without regard to classical grounds for jurisdiction'.[23] Thus, the four Geneva Conventions of International Humanitarian Law of 12 August 1949, together with Additional Protocol I, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and its Second Additional Protocol of 26 March 1999, and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 establish the universal jurisdiction, as discussed.

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[20] *Ibid*, 51.

[21] Sassòli, M, "La Définition du Terrorisme et le Droit International Humanitaire", *Revue Québécoise de Droit International* (2007) 34.

[22] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Appeals Chamber (ICTY), *Prosecutor v. Stanislav Galic*, IT-98-29-A, Judgment, 30 November 2006, para 88.

[23] Simon, TW, *Genocide, Torture and terrorism – Ranking International Crimes and Justifying Humanitarian Intervention* (Palgrave Macmillan 2016), 2.

The principle of universal jurisdiction is explicitly reflected in the four Geneva Conventions of International Humanitarian Law 1949.[24] Article 49 of the First Convention, for example, reads:

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[25]

As can be seen, the scope of this obligation is not limited to the principle of *aut dedere aut judicare* but extends to full universal jurisdiction. Naturally, we must not forget that this only applies to serious infractions. As Flory and Higgins recognizes, 'In that context we could say "terrorism" is a crime which allows universal jurisdiction'.[26]

In this regard, the International Criminal Tribunal for the Former Yugoslavia has stated that 'the Conventions create universal mandatory criminal jurisdiction between Contracting States'.[27] Moreover, we should not ignore the signing on 26 November 1968 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Although it has not been widely ratified,[28] the convention shows it to be considered as customary law. Practical proof is given by the trials still continually being brought against war crimes or crimes against humanity committed during World War II and later violations of criminal international law and against which neither an exception of incompetence *ratione temporis* or *rationae personae* or *ratione loci* can be alleged.[29]

In this sense, in its judgment on the *Klaus Barbie Case* of 20 December 1985,[30] the French Court of Cassation deemed crimes against humanity to be imprescriptible, thus considering itself competent to prosecute acts committed during the Second World War.[31] A similar case arose when an American television station found Erich Priebke on

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[24] Sandoz, Y, "L'applicabilité du droit international humanitaire aux actions terroristes" *in* Flauss, J-F, ed, *Les nouvelles frontières du droit international humanitaire, actes du colloque du 12 avril 2002 organisé par l'Institut d'études de droit international de l'Université de Lausanne* (Bruylant: Nemesis 2003).

[25] This provision is also included in Article 50, International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (Second Geneva Convention); Article 129, ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (Third Geneva Convention) and Article 146, ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention).

[26] Flory, M and Higgins, R, *Terrorism and International Law* (Routledge 1997), 28.

[27] ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Decision on Jurisdiction, 2 October 1995, para 79.

[28] The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanityhas been ratified by 55 States Parties.

[29] One might recall the Klaus Barbie Case in France or the Case of the Massacre of the Ardeatine Pits in Italy, for which the French and Italian judicial authorities respectively condemned Barbie and Erick Priebke and Karl Hass, in 1985 and 1998, for acts committed during the Second World War. Further examples can be seen in the proceedings currently underway in Spain against Videla and Pinochet, for events that occurred in the 1970s and 1980s.

[30] This judgement can be found in the *Journal de Droit International*, (1986), 129–142.

[31] For a more detailed study of the circumstances taken into account by the Court, see the study by Wexler, L S, "The interpretation of the Nüremberg Principles by the French Court of Cassation: From Touvier to Barbi and back again", 32 *Columbia Journal of International Law* (1994).

9 May 1994, living in Bariloche, Argentina. Italy requested his extradition, accusing him of the reprisal carried out on 24 March 1944, when, together with Karl Hass, he arrested 335 people and had them shot near the Via Ardeatina in Rome. Priebke and Hass were sentenced to life imprisonment by the Military Court of Rome on 7 March 1998.

According to article 86 of Additional Protocol I 1977, to the four Geneva Conventions 1949:

> The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

It therefore refers to an obligation on the High Contracting Parties, whether or not they are parties to the conflict, to 'repress' and 'take measures necessary to supress all other breaches ... which result from a failure to act when under a duty to do so' by any State Party.[32]

Article 88 of the Protocol requires that the High Contracting Parties 'shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol' and

> [t]he law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

In the framework of serious infringements against cultural heritage in periods of armed conflict, Article 16-2 of the Second Additional Protocol of 26 March 1999, to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, states as follows:

> 2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:
> a. this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable or affect the exercise of jurisdiction under customary international law.

Examining this clause closely, we see that it speaks of the exercise of jurisdiction under applicable international law or customary international law, which can only be interpreted as universal jurisdiction. Finally, Article 9 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989, clearly states that: 'The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law'.

It therefore accepts universal jurisdiction provided it is admitted in domestic law. Obviously in all these international treaties and as we shall see, there is an identification

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[32] Voneky, S, "The Fight against Terrorism and the Rules of the Law of Warfare", Walter, C, Voneky, S, Roeben, V and Schorkopf, F, eds, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer 2003).

between jurisdiction and jurisdictional competence. I believe they are referring to jurisdictional competence.

The High Court of Brussels decided to close a case, interpreting that the Belgian Law of 16 June 1993 on the suppression of serious crimes of International Humanitarian Law should only be applied when the defendant is under the territorial jurisdiction of Belgium. This judgement was later overturned by the *Cour de Cassation*, in its judgment of 12 February 2003, which reaffirmed the absolute nature of universal jurisdiction.[33] These divergences sparked parliamentary debate, and the act of 16 June 1993, on the suppression of serious crimes of International Humanitarian Law had to be repealed and replaced by another, the Act of 5 August 2003 on the repression of serious violations of International Humanitarian Law.[34] While proposals have been made on the status that should be afforded to authors of terrorist acts in situations of armed conflict,[35] they are not relevant to this discussion.

II. The Conventionality of the Crime of Terrorism as a Crime against Humanity and the Exercise of Universal Jurisdiction

The term 'crimes against humanity' was first used in 1915 by the allied powers in the First World War, in condemning the mass killing of Armenians by Turkey. After the Second World War, the term was included in the Agreement of the United Kingdom of Great Britain and Northern Ireland, the United States of America, France and the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, signed in London, on 8 August 1945.[36]

Art. 6-c of this Treaty states that the following acts are crimes coming within the jurisdiction of the Tribunal (the Nuremberg Tribunal):

> *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country were perpetrated.[37]

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[33] Cour de Cassation, Section Française, 2e. Chambre*, arrêt de 12 febvrier 2003 at* <www.cass.be/juris> (accessed 4 May 2018). On the Belgian experience in this field of universal jurisdiction, see D'Argent, P, "L'expérience belge de la compétence universelle : beaucoup de bruit pour rien?", 108 *Revue Générale de Droit International* (2004) 597 and ff. Also López-Jacoiste Díaz, M, E, "Comentarios a la ley belga de jurisdicción universal para el castigo de las violaciones graves del Derecho Internacional humanitario reformada el 23 de abril de 2003", 55(2) *Revista Española de Derecho Internacional* (2003).

[34] *Act of 5 August 2003 on the Repression of Serious Violations of International Humanitarian Law* (Belgium) 2003. See the text of the new Act *at* <ulb.ac.be/droit/cdi/loi2003.html> (accessed 21 April 2018).

[35] This question has been raised by Sassòli, M, "La guerre contre le terrorisme, le droit international humanitaire et le statut de prisonnier de guerre", 39 *The Canadian Yearbook of International Law* (2001) 211.

[36] United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, 82 UNTS 280 (London Agreement).

[37] *Ibid*.

A similar definition was included by the International Military Tribunal for the Far East, proclaimed by the Supreme Commander for the Allied Powers at Tokyo, on 19 January 1946 (art. 5-c).[38]

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, which was established on 25 May 1993, includes crimes against humanity among the crimes covered by the Statute (art. 5),[39] as does the Statute of the International Criminal Tribunal for Rwanda, which was established on 8 November 1994 (art. 3).[40] However, no general codification of this kind of crime against humanity was made until the 1998 Rome Statute establishing the International Criminal Court.[41] The Statute offers a definition of crime against humanity for different acts (such as murder, extermination, enslavement, deportation or forcible transfer of population, etc.) when they are committed 'as part of widespread or systematic attack directed against any civilian population with knowledge of the attack' (Art. 7). The elements of crimes against humanity may be compatible with those of the crime of terrorism or any terrorist acts codified: the physical element, the contextual element and the mental element.

As I shall explain, there are eighteen international treaties that allude to certain acts of terrorism as crimes of international law.[42] All of these terrorist acts are perpetrated under conditions to make them classifiable as crimes against humanity (since they include the elements of crimes against humanity). They may, therefore, qualify for universal jurisdiction, without requiring conventional references on the exercise of universal jurisdiction in all cases. Examples include Article 3.3 of the Tokyo Convention on offences and certain other acts committed on board aircraft of 14 September 1963, which 'does not exclude any criminal jurisdiction exercised in accordance with national laws'; Article 4-3 of The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, and Article 5-3 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 23 September 1971, Article 3-3 of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973, Art. 5-3º of the Convention of New York on the Taking of Hostages of 17 December 1973, Art. 6-5º of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, Article 5-3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 10 December 1984, and Article 6-2 of the European Convention for the Suppression of Terrorism of 27 January 1977.

While none of these international conventions make explicit mention of the principle of universal jurisdiction, one may deduce from their respective texts the

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38 United Nations, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* and *Charter of the International Military Tribunal,* 8 August 1945, Treaties and Other International Acts Series 1589.

39 UN Security Council, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 25 May 1993, S/RES/827.

40 UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, S/RES/955.

41 United Nations, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 90.

42 For a broader analysis of this question, see Schabas, WA, "Is Terrorism a Crime Against Humanity?", 8 *International Peace Keeping* (2002), 255 and ff.

imposition of the principle of *aut dedere aut judicare,*[43] the preference of jurisdictions in relation to the place of commission of the crime, the nationality of the offender or the place of detention and the reference to any other criminal jurisdiction. According to this paper, these also refer to universal jurisdiction — that is, the possibility that a person may be tried by any state for terrorist acts committed abroad, against nationals or even against non-nationals.[44] This is also the opinion held by most doctrines, Spanish[45] or otherwise.[46] In addition, there have been cases in which it is adjudged that the issue is not the right of the state to universal jurisdiction, but the obligation of *aut dedere aut judicare*, even if this is not formally included in a treaty. This is an advantage to considering some terrorist acts as crimes against humanity.[47] The consequences of many terrorist acts may be covered by other crimes, such as genocide, torture and these crimes are crimes against humanity.

The German Constitutional Court was called upon to interpret Article 7 of the Convention on the Prevention and Punishment of the crime of genocide of 9 December 1948 (which states that 'For the purposes of extradition, genocide and the other acts listed in Article III will not be considered as political offenses. The Contracting Parties undertake, in such a case, to grant extradition in accordance with their legislation and current treaties'). The court judged that Germany had an absolute obligation to extradite or prosecute. It also stated that the 'Federal Republic of Germany would be obliged to comply with an extradition request from Bosnia-Herzegovina'.[48] In the Scilingo Case of 19 April 2005, the Spanish National Court sentenced the captain of an Argentine Corvette to 640 years in prison for crimes against humanity resulting in 30 deaths with malice aforethought [*alevosía*], illegal detention and torture. This is, therefore, an example of the exercise of universal jurisdiction, for crimes classified as crimes against humanity, committed abroad, by foreign citizens, against foreign citizens.[49] Crimes against humanity include terrorist acts.[50]

Today, the court would be unlikely to have reached the same conclusion, given that Spain has substantially amended its legislation on the attribution of competence for terrorist offenses for the exercise of universal jurisdiction. In this regard, Art. 23-4º of the Organic Law of Judicial Power lists terrorism as one of the crimes for which Spanish judges may exercise universal jurisdiction, without limitation:

> d) Crimes of piracy, terrorism, trafficking in toxic, narcotic or psychotropic substances, trafficking in persons, crimes against the rights of foreign nationals and crimes against the safety of maritime navigation committed in maritime areas

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[43] Newton, MA, "Terrorist crimes and the *aut dedere aut judicare* obligation" *in* Van Den Herik, L and Schrijver, N, eds, *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press 2013).

[44] The Convention for the Suppression of Trafficking in Persons and Exploitation of the Prostitution of Others of 21 March 1950 clarified the principle of universal jurisdiction.

[45] See *inter alia* Abellán Honrubia, V, "La responsabilité internationale de l'individu", 280 *in Recueil des Cours de l'Academie de Droit International* (1999), 373; Remiro Brotons, A, *El caso Pinochet. Los límites de la impunidad* (Biblioteca Nueva 1999), 56.

[46] See the separate opinions of the Judges Buergenthal, Kooijmans & Higgins in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Case*.

[47] See Newton, MA and Scharf, MP, "Terrorism and Crimes Against Humanity", *in* Nadya Sadat, L, ed, *Forging a Convention for Crimes Against Humanity*, (Cambridge University Press 2011), 262–278.

[48] Bundesverfassungsgericht, *BVerfG, Beschluss vom 12.12.2000 – 2 BvR 1290/99*, 82.

[49] See a critique of this judgment in Gil, A, "La Sentencia de la Audiencia Nacional en el Caso Scilingo", *Revista Electrónica de Ciencia Penal y Criminología* (2005) *at* <criminet.ugr.es/recpc/07/recpc07-r1.pdf> (accessed 21 April 2018).

[50] Úbeda-Portugués, JE, "El Terrorismo como Crimen Contra la Humanidad", 26(54) *Temas Socio-Jurídicos* (2008) 16–38.

> in the cases provided for in the treaties ratified by Spain or the normative instruments of an international organization of which Spain is a member.[51]

Thus, the only restriction is that such acts must be 'provided for in the treaties ratified by Spain or the normative instruments of an international organization of which Spain is a member'. Curiously, however, the following section establishes a specific type which it also calls 'terrorism', but for which it establishes many more limitations:

> e) Terrorism, in any of the following circumstances:
> 1. Proceedings are brought against a Spanish national;
> 2. Proceedings are brought against a Spanish national or a foreigner who habitually resides or is present in Spain, or against any individual who does not fall into one of these categories but who collaborates with a Spanish national or with a foreigner residing or present in Spain to commit a terrorist offence;
> 3. The crime is committed on behalf of a legal person whose registered office is in Spain;
> 4. The victim had Spanish nationality at the time when the crime was committed;
> 5. The crime is committed with the aim of unlawfully influencing or determining the actions of any Spanish authority;
> 6. The crime is committed against an institution or agency of the European Union that is headquartered in Spain;
> 7. The crime is committed against a vessel or aircraft flying the Spanish flag; or
> 8. The crime is committed against Spanish official facilities, including Spanish embassies and consulates.
> For these purposes, a Spanish official facility means any permanent or temporary facility in which Spanish authorities or public officials carry out their public functions[52].

The same is true in relation to terrorist acts against the security of international civil aviation (in the cases provided for in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971, and in its Supplementary Protocol signed in Montreal on 24 February 1988) or on the physical protection of nuclear materials (provided that it has been committed by a Spanish citizen).

Within the framework of international law, it has not been possible to reach an agreement on a definition of the crime of terrorism, which could have constituted a *hostic humani generis* or *delicta iuris gentium* created in the Statute of Rome establishing the International Criminal Court. However, in Resolution E of Annex I to the Final Act of Rome, the United Nations Plenipotentiaries recognise that: 'terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community'.[53]

Similarly, Resolution E of the Diplomatic Conference of the Plenipotentiaries of the United Nations on the Establishment of an International Criminal Court

> Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism (...) with a view

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[51] Articles 23 and 24, *Organic Law 6/1985, of 1 July, on the Judiciary* (Spain) 1985.

[52] *Ibid.*

[53] United Nations, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, A.CONF.183/10.

> to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.[54]

Why is it important to consider that some terrorist acts may constitute crimes against humanity? The answer is simple: by doing so, we pave the way for the exercise of universal jurisdiction.[55] Judge Garzón has acknowledged that

> regarding the inclusion of organizations, there is no doubt regarding the suitability of para-state, paramilitary and terrorist organisations, provided that the acts created in Article 7 are part of a generalized and systematic attack against a sector of the civilian population, forming part of a preconceived plan directed against that sector, determined by its permanent or transitory characteristics (trade union, corporate cultural, economic, national, rational characteristics, etc.) For all these reasons, in cases such as terrorism by Islamic organisations, ETA, the IRA, FARC, etc., their actions may in some cases be classified as crimes against humanity and be submitted to the International Criminal Court.[56]

However, for a crime of terrorism to constitute a crime against humanity certain specific circumstances are required. Emilio Cárdenas lists three:

- First, it must be framed in a wider, extended and systematic strategy. It must be part of a flow of terrorist attacks, with some central or higher element of planning — that is to say, it cannot simply consist of an isolated episode.
- Second, it must involve violent attacks perpetrated against the civilian population, since attacks targeting the military may constitute war crimes, depending on the circumstances.
- Third, there must be knowledge and intent on the part of the perpetrators — clearly a frequent condition.[57]

Those who commit such crimes may therefore be assured of universal persecution preventing their impunity.[58] For example,

> September 11 is different because of its context and its magnitude. By its sheer size, its wantonness, its ferocity, its callousness, its suddenness, the means used, the thousands of innocent civilians destroyed in minutes, September 11 qualifies as a crime against humanity, a category which, unlike 'terrorism', is well defined in international law and carries the common responsibility of humankind.[59]

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54 *Ibid.*

55 Remiro Brotóns, A, "Terrorismo, Mantenimiento de la Paz y Nuevo Orden", 53(1) *Revista Española de Derecho Internacional* (2001) 128–129.

56 Garzón, B, *El Terrorismo y el Estatuto de Roma*, (3rd edn, Ediciones de La Tierra 2002), 138.

57 Cárdenas, EJ, "El Terrorismo Internacional, Crimen de Lesa Humanidad", 2 *Agenda Internacional* (2004) 47–48.

58 Robertson, G, *Crimes Against Humanity. The Struggle for Global Justice* (2nd ed, Penguin Books 2002), 25.

59 Mallet, C, "The Original Sin: "Terrorism" or "Crime Against Humanity"?", 34(2) *Case Western Reserve Journal of International Law* (2002) 246–247.

Moreover, as the international criminal tribunal has concluded '[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution'.[60]

With regard to this analysis, very significant international jurisprudence exists considering acts of terrorism to be crimes against humanity.[61] For example, in the Sebrenica case, the ICTY characterised 'the crimes of terror and the forcible transfer of the women, children and elderly at Potocari as constituting crimes against humanity'.[62] In the *Kvocka case*, the ICTY states that the use of concentration camps to terrorise Muslims, Croats and other non-Serbs detainees was considered to be a crime against humanity.[63] In the *Tadic Case*, the ICTY considered that the creation of an atmosphere of terror in the camps was a form of persecution.[64]

III. Specific International Treaties Against Terrorism and the Implicit Authorization of the Exercise of Universal Jurisdiction for their Persecution and Repression

As already stated, several international conventions have been signed at a universal level. These include the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo on 14 September 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed in New York on 14 December 1973, the International Convention against the Taking of Hostages, signed in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Materials, signed in Vienna on 26 October 1979, the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, signed in Montreal, on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed in Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed in Rome on 10 March 1988, the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed in Montreal, on 1 March 1991, the International Convention for the Suppression of Terrorist Bombings, signed in New York, on 15 December 15 1997; the International Convention for the Suppression of the Financing of Terrorism, signed on 9 December 1999, the International Convention for the Suppression of Acts of Nuclear Terrorism, signed in New York, on 13 April 2005; the Amendment to the Convention on the Physical Protection of Nuclear Materials, signed in Vienna on 8 July 2005; the Protocol relating to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed in London, on 14 October 2005, the Protocol Relating to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed in London, on 14 October 2005, the Convention for the Suppression of Unlawful

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60 ICTY, *Prosecutor v Tadic*, Judgement, IT-94-17, 7 May 1997, para 649.

61 See the analysis by Arnold, R, "The Prosecution of Terrorism as a Crime Against Humanity", 64 *ZaöRV* (2004) 987–992.

62 ICTY, *Prosecutor v Krstic*, TC Judgment, IT-98-33, 2 August 2001, para 607.

63 ICTY, *Prosecutor v Kvocka*, TC Judgement, IT-98-30/1, 2 November 2001, para 117.

64 ICTY, *Prosecutor v Tadic*, Second amended Indictment, IT-94-1-I, 14 December 1995, para 4.

Acts Related to International Civil Aviation, signed in Beijing, on 10 September 2010, and the Supplementary Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in Beijing, on 10 September 2010.[65] At a regional level, too, there are other Conventions such as the European Convention on the Repression of Terrorism, signed in Strasbourg, on 27 January 1977, and the Inter-American Convention against Terrorism, signed in Washington, on 3 June 2002.

Do any of these international conventions mention the possibility of exercising universal jurisdiction? The first thing to note is that these international agreements are only operative when the acts committed have a transnational element, that is, they do not operate when the terrorist act is committed within a state, by and against citizens of that state.[66] To take just one example, Article 3 of the International Convention for the Suppression of Terrorist Bombings 1997 expressly states that

> This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases.[67]

However, the fundamental bases of all these treaties against terrorist acts are intended to prevent impunity from occurring because there may be spaces where the pursuit and/or prosecution for these crimes may be avoided. Therefore, the principle of territoriality (which entitles the territorial state, including its ships and aircraft, to take pertinent penal actions) will operate. The principle of active nationality may also operate when the crime has been committed abroad by a national, against whom criminal action may be taken, in the event that there is no possibility of extraditing own citizens. The principle of passive nationality may also operate, i.e. when the victim has previously been a national.

Finally, the principle of conventional universal jurisdiction operates when the perpetrator of a terrorist act committed abroad is in national territory and cannot be extradited or when the state does not wish to extradite him, in exercise of the Principle of *aut dedere aut judicare.*[68] For example, Article 8 of the 1997 International Convention for the Suppression of Terrorist Bombings, states that:

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[65] All of the mentioned Conventions can be consulted *at* < unodc.org/tldb/es/universal_instruments_list__NEW.html> (accessed 21 April 2018).

[66] According to Article 3 UN General Assembly, *United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25: "an offence is transnational in nature if:
(a) It is committed in more than one State;
(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
(d) It is committed in one State but has substantial effects in another State."

[67] Article 3, United Nations, *International Convention for the Suppression of Terrorist Bombings* (1997) 2149 UNTS 256.

[68] Hesenov, R, "Universal Jurisdiction for International Crimes - A Case Study", *Eur J Crim Policy Res* (2013) 276–277 *at* <link.springer.com/content/pdf/10.1007%2Fs10610-012-9189-8.pdf> (accessed 21 April 2018). For a list of the numerous treaties on international criminal law that contain the obligation *aut dedere aut judicare*, see Bassiouni, MC, and Wise, EM, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Brill & Nijhoff 1995).

> The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.[69]

This is also consistent with certain resolutions of the Security Council, such as Resolution 1373 (2001), in which the Council incorporates the principle of *aut dedere aut judicare*, determining that states must 'ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice'. Resolutions 1456 (2003), 1566 (2004) and 1963 (2010) of the Security Council expressly specify the principle of *aut dedere aut judicare.*[70] This obligation to exercise the principle of *aut dedere aut judicare*, where *judicare* is understood as prosecution, is a general principle that generates an obligation of result.[71] While it is true that the legal institution of universal jurisdiction need not necessarily be identified with the principle of *aut dedere aut judicare*, the direct link is obvious, as the Report on the Obligation to Extradite or Judge (*aut dedere aut judicare*) by Mr. Zdzislaw Galicki, Special Rapporteur of the United Nations, in 2006 clearly states.[72] After all, the principle *aut dedere at judicare* derives from the principle of universality.[73] Therefore, the principle of *aut dedere aut judicare* implies an implicit qualification for the exercise of universal jurisdiction.

IV. Non-Conventional Grounds for the Application of Universal Jurisdiction for Acts of Terrorism

Like any other international legal norm, the powers attributed to the state for the exercise of universal jurisdiction may have the nature of customary law and even general international law, as a legal principle. A state could, therefore, exercise its right to universal jurisdiction —even in the absence of a conventional norm to protect it— on the grounds of customary norms or legal principles of international law.

Professor Sánchez Legido has conducted a rigorous study of the degree of consensus among conventional parties, to determine whether the presence of the principle of universal jurisdiction can be observed in general international law. He concludes that there are

> signs pointing to the existence of a general consensus, in favour of universal jurisdiction, only with respect to the serious infractions provided for in the 1949

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69 Article 8, *International Convention for the Suppression of Terrorist Bombings*, *supra* nt 67.

70 See an analysis in Bianchi, A, "Security "Council's Anti-Terror Resolutions and Their Implementation by Member States", 4(5) *Journal of International Criminal Justice* (2006) 1044–1073. Also, Plachta, M, "The Lockerbie Case: the role of the Security Council in enforcing the principle *aut dedere aut judicare*", 12(1) *European Journal of International Law* (2001) 125–140.

71 Betti, S, "The duty to bring terrorists to justice and discretionary prosecution", 4(5) *Journal of International Criminal Justice* (2006) 1104–1116.

72 United Nations, Galicki, Z, REPORT: *The Obligation to Extradite or Prosecute,* Doc. A/CN.4/571, 7 June 2006, *at* <legal.un.org/ilc/documentation/spanish/a_cn4_571.pdf> (accessed 21 April 2018).

73 Henzelin, M, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les États de poursuivre et juger selon le prin- cipe de l'universalité* (Helbing & Liechtenhahn 2000).

> Geneva Conventions and Additional Protocol I, torture, human trafficking, drug trafficking and crimes against the safety of air navigation.[74]

That is to say, he includes terrorist acts in the context of armed conflicts, torture or terrorist acts against air navigation. Professor Legido's doctrine is only partially valid although I understand his grounds for this statement. I have nothing to add on war crimes (especially when they become crimes against humanity), torture or crimes against air navigation (I would also include maritime navigation). I believe that in addition to genocide, he ignores other crimes related to terrorism, which today would not be excluded.

The basis of universal jurisdiction, then, even for conventionally established crimes, must be exclusively conventional for the crimes recognized in these international treaties. Today, one could not maintain that the principle of universal jurisdiction cannot be applied to the crime of genocide or the use of non-conventional weapons or bombs on the grounds that they are not covered by convention. The same is true for torture, for example. Moreover, the International Criminal Tribunal for the former Yugoslavia stated that

> at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.[75]

Kamminga, for example, recognizes that even

> States not parties to the Convention against Torture are entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary law... Perpetrators of torture committed in states that are not parties to the Convention against Torture may therefore be brought to trial elsewhere on the basis of universal jurisdiction.[76]

Subsequently, the connection between torture and terrorist acts is very clear.

One general principle of law is of key importance to our analysis, *Delicta puniri reipublicae interest* (The punishment of crimes is in the public interest).[77] Obviously, this general principle of law may be transposed to the international legal order since it

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[74] Sánchez Legido, A, *supra* nt 10, 84.

[75] ICTR, Trial Chamber, *Prosecutor v. Furundñija*, Judgment, IT-95-17/1-T, 10 December 1998, para 156.

[76] International Law Association, Committee on International Rights Law and Practice, Kamminga, MT, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences (Final ILA Report)*, London, 2000, 8.

[77] This principle is addressed by Mans Puigarnau, JM, *Los Principios Generales del Derecho – Repertorio de Reglas, Máximas y Aforismos Jurídicos con la Jurisprudencia del Tribunal Supremo de Justicia*, *Bosch* (Casa Editorial 1957), 131.

recognizes a fundamental value that informs all or part of a legal system.[78] From this perspective, universal jurisdiction is not a *prima facie* general principle of international law; rather, as a consequence of the *delicta puniri reipublicae interest* principle, it falls within the area of International Criminal Law. This, therefore, is a legal principle of International Criminal Law deduced from a general principle of law, but also induced by recognition of that principle. As Luis Peraza Parga recognizes, 'the principle of universal jurisdiction is easy to explain, but complicated to interpret and execute'.[79]

Some authors have questioned whether all states have an interest in combatting terrorism.[80] Indeed, there may be states that harbour or protect terrorists for their own interests. However, as Judge Tanaka stated in his dissenting opinion in the Judgment of the International Court of Justice in the Matter of South-West Africa, 'the recognition of a principle by civilized nations (...) does not mean recognition by *all* civilized nations, nor does it mean recognition by an official act such as a legislative act'.[81] These principles can, therefore, be deduced or induced, and their recognition or discovery is linked to jurisprudence, to doctrine or to the subjects of the legal system, through their own practice or unilateral acts.

Universal jurisdiction is a specific principle of International Criminal Law. It is therefore an abstract proposal that lends support to the idea that if a norm of International Criminal Law is violated (through acts classed as terrorist acts), those interested in the reestablishment of that norm must all be its subjects. It is the very basis by which states are obliged not to recognize unlawful situations. Furthermore, if we consider that these are serious violations of human rights, involving terrorist acts, which have an aspect that necessarily derives from natural law, then a legal principle can be said to exist attributing competence to the state for the exercise of universal jurisdiction against terrorist acts.

Universal jurisdiction is thus an ontological element of international law that determines the existence of and requirement for what is just. It is, then, an imperative of social awareness. In this sense, it is a legal principle. As Yoram Dinstein put it some years ago, individual responsibility means subjection to criminal sanctions. Distein states:

> When an individual human being contravenes an international duty binding him directly, he commits an international offence and risks his life, liberty or property. Hence, international human duties are inextricably linked to the development of international criminal law.[82]

However, the existence of the principle of universal jurisdiction is not sufficient for its exercise or for the attribution of powers to a judge to try the matters involved therein. It also requires an internal law attributing competence or, at the very least, a minimum practice that could be invoked as a basis for the existence of the principle in those systems that allow it. Is this, then, a subsidiary principle? This would appear to be the logical deduction if it is viewed as a corollary of the principle of *aut dedere aut judicare*. Nevertheless, the duty to *aut dedere aut judicare* is exclusively conventional in nature. In this conventional context, therefore, this obligation *aut dedere aut judicare* is a corollary of

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78 Schawarzemberger, G, "The Fundamental Principles of International Law", 87 *RCADI* (1955) 201.

79 La Insignia, Parga, LP, *La Jurisdicción Universal y el Ejemplo del Tribunal Constitucional Español*, October 2005, *at* < lainsignia.org/2005/octubre/int_006.htm> (accessed 21 April 2018).

80 Morris, M, "Arresting Terrorism: Criminal Jurisdiction and IR" *in* Bianchi, A, ed, *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004), 68.

81 C.I.J., *Recueil*, 1951, 23 (emphasis added).

82 Dinstein, Y, "International Criminal Law", 5 *Israel Yearbook on Human Rights* (1975) 55.

the principle of universal jurisdiction, whereas in the context of the general norms of international law, it is not. It is true that there is doctrine, albeit very qualified, which considers that the circumstances exist to establish a requirement to apply an *in fieri* rule of customary law, such as the acceptance of the *aut dedere aut judicare* duty, as stated in the preliminary report on the Obligation to Extradite or Judge (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur of the United Nations, in 2006.[83] However this cannot be conclusively stated at this time.

Perhaps, as we shall see, this duty to *aut dedere aut judicare* might be called —as Jaume Ferrer does— universal (or conditional) territorial jurisdiction,[84] which would explain the confusion. The invocation of the principle of universal jurisdiction might, therefore, be seen to be what some writers call a delegated principle. In this regard, however, I fully share Jean-Michael Simon's idea, when he says that it is not a matter of 'delegating a competence' but rather that this interest constitutes *per se* a sufficiently relevant contact in legal terms.[85] When universal jurisdiction is viewed as a corollary of the principle of *aut dedere aut judicare*, the obligation for the state is resolved with its obligation in the right of option. On the contrary, when the source of the principle of universal jurisdiction takes the form of a general norm, no duty is generated on the state, but rather, a right. Professor Sánchez Legido develops this idea, and he relies on doctrine, international jurisprudence, the position of the United Nations' International Law Commission and, even, the position of some cases of domestic law.[86]

Luis Benavides considers that the principle of universal jurisdiction is an exceptional jurisdiction and an auxiliary principle, although he does not believe that the jurisdiction of the territorial state should take precedence[87] — a very important issue when it comes to the commission of terrorist acts. It cannot, therefore, be solely the corollary to the principle of *aut dedere aut judicare*, since this, assumes a duty of option, within the framework of the conventional. As Professor Benavides points out, universal jurisdiction is the result of the state's right to exercise this jurisdiction over the commission of certain international crimes, such as terrorist acts, but without obligation.

On the contrary, the principle of *aut dedere aut judicare* implies a duty of option or alternative within the conventional framework in which it is established. Indeed, Professor Benavides offers an interesting table showing the differences between the two legal institutions. Other differences include the fact that universal jurisdiction is a principle based on customary international law, which applies exceptionally to a limited number of crimes in all states. In the meantime, the principle of *aut dedere aut judicare* is a provision of the treaties, which today extends to more than twenty conventions applying to very different crimes, which can only be invoked by the States Parties.[88] One may or may not share his opinion, but one cannot deny that it is well grounded. However, we should consider that, today, the terrorist acts to which both principles can be applied coincide. For example, the legal basis for the existence of war crimes is not exclusively conventional. The same is true for genocide (where, incidentally, the Convention does

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[83] United Nations, Galicki, Z, REPORT: *The Obligation to Extradite or Prosecute,* UN Doc A/CN.4/571, 7 June 2006, *at* <legal.un.org/ilc/documentation/spanish/a_cn4_571.pdf> (accessed 21 April 2018).

[84] Lloret, JF, "Impunidad versus inmunidad de jurisdicción: la sentencia del Tribunal Internacional de Justicia de 14 de febrero de 2002 (República Democrática del Congo contra Bélgica)", 18 *Anuario de Derecho Internacional* (2002) 315.

[85] Simon, JM, "*Jurisdicción Universal. La perspectiva del Derecho Internacional Público*" 4 Revista *Electrónica de Estudios Internacionales* (2002) 34–35.

[86] Sánchez Legido, A, *supra* nt 10, 254–258.

[87] Benavides, L, "The Universal Jurisdiction Principle: Nature and Scope", 1 *Anuario Mexicano de Derecho Internacional* (2001) 32.

[88] *Ibid*, 36.

not include the principle of *aut dedere aut judicare*), torture and many others. For this reason, among other considerations, the principle of reciprocity does not operate.

I therefore do not fully share the opinion of those, like Eric David,[89] who consider that the *aut dedere aut judicare* principle can be applied to genocide (like any terrorist act to which universal jurisdiction may be applied, as the International Tribunal for the former Yugoslavia does with respect to war crimes)[90] even if it is not expressly recognized in the 1948 Convention. I do believe, in contrast, that the principle of universal jurisdiction can be applied to it, since the legal basis is the violation of a rule of *ius cogens*, which is customary and not exclusively conventional in nature.[91]

This difference between the principle of universal jurisdiction and the principle of *aut dedere aut judicarem* is so important that it means that many writers (including leading magistrates of the International Court of Justice) have been unable to distinguish between the two principles. This has led some authors to consider that the application of the principle of universal jurisdiction requires the physical presence of the accused in the territory of the state in which it is being exercised, as if dealing with the principle of *aut dedere aut judicare*, for which such physical presence is required.[92]

This is also the position of the International Law Commission of the United Nations, as stated in its last draft of 1996 on the Code of Crimes against the Peace and Security of Mankind. In Article 9, entitled 'Obligation to extradite or prosecute' (which in itself gives some idea of the IDC's identification of the principle of universal jurisdiction with the principle of *aut dedere aut judicare*), the latter principle is specifically identified as a conventional principle (of the Code) which would force extradition or prosecution[93]. This formulation, which by dint of repetition is becoming a classic, requires no further commentary. However, in his comments on Art. 8, the general rapporteur states that

> Jurisdiction over the crimes covered by the Code is determined in the first case by international law and in the second case by national law. As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of 'universal jurisdiction' set forth in Article 9.[94]

One can see how States Parties identify the two principles as one. I have already expressed my opinion on this matter. These are two principles of a different nature. In the conventional framework, the *aut dedere aut judicare* principle is a corollary of the principle of universal jurisdiction. In any case, had these statements been made in 2018 rather than 1996, they might have been quite different, since in the intervening time there have been increasing data pointing to other considerations, including internal rules and the jurisprudence of numerous domestic courts. The International Court of Justice had an opportunity to rule on this aspect yet failed to do so. I am referring to the Yerodia

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89 David, E, *Principes de droits des conflicts armés* (3rd ed, Bruylant 2002), 668.

90 ICTY, *Prosecutor v Blaškić,* Judgment, IT-95-14, 29 October 1997, para 29.

91 See also Kelly, MJ, "Cheating justice by cheating death: the doctrinal collision for prosecuting foreign terrorists - passage of *aut dedere aut judicare* into customary law and refusal to extradite based on the death penalty", 20(3) *Arizona Journal of International and Comparative Law* (2003) 491–532.

92 On these issues see the magnificent analysis by Sánchez Legido, A, *supra* nt 10, 268–293.

93 International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, 5 July 1996, (48th plenary meeting) UN Doc A/51/10.

94 *Ibid*, 29 comment on Article 8, para 7.

Ndombasi case, in which Congo brought a case against Belgium for its attempt to apply universal jurisdiction against A. Yerodia Ndombasi, the Congolese Minister of Foreign Affairs, for international crimes.[95] However, the basis of the case is different, since it involves immunity from jurisdiction rather than from universal jurisdiction. In this regard, it is interesting to note the new article 12 bis of the Belgian Code of Criminal Procedure, introduced by an act of 5 August 2003, which recognizes that the Belgian courts will be competent to try serious breaches of International Humanitarian Law (to which the law expressly refers) when a conventional or customary international law allows Belgium to prosecute the authors.[96]

As we can see, the subsequent conclusion is that Belgium formally recognizes the possibility that there are customary international rules that allow it to prosecute defendants not under its jurisdiction for war crimes or crimes against humanity. In my personal judgement, therefore, judicial proceedings can be initiated, in application of the principle of universal jurisdiction, by an internal judicial body of a state, even when the accused is not physically present within its territory. This would not be possible if it were the *aut dedere aut judicare* principle that was being applied. The *aut dedere aut judicare* principle is different in nature and requires the physical presence of the person against whom the request for extradition has been made. In other words, the state has an obligation to choose one option or another, which is not the same as the right of the state to initiate the procedure of universal jurisdiction. This does not mean that the prosecution can be carried out in absentia, which is a practice prohibited by many internal legal systems and opposed by international human rights law.

Universal jurisdiction rests on the doctrine that the defendant is not prosecuted in the country in which he is a national or where he resides; acting subsidiarily, and in order to prevent impunity, another state may request his or her presence and make that request within the framework of a procedure for which it is competent under its internal legislation, under conventional international legislation or under the customary norm based on the principle of universal jurisdiction. As Professor Reinoso Barbero says,[97] the principle of universal jurisdiction cannot contradict other norms. As for the customary nature of universal jurisdiction, in the case of terrorist acts, we must logically proceed to examine the practice of states. The Israeli Supreme Court, in the *Eichman Case*, argued that the basis of its jurisdiction is customary law. However, at the time when the judgment was served, on 20 May 1962, no other judgment on the matter of genocide had ever been issued to establish the *opinio iuris* required by a customary norm [98]. Nonetheless, the Supreme Court of Israel concluded that such crimes 'violated the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations'.[99]

Most qualified authors have also established that universal jurisdiction is a general rule of a customary nature,[100] although there are others, who, with less ground,[101] refute

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[95] ICJ, *Judgment of 14 February, 2002;* Henzelin, M, "La compétence pénale universelle : Une question non résolue par l'arrêt Yerodia", 107 *Revue Générale de Droit International Public* (2002) 819.

[96] The exact wording of this aspect of Belgian law is as follows: "*...les juridictions belges sont également compétentes pour connaître des infractions commises hors du territoire du Royaume et visées par règle de droit international conventionnelle ou coutumière liant la Belgique, lorsque cette règle lui impose, de quelque manière que ce soit, de soumettre l'affaire à ses autorités compétentes pour l'exercice des poursuites*".

[97] Barbero, FR, *Los principios generales del Derecho en la jurisprudencia del Tribunal Supremo* (Editorial Dykinson 1987), 114–115.

[98] District Court of Jerusalem, *Attorney General of Israel v. Eichmann*, *International Law Report* vol. 36, 1962.

[99] *Id*, 277.

[100] Among many others, see Rodley, N, *The Treatment of Prisoners under International Law* (2nd ed, Clarendon Press 1999), 130-133; Bodansky, D, "Human Rights and Universal Jurisdiction" *in* Gibney,

this finding. Professor Fletcher, for example, does not believe that customary law serves as a basis for criminal justice; in his opinion, the principle of *non bis in idem* is often at stake. The great concern of such writers involves the rights of the accused.[102] Although I appreciate these arguments, I do not share them; in international law, custom is a very important source of law and, therefore, also of International Criminal Law. Indeed, the Statute of the International Criminal Court accepts customary norm as applicable law.[103]

Some have argued that this norm is only practised in Western Europe and should not therefore be taken to signify a practice generally accepted as a right. This might well appear to be true, given the various cases taken in Spain, France,[104] Belgium, the United Kingdom and the Netherlands.[105] Moreover, it may be true that all the cases brought before the different jurisdictions have proved complex, among other reasons because they cover new ground with respect to ordinary criminal systems. However, Human Rights Watch believe that the fair and effective exercise of universal jurisdiction is achievable where there is the right combination of appropriate laws, adequate resources, institutional commitments and political will.[106]

However, as I have said, this is a question of appearance; although it is true that most of the cases in which the exercise of universal jurisdiction could be invoked have taken place in the European legal world, many other states throughout the world are doing the same. They include Mexico, in the case of Manuel Cavallo, who was extradited to Spain for crimes against humanity, Afghanistan, which allowed British police officers to investigate the commission of crimes against humanity on its territory and Ghana, Chad, Togo and Guatemala, all of which allowed Belgian officers to investigate crimes subject to universal jurisdiction on their own territory.[107] It is, therefore, important to note that the application of universal jurisdiction, in addition to the many considerations that may be inferred from the different legal instruments, represents a customary norm that has been transposed into the internal order of many states, including Spain.

Giulia Pinzauti considers that the existence of an international norm, in this customary case, which establishes universal jurisdiction, is sufficient for an internal tribunal to be accused of acting *ultra vires.*[108] As I have stated, I believe she is correct; however, jurisdiction and lack of competence of a specific internal tribunal are two distinct issues. The principle of universal jurisdiction cannot be questioned on the

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M, *World Justice: U.S. Courts and International Human Rights* (Westview Press 1991); Gilbert, G, "Crimes Sans Frontières: Jurisdictional Problems in English Law", 61 *British Yearbook of International Law* (1992) 63, 415,423, 424; or in French doctrine Huet, A, and Koering-Joulin, R, *Droit pénal international* (Presses Universitaires de France 1994), 191.

[101] Universal jurisdiction has been contested by Henry Kissinger, who even called it "judicial tyranny". See Kissinger, H, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny" in *Foreign Affairs*, July/August 2001. This opinion was rebutted by Roth, K, "The Case for Universal Jurisdiction" *Foreign Affairs*, September/October 2001.

[102] Fletcher, G, "Against Universal Jurisdiction", 1 *Journal of International Criminal Justice* (2003) 580–584.

[103] See in this regard my work, Fernández Sánchez, PA, "El derecho aplicable por la Corte Penal Internacional" *in* Carrillo Salcedo, JA, ed, *La Criminalización de la Barbarie: la Corte Penal Internacional (*Ed. Consejo General del Poder Judicial 2000), 245-265.

[104] Stern, B, "La Competénce Universelle en France – le Cas des Crimes commis en ex-Yougoslavie et au Rwanda", 40 *German Yearbook of International Law* (1997) 280 et seq.

[105] On the exercise of universal jurisdiction throughout Europe, see Human Rights Watch, *Universal Jurisdiction in Europe, The State of the Art,* vol. 18, No. 5 (D), June 2006.

[106] *Ibid.*

[107] All these cases are fully documented in the aforementioned report by Human Rights Watch.

[108] Pinzauti, G, "An Instance of Reasonable Universality", 3(5) *Journal of International Criminal Justice* (2005) 1092–1105.

grounds of the incompetence of the judges of a given state to try acts committed during periods of armed conflict that may be classed as internal. Indeed, in the *Tadic Case,* the Tribunal for the Former Yugoslavia reminds us that:

> customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general principles and rules on the protection of victims of human rights violations. internal armed conflicts.[109]

This precisely entails the application of the principle of universal jurisdiction, which is not only a conventional norm provided for in many international treaties (as already deduced), but corresponds to a well-established *opinio iuris.*[110] Indeed, the grounds adduced by the Israeli Court in the Eichmann Case, were as follows:

> The 'right to punish' the accused by the State of Israel arises ... from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific national source which gives the victim nation the right to try any who assault their existence.[111]

Moreover, the existence or absence of the State of Israel at the time of the commission of crimes is not even questioned. In this sense, the Israeli Court ignored even conventional obligations, centring the basis of its argumentation on customary law, when it stated that

> Israel has the faculty [...] as the guardian of international law and agent for its implementation, to prosecute to the appellant. This being the case, no significance attaches to the fact that the State of Israel did not exist when the crimes were perpetrated.[112]

In *Demjanjuk v. Petrovski*, the United States Court of Appeals, in 1985,[113] decided to accede to Israel's request to extradite the former guard of a Nazi concentration camp, also based on the principle of universal jurisdiction, despite the fact that the crime the crime did not occur either on the territory of the United States or of Israel and had not been committed by or against Israeli citizens. This case was cited in the appeal proceedings in the Pinochet Case, before the British House of Lords, where Lord Browne-Wilkinson said:

> [t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are

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[109] ICTY, *Prosecutor v Tadic,* Decision on the defence motion for interlocutory appeal on jurisdiction, IT-94-I-AR72, 2 October 1995, paras 132, 69–70.

[110] See in this respect Gutiérrez Espada, C, "El Derecho Internacional Humanitario y los conflictos internos (Aprovechando el Asunto TADIC)", 68 *Revista Española de Derecho Militar* (1996), 13 and ff., especially 32 and ff.

[111] 1st. District Court of Jerusalem, *Attorney General of Israel v. Eichmann, International Law Report* 36, 1962, para 39.

[112] *Id*, 304.

[113] US Court of Appeal, Sixth Circuit, *Demjanjuk v Petrovsky*, 776 F., Second 571, 1985, cert. Denied, 475, U.S. 1016, 1986.

> 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'.[114]

The famous Filartiga Case, among others, confirmed this view, given that a US Federal Court tried Mr. Filartiga, a former member of the Paraguayan political police, despite the fact that the crimes had not been committed in the territory of the United States and did not involve US citizens.[115]

The principle of universal jurisdiction, including within the framework of terrorist acts, has been sufficiently invoked by states (and not only by Western European states) to construct it as part of the *corpus iuris* of international law.[116] It is true that there is a growing tide of fear regarding the exercise of universal jurisdiction due to the political problems it might raise. It is perhaps for this reason that the EU Directive on combatting terrorism provides states with a wide margin of appreciation to establish their jurisdiction over the offenses covered in the directive.[117]

There are already many internal rules in place allowing the exercise of universal jurisdiction, without requiring its use to be bound to international treaties. Some refer to specific crimes, such as the Austrian Criminal Code,[118] the Organic Act of the Spanish Judiciary (which lists certain crimes, including terrorism, although with limitations, in addition to others provided for in binding treaties for Spain), the Belarusian model (similar to Spain's), the Belgian model,[119] the Canadian model[120] and the Danish model.[121] Others expressly mention this type of jurisdiction by referring to its general rules. This is the case of Croatia,[122] the Honduran Criminal Code,[123] the Ethiopian Criminal Code,[124] the Finnish Criminal Code[125] and the Criminal Code of Tajikistan.[126]

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[114] See this case in *International Legal Material,* No. 38, 589.

[115] US Court of Appeal, Second Circuit, *Filartiga v Pena-Irala*, 630 F., Second 876, 1980, para 881–883.

[116] The first case on the African continent, in which universal jurisdiction was invoked, was Senegal. See Cissé, A, "Droit sénégalais" *in* Cassese, A, and Delmas-Marty, M, eds, *Juridictions nationales et crimes internationaux* (Press Universitaires de France 2002), 437 and ff.

[117] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L88/6.

[118] See the case brought before the Austrian courts on universal jurisdiction in Marschik, A, "The Politics of Prosecution: European National Approaches to War Crimes" *in* McCormack, TLH and Simpson, GJ, eds, *The Law of War Crimes, National and International Approaches* (Kluwer 1997), 79–81.

[119] See *Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, 16 June 1993* in *Moniteur Belge*, 5 August 1993.

[120] See Supreme Court of Canada, *Regina v. Finta*, *24 March 1994*. For commentary on this case, see Cotler, I, 90 *American Journal of International Law* (1996) 460. For a more recent example, see Torroja Mateu, H, "La competencia de la jurisdicción canadiense en materia de crímenes de Derecho Internacional: el trayecto hacia un *refugio inseguro*", 11 *Revista Electrónica de Estudios Interacionales* (2006) 10.

[121] See Supreme Court of Denmark, *Prosecution v. Refik Saric*, in *Ugeskrift for Retsvaesen* 195, 15 August 1995, para 838.

[122] "… provisions of international law and international treaties or intergovernmental agreements".

[123] "… or when the principles of international law allow courts to exercise such jurisdiction".

[124] *Article 17, Criminal Code* (Ethiopia) 2010, *Proclamation No. 414/2004* (Ethiopia) 2004, "Any person who has committed in a foreign country: a) an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered (…) shall be liable to trial in Ethiopia in accordance with the provisions of this Code".

[125] "…is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland".

[126] "… a) they have committed a crime provided for by the rules of international law recognized by the Republic of Tajikistan or by international treaties and agreements".

However, recognizing the principle of universal jurisdiction only for certain crimes does not mean that the principle is not applicable to others.[127] There can be no contradiction between internal norms and international ones; if there were such discrepancies, it might generate international liability. By this I mean that it is desirable for states, in the exercise of their sovereignty, to be able to resort to universal jurisdiction for some crimes; however, if there are other crimes to which, at international level, universal jurisdiction applies, the states cannot use internal law as grounds for violating an international conventional norm.[128]

The Spanish courts can try cases involving criminal acts committed by foreign nationals abroad, in cases of genocide[129] (Article 607 of the Criminal Code)[130] or the unlawful seizure of aircraft (Articles 39 and 40 of Law 29/1964, Criminal and Procedural of Air Navigation),[131] which is classed as a terrorist act. We can see, then, that in these crimes, Spanish jurisdiction is very broad and does not rely exclusively on conventional rules and accepts universal jurisdiction. The Spanish courts can also try crimes committed abroad by foreign nationals against the property, rights or interests of a Spanish national, with explicit reference (Article 23.4 LOPJ) [132] to the crime of terrorism and the crime of torture. The judges of the National Court have presided over several proceedings against Pinochet[133] and against the Argentine military,[134] despite internal laws on due obedience or amnesties in their respective countries.[135]

On 19 April 2005, the Spanish National Court issued a judgment against former Argentine naval officer Adolfo Scilingo,[136] sentencing him to 640 years in prison for crimes against humanity committed during the last Argentine military government (1976 – 1983). Despite the attention it received, this was the first sentence to condemn a foreign national for crimes committed abroad against foreign nationals, in application of the principle of universal jurisdiction.

However, this ruling received different reactions in the doctrine. Tomuschat, for example, considers that the grounds are not universal jurisdiction, as the sentence claims, arguing that the crimes committed by Scilingo were neither acts of genocide nor terrorism, but crimes against humanity for which Spanish national law does not provide this type of jurisdiction. The only possible argument of the National Court was the

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[127] On crimes against humanity, see Peyro Llopis, A, *La competence universelle en matière de crimes contre l'humanité* (Bruylant 2003).

[128] In this regard, Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 is clear: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

[129] Recall that, strictly speaking, the UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948 78 UNTS 277 of which Spain is a party, does not include the principle *aut dedere aut judicare*, and therefore Spain, conventionally speaking, is not obliged to include this principle in its internal order.

[130] *Organic Law No. 10/1995 of November 23, 1995, as amended up to Law No. 4/2015 of April 27, 2015* (Spain) 2015.

[131] *Ley 209/1964, de 24 de diciembre, Penal y Procesal de la Navegación Aérea* (Spain) 1964.

[132] *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* (Spain) 1985.

[133] Spain, Order of the Criminal Chamber of the National Court of 4 November 1998, and Spain, Order of the Criminal Chamber of the National Court of 5 November 1998.

[134] See the cases of the Argentine military Ricardo Miguel Caballo & Adolfo Scilingo (Judgment of the Criminal Chamber of the National Court, of 19 April 2005).

[135] Note that the Supreme Court of Argentina, in the Simon Case, of 14 June 2005, declared the Due Obedience and Clean Slate laws to be unconstitutional.

[136] Gil, A, "The Flaws of the Scilingo Judgement", 3(5) *Journal of International Criminal Justice* (2005) 1082–1091.

perpetrator's presence on Spanish soil, having arrived in the country to testify in another trial relating to the so-called 'death flights'.[137]

Conclusion

The international crime of terrorism has only relatively recently been created. Numerous international treaties establish the possibility of the exercise of universal jurisdiction. For example, in the framework of International Humanitarian Law, war crimes specifically classed as terrorist acts and even those terrorist acts whose human consequences are mentioned, expressly include the possibility of the exercise of universal jurisdiction, which goes beyond the simple application of the principle of *aut dedere aut judicare*.

This is also the case when the classification of terrorist acts coincides with crimes against humanity. In addition, there are specific terrorist acts for which international law has provided international treaties that generate obligations, including the principle of *aut dedere aut judicare* and even the exercise of its parent principle of universal jurisdiction.

Today, no one would argue that torture or genocide or terrorism constitute assaults only on individual victims. Rather, they are considered to have a collective victim: the international community. Therefore, their criminalisation cannot be limited to the territory of the state with jurisdiction over the victim, the offender or the commission of the facts, but to the entire territory of the planet.

This is reflected in the attitude of the states in international scenarios, or in their own internal legal systems, as well as in some jurisprudence and much of the doctrine. It has served, then, as a *ratio decidendi* for numerous internal rules and in numerous court cases. The corollary of the principle of universal jurisdiction in the conventional framework is the duty of *aut dedere aut judicare*, which differs from its parent principle in that it imposes an obligation of option, while the parent principle takes the form of law without constituting a legal obligation. The legal principle of universal jurisdiction has served as a basis for states to initiate a process of affirmation of the norm, through which it has been incorporated into the legal order in the form of customary norms.

Such legal manifestations can be seen in the amendments and incorporations being made to domestic legal systems, in the acceptance of cooperation in judicial or police assistance when it comes to the exercise of this jurisdiction by other states, in the lack of persistent objectors to the generality of the customary norm, etc.

Obviously, the *opinio iuris* of this norm is clearly determined by the position of the subjects of the right. It is constructed by their stances in international organizations, their internal legal reforms and their attempts to limit it. However, it is also true that some states, more out of fear than reason, are beginning to turn away from establishing specific competences for their own courts, even if they cannot renounce the universal jurisdiction, to which they are subject by their own *opinio iuris*.

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[137] Tomuschat, C, "Issues of Universal Jurisdiction in the Scilingo Case", 3(5) *Journal of International Criminal Justice* (2005) 1074–1081.

The Apple Does Not Fall Far from the Tree: Self-Defence in the Context of State-Sponsored Terrorism

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Keywords
TERRORISM; STATE-SPONSORED TERRORISM; SELF-DEFENCE; ARMED ATTACK; USE OF FORCE; STATE RESPONSIBILITY

Abstract
The Article will examine the parameters of state-sponsored terrorism through an evaluation of the tenets of state responsibility. Under customary international law, States are not perpetrators of terrorism because terrorism is a penal offence and states are not subjects of international criminal law. Nonetheless, General Assembly resolutions repeatedly condemn States that undertake and/or support acts of terrorism. It reflects the absolute prohibition on the use of force except in reaction to a conventional armed attack and the seeming metamorphosis and fluidity of the traditional understanding.

Introduction

The lethal capabilities of terrorists demonstrated by the September 11 terrorist attacks in 2001 were a paradigm-changing event that generated a new dimension in international legal and political discourse. It prompted the international community to examine terrorism anew with statements from capitals around the world pointing to a need to develop new strategies to confront a new reality. The attacks of September 11 and consequential American response with the international community's approval of the use of lethal military action represented a new paradigm in international law relating to the use of force. Previously acts of terrorism were basically seen as criminal acts within the realm of domestic enforcement agencies. The September 11 attacks were regarded as an act of war. This effectively marked a turning point in the long-standing premise of international law that military force was an instrument of relations between States. Terrorism was no longer merely seen as a serious threat to be combated through domestic penal mechanisms. Use of lethal military force was now an avenue for managing the consequences of terrorist strikes.

This article will outline the normative framework on the use of force as enshrined in the UN Charter. It will be posited that the UN Charter regime on the use of force is visibly engaged in a process of change through an evaluation of the uncertainty and indeterminacy of the doctrine of State responsibility. Can terrorist attacks be co-opted into the understanding of 'armed attack' and thus form a basis for the use of military force against the responsible entity? This question is important considering potential abuse of the option of lethal military force when a State seeks to use the broad validation banner of national security. It is not entirely clear from the practice in the aftermath of September 11 whether the requirement of the attribution of a terrorist act to a specific

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State actor was abandoned, or whether the qualification of 'armed attack' still requires a nexus of the terrorist act to a State entity.

I. State Responsibility

State responsibility is based upon a State's physical control over harmful events occurring through its explicit or implicit support. In considering responses to terrorism, it must be determined who is in fact responsible for the acts. If a State is suspected, analysis of the principles governing State responsibility is appropriate.[1] Some six decades ago, Hersch Lauterpacht noted that:

> Customary international law holds that a State is normally responsible for those illegalities which it has originated. A State does not bear responsibility for acts injurious to another State committed by private individuals when the illegal deeds do not proceed from the command, authorisation, or culpable negligence of the government. However, a State is responsible vicariously for every act of its own forces, of the members of its government, of private citizens, and of aliens committed on its territory. If the State neglects the duties imposed by vicarious responsibility it incurs original liability for the private acts and is guilty of an international delinquency.[2]

In 1970, the UN General Assembly in Resolution 2625[3] made it clear that a State's mere acquiescence in terrorist activity emanating from its soil is a violation of the State's international obligations. Numerous other resolutions from both the UN General Assembly and the UN Security Council leave no doubt that harbouring or supporting terrorist groups violates State responsibility under international law.[4]

A. Guilt by association: attribution of actions In the *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Merits)*,[5] the International Court of Justice (ICJ) was presented with the question whether Iran was responsible for the taking of US hostages by private militants premised on the fact that the Iranian Government sanctioned and perpetuated the hostage crisis.[6] The ICJ was faced with whether the action of Iranian students in occupying the US embassy and taking embassy staff hostage

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1 These ideas have been equally developed in Maogoto, JN, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Routledge, 2016), 153.

2 Oppenheim, L, *International Law* (8th ed, Longmans, Green & Co, London, 1955), 337–33838, 365.

3 UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970, (1883rd plenary meeting) A/RES/2625 (XXV); UN General Assembly, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States* (1970) UN GAOR 25th Session Supp No 18 UN Doc A/8018 ("UN Doc A/8018"). G.A. Res No 2625, U.N. Doc No A/8018 (1970).

4 UNGA Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc A/CONF.2/108/Rev.1 (1951); UN General Assembly, *Measures to Prevent International Terrorism*, 9 December 1985, (108th plenary meeting) A/RES/40/61; UNSC Libyan Arab Jamahiriya (31 March 1992) UN Doc No S/RES/748; These ideas have been equally developed in the article of Travalio, GM, "Terrorism, State Responsibility, and the Use of Military Force" 4(1) *Chicago Journal of International Law* (2003) 97.

5 International Court of Justice (ICJ), *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ Reports 1980, 24 May 1980, paras 32-33, 36 ("*Tehran Hostages*").

6 *Ibid*, para 74.

could be attributed to the government of Iran. In its opinion, the ICJ divided the events into two phases: the initial takeover by the students and the subsequent lengthy occupation of the embassy. The Court found that during the initial phase the students did not act on behalf of the state, therefore, the state did not bear responsibility for their actions — despite acknowledging that Iranian authorities were obliged to protect the embassy, and had the means to do so, but failed.[7] Only after the takeover was complete did the Iranian government bear responsibility for the actions of the students, through its tacit approval.

Six years later the ICJ handed down its judgment in the *Military and Paramilitary Activities in and against Nicaragua*, which had presented the question of whether the actions of Nicaragua in supporting rebels in El Salvador constituted an armed attack by Nicaragua sufficient to justify military action by the US in collective self-defence with El Salvador. On this basis, the US argued that this support justified its mining of Nicaraguan waters and taking other military action against Nicaragua. The ICJ soundly rejected the arguments of the US. It said sending 'armed bands' into the territory of another State would be sufficient to constitute an armed attack, but supply of arms and other support to such bands cannot be equated with an armed attack and did not justify the use of military force by the US against Nicaragua.[8]

Since the Nicaragua and Iran Hostages decisions, a variety of scholars have argued that substantial support of terrorists by a State can be sufficient to impute their actions to the supporting State.[9] Among the most prominent is Professor Oscar Schachter, who stated, '[W]hen a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.'[10] However, this position is at variance with the ICJ's conclusion in Nicaragua that found the acts of the US backed Nicaraguan Contras could not be attributed to the US even though it was clear from the evidence that, in many ways, the Contras were a proxy army for the US and could not have existed without the financing and support of the US. In a critical review of the Court's judgment, Abraham Sofaer points out that:

> The Court had no basis in established practice or custom to limit so drastically the responsibility of States for the foreseeable consequences of their support of groups engaged in illegal actions, whether the actions are called 'armed resistance' or whether the perpetrators are called terrorists. Established principles of international law and many specific decisions and actions strongly support the principle that a State violates its duties under international law if it supports or even knowingly

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7 These ideas have been equally developed in Maogoto, JN, *Battling Terrorism* (n 1), 156.

8 *Ibid*, paras 126–127.

9 Coll, A, "The Legal and Moral Adequacy of Military Responses to Terrorism" 81 *Proceedings of the American Society of International Law* (1987) 297; Murphy, JF, *State Support of International Terrorism: Legal, Political, And Economic Dimensions* (Westview Press, Boulder; Mansell Publishing, London, 1989), 99–109.

10 Schachter, O, "The Lawful Use of Force by a State Against Terrorists in Another Country" *in* Han, HH, ed, *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (Oceana Publications, New York, 1993), 243, 249 (one State cannot be invaded by another State in response to terrorism unless responsibility for the terrorist attack can be imputed to the invaded State).

> tolerates within its territory activities constituting aggression against another State.[11]

Arguably, State responsibility for terrorist activities supported by a State logically forms the linkage to a State's complicity in the offence.[12] More problematic is a State's responsibility for acts of terrorism that it failed to prevent. A State is not expected to prevent every act of international terrorism that originates from within its territory. What is expected is that States exercise due diligence in the performance of their international obligations so as to take all reasonable measures under the circumstances to protect the rights and security of other States since customary international law expects States to prevent their territory from being used by terrorists for the preparation or commission of acts of terrorism against aliens within its territory or against the territory of another State.[13]

II. Use of Force and State-Sponsored Terrorism

In 1945, the drafters of the UN Charter were concerned with a completely different set of problems — the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. At that point in time, the regime on the use of force was folded within statal perimeters — States as the entities with the monopoly over the use of lethal military force and it was and could not have been envisaged that well-financed and organised non-state entities would emerge in a world of chemical, biological, and nuclear weapons possessing the ability to not only acquire weaponry but equally the organisation and ability to challenge a State.

The question that arises, especially post-9/11, is to what extent may a State lawfully respond with armed force against the State that has sponsored the terrorists deemed responsible for the attack? Under international law, the response of a targeted State is predicated on principles of self-defence, and these are in turn based on what the international community regards as the 'inherent' right to ensure national security and the attendant duty to protect one's citizens from terrorist attacks. The norms of self-defence revolve around survival, and a State's inherent right to protect and defend its sovereignty.[14]

Managing the terrorist threat posed by State sponsors requires identification of the threat, clear establishment of linkage to a State sponsor and, in the event of use of military force, the meeting of the dual legal requirements of self-defence — necessity and proportionality.[15] The problem is that responses to terrorism are usually coloured, often negatively, by the reality that States intertwine responses with their own national interest. This reality weakens the substantive international legal bases, which support military

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11 Sofaer, AD, "The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense" Defense' 126 *Military Law Review* (1989) 89, 102.

12 Lillich, R and Paxman, J, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities" 26 *American University Law Review* (1976) 217, 236–237.

13 *Id*, 245, 261. See also, Oppenheim, *supra* nt 2.

14 These ideas have been equally developed in Maogoto, JN, *Battling Terrorism*, supra nt 1.

15 Stahn, C, "Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say" *European Journal of International Law* (2003), 13–14; Byers, M, "Terrorism, The use of Force and International Law After 11 September" 51 *International & Comparative Law Quarterly* (2002) 401, 406.

action, despite frequent justifications that action is supported in customary international law by the inherent right of self-defence.[16]

A. Self-Defence in the context of state-sponsored terrorism

Self-defence under the UN Charter is generally addressed in the context of large-scale attacks by the regular armed forces of one State against the territory of another, not the mere harbouring of a terrorist group or support of the same.[17] However, use of Article 51 of the UN Charter to defend a State's decision to use armed force against terrorists and terrorist havens is not novel.[18] Although the right of self-defence may be described as 'inherent'[19] the UN Charter does not specify what is *specifically* by the phraseology.[20] Is it the phraseology that antedates and exists independently of the UN Charter or did the UN Charter subsume any previous understandings in a new holistic encapsulation? [21]

Even allowing for the view that of the right of self-defence antedates the UN Charter and continues to exist, it should be noted though that in contrast to international customary law, the UN Charter appears to have added a new requirement to the 'inherent' right — the occurrence of an 'armed attack.' It is unclear whether this was intended to narrow the existing right of self-defence. Even if this is the intention, it is equally unclear how and to what extent the right is limited. There appears to be no discussion of the phrase 'armed attack' in the records of the United Nations Conference on International Organisation (UNCIO). An explanation might be that the drafters felt that the words themselves were sufficiently clear. It is also significant that the drafters chose the word 'attack' over the term 'aggression' which is used repeatedly throughout the UN Charter. Even then, under the UN Charter the term 'aggression' is undefined but can be logically presumed to have a wider meaning than 'attack'.[22] In matters relating to State-sponsored terrorism, the nature of terrorism renders this concept rather vague and blurred since terrorism does not fall easily within traditional doctrines and principles of international law.[23] Terrorists are not State actors bound by international law but rather

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16 These ideas have been equally developed in the article of Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism", 4(2) *Melbourne Journal of International Law* (2003) 406.

17 Travalio, GM, "Terrorism, International Law, and The Use of Military Force" 18 *Wisconsin International Law Journal* (2000) 145, 156.

18 The Israelis used it in defence of its raid on Entebbe as did the US in attempting to justify its bombing of Libya. Such claims did not win a favourable response from the international community. See, Murphy, J, *Legal Aspects of International Terrorism* (Lexington Books, 1978), 556; Boyle, F, "Preserving the Rule of Law in the War against International Terrorism' 8 *Whittier Law Review* (1986) 735, 736–738 ("*Preserving the Rule of Law*"); Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406 and See Travalio, GM, "Terrorism, International Law, and The Use of Military Force" 18 *Wisconsin International Law Journal* (2000) 145, 156.

19 *Ibid;* It is clear that the word was intentionally used because the initial draft of Article 51 did not contain the term 'inherent'.

20 Baker, M, "Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)" 10 *Houston Journal of International Law* (1987) 25, 31.

21 These ideas have been equally developed in the article of Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406.

22 See UN General Assembly, *Definition of Aggression*, 14 December 1974, (2319th plenary meeting) A/Res/29/3314 ("*Definition of Aggression")*, which attempts to give guidance to the Security Council in dealing with this matter. Note, however, that the annex and arts 2, 4, and 6 of the *Definition of Aggression* clearly indicate that the Security Council is not limited by the *Definition* and further, that the *Definition* is not intended as a modification or amendment of the *Charter*.

23 These ideas have been equally developed in the article of Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406.

are similar to criminals in that they act outside of the scope of law.[24] This presents States with an intractable problem — how to respond legally to groups who are not adhering to legal strictures.

B. Resort to retaliatory strikes

Frustration with the legal strictures inherent in the concept of self-defence in the face of the ever-increasing threat of terrorism and the inability to root out terrorist groups, have led States such as the US and Israel to resort to retaliatory strikes against terrorist cells located in sovereign States. These States contend that terrorist threats represent a legitimate justification for the use of force abroad. The idea of strategic deterrence of terrorist attacks is not without controversy considering that the UN Charter and customary international law authorise the use of force only for self-defence. Reprisals and retaliatory strikes are illegal under contemporary international law because they are punitive, rather than legitimate actions of self-defence.[25] It would be difficult to reconcile acts of reprisal with the overriding dictate in the UN Charter that all disputes must be settled by peaceful means. Further, under the UN Charter regarding self-defence, there are three main principles that go into examining the *jus ad bellum* dimensions of a State's response if it has suffered a terrorist attack. These principles dealing with the timeliness of the response and the requirements of necessity and proportionality are difficult to reconcile with retaliatory strikes. A sharp distinction exists between use of force in self-defence and its use in reprisals.[26] The legal status of reprisals is stated very succinctly by Professor Ian Brownlie thus '[t]he provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.'[27]

Cast against the backdrop of the snapshot on the use of force to counter terrorism, the legal response to the September 11 attacks was unusual. The international community broadly qualified the September 11 attacks as 'armed attacks' against the US justifying the exercise of self-defence with quasi-unanimous statements of support coupled with offers of assistance to the US to facilitate the lethal military action that ensued.[28] The Preambles of Resolution 1368 and Resolution 1373, endorsed anchored the military actions that ensued against the Taliban Regime, within the arena of the 'inherent right of individual and collective self-defence'.[29]

C. Expanding the definition of armed attack

The right of self-defence laid down in Article 51 of the UN Charter is the pivotal point regarding the use of force in inter-State relations. A major question is whether the right of self-defence under Article 51 is limited to cases of 'armed attack' or whether there are other instances in which self-defence may be available. A number of scholars argue that

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[24] Warriner, W, "The Unilateral Use of Coercion under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986" 37 *Naval Law Review* (1988) 49, 76–777.

[25] Bowett, DW, *Self-Defence in International Law* (Praeger, New York, 1958), 13; Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism", 4(2) *Melbourne Journal of International Law* (2003) 406.

[26] Oppenheim, *supra* nt 2, 419; Maogoto, JN, *Battling Terrorism* supra nt 1.

[27] Brownlie, I, *International Law and the Use of Force by States* (Oxford Scholarship Online 1963), 281.

[28] See Beard, J, "Military Action against Terrorists under International Law: America's New War On Terror: The Case for Self-Defense under International Law" 25 *Harvard Journal of Law and Public Policy* (2002) 559, 571.

[29] UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368, Preamble; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, Preamble.

an 'armed attack' is the exclusive circumstance in which the use of armed force is sanctioned under Article 51.[30] Furthermore, the ICJ in *Nicaragua* clearly stated that the right of self-defence under Article 51 only accrues in the event of an 'armed attack'.[31]

The traditional requirement of self-defence is that a triggering event justifying a military response has already occurred.[32] When a State harbouring terrorists[33] provides active support for the terrorist group, as distinguished from mere tolerance and encouragement, there is a raging debate among scholars over whether, and under what circumstances, such support can constitute an 'armed attack' under Article 51 of the UN Charter against the target State. On this point there is considerable authority for the proposition that under some circumstances active support to terrorist groups can constitute an 'armed attack' against another State. For example, Professor Oscar Schacter has stated that 'when a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.'[34]

The *Nicaragua Case* is the most analogous on this issue. In the *Nicaragua Case*, the ICJ rejected the claim of the US that the support of Nicaragua to the rebels in El Salvador justified the use of force by the US against Nicaragua in self-defence under Article 51. The Court said that the provision of weapons or logistical support by one State to the opposition in another State is not an 'armed attack' under Article 51.[35] Consequently, this opinion suggests that even active support by a State to terrorist groups would not be an armed attack under Article 51. Nicaragua, however, is far from directly on point and leaves many questions unanswered. For example, what if the support includes not only weapons and logistical support, but includes the provision of training and a secure base of operations? Does it change matters if the terrorists might have access to weapons of mass destruction? Might support to terrorists acting trans-nationally be sufficient to be an armed attack against a target State, even though support to an armed opposition located within the target country would not? None of these questions is addressed by Nicaragua.

D. A silent revolution? Armed attacks and non-state entities

Prior to the September 11 attacks, Article 51 of the UN Charter was generally interpreted in a restrictive fashion. Most States (with the exception of the US and Israel) did not recognise a right of self-defence against terrorist networks hiding in territories of other States. Nor did a majority of States recognise the legitimacy of military action intended to

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30 See, for example, Dinstein, Y, *War, Aggression, and Self-Defence* (3rd ed, Cambridge University Press, New York, 2001), 168. Dinstein argues that as the choice of words in art 51 is deliberately restrictive, the right of self-defence is limited to armed attack. See also Jessup, P, *A Modern Law of Nations*: *An Introduction* (Macmillan, New York, 1948), 166.

31 The ICJ stipulated in *Nicaragua* that the exercise of the right of self-defence by a State under art 51 'is subject to the State concerned having been the victim of an armed attack'; see *Nicaragua Case, supra* nt 9, para 103.

32 McCoubrey, H and White, N, *International Law and Armed Conflict* (Aldershot, Hants, Dartmouth, 1992), 91–922.

33 Harbouring entails providing sanctuary and training to international terrorists as well as conditions that support their ability to engage in terrorist activities: see, eg., UN Security Council, Resolution 1193, *On the Situation in Afghanistan*, 28 August 1998, UN Doc No S/RES/1193; UN Security Council, Resolution 1214, *On the Situation in Afghanistan*, 8 December 1998, UN Doc No S/RES/1214S.C. Res 1193.

34 Schachter, *supra* nt 12, 250; see also Coll, *supra* nt 11, 298.

35 International Court of Justice (ICJ) *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986, 27 June 1986, para 228.

prevent future attacks. Self-defence was seen as an action of immediate response to an ongoing armed attack. Preventive or anticipatory self-defence was more or less ruled out. However, the terrorist attacks on 9/11 marked a turning point in the discourse on the use of force.

September 11 ignited heated debate as to whether the concept of 'armed attack' as contained in Article 51 must originate from a State rather than a non-State actor like Al Qaeda.[36] In its preamble, Resolution 1368 'recogni[ses] the inherent right of individual or collective self-defence in accordance with the Charter'.[37] The recognition that acts of private actors may give rise to an 'armed attack' is revolutionary. The term 'armed attack' was traditionally applied to States, but nothing in the UN Charter indicates that 'armed attacks' can only emanate from States. The main question is whether a terrorist act must be in some form attributable to a State in order to qualify as an 'armed attack' for the purposes of the UN Charter.

It is not entirely clear from the practice in the aftermath of 9/11 whether the requirement of the attribution of a terrorist act to a specific State actor was, in fact, fully abandoned. The North Atlantic Treaty Organization (NATO), for instance, introduced an interesting new formula when determining whether the 9/11 attacks amounted to 'armed attacks.' It did not expressly inquire whether the attacks were 'attributable' to the Taliban or Afghanistan, but instead asked whether 'the attack against the United States on 9/11 was directed from abroad' and could therefore 'be regarded as an action covered by Article 5 of the Washington Treaty.'[38]

One may argue that the criterion of the attribution of an 'armed attack' is only relevant in the context of the question towards whom the forcible response may be directed, but not in the context of the definition of an 'armed attack'. Carsten Stahn postulates that 'the main criteria to determine whether a terrorist attack falls within the scope of application of Article 51 should not be attributability, but whether the attack presents an external link to the State victim of the attack.'[39] Reviewing the relationship between Articles 2(4) and 51 vis-à-vis other coercive uses of force, Professor Myres McDougal avers that:

> Article 2(4) refers to both the threat and use of force and commits the Members to refrain from 'threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'; the customary right of defence, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purposes of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible

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[36] Byers, *supra* nt 17, 406–412; Stahn, *supra* nt 17, 49–50.

[37] However, it is instructive that the operative part of the resolution describes the attacks as 'terrorist attacks' (not armed attacks) that 'represent a threat to international peace and security." Thus, Resolution 1368 is ambiguous on the issue whether the right of self-defence applies in relation to any parties as a consequence of the September 11 attacks.

[38] NATO, *Statement of the North Atlantic Council*, Press Release 124, 12 September 2001, *at* <nato.int/docu/pr/2001/p01-124e.htm> (accessed 22 April 2018).

[39] Stahn, C, "Nicaragua is Dead, Long Live Nicaragua – The Right to Self-defence under Art. 51 UN Charter and International Terrorism" Terrorism (Impressum Conference, *Terrorism as a Challenge for National and International Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 24–25 February 2003).

> coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion[.][40]

Considering that the preferred *modus operandi* of terrorist organisations is a drawn out, sporadic pattern of attacks, it is very difficult to know when or where the next incident will occur. Professor Gregory Travalio reflects that:

> Reasonable arguments can be made that the definition of 'armed attack' should be interpreted to include the purposeful harbouring of international terrorists. The potential destructive capacity of weapons of mass destruction, the modest means required to deliver them, and the substantial financial resources of some terrorist organisations, combine to make the threat posed by some terrorist organisations much greater than that posed by the militaries of many States.[41]

Conclusion

Terrorism presents several problems: the identification of terrorists is often difficult; the inconsistent international legal system fails to deter terrorist operations; and the complicated cross-border nature of terrorist networks makes it difficult to effectively diminish the threat. In the face of these problems, States that are targeted by terrorists essentially have two options in responding. If the terrorists are located within the target State's borders, they may be captured and prosecuted under domestic criminal law. However, as is frequently the case, if terrorists are located outside the target State, military strikes against them may be undertaken. Though it is clear that effective deterrence demands that terrorists do not have safe havens and that terrorists must fear that they ultimately will pay a price for their mayhem, there is no indication that the world community is prepared to whole-heartedly accept the use of force against sovereign territories.[42]

There is no doubt from the discussion above that the distinction between 'armed attacks' and 'terrorist acts' has become blurred in the aftermath of the acts that took place during 9/11, possibly because of the enormous consequences of this event. By 'recognizing the inherent right of individual or collective self-defence in accordance with the Charter the preambular paragraph of Resolution 1368 appeared to imply that the terrorist acts were an 'armed attack within the meaning of Article 51 of the UN Charter.[43] A similar preambular paragraph was also included in Resolution 1373.[44] Even more explicit was the Statement that 'an armed attack' occurred was more explicit in the statement made by NATO on 12 September 2001, which states that if it were deemed that the attack on the US was from abroad, it would fall within the ambit of Article 5 of

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40 McDougal, M, "The Soviet-Cuban Quarantine and Self-Defense" 57 *American Journal of International Law* (1963) 597, 600.

41 Travalio, GM, "Terrorism, International Law and the Use of Military Force" 18 Wisconsin International Law Journal (2000) 145, 155.

42 Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406.

43 UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

44 UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

the Washington Treaty ('an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all').[45]

Whatever the particular circumstances, policy makers and lawyers must keep in mind that there are significant potential dangers in expanding the category of 'armed attack' in Article 51 beyond its obvious meaning of a direct attack by the military of one State against the territory, property or population of another. It does seem to stretch the common understanding of the term to suggest that a State has committed an 'armed attack' against another by tolerating persons on its soil who are, in one view, nothing more than criminals. Too loose a definition of 'armed attack' invites future abuse and undermines the predictability of international law regarding the use of force. Moreover, while the right of self-defence, even against armed attack, is subject to limitations of proportionality and necessity, it is generally accepted that self-defence against an armed attack includes both a right to repel the attack and in limited cases to take the war to the aggressor State to prevent a recurrence.

The terrorist threat posed by biological, chemical or nuclear attacks is chilling, but intervention to prevent the sinister marriage of international terrorism and weapons of mass destruction presents serious questions of legitimacy. It is not necessarily in the interest of the international community to make the category of 'armed attack' under Article 51 so broad and potentially open-ended that nations harbouring groups committing violent acts in other States will be considered to have made armed attacks on the target State. Furthermore, the scope of a nation's permissible military response is almost certainly greater in the event of an 'armed attack' by another State than in other situations in which a more limited military response might be justified, and a broad definition of 'armed attack', including occasions where States are simply harbouring terrorists would too readily justify the robust use of military force.[46]

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[45] NATO, *Statement of the North Atlantic Council*, Press Release 124, 12 September 2001, http://www.nato.int/docu/pr/2001/p01-124e.htm *supra* nt 40, neither the Security Council Resolutions, nor the NATO Statement attempted to establish a link between the terrorist acts and a particular State. However, these texts do not provide a clear indication whether they intend to refer to a wide concept of 'armed attack', which would also comprise acts, which are not attributable to a State. The issue whether the acts in question could be regarded as State acts depends on factual elements, which are still controversial.

[46] Maogoto, JN, *Battling Terrorism* (n 1), 153ff.

The Evolution of UN Anti-Terrorist Conventions towards the Universal Treaty-Based Model of Combating Terrorism

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Keywords
INTERNATIONAL TERRORISM; UNITED NATIONS; ANTI-TERRORIST CONVENTIONS; LEGAL COUNTER-TERRORIST MEASURES; PREVENTING TERRORISM; COMBATING TERRORISM

Abstract

Adopted in Montreal in 2014, the Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft is the nineteenth international legal instrument in the *acquis* of the United Nations ('UN') and its related organisations devoted to prevention and suppression of terrorism. Considering the first of such instruments – the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft ('the Tokyo Convention') – was adopted in 1963, it may be assumed that throughout the period of 55 years the UN has succeeded in solving the specific model of combating international terrorism. Although the existing and binding international conventions on suppression of terrorism do not form a uniform group and differ in terms of material scope of offences described therein, it is still possible to indicate one significant feature common to all conventions, and that is a set of legal measures and remedies available at the international level which guarantee an effective fight against terrorism. The above-mentioned set of regulatory measures – including, *inter alia*, jurisdictional clauses – constitutes a consistent collection of rules to be applied in cases of the majority of terrorist activities. The aforesaid model is based on the principle of *aut dedere aut judicare* supplemented with a rational control of extradition and jurisdictional issues. This model is also enriched with rules concerning other forms of co-operation such as mutual legal assistance, exchange of information and preventive measures. The rationale for the above-referred measures is to ensure that perpetrators of specific international terrorist offences shall be prosecuted regardless of their place of residence or motives that triggered such action. International anti-terrorist conventions adopted under auspices of the UN help to achieve this goal, confronting the internationalisation of terrorism with internationalisation of means and methods of combating this dangerous phenomenon.

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Introduction

Since 1963, when the Tokyo Convention was adopted under the auspices of the International Civil Aviation Organisation (ICAO), the UN and its specialised agencies have been working on the gradual development of treaty law within the scope of prevention and combating international terrorism. So far the number of UN conventions and protocols on the suppression of this criminal phenomenon has equalled nineteen, seventeen of which have already entered into force.[1] Although these agreements are not a homogenous group and they differ as far as the subject matter relating to the categories of crimes referred to therein is concerned, a crucial common feature combining these conventions may be indicated, namely a certain set of international legal measures which are supposed to guarantee effective prevention and combat international terrorism. This specific set of regulatory measures is composed of a relatively concise set of principles applicable to most of the forms of terrorist activity.[2] Among these measures is principle of *aut dedere aut judicare* accompanied by an appropriate regulation of extradition and jurisdictional issues as well as rules concerning other forms of co-operation, such as mutual legal assistance, exchange of information and preventive measures.

This article contains the evaluation of these measures regarding their use and effectiveness in the suppression of the phenomenon in question. Nevertheless, the main purpose of the analysis conducted below is to demonstrate whether international legal counter-terrorism measures provided for in the UN conventions form a fairly coherent and uniform system which could be referred to as a model of combating terrorism within the frames of the UN. Moreover, a question the author attempts to answer is whether a universal model of combating terrorism in international law is also being developed on the basis of solutions adopted in the foregoing UN conventions. However, such a model would require a significant initial assumption, namely the obligation to treat terrorist crimes like any common crime of serious nature. In other words, an approach formulated in the UN Declaration on Measures to Eliminate International Terrorism of 1994[3] should be adopted, according to which all acts, methods and practices of terrorism are criminal and unjustifiable, wherever and by whomever they are committed.[4] Furthermore, if such acts are intended or calculated to provoke 'a state of terror in the general public, a group of persons or particular persons for political purposes', they cannot be justified in any circumstances, irrespective of considerations of a political, philosophical ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[5] The purpose of the adopted legal instruments is to thoroughly prevent the perpetrators of certain terrorist crimes – considered

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1 See UN Office of Counter-Terrorism, 'International Legal Instruments' <http://www.un.org/en/counterterrorism/legal-instruments.shtml> accessed 28 December 2017; OSCE Transnational Threats Department, 'Status of the Universal Anti-Terrorism Conventions and Protocols as well as other International and Regional Legal Instruments related to Terrorism and Co-operation in Criminal Matters in the OSCE Area', p. 4–5 <https://www.osce.org/atu/17138?download=true> accessed 28 December 2017.

2 Bianchi, A, 'Enforcing International Law Norms Against Terrorism: Achievements and Prospects' *in* Bianchi, A and Naqvi, Y, eds, *Enforcing International Law Norms Against Terrorism* (Hart Publishing, Oxford 2004) 494.

3 UNGA Res 49/60 (9 December 1994) UN Doc A/RES/49/60, Annex.

4 *Ibid*, pt I, para 1.

5 *Ibid*, pt I, para 3.

by the international community as particularly dangerous – from avoiding punishment, regardless of their place of residence or motivation of actions.[6]

The UN conventions on preventing and suppressing terrorist acts, discussed in this article, are universal and 'sectoral'. This means that they are international legal instruments with a global scope of application, and the subject matter of each of them concerns a specific form of terrorist activity. These instruments may be classified as follows:

- instruments regarding civil aviation;[7]
- instrument regarding the protection of international staff;[8]
- instrument regarding the taking of hostages;[9]
- instruments regarding the nuclear material;[10]
- instruments regarding the maritime navigation;[11]
- instrument regarding explosive materials;[12]

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[6] Cf. B Wierzbicki, 'Model zwalczania terroryzmu międzynarodowego w umowach wielostronnych o charakterze uniwersalnym [The Model of Combating International Terrorism in Multilateral Agreements of Universal Character]' (1983) 11 Państwo i Prawo 81, 89.

[7] Convention on Offences and Certain Other Acts Committed On Board Aircraft, signed at Tokyo on 14 September 1963, 704 UNTS 10106 (hereinafter Tokyo Convention of 1963); Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, 860 UNTS 12325 (hereinafter The Hague Convention of 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, 974 UNTS 14118 (hereinafter Montreal Convention of 1971); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24 February 1988, 1589 UNTS A-1418 (hereinafter Airport Protocol of 1988); Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, signed at Beijing on 10 September 2010, 50 ILM 144, (2011) (hereinafter Beijing Convention of 2010 – not yet in force); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at Beijing on 10 September 2010, 50 ILM 153 (2011) (hereinafter Beijing Protocol of 2010); Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Montreal on 4 April 2014, ICAO Doc 10034, 2014 (hereinafter Montreal Protocol of 2014 – not yet in force).

[8] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the UN General Assembly on 14 December 1973, 1035 UNTS 15410 (hereinafter Diplomatic Agents Convention of 1973).

[9] International Convention against the Taking of Hostages, adopted by the UN General Assembly on 17 December 1979, 1316 UNTS 21931 (hereinafter Hostages Convention of 1979).

[10] Convention on the Physical Protection of Nuclear Material, signed at Vienna and at New York on 3 March 1980, 1456 UNTS 24631 (hereinafter Vienna Convention of 1980); Amendment to the Convention on the Physical Protection of Nuclear Material, signed at Vienna on 8 July 2005, IAEA International Law Series, No. 2, 2006 (the Amendment entered into force on 8 May 2016 and replaced the title of the Vienna Convention with the title 'Convention on the Physical Protection of Nuclear Material and Nuclear Facilities').

[11] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed at Rome on 10 March 1988, 1678 UNTS 29004 (hereinafter Rome Convention of 1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed at Rome on 10 March 1988, 1678 UNTS I-29004 (hereinafter Rome Protocol of 1988); Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed at London on 14 October 2005, IMO LEG/CONF.15/21, 1 November 2005 (hereinafter London Protocol of 2005); Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed at London on 14 October 2005, IMO LEG/CONF.15/22, 1 November 2005 (hereinafter Fixed Platforms Protocol of 2005).

[12] Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991, 2122 UNTS 36984 (hereinafter Plastic Explosives Convention of 1991).

- instrument regarding terrorist bombings;[13]
- instrument regarding the financing of terrorism;[14]
- instrument regarding nuclear terrorism.[15]

Reference should also be made to the work on the text of the general, comprehensive convention devoted to the fight against terrorism. This work is being carried out by the Ad Hoc Committee on International Terrorism, established by the UN General Assembly in 1996.[16] This convention is to be an 'umbrella treaty' that will combine a series of existing anti-terrorist agreements that address specific aspects of the phenomenon, such as aerial terrorism, hostage-taking or financing of terrorist activities. The convention will also include a general definition of terrorism and terrorist offences, which will fill the gaps left by the 'sectoral' conventions. Obviously, these conventions will not lose their binding force, nor will they be rendered useless. The 'thematic' definitions of terrorist offences adopted in them will simply continue to serve as models for national legislators when implementing relevant legal instruments.[17] The comprehensive convention, on the other hand, will apply to cases not regulated by the 'sectoral' conventions,[18] which – paraphrasing one of the paragraphs of the preamble of the draft of this convention – will guarantee that no terrorist will escape prosecution and punishment.

I. The Principle of *Aut Dedere Aut Judicare*

The issue of bringing to justice someone who commits an international crime is inextricably connected with the possibility to extradite the person. In such a case, international law applies the principle of 'extradite or prosecute', derived from the concept conceived by Hugo Grotius in 1625 – *aut dedere aut punire* ('either extradite or punish') – which has contemporarily assumed the form of adage *aut dedere aut judicare*. This expression is commonly used with reference to the alternative obligation imposed on States regarding the extradition or trial of a perpetrator of a certain crime and included in a number of multilateral treaties regarding international co-operation in combating certain forms of criminal activity. The foregoing obligation is formulated differently in various agreements;

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[13] International Convention for the Suppression of Terrorist Bombings, adopted by the UN General Assembly on 15 December 1997, UNGA Res 52/164 (15 December 1997) UN Doc A/RES/52/164, Annex (hereinafter Terrorist Bombing Convention of 1997).

[14] International Convention for the Suppression of the Financing of Terrorism, adopted by the UN General Assembly on 9 December 1999, UNGA Res 54/109 (9 December 1999) UN Doc A/RES/54/109, Annex (hereinafter Terrorist Financing Convention of 1999).

[15] International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the UN General Assembly on 13 April 2005, UNGA Res 59/290 (13 April 2005) UN Doc A/RES/59/290 (hereinafter Nuclear Terrorism Convention of 2005).

[16] The text of the draft comprehensive convention – see UNGA 'Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996' (28 January – 1 February 2002) 6th Session (2002) UN Doc Supp No 37 (A/57/37, Annex I–III).

[17] Cf. Röben, V, "The Role of International Conventions and General International Law in the Fight against International Terrorism" *in* Walter, C and others, eds, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, Berlin 2004) 816.

[18] According to Article 2 *bis* of the draft comprehensive convention, '[w]here this Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between States that are parties to both treaties, the provisions of the latter shall prevail', *supra* nt 16, Annex II, 7.

however, it generally demands that a State detaining someone who committed a crime of an international nature should either extradite the person to a State seeking to judge the person or undertake appropriate measures with the aim of bringing said person before the State's own relevant legal authority in order to settle the issue of criminal responsibility.[19]

Despite the widespread application of the *aut dedere aut judicare* principle in contemporary international agreements, its international legal status – and particularly its status as a norm of customary international law – is not evident. Undoubtedly, this principle is adopted in international conventions concerning a specific type of crime, such as terrorist acts. Its increasingly frequent occurrence in – already multiple – multilateral treaties raises the question whether the *aut dedere aut judicare* principle can now be regarded as an emerging principle of customary international law; this is at least in relation to international crimes, for which it applies even without the need to refer to the specific convention in which it was formulated.[20] In the doctrine of international law, however, there is an ambiguous answer to this question. This dilemma was being analysed by the International Law Commission. However, in its Final Report on the obligation to extradite or prosecute (*aut dedere aut judicare*) of 2014,[21] the Commission underlined

'general disagreement with the conclusion that the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes'.[22] The Commission also noted that 'the scope of the obligation to extradite or prosecute under the relevant conventions should be analysed on a case-by-case basis'.[23]

The uncertainty as to the status of the discussed principle in international law affects, unfortunately, both the scope of its application and its effectiveness. Practically speaking, an alternative State obligation, i.e. either to extradite a person or prosecute him or her, exists only to the extent that it has been literally expressed in an international treaty or, exceptionally, in domestic legislation. It can even be said that in extradition law, it is the *aut dedere aut judicare* principle that has become the formulating rule which is introduced into agreements, in particular in cases of a refusal by the State requested to the rendition of its own citizens.[24] This solution is also recommended in Article 4 of the Model Treaty on Extradition, elaborated by the UN General Assembly in 1990.[25]

As regards the formulation of the principle of *aut dedere aut judicare* in contemporary international treaties, one can notice a general tendency to repeat the phrase used in Article

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[19] See Cherif Bassiouni, M and Wise, EM, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, Dordrecht 1995) 3. The nature of the obligation to 'either extradite or prosecute' is 'alternative' in the sense that a State subjected to this obligation must decide on one of two above-referred possible solutions: it must extradite the perpetrator if it does not intend to prosecute him or her, or prosecute the perpetrator if it does not intend to extradite him or her (*Ibid*). Cf. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, at 443, para 50.

[20] Cherif Bassiouni and Wise, *supra* nt 19, 5.

[21] ILC, "The obligation of extradite or prosecute (aut dedere aut judicare) – Final Report" (2014) Yearbook of the ILC vol. II (Part Two).

[22] *Ibid*, para (51).

[23] *Ibid*, para (13).

[24] Płachta, M, *Kidnaping międzynarodowy w służbie prawa* [International Kidnapping in the Service of Law] (Dom Wydawniczy ABC, Warszawa 2000) 47–48.

[25] UNGA, "Model Treaty on Extradition" UNGA Res 45/116 (14 December 1990), UN Doc A/RES/45/116 – Annex.

7 of the Hague Convention of 1970.[26] The Convention stipulates in the above-mentioned Article that

> '[t]he Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution'.

This 'Hague formula' has served as a model for several subsequent conventions aimed at the suppression of specific offences, principally in the fight against terrorism.[27] Therefore, it is assumed that the conventions that incorporated this formula are based on the principle of *aut dedere aut judicare*.[28]

Nevertheless, the use of the expression *aut dedere aut judicare* with reference to the obligation established in Article 7 of the Hague Convention of 1970 is a solecism. The word *judicare* means 'to judge' or 'to conduct legal proceedings' which would suggest carrying out the whole trial before the court. However, the Hague Convention does not actually formulate the obligation of trial instead of extradition. It merely requires the requested State to take appropriate measures in order to punish the perpetrator of a certain crime.[29] Similarly, the verb *dedere* does not literally mean 'to extradite', but rather 'to surrender' or 'to provide'. However, it is one of several imprecise terms used formerly to describe an activity presently referred to as 'extradition'.[30]

The formula adopted in Article 7 of the Hague Convention of 1970 was a result of the compromise achieved at the end of negotiations regarding the contents of the treaty. The drafters of the foregoing convention intended to prevent hijackers, in the widest scope possible, from being provided a 'safe haven'. A possible way of achieving that objective could be to enunciate an absolute obligation to extradite perpetrators of crimes to a State where the aircraft was registered (or another State having particular jurisdictional interest). Although the proposal was presented, it was not sufficiently supported since it involved a potential obligation to extradite their own citizens, which is deemed unacceptable by many States. It also excluded the possibility of granting political asylum even where granting such asylum could be justified. Therefore, the focus of the attempts made by the drafters of the Hague Convention of 1970 was to establish an obligation to prosecute if extradition is denied. However, an absolute obligation to bring a hijacker before the State's own competent authorities proved unacceptable as well. A proposal according to which the parties must submit the case to competent authorities in order to conduct a criminal prosecution was too demanding. All in all, the States who negotiated the text of the Convention agreed on the alternative obligation to extradite or refer the case ('without exception whatsoever') to competent authorities on the condition that the authorities took

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[26] The Hague Convention of 1970, *supra* nt 7.
[27] ILC, *supra* nt 21, para (10).
[28] Cherif Bassiouni and Wise, *supra* nt 19, 3.
[29] Cf. Guillaume, G, "Terrorisme et droit international" (1989) 215 *Recueil des Cours de l'Académie de Droit International* 371.
[30] Cherif Bassiouni and Wise, *supra* nt 19, 4.

decisions in the same manner as in the case of any ordinary offence of a serious nature, according to *lex loci deprehensionis*.[31]

As mentioned above, the structure of the obligation set out in Article 7 of the Hague Convention of 1970 has been included in all UN sectoral conventions against international terrorism concluded since 1970.[32] Thus, the principle of *aut dedere aut judicare* in the 'Hague formula' has been adopted in: the Montreal Convention of 1971 (Article 7), the Diplomatic Agents Convention of 1973 (Article 7), the Hostages Convention of 1979 (Article 8(1)), the Vienna Convention of 1980 (Article 10), the Rome Convention of 1988 (Article 10), the Terrorist Bombing Convention of 1997 (Article 8(1)), the Terrorist Financing Convention of 1999 (Article 10(1)), the Nuclear Terrorism Convention of 2005 (Article 11(1)), and the Beijing Convention of 2010 (Article 10). Each of these conventions, following the formula applied in Article 7 of the Hague Convention of 1970, make the State Parties obliged to prosecute the perpetrator of the crime specified therein, or to extradite him or her in order to conduct a criminal prosecution.

The fundamental formula (either 'extradite' or 'refer the case to your own competent authorities in order to conduct a criminal prosecution') proved fairly permanent throughout nearly fifty years. Moreover, the wording of *aut dedere aut judicare* principle, adopted in the Hague Convention of 1970, appears in the same manner not only in international anti-terrorist conventions, but also in almost every multilateral treaty adopted since 1970 concerning the fight against international crimes. This fact may be a crucial argument in a discussion on whether the approval of the obligation to extradite or to prosecute is wide enough to start constituting a rule of customary international law.[33]

Furthermore, the fulfilment of the obligations resulting from the *aut dedere aut judicare* principle creates other liabilities. A State that adopts a decision to 'prosecute' must undertake appropriate measures which guarantee the appearance of the alleged perpetrator before the appropriate authorities; any and all analysed anti-terrorist conventions contain provisions which refer to this issue.[34] Decisions on the employment of detention, or other measures intended to guarantee the person's presence at the time of extradition or the criminal procedure, has been left at the State's discretion in the area of which the alleged perpetrator is staying.[35] A person detained in such a way is entitled to immediate contact with an appropriate representative of the State of which that person is a national. Moreover, a party to the convention ought to ensure all facilities necessary to exercise this right are made available to the detained.[36] Finally, the provisions of international conventions leave

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[31] *Ibid*, 16–17. Cf. Tuerk, H, "Combating Terrorism at Sea – The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation" (2008) 15 *University of Miami International and Comparative Law Review* 337, 349.

[32] ILC, *supra* nt 21, para (1).

[33] Cherif Bassiouni and Wise, *supra* nt 19, 18–19.

[34] See, eg, Article 6(1) of the Hague Convention of 1970; Article 6(1) of the Montreal Convention of 1971; Article 6(1) of the Diplomatic Agents Convention of 1973; Article 6(1) of the Hostages Convention of 1979; Article 7(2) of the Terrorist Bombing Convention of 1997.

[35] Wierzbicki, *supra* nt 6, 89.

[36] See, eg, Article 6(3) of the Hague Convention of 1970; Article 6(3) of the Montreal Convention of 1971; Article 7(3)(a) of the Terrorist Bombing Convention of 1997; Article 9(3)(a) of the Terrorist Financing Convention of 1999.

several issues regarding the punishment for terrorist offences to be regulated by the national legislation of the State Parties to these conventions.[37]

II. The Question of Extradition

Apart from the rules of jurisdiction, the extradition of a person suspected (or accused) of committing a terrorist offence is one of international legal measures that was quite uniformly elaborated in the current *acquis* of anti-terrorist conventions. Extradition is almost commonly considered to be the most appropriate instrument in the fight against terrorism, is necessary to prevent the impunity of terrorists and, consequently, is the trigger to weakening and limiting its scope. Extradition is a legal process based on either a treaty, reciprocity or national law, in which one State transfers to another State a person accused or convicted of committing a crime infringing either the law of the requesting State, or international criminal law, in order to conduct a judicial prosecution or to serve the sentence in the requesting State for the crime referred.[38]

Extradition warrants do not exist in general international law. To an appreciable extent they are regulated by bilateral or regional agreements. Provisions regarding extradition also constitute parts of national legislation, yet many countries do not have such regulations. Moreover, national legislation differs considerably between States as far as the scope and details of the extradition law are concerned. What most States require for extradition purposes is, excluding the national regulations, the application of an appropriate treaty. Furthermore, it must be remembered that crucial differences regarding the issue of extradition also refer to the administrative and judicial practice of individual States. Nevertheless, both treaties and national legislation contain similar substantive requirements and similar grounds concerning the denial of extradition.[39]

A. Principles of extradition

Extradition is possible only following the formal request of the other party of the extradition treaty. However, extradition treaties are prepared based on rules which may be treated as customary international law norms. Therefore, an offence someone is prosecuted for must be punishable both in the State requesting to extradite the person, and in the State requested to extradite the person; this is the so-called principle of dual criminality. Significantly, the exclusion of extradition is possible in the case of certain offences, for example, those committed out of political reasons, especially when a person subject to surrender was threatened by death penalty or inhuman treatment in the requesting State. Furthermore, most extradition agreements are based on the principle of speciality, by virtue of which extradition is possible provided that the surrendered person is prosecuted and punished only for the crime for which extradition was granted.[40]

However, although both the principle of dual criminality and the principle of speciality are present in the extradition law of almost all States and are included in almost

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[37] See, eg, Articles 3 and 10(1) of the Montreal Convention of 1971; Article 5 of the Rome Convention of 1988; Article 5 of the Nuclear Terrorism Convention of 2005.

[38] Cherif Bassiouni, M, "Reflections on International Extradition" in Schmoller, K, ed, *Festschrift für Otto Triffterer zum 65. Geburtstag* (Springer, Wien–New York 1996) 715.

[39] Cherif Bassiouni, M, *Introduction to International Criminal Law* (International Criminal Law Series vol. 1, 2nd rev edn, Martinus Nijhoff Publishers, Leiden 2013) 500–501.

[40] *Ibid*, 501.

every extradition treaty, the judicial practice of their application in individual States may vary. With respect to the principle of dual criminality, some States require that crimes in both legal systems be identical, while others are content when the evaluation of existing facts according to the law of the requesting State warrants prosecution. As regards the principle of speciality, some States enable the surrendered persons to voluntarily undertake appropriate steps in so far as the requesting State departs in the conducted criminal proceedings from charges presented in the extradition request. Other States require that the requested State files a protest with the requesting State.[41]

The inefficiency of the extradition system is due to it being bureaucratically overloaded. In practice, the extradition procedure is highly formalised whilst also being complicated, lengthy and expensive. Finally, it does not always guarantee the success understood as the actual surrender of a wanted person. The reason for this is created by the common conviction that the delivery of a person is an act of a sovereign State.[42] It must be remembered that the sovereign rights of a State are not subject to any customary restrictions, and all international obligations in this respect may result only from international conventions ratified by the States; what is significant in this respect is also national regulations. Moreover, irrespective of the above specified scope of obligations regarding extradition, such obligations are subject to considerable limitations included both in extradition agreements and domestic regulations. Most commonly applied rules, reinforced by treaty and legislative practice, are the so-called obstacles to extradition.[43] These obstacles involve an exception related to a political offence (excluding extradition provided that an offence to which the request refers, is considered a 'political offence'), as well as the prohibition of extradition of the State's own citizens.

The denial of extradition of a State's own citizens is the most crucial and many States decided to incorporate this rule in their own constitutional order. It is widely assumed that the requested State may extradite the requesting State's, or a third State's, citizen. When it comes to its own citizens, two other practices may be pointed out. According to the common law tradition, the principle of territorial jurisdiction prevails over the principle of nationality. Therefore, the State requested to extradite is obliged to surrender the perpetrators to the State on which they committed the crime, even if they are citizens of the requested State and assuming that both concerned States have ratified extradition treaty. On the other hand, continental law does not form a hierarchy of the foregoing rules on jurisdiction and States may attempt to prosecute perpetrators who are their citizens before their own courts even if a given crime had been committed abroad.[44]

B. Extradition and the political offence exception

Considering the subject matter of the present article, the extraordinarily important obstacle to extradition is the political offence exception. Attempts were made in some conventions to prevent the use of this exception by introducing a special clause according to which an offence under a given agreement shall not be considered a political offence. This type of formula ('offence "x" shall not be treated as a political offence') is derived from standard

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41 *Ibid*.

42 Płachta, *supra* nt 24, 15. Cf. Cherif Bassiouni, *supra* nt 39, 504.

43 Galicki, ZW, *Terroryzm lotniczy w świetle prawa międzynarodowego* [Aerial Terrorism in the light of International Law] (Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 1981) 29–30.

44 Gal-Or, N, *International Co-operation to Suppress Terrorism* (Croom Helm Ltd, London 1985) 128.

provisions contained in bilateral extradition treaties in order to ensure that, for example, an assassination of the head of State shall not be deemed a political offence. Unfortunately, for many years States have accepted the view that, in the case of terrorist offences, they could refuse extradition due to the political nature of terrorism. However, in the face of the refusal to surrender the perpetrator, States were still obliged to conduct criminal proceedings on their own.[45]

Since this is in terms of the fight against terrorism, which is an obstacle to extradition related to the political nature of an offence, it is of particular importance and is worth having a closer look at it. The legal framework offers a variety of approaches to the concept of a political offence. It is seen by both law theoreticians and practitioners as an ordinary offence which prejudices the interests of the State, its government or its political system. In other words, it is a criminal act according to the national law of a State and is of political nature. The word 'political' is, however, very flexible and depends on various factors. The scope of this term changed along with historic events, political systems, ideologies and interests of which it was supposed to serve. Therefore, it is construed differently, similar to the concept of a political offence.[46]

The very concept of a political offence underwent a boom in the 19th century with the wave of various revolutionary movements including the propagation of human rights' doctrines, according to which all human beings are vested with an inalienable right to oppose authoritarian regimes which violate the fundamental rules such as democracy, justice and morality. Although the concept was universally acknowledged, it provoked scepticism and numerous problems. It was intended to protect individuals fighting in the name of liberal rules of democracy against severe punishments which could be expected to be administered for their political activity; nevertheless, it was also being gradually applied – in an unchanged form – in cases of insurgents fighting against democracy. The core of the problem concerns the definition of a 'political offence'. Essentially, this concept may guarantee protection in cases of terrorists, provided that their actions are motivated by political reasons. This conclusion, however, is erroneous because it is based on a flawed assumption that every act motivated by political reasons, including an act of terrorism, should automatically be regarded as a political offence.[47]

The doctrine differentiates between two types of political offences: a typical political offence understood as a violation of law aiming exclusively at the State, and political offences of relative nature which also prejudice individual welfare and bring harm to persons. Contrary to the above-mentioned typical political offence they involve, and are classified, as an ordinary offence.[48]

A political offence may be *sensu stricto* or of relative nature. Strictly political offences are defined as any behaviour perceived as a threat to the State's sovereignty or its political foundations, devoid of, however, elements of an ordinary offence. These offences aim only at the political order, not against the society, and include high treason, espionage, spreading subversive propaganda, electoral frauds, and establishing or becoming a member of a

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45 Cf. Cherif Bassiouni and Wise, *supra* nt 19, 10–11.

46 Gal-Or, *supra* nt 44, 131–132.

47 Arnold, R, *The ICC as a New Instrument for Repressing Terrorism* (Transnational Publishers, Ardsley 2004) 36. More on the historical evolution of political offence – see Baudouin, J-L, "Les délits politiques et leurs modes de répression législative" *in* Baudouin, J-L, Fortin, J and Szabo, D, eds, *Terrorisme et justice: entre la liberté et l'ordre – le crime politique* (Editions du Jour, Montréal 1970) 24–37.

48 Gal-Or, *supra* nt 44, 132.

prohibited political party.[49] Political offences of relative nature constitute a hybrid of some sort and are a combination of an ordinary offence with a *sensu stricto* political offence or, even more often, constitute offences committed out of political reasons.[50] With regard to extradition, political offences of relative nature constitute a serious problem as the extradition request usually refers to an ordinary offence, for example a murder, whereas such a crime may be political due to underlying motives and objectives.[51]

In order to determine whether an ordinary offence is of political nature it is necessary to take into account three alternative factors:

1) a degree of political involvement of a perpetrator in a political movement on behalf of which he or she has committed an ordinary offence;
2) a connection between an ordinary offence and political objectives;
3) proportionality of applied measures to assumed goals.[52]

These factors are evaluated differently by the judicial authorities of each State, even if a political element seems to prevail over an intent to commit an ordinary offence. Consequently, there is a lack of uniformity in the treatment of offences of political nature by States which results in absence of common agreement regarding the definition of a 'political offence'. This situation is dangerous because it allows offenders, especially terrorists, to conduct their criminal activity under the guise of various and incomplete *ad hoc* definitions.[53]

One difference between a political offence and terrorism has been described in an interesting way by Nicholas Kittrie, according to whom the former is mostly an offence aiming at the political regime regardless of whether it is good or bad. Therefore, it is *mala prohibita* – the prohibited evil. A political offence does not, however, constitute an evil in itself; it is prohibited since a regime desires to oppose any such behaviour. Terrorism is something completely different. By definition, it is an act of violence and, though intended to target and harm a specific regime and its institutions, it also causes damage to the society and among its victims are often innocents. Consequently, terrorism is, from an ethical point of view, more difficult to justify than a political offence since it is an act of violence that does not consider who falls victim; it constitutes *mala in se* – evil in itself which is contradiction of fundamental social and humanitarian rules.[54]

C. Solutions adopted in UN anti-terrorist conventions

In the case of terrorist crimes, the surrender and delivery of perpetrators for such acts generally boils down to extradition agreements existing and in force between parties thereof or to be concluded in the future. Generally speaking, in conventions adopted under the auspices of the UN, offences covered by the scope of analysed treaties are to be incorporated

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[49] Phillips, RS, "The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for Its Future" (1997) 15 *Dickinson Journal of International Law* 337, 341.
[50] *Ibid*, 342.
[51] Arnold, *supra* nt 47, 37.
[52] *Ibid*.
[53] *Ibid*.
[54] Kittrie, NN, "Comments: Panel on Terrorism and Political Crimes in International Law" (1973) 67 *AJIL* 104.

in the future and are deemed to be incorporated to existing extradition agreements.[55] Only in the absence of any such agreements may the very conventions constitute a basis, although purely optional, for the surrender and delivery of perpetrators. However, conditions and rules of surrender must, in such circumstances, comply with legal provisions of the State requested to extradite.[56] Moreover, for the purpose of extradition, offences covered by the scope of anti-terrorist conventions are to be treated by the parties as committed not only in the place of the actual offence but also on the territory of the States obliged to establish their jurisdiction.[57]

Thus, according to anti-terrorist conventions, the alleged perpetrator of the offence, detained in the territory of the State-party, should be either surrendered to the State requesting their extradition, or – 'without exception whatsoever and whether or not the offence was committed in [the requested State's] territory' – handed over to the competent authorities of the requested State for the purpose of prosecution. It appears that, under the conventions referred to above, extradition is not perceived as an obligatory measure but considered as one of the possible solutions. The obligation to extradite is, therefore, conditioned on a negative decision regarding the conduct of criminal proceedings. It should also be noted that anti-terrorist conventions do not attempt to establish a priority pattern with regard to extradition. In such cases it would be advisable to determine the competent jurisdiction on a neutral forum; ultimately, the UN Security Council may be addressed. Legal precedents do exist; one relates to the *Lockerbie* case,[58] the other concerns the sentence passed by the United States to target Osama bin Laden where the Security Council, acting pursuant to Chapter VII of the UN Charter, demanded that the Taliban regime immediately surrenders the leader of al-Qaeda.[59]

The adoption of the solution, according to which crimes included in the UN anti-terrorist conventions are to be regarded as subject to extradition pursuant to the existing extradition treaties in force,[60] to a certain extent, modifies previous extradition treaties within the range of their application by *lex posterior* principle. Moreover, the conventions provide that they may serve as the extradition title in the absence of a relevant extradition treaty between the States concerned and when such deficiency could preclude extradition. What is important, however, is the fact that the foregoing provision is not of an obligatory nature.[61]

International anti-terrorist conventions also contain regulations referring to the 'political nature' of the phenomenon of terrorism. What is crucial is that, at the universal

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[55] See, eg, Article 8 of the Hague Convention of 1970; Article 8 of the Montreal Convention of 1971; Article 8 of the Diplomatic Agents Convention of 1973; Article 11(1) of the Terrorist Financing Convention of 1999; Article 10(1) of the London Protocol of 2005.

[56] Galicki, *supra* nt 43, 29.

[57] See, eg, Article 8 of the Hague Convention of 1970; Article 8 of the Diplomatic Agents Convention of 1973; Article 9(4) of the Terrorist Bombing Convention of 1997; Article 13(4) of the Nuclear Terrorism Convention of 2005; Article 12(4) of the Beijing Convention of 2010.

[58] See UNSC Res 731 (1992) (21 January 1992) UN Doc S/RES/731 (1992); UNSC Res 748 (1992) (31 March 1992) UN Doc S/RES/748 (1992).

[59] See UNSC Res 1267 (1999) (15 October 1999) UN Doc S/RES/1267 (1999).

[60] See, eg, Article 8(1) of the Montreal Convention of 1971; Article 11(1) of the Rome Convention of 1988; Article 9(1) of the Terrorist Bombing Convention of 1997; Article 11(1) of the Terrorist Financing Convention of 1999.

[61] Kolb, R, "The Exercise of Criminal Jurisdiction over International Terrorists" *in* Bianchi, A and Naqvi, Y, eds, *Enforcing International Law Norms Against Terrorism* (Hart Publishing, Oxford 2004) 260.

level, a tendency to exclude acts of terrorism from the 'political offence' clause can be noticed which may reflect a growing perception of terrorism as an unjustifiable and illegal activity. It means that the political nature of terrorism, once expressly emphasised, now tends to be superseded by a more 'technical' approach, according to which it is absolutely necessary to combat and eradicate such acts of violence without considering motives and justifications for the terrorist activity.[62] The aforementioned clause, for the first time, came into effect in the Terrorist Bombing Convention of 1997.[63] According to Article 11, '[n]one of the offences set forth in [A]rticle 2 shall be regarded, for the purpose of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives'.[64] Accordingly, any request for extradition (or for mutual legal assistance) based on such an offence 'may not be refused on the sole ground that it concerns a political offence[,] or an offence connected with a political offence or an offence inspired by political motives'.[65] Moreover, to fill the potential gap, the Convention adds in Article 9(5)

> 'the provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention'.[66]

These provisions imply that this Convention, implementing the exclusion of an exception regarding the political offence, overrides any other clause providing for the foregoing exception and adopted under previous extradition treaties.

Similar provisions have been included in the Terrorist Financing Convention of 1999 (accordingly – Article 14 and Article 11(5))[67] and in the Nuclear Terrorism Convention of 2005 (Articles 15 and 13(5)),[68] thus, it may be expected that the above provisions related to the question of political offence shall constitute one of the elements of the international legal model of preventing and suppressing terrorism. In fact, this assumption becomes a reality because the solution in question has already been included in the conventions and protocols adopted since 2005, amending and supplementing the older UN anti-terrorist conventions: the London Protocol of 2005 (amending the Rome Convention of 1988),[69] the Beijing Convention of 2010 (intended to replace the Montreal Convention of 1971 and its Airport Protocol of 1988)[70] and the Beijing Protocol of 2010 (intended to supplement the Hague Convention of 1970).[71] Nevertheless, it must be stressed that a political exception has to be

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62 *Ibid*, 266.
63 Terrorist Bombing Convention of 1997, *supra* nt 13.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.
67 Terrorist Financing Convention of 1999, *supra* nt 14.
68 Nuclear Terrorism Convention of 2005, *supra* nt 15.
69 See Article 10(2) of the London Protocol of 2005, introducing Article 11 *bis* to the Rome Convention of 1988. More on the amendments introduced by this Protocol – see Tuerk, *supra* nt 31, 358–365.
70 See Article 13 of the Beijing Convention of 2010.
71 See Article XII of the Beijing Protocol of 2010, introducing Article 8 *bis* to the Hague Convention of 1970. More on the amendments introduced both by the Beijing Convention and Protocol – see Witten, SM, "Introductory Note to the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft" (2011) 50 *ILM* 141–143.

clearly separated from clauses contained in more contemporary conventions, according to which a mutual legal assistance or extradition may be refused if a request has been submitted with the purpose to judge, to punish or to persecute such a person on account of his or her political opinions or similar reasons.[72]

A fear to extradite to a State affected by *coup d'état* or a State authorised to conduct criminal proceedings and, consequently, to issue a judgment of conviction may be regarded as one of the major factors discouraging potential terrorists. Therefore, it is important to formulate extradition law in such a way as to guarantee that individuals responsible for acts of terrorism, when captured, will certainly be held liable and will face justice. What is extremely crucial is also the relationship between the right to political asylum and developing (especially after the events of the 11th September 2001) anti-terrorist law, according to which an individual guilty of a terrorist crime is denied political asylum. Following the above, the international law regime in conjunction with effective extradition law, which excludes any 'safe haven' for terrorists, could become a successful deterrent and a specific preventive measure in suppressing international terrorism. In fact, considering the increasing tendency to exclude acts of terrorism from the category of political offences that are not subject to extradition and to qualify them as ordinary crimes, terrorists are not entitled to political asylum. As emphasised in Article XIV(2) of the Universal Declaration of Human Rights of 1948,[73] '[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

However, due to difficulties accompanying the process of defining 'political offence', the assessment and the final classification of such an offence lies within the competency of the State to whom an extradition request has been forwarded.[74] Such classification consists mainly of the determination of which offences would not be regarded as political offences. Among these exceptions are assassinations of heads of States and persons entitled to international protection, crimes against life, genocide, aircraft hijacking and war crimes. Still, what is lacking is a positive definition of 'political offence' – thus the evaluation of 'acts of terrorism' could be subjective, despite the above-mentioned relevant provisions of the UN conventions. Additional factors which greatly hinder an effective application of extradition against terrorists are: treatment of terrorists as members of regular (or irregular) armed forces by some States (including all legal consequences arising therefrom, especially with regard to relevant provisions of international humanitarian law)[75] and a refusal to recognise terrorism,

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[72] See Article 12 of the Terrorist Bombing Convention of 1997; Article 15 of the Terrorist Financing Convention of 1999; Article 16 of the Nuclear Terrorism Convention of 2005; Article 10(3) of the London Protocol, introducing Article 11 *ter* to the Rome Convention of 1988; Article 14 of the Beijing Convention of 2010; Article XIII of the Beijing Protocol of 2010, introducing Article 8 *ter* to the Hague Convention of 1970. Cf. Röben, *supra* nt 17, 803.

[73] UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/3/217 A.

[74] Wierzbicki, B, *Zagadnienia współpracy państw w zapobieganiu i zwalczaniu przestępczości* [The Issues of co-operation between States in Preventing and Combating Crime] (Dział Wydawnictw Filii UW w Białymstoku, Białystok 1986) 27.

[75] According to Article 19(2) of the Terrorist Bombing Convention of 1997, '[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention'. Cf. Article 4(2) of the Nuclear Terrorism Convention of 2005; Article 3 of the London Protocol of 2005, introducing Article 2 *bis* to the Rome

even when directed against civilian objects, as illegitimate conduct.[76] However, as the fight against terrorism is expected to be long-term and global, the issue of surrender of individuals suspected of being involved in such activity becomes one of the most crucial modern issues.

In conclusion, it must be emphasised that extradition, in many cases, is still the best possible measure that ensures acts of terrorism will not be carried out without impunity. It is true that the extension of jurisdiction through re-interpretation of the territoriality principle, the principle of nationality or by means of the adoption of the principle of universal jurisdiction, is crucial and most definitely desired. More effective, however, may turn out to be making extradition; a practical and efficient measure ensuring the accomplishment of the goal, namely, counteracting the phenomenon in question. This is what the initiators of the international anti-terrorist conventions aimed for. In case of terrorist crimes, extradition, therefore, ought to be regarded as the practical alternative, if not the preferential option.

III. Jurisdictional Clauses

Acquiring physical control over a person suspected of terrorism by the State authorities leads to another question, namely the determination of proper jurisdiction. Any disputes arising therefrom between the States take the form of a conflict of jurisdiction: either positive (when two or more States claim a right to judge the accused) or negative (when governments of the States, usually due to political reasons, prefer to dispose of the accused together with the related problem from their own territory). Those conflicts stem from the fact that neither in the doctrine nor in the case-law of international criminal law are there commonly accepted criteria of addressing which States concerned should have jurisdiction over the case. Usually, the State whose authorities have already apprehended the accused is the State who has jurisdiction, provided that the rules of competence deriving from the national criminal law do not provide otherwise.[77]

In general, the doctrine of international law distinguishes four principles of jurisdiction in criminal cases. The first is the territoriality principle which constitutes all crimes committed on the territory of the State, onboard maritime vessels and onboard aircraft registered under the flag of said State. The second principle is based on the competence arising from nationality and authorises the State to judge and prosecute their citizens, irrespective of the place of commitment of the criminal act (the principle of nationality). The third principle concerns the protection of State security and provides measures to prosecute and penalise individuals threatening either the State's security, integrity or independence, regardless of the perpetrator's nationality and the place where the crime was committed (the protective principle). Finally, the fourth principle is underpinned by the universality of jurisdiction of all States regarding certain crimes irrespective of whose territory, against whom and by whom these crimes have been committed (the principle of universality, or the principle of universal jurisdiction).

Convention of 1988; Article 6(2) of the Beijing Convention of 2010; Article VI of the Beijing Protocol of 2010, introducing Article 3 *bis* to the Hague Convention of 1970. More on this question – see O'Donnell, D, "International Treaties Against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces" (2006) 88 *IRRC* 853, 863–871.

[76] Cf. Płachta, *supra* nt 24, 42.

[77] Płachta, M, "Bitwy wielkiej wojny [The Battles of Great War]" *Rzeczpospolita* (Warszawa 2 March 2002) Law 4.

As easily noticed, the most effective way which guarantees punishment of perpetrators of terrorist crimes is to adopt the principle of universal jurisdiction, which has already been applied in international law. The principle of universal jurisdiction concerning repression of international crimes condemned by the international community covered, *inter alia*, piracy (often compared with the phenomenon of terrorism), human trafficking, war crimes, genocide, crimes against humanity and apartheid. As for terrorism, numerous national legislation and international agreements strongly condemn various crimes of global nature which may be referred to as 'terrorist acts', such as taking hostages or aircraft hijacking. Moreover, every State denounces, persecutes and penalises acts of terrorism directed against any such State or their citizens.[78] However, existing international legal regulations related to the fight against terrorism do not grant absolute priority to the principle of universality, establishing usually a combined system of various principles and rules and merely adopting the principle of universality as ancillary and supplementary.[79]

In principle, all UN anti-terrorist conventions adopted after 1963 are based on a similar jurisdictional system, with some minor differences. Thus, all UN anti-terrorist conventions contain a set of specific jurisdictional grounds for all State Parties. However, in the majority of those conventions States have decided upon solutions aimed at establishing their own jurisdictions over crimes set forth in said conventions. The most frequently repeated term is as follows, 'Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences…' etc. What is important is that this obligation usually applies to instances where a crime was committed either:

1) on the territory of a particular State;
2) by nationals of a particular State, sometimes even by a stateless person with a permanent residency in a given State;
3) on board a maritime vessel or aircraft registered in that particular State.[80]

As is clear from above, the foregoing solution in no way refers to the principle of universal jurisdiction. Moreover, most anti-terrorist conventions comprise an additional provision which is formulated similarly to a recommendation rather than an obligation: 'Each State Party may also establish its jurisdiction over any such offence when (…)':

1) the offence is committed against a national of that State;
2) the offence is committed against a State or government facility of that State abroad, i.e. against its embassy;
3) the offence is committed in an attempt to compel that State to do or abstain from doing any act.[81]

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[78] More on this question – see Blakesley, CL, *Terrorism, Drugs, International Law, and the Protection of Human Liberty: A Comparative Study on International Law, Its Nature, Role, and Impact in Matters of Terrorism, Drug Trafficking, War, and Extradition* (Transnational Publishers, New York 1992) 137–141.

[79] Galicki, *supra* nt 43, 27.

[80] See, eg, Article 5(1) of the Montreal Convention of 1971; Article 3(1) of the Diplomatic Agents Convention of 1973; Article 7(1) of the Terrorist Financing Convention of 1999; Article 9(1) of the Nuclear Terrorism Convention of 2005; Article 8(1) of the Beijing Convention of 2010.

[81] See, eg, Article 5(1) of the Hostages Convention of 1979; Article 6(2) of the Rome Convention of 1988; Article 6(2) of the Terrorist Bombing Convention of 1997; Article 8(2) of the Beijing Convention of 2010; Article VII of the Beijing Protocol of 2010, introducing Article 4 to the Hague Convention of 1970.

The solution presented above is accurately illustrated by Article 6 of the Terrorist Bombing Convention of 1997:

> '1. Each State Party shall take such measures as may be necessary to establish its j urisdiction over the offences set forth in Article 2 when:
> (a) The offence is committed in the territory of that State; or
> (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
> (c) The offence is committed by a national of that State.
> 2. A State Party may also establish its jurisdiction over any such offence when:
> (a) The offence is committed against a national of that State; or
> (b) The offence is committed against a State or government facility of that State a broad, including an embassy or other diplomatic or consular premises of that State; or
> (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or
> (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or
> (e) The offence is committed on board an aircraft which is operated by the Government of that State.
> 3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2 under its domestic law. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.
> 4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.
> 5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law'.[82]

The jurisdictional scope of the Terrorist Bombing Convention of 1997 is relatively wide due to the equally wide scope of its application. On the other hand, the jurisdictional clauses of the Diplomatic Agents Convention of 1973 are definitely narrower.[83] It should also be noted that all discussed conventions contain the provision expressed in Article 6(5) of the Terrorist Bombing Convention, according to which they do not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.[84] Thus, if national criminal law provides for any additional jurisdictional grounds that are not contrary to international law, proceedings may be conducted on their basis without prejudice

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[82] Terrorist Bombing Convention of 1997, *supra* nt 13.

[83] See Article 3(1) of the Diplomatic Agents Convention of 1973.

[84] See, eg, Article 7(6) of the Terrorist Financing Convention of 1999; Article 9(5) of the Nuclear Terrorism Convention of 2005; Article 8(4) of the Beijing Convention of 2010.

to the provisions of any of those conventions. In the legal sense, the jurisdictional bases provided for in the treaties in question are not exhaustive, but complementary to the grounds provided for under national law. Where conventions oblige State Parties to exercise jurisdiction in accordance with the rules envisaged therein, jurisdiction becomes mandatory, whereas jurisdiction based on national law is optional. The national legal bases correspond to those listed in Article 6(2) of the Terrorist Bombing Convention and are clearly identified as discretionary (a State Party 'may also establish its jurisdiction').[85] It should be added that the distinction between obligatory and discretionary jurisdictional grounds is a relatively new solution in terms of anti-terrorist conventions. In older conventions, for example in the Montreal Convention of 1971 (in its original wording), only obligatory grounds are provided.[86]

It should also be noted that the conventions in question contain a clause providing for some 'autonomy' of the domestic law of State Parties. In order to establish its own jurisdiction, the national legislation of the State Party must enable it to detain the alleged offender, if appropriate, extradite that person or prosecute him or her (the principle of *aut dedere aut judicare*). To fulfil this obligation, jurisdictional clauses must be formulated in such a way that they can be applied in the event of the perpetrator's presence in that State, even if there is no connection between that State and the criminal offence or its perpetrator. This allows the introduction of a clause relating to universal jurisdiction based on the presence of a perpetrator in an unconnected State. Conventions do not indicate which State Parties have the priority of jurisdiction. In practice, the State Party that detained the alleged perpetrator may judge him or her, and if it does not, it must initiate extradition proceedings. Thus, the analysed conventions present a uniform and comprehensive approach towards the establishment of State jurisdiction in the absence of traditional relationships allowing it to be determined.[87]

The UN conventions on the fight against international terrorism have, in a sense, attempted to fill the gap left by classical international law. According to such classical law, national courts had primary jurisdiction over crimes committed on their territory, on certain crimes committed abroad by citizens of that State and on crimes aimed against them or at the basic interests of that State. Most national courts, however, did not have sufficient jurisdiction to deal with crimes committed abroad by foreigners and directed against foreigners. As a result, terrorists who have taken refuge in the territory of a third State could have escaped prosecution in such cases. The above-mentioned conventions, concerning the various forms that the phenomenon of terrorism can take, can therefore be considered as an important step towards bridging the current gap.[88]

The UN anti-terrorist conventions form a somewhat two-tier system of jurisdiction. One of these levels is based on numerous grounds of jurisdiction, of an obligatory or discretionary (optional) nature, which State Parties must guarantee (or may maintain) in order to prosecute those suspected of committing a crime established within such conventions. The second level refers to jurisdiction based on the *aut dedere aut judicare* principle which obliges State Parties to lay down in their national legislation the right to

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85 Kolb, *supra* nt 61, 248–249.

86 See Article 5(1) of the Montreal Convention of 1971. The optional jurisdictional grounds have been included in Article 8(2) of the Beijing Convention of 2010, intended to replace the Montreal Convention.

87 Röben, *supra* nt 17, 799–800.

88 Guillaume, G, "Terrorism and International Law" (2004) 53 *ICLQ* 537, 542.

prosecute; this must also extend to cases where there is no connection between that State and the criminal offence or perpetrator, and extradition does not occur. States are therefore obliged under the conventions to amend their domestic legislation, so they can pursue the defined crimes on the basis of universal jurisdiction. The basis of this jurisdiction is the presence of an alleged offender in the territory of the prosecuting State.[89] Thus, there is no doubt that consistent and objective compliance with the above principle would improve the effectiveness of the international legal system of combating terrorism.[90]

IV. Other Forms of Co-operation

The effective fight against terrorism requires the close co-operation of States. An important role of this co-operation is emphasised by the fact that even if the alleged perpetrator of a terrorist offence has been extradited, or if the jurisdiction over the perpetrator has been clearly established, nothing can guarantee that the trial will be successful. The need for co-operation is obvious, and its forms can be very diverse. These include the exchange of (confidential) information, legal assistance in conducting investigations and criminal proceedings, taking evidence from witnesses at the request of the requesting State, transferring witnesses or material evidence to the requesting State, taking joint preventive measures and many other forms, most somewhat formalised.

Inter-state co-operation aiming at the suppression of international terrorism assumes a different form in the UN anti-terrorist conventions, yet in principle some forms of co-operation are repeated. These include: taking preventive measures, exchanging information and mutual legal assistance in cases of terrorist offences. These forms do not occur in all the conventions discussed, but their provisions are formulated in a very similar manner and the goal to be achieved is identical. These other forms of co-operation should, of course, compliment the extradition and jurisdictional provisions discussed above, creating together an integrated system of legal measures to prevent and combat international terrorism.

A. Preventive measures and exchange of information

The experience gained from the fight against transnational criminal activity, including terrorism, permits the statement that the first and most important stage of this fight is the co-operation of intelligence agencies and law enforcement organs. This co-operation is to be primarily a preventive and deterrent measure, and only as a last resort is it to serve as a repressive measure. National systems, however, share intelligence and preventive functions between rival, bureaucratised agencies, thus limiting their individual and shared effectiveness. In addition, such independent State agencies have a tendency to establish and develop *ad hoc* relations with their counterparts in other States. Therefore, any information that flows between these correspondent agencies encounters internal and bureaucratic obstacles; this characterises the co-operation of States in the field of information exchange and the implementation of preventive measures.[91]

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[89] See, eg, Article 6(4) of the Rome Convention of 1988; Article 6(4) of the Terrorist Bombing Convention of 1997; Article 9(4) of the Nuclear Terrorism Convention of 2005; Article 8(3) of the Beijing Convention of 2010. Cf. Kolb, *supra* nt 61, 255–256.

[90] Cf. Guillaume, *supra* nt 88, 542.

[91] Cf. Cherif Bassiouni, M, "Legal Control of International Terrorism: A Policy-Oriented Assessment" (2002) 43 *Harvard International Law Journal* 83, 94.

No international agreement has been established so far to regulate this issue of inter-state co-operation between intelligence agencies and law enforcement organs. It is possible to speak at most of certain fragmentary regulations that were included in various international conventions which were devoted to the issues of combating broadly-understood transnational crimes and concerning the co-operation of States in criminal matters. These regulations usually concern only specific aspects of the co-operation in question – for example the exchange of information – and mostly take the form of a general obligation or appeal addressed to States Parties without specifying entities that should be responsible for the implementation of this co-operation.

Similar solutions have been included in UN anti-terrorist conventions, particularly regarding the co-operation on preventive measures and the exchange of information between States. These issues have been uniformly regulated in the analysed conventions, and the differences result only from the specificity of the problem regulated by the particular treaty.[92] The Nuclear Terrorism Convention of 2005[93] may boast the most extensive and universal provisions in question. Indeed, the form of terrorist activity stipulated in said convention requires, above all, preventive actions. Therefore, Article 7 of the Nuclear Terrorism Convention focuses on the issue of joint preventive measures in an exhaustive manner and clearly underlines the importance of information exchange. Moreover, Article 7 of the convention discussed contains not only solutions already accepted in the existing anti-terrorist conventions,[94] but also enriches this set with some new elements that will be used – wholly or partially – in subsequent anti-terrorist conventions.[95]

According to Article 7(1) of the Nuclear Terrorism Convention, State Parties are obliged to co-operate to prevent terrorist offences by:

> '[t]aking all practicable measures, including, if necessary, adapting their national law, to prevent and counter preparations in their respective territories for the commission within or outside their territories of the offences set forth in Article 2, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of those offences'.[96]

State Parties shall also co-operate by:

> '[e]xchanging accurate and verified information in accordance with their national law and in the manner and subject to the conditions specified herein, and coordinating administrative and other measures taken as appropriate to detect, prevent, suppress

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92 For example, Article 18(2)(a) of the Terrorist Financing Convention of 1999 underlines the need of co-operation in the prevention of offences set forth in Article 2 of the convention by considering '[m]easures for the supervision, including, for example, the licensing, of all money transmission agencies'.

93 Nuclear Terrorism Convention of 2005, *supra* nt 15.

94 See, eg, Article 5(2) of the Vienna Convention of 1980; Article 15 of the Terrorist Bombing Convention of 1997; Article 18 of the Terrorist Financing Convention of 1999.

95 See, eg, Article 12 of the London Protocol of 2005, amending Article 13(1) of the Rome Convention of 1988; Article XVI of the Beijing Protocol of 2010, introducing Article 10 *bis* to the Hague Convention of 1970.

96 Nuclear Terrorism Convention of 2005, *supra* nt 15.

> and investigate the offences set forth in Article 2 and also in order to institute criminal proceedings against persons alleged to have committed those crimes. In particular, a State Party shall take appropriate measures in order to inform without delay the other States referred to in Article 9 in respect of the commission of the offences set forth in Article 2 as well as preparations to commit such offences about which it has learned, and also to inform, where appropriate, international organizations'.[97]

Concerning the above-mentioned information, State Parties shall take all appropriate measures consistent with their national law

> 'to protect the confidentiality of any information which they receive in confidence by virtue of the provisions of this Convention from another State Party or through participation in an activity carried out for the implementation of this Convention'.[98]

It should be added that in situations where State Parties decide to provide information to international organisations as confidential, they should take appropriate measures to ensure the confidentiality of such information.

B. Mutual legal assistance

Most UN anti-terrorist conventions contain provisions relating to the institution of mutual legal assistance. It is a relatively new form of co-operation between States, developed primarily since the 1960s, but has its origins in an almost century-old and still-functioning practice known as 'rogatory letters', mainly used in civil matters and based on the principle of comity. According to this practice, the judicial authority of one State addresses to a judicial authority of another State a request for judicial assistance in the form of taking the testimony of a witness or securing tangible evidence. The requested court then transmits the record of the witness testimony or tangible evidence to the requesting court, certifying that the evidence has been secured in accordance with the requirements determined by the law of the requested State. As this practice became more common, some of the States decided to go a step further and began sending special commissions to other States ('rogatory commissions'), the task of which was to conduct their own investigation in a given case. This practice was not based on comity but on an agreement between the States concerned. The member of such commissions was either a judge or prosecutor who conducted an investigation or examination of a witness in the territory of another State.[99]

Since the 1960s, the practice of many States (particularly in Europe and the Americas) has departed from the establishment of the above committees and replaced them with bilateral agreements on mutual legal assistance (so-called Mutual Legal Assistance Treaties – MLATs). Some regional organisations, such as the Council of Europe, the Organization of American States and the League of Arab States, have also begun to support MLATs, adopted as multilateral and regional agreements.[100] Similarly, the UN began to support mutual legal assistance as an effective instrument for combating international crimes

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[97] *Ibid*.
[98] *Ibid*.
[99] Cherif Bassiouni, *supra* nt 39, 504–505.
[100] *Ibid*, 505.

– many UN treaties contain appropriate provisions establishing the general legal framework for this form of legal co-operation.

The scope of legal assistance is extremely broad, and its forms are very diverse. They include: taking of witness testimony, securing tangible evidence (such as bank records) or conducting investigations. These forms of legal assistance may be provided by judicial authorities, prosecutorial personnel or law enforcement organs of the requested State. Sometimes the requested State allows a judge or prosecutor from the requesting State to conduct the investigation on its territory, but only under the supervision of the judicial authorities of the requested State.[101]

The transnational character of many terrorist groups and their activities, often exceeding the borders of one State, triggered the introduction of provisions that exclude terrorist acts from the benefits of the political offence exception into contemporary agreements concerning legal assistance in criminal matters. The obligation to provide the greatest possible legal assistance in criminal proceedings, conducted in relation to specific terrorist offences, also results from provisions of the UN anti-terrorist conventions.[102] Article 10(1) of the Terrorist Bombing Convention of 1997 can be indicated as a model example of anti-terrorist solutions regarding mutual legal assistance. According to this Article, State Parties are obliged to

> 'afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 2, including assistance in obtaining evidence at their disposal necessary for the proceedings'.[103]

Article 10(2) stipulates that State Parties shall 'carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them'. In the absence of such treaties or arrangements, 'State Parties shall afford one another assistance in accordance with their domestic law'.[104]

This general obligation of States to provide legal assistance is a natural consequence of the adoption (albeit to a limited extent) of the principle of universality of prosecution with respect to acts of international terrorism. Indeed, in a significant number of cases, only legal assistance allows the fulfilment of the obligation to prosecute and punish the offender. In order to conduct criminal proceedings or to request for extradition, it is necessary to gather essential data and relevant evidence.[105]

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[101] *Ibid*, 506.

[102] See, eg, Article 10 of the Hague Convention of 1970; Article 11 of the Montreal Convention of 1971; Article 11 of the Hostage Convention of 1979; Article 13 of the Vienna Convention of 1980; Article 12 of the Rome Convention of 1988; Article 12 of the Terrorist Financing Convention of 1999; Article 17 of the Beijing Convention of 2010.

[103] Nuclear Terrorism Convention of 2005, *supra* nt 15.

[104] *Ibid*.

[105] Cf. Wierzbicki, *supra* nt 74, 205.

V. Is There a Universal Treaty-Based Model of Combating Terrorism?

The legal analysis of the UN anti-terrorist conventions presented above, relating to extradition issues, jurisdictional clauses and other forms of co-operation, confirms the fact that there is a specific system of legal measures within the UN aimed at suppressing international terrorism. It can even be assumed that within this organisation a specific, treaty-based model of combating international terrorism has been developed. One perceives that the legal framework of this model is fairly comprehensive when it comes to its scope. While some gaps and shortcomings can be found, in principle, international legal measures relating to the fight against international terrorism are quite satisfactory, even though no universal and comprehensive anti-terrorist convention has been adopted so far. The consistent normative approach adopted by the international community represented at the UN, which focuses on creating principles and rules to effectively prosecute individuals responsible for activities prohibited in the light of the conventions in question, is generally an appropriate framework for the UN legal model of combating terrorism.[106]

The significant evidence for the development of this legal model are amendments and modernisation introduced in 2005–2014 by conventions and protocols relating to the suppression of terrorism, beginning from the London Protocol of 2005 and ending with the Montreal Protocol of 2014.[107] Thanks to these amendments, older anti-terrorist conventions (namely, the Tokyo Convention of 1963, the Hague Convention of 1970, the Montreal Convention of 1971 and the Rome Convention and its Protocol of 1988) have been supplemented with the current standard provisions enshrined in modern international anti-terrorist treaties. For example, both the Beijing Convention and Beijing Protocol of 2010 expand the jurisdictional provisions of the Hague and Montreal Conventions (for example by requiring State Parties to establish jurisdiction where the alleged offender is a national) and establish other optional grounds for jurisdiction. Both instruments also contain a standard provision, originating with the Terrorist Bombing Convention of 1997.[108] By amending and supplementing these conventions, State Parties have 'adapted' them to the contemporary threats posed by terrorism, thus unifying the system of international legal solutions for combating terrorism and increasing the effectiveness of the UN treaty-based model of combating terrorism. It is worth mentioning that the solutions adopted in the UN anti-terrorism treaties regarding the principle of *aut dedere aut judicare*, extradition, jurisdictional clauses and certain forms of inter-state co-operation were also included in the draft comprehensive convention against terrorism.[109]

Is it a universal model though? It seems that it is still too early to formulate such an opinion. There are still many factors and difficulties that make it impossible to treat the above-mentioned model as universal. First of all, international anti-terrorist conventions create a system of principles and rules that constitute treaty law, and therefore apply only *inter partes*. Therefore, the *aut dedere aut judicare* principle binds only the State Parties to these conventions. This principle is still not a rule of customary international law. Thereby, one cannot speak of the universality of this principle as binding *erga omnes*. This means, among

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[106] Cf. Bianchi, *supra* nt 2, 498.

[107] As regards the amendments which will be introduced by the Montreal Protocol of 2014 – see Urban, JA, "The Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft: A Missed Opportunity or a Sufficient Modernization?" (2016) 49 *Indiana Law Review* 713–743.

[108] Witten, *supra* nt 71, 142.

[109] See UNGA, *supra* nt 16, Annex III, Articles 6, 8, 11, 13, 14, 15, and 17.

other things, that third States do not have to observe it, as opposed to the State Parties to the conventions in question.[110] However, some representatives of the doctrine maintain that the universality of the *aut dedere aut judicare* principle is just a matter of time.[111]

Another problem is related to the alleged lack of efficacy of the anti-terrorist treaty regime, which largely depends on national measures implementing relevant rules rather than on the scope and content of these rules. By opting for a system that entrusts national authorities with the task of prosecuting individuals, it is assumed not only that the States ratify the treaty, but also that national legal systems incorporate the treaty within the national legal order effectively and in a timely manner. Adopting such legislation may be necessary to make the treaty norms self-executing and directly applicable by courts. The decision-making process at the national level on when to prosecute and when to extradite must be clearly defined to ensure the correct implementation of the *aut dedere aut judicare* principle, when applicable, and national legislative bodies must promptly adopt legislation whenever the amendments of criminal law and criminal procedure is needed.[112]

Finally, there is no doubt that without a commonly accepted definition of terrorism, it is difficult to create a coherent and efficient regime to prevent and combat this phenomenon. Obviously, it is possible to assume – for the needs of the theoretical model – that terrorist acts are defined, according to the UN Security Council Resolution 1566 (2004), as:

> 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism'.[113]

However, it is a general description of acts that fall within the rubric of terrorist activity without purporting to fully define terrorism, and Resolution 1566 limits the use of the term 'terrorism' to offences that are already recognised in existing international conventions and protocols.[114] Therefore, as long as the universal legal definition of terrorism does not exist, one cannot rely on the emergence of a universal model of combating terrorism in international law.

Conclusion

The nature of contemporary terrorism requires broad regional and international co-operation. There is no doubt that the fight against this criminal activity must be conducted in accordance with the principles and rules of international law, which can be considered as extremely useful in this fight. Several states, on the basis of adopted international

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[110] Cf. Kolb, *supra* nt 61, 272.

[111] See Higgins, R, "The General International Law of Terrorism" *in* Higgins, R and Flory, M, eds, *Terrorism and International Law* (Routledge, London–New York 1997) 26.

[112] Bianchi, *supra* nt 2, 499.

[113] UNSC Res 1566 (2004) (8 October 2004) UN Doc S/RES/1566 (2004) para 3.

[114] Setty, S, "What's in a Name? How Nations Define Terrorism Ten Years After 9/11" (2011) 33 *University of Pennsylvania Journal of International Law* 1, 15–16.

agreements, have committed to observe these principles and rules and take them into account when establishing appropriate internal legal standards. The principles and rules in question constitute the legal basis for measures taken to prevent and combat terrorism, such as extradition or mutual legal assistance. However, if the fight against the discussed phenomenon is to be successful, these measures must be at least similar in character, and ideally, they should constitute a consistent and uniform system, which significantly facilitates co-operation and co-ordination of activities aimed at implementing these measures.

Within 55 years of the adoption of the Tokyo Convention of 1963, the international community has made significant progress in the fight against international terrorism. Achievements in this area of international co-operation were possible due to the engagement of various international organisations – including the universal organisation, which is the UN. A number of international anti-terrorist conventions, adopted at that time under the auspices of the UN or its specialised agencies and ratified by the majority of States, enabled the introduction, development and strengthening of the *aut dedere aut judicare* principle in cases of terrorist offences; numerous forms of international co-operation, including the institution of extradition and mutual legal assistance, have become inseparable and – through practice – more effective means to prevent and combat the phenomenon in question.[115] The essence of all UN anti-terrorist conventions is a certain basic assumption that the alleged perpetrator can nowhere, in any State Party, find a safe haven, regardless of his or her citizenship or where the crime was committed. This assumption can be realised thanks to the introduction of the legal measures mentioned above to all the conventions discussed, although their formulations in relevant provisions may differ slightly.[116]

The phenomenon of terrorism is so extensive and dynamic that it is necessary to constantly improve anti-terrorist measures, particularly in the legal sphere. For example, in the case of extradition, it is necessary to modernise this form of international co-operation to adapt it to the specificity of prosecuting contemporary terrorists and ensure greater efficiency in its practical application. The structure of extradition should be strengthened, *inter alia* by explicit and unambiguous determination of the obligation arising from the *aut dedere aut judicare* principle. Interpretation of this principle must include criteria to determine when there is an obligation to extradite, and when (under what conditions) the obligation to prosecute may be recognised as effective and just. Without more specific provisions, the existing general obligation States derive from this principle, and relating to the fight against terrorism, may prove insufficient in the future.[117]

Finally, the broadly understood co-operation in combating international terrorism, contained in the UN anti-terrorist conventions, should be interpreted not only from the perspective of the object and purpose of these treaties, but also in the spirit and context of concrete UN Security Council Resolutions aimed at international terrorism. Undoubtedly, the imperative nature of these resolutions and their global impact (for example Resolution 1373 of 2001[118] was addressed to all States, not only to Member States of the UN) have contributed to intensifying inter-state co-operation in the global 'war on terrorism' and have

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[115] Cf. Guillaume, *supra* nt 88, 547.
[116] Röben, *supra* nt 17, 799.
[117] Cf. Cherif Bassiouni, *supra* nt 38, 731.
[118] UNSC Res 1373 (2001) (28 September 2001) UN Doc S/RES/1373 (2001).

caused various forms of this co-operation to undergo gradual unification.[119] This is certainly a significant step forward in the process of shaping a universal model of combating international terrorism.

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[119] For example, in resolution 1373 (2001) the Security Council called upon all States to 'exchange information in accordance with international and domestic law and co-operate on administrative and judicial matters to prevent the commission of terrorist acts' (*Ibid*, para 3(b)).

Closing the 'Intangible Technology Transfer' Gap within the Existing Legal Frameworks: Time for an Additional Protocol(s)?

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Keywords
INTERNATIONAL LAW; TERRORISM; ORGANISED CRIME; INTANGIBLE TECHNOLOGY TRANSFER; DUAL USE TECHNOLOGY; 3D PRINTING

Abstract

The current terrorism landscape poses increasing, diverse levels of threat, with accompanying complex and challenging counter-terrorism responses, as terrorist groups (TGs) become more global in their reach, creative in their methods, as well as more connected to organized criminal groups (OCGs). One concerning trend, in at least some geographical regions, is increased cooperation between OCGs and TGs or even convergence whereby the level of integration between the two groups is such that it is difficult to discern the parameters between them. Such cooperation or convergence can put existing applicable legal frameworks under strain, highlighting or even creating normative gaps in the process. In turn, these may hinder effective international cooperation, including in the domains of legal terrorism prevention and criminal justice responses to organized criminal and terrorist activities, thereby posing significant threats to international peace and security.

The related risks, together with the accompanying challenges and complexities for the international community to effectively counter such threats, are increasing exponentially via rapid technological advances, notably "emerging technologies". These are aggravated by the fact that applicable legal instruments (international, regional and national) have generally not managed to keep pace with such technological advances and associated risks. One such area relates to intangible technology transfer (ITT) by OCGs and TGs, which incorporates manufacturing techniques, technical know-how and intellectual property, and can take a number of forms such as the electronic transfer of weapons blueprints.

A particular issue, considered in this article, relates to the potential for OCGs/TGs to acquire "dual use" technology (i.e., technology with the potential to be used for both

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legitimate civil/military as well as illicit criminal purposes), for instance 3D printers, together with the software and/or blueprints necessary (e.g., obtained through cybercrime) to print weapons. In terms of the risks posed by ITT, though it is not possible to 3D print fissile, chemical, explosive etc materials, nonetheless the defence and security sector is reporting the rapid development of technology towards the 3D printing of the component parts of missiles, for instance, by military troops who are operationally deployed. Clearly, if such technology were to fall into the hands of OCGs/TGs, catastrophic consequences could ensue.

Somewhat surprisingly, despite the associated, foreseeable peace and security risks, such issues have attracted only modest research or even political attention to date from a legal perspective, resulting in significant knowledge gaps in relation to the development of policy, law and practice governing emerging technologies related challenges. More worrying are the gaps which appear to be present within existing criminal justice and anti-terrorism instruments governing OCG and TG activities. As this article reveals, minimal, if any, criminalization of ITT related activities exist. Instead, two primary gaps appear to exist: first, existing treaties do not generally criminalize the transfer of intangible technology as an asset for criminal purposes, whether for financial gain or to perpetrate terrorist acts; second, the existing frameworks do not criminalize the utilization of technology for the transfer of intangible technology assets by OCGs or TGs.

The article concludes with a number of recommendations as to how some of the identified weaknesses might be addressed.

Introduction

The current terrorism landscape poses increasing and diverse levels of threat, with accompanying complex and challenging counter-terrorism responses, as terrorist groups (TGs) become more global in their reach, creative in their methods, as well as more connected to organized criminal groups (OCGs). One concerning trend, which appears to be growing in at least some geographical regions, is increased cooperation between OCGs and TGs (such as the 'outsourcing' of certain criminal services, e.g., hostage-taking or the provision/movement of firearms, on a 'pay as you go' basis) or even convergence whereby the level of integration between the two groups is such that it is difficult to discern the parameters between them. Indeed, in some instances TGs may immerse themselves in traditionally OCG activities in order to fund their terrorist objectives and activities.[1]

That said, it is equally acknowledged that the exact nature and parameters of increased cooperation or convergence remain unsettled and contentious, with some commentators disputing the existence of these trends at all due to such factors as, for example, differing ideologies and goals, or the fact that association of an OCG with a TG

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[1] On such themes see further, for example, West Sands Advisory LLP, "Europe's Crime Terror Nexus: Links Between Terrorist and Organized Crime Groups in the European Union" (2012), Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs (2012), *at* <europarl.europa.eu/RegData/etudes/etudes/join/2012/462503/IPOL–LIBE_ET(2012)462503_EN.pdf> (accessed 4 April 2018); Kessels, E, and Hennessy, O, "Examining the Nexus between Terrorism and Organized Crime: Linkages, Enablers and Policy Implications" in H Glaser (ed), *Talking to the Enemy: Deradicalization and Disengagement of Terrorists* (Nomos 2017); T Makarenko, 'The Crime–Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism' 6 *Global Crime* (2004) 129–145, *at* <iracm.com/wp–content/uploads/2013/01/makarenko–global–crime–5399.pdf> (accessed 4 April 2018); United Nations Security Council (UNSC) Res 2368 (2017) Preamble.

may make it more exposed and vulnerable to counter-terrorism and criminal justice efforts. It can also be difficult to access reliable research data; typically, only limited, anecdotal evidence is available due to the clandestine nature of OCG and TG criminal activities.[2] What is equally true, though, is that the line between the criminal activities and goals of OCGs and TGs can be a thin one.[3]

When cooperation or convergence does occur, be it between OCGs or TGs and/or their traditional domains of criminal activities, it can put the existing applicable legal frameworks under more strain, highlighting or even creating normative gaps in the process. In turn, these may hinder effective international cooperation, including in the domains of legal terrorism prevention and criminal justice responses to both organized criminal and terrorist activities. Any such constraint can be especially worrisome when the criminal activities engaged in pose significant threats to international peace and security, such as attempts by non-State actor groups to acquire weapons of mass destruction (WMDs).[4] Access to more conventional weapons and explosives remain a primary source of concern too as the normal 'modus operandi' of TGs.

The related risks, together with the accompanying challenges and complexities for the international community to effectively counter such threats, are increasing exponentially via rapid technological advances. These are aggravated by the fact that the relevant legal instruments (international, regional and national) have generally not managed to keep pace with such technological advances and accompanying risks, which is the primary focus here. Specifically, this article focuses on related issues regarding intangible technology transfer (ITT) by OCGs and TGs, which incorporates manufacturing techniques, technical know-how and intellectual property. ITT can take different forms, such as the oral transfer of technical know-how between persons, or the transfer of technology - e.g., blueprints for conventional or non-conventional weapon systems (including WMDs) - through intangible means (e.g., through emails, social media, software uploads or document downloads). Somewhat surprisingly, considering the threats to international peace and security posed by the risk of OCGs and TGs being engaged in ITT for illicit or terrorist purposes, which are likely to increase exponentially rather than diminish, such issues have attracted only modest research, scholarship or even political attention to date.[5] Of particular note here, the research

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2 See, e.g., Howard RD and Traughber C, "The Nexus of Extremism and Trafficking: Scourge of the World or So Much Hype?" *Joint Special Operations University Report* 13–6 (October 2013), Introduction, *at* <socom.mil/JSOU/JSOUPublications/13–6_Howard_Nexus_FINAL.pdf> (accessed 4 April 2018). For diverse OCG/TG case studies, see Rollins J, Wyler LS and Rosen S, 'International Terrorism and Transnational Crime: Security Threats, U.S. Policy, and Considerations for Congress' (Congressional Research Service, 5 January 2010) including at 13, *at* <fas.org/sgp/crs/terror/R41004–2010.pdf> (accessed 4 April 2018).

3 See, e.g., Fatić A, *Osnovni aspekti borbe protiv organizovanog kriminala na Balkanu* (tr *The Basic Aspects of Combating Organized Crime in the Balkans*), LVII (2005) at 82, cited in Prokić, A, "The Link between Organized Crime and Terrorism" 15 *Law and Politics* (2017) 85, 88.

4 See, e.g., UNSC Res 2370 (2017).

5 See further on this, e.g., National Consortium for the Study of Terrorism and Responses to Terrorism, "Motivations, Mechanisms and Determinants of Terrorist Technology Transfer", *Research Brief* (October 2017), *at* <start.umd.edu/pubs/START_MotivationsMechanismsDeterminantsOfTechnologyTransfer_ ResearchBrief_Oct2017.pdf> (accessed 4 April 2018), which has begun some pilot research in this regard.

that has been undertaken has tended to be technical rather than legal in focus.[6] As such, major gaps are present within existing legal scholarship on ITT related issues, including from national/international criminal justice and security perspectives regarding the criminal activities of OCGs and TGs. This article seeks to make a modest contribution towards closing this research lacuna whilst also urging the international community to put these pressing issues more squarely onto its serious crime prevention as well as peace and security agendas.

To this end, the article is framed around three central research questions: (1) what relevant gaps exist within the current international criminal justice frameworks governing organized crime and terrorism?; (2) what are some of the implications of these gaps on international cooperation, focussing especially on the prevention and prosecution of involved non-State actors?; and (3) what steps might be taken to address such gaps? In terms of its methodology, the article starts from the premise that on the evidence available there are in fact such gaps, and analyses existing international organized crime and anti-terrorism conventions, together with other relevant instruments (especially those of the United Nations (UN) Security Council (UNSC)), within the context of weapons proliferation and ITT advances, to substantiate that conclusion. In terms of structure, the article commences with a discussion of what threats to international peace and security may ensue from current technological advancements, specifically regarding ITT and weapons proliferation, together with existing responses by the international community to these threats. It then examines each of the three posed research questions in turn, leading to some proposals regarding possible future steps to address identified weaknesses within the current applicable international legal architecture.

I. Framing the Problem

A. Potential threats to international peace and security posed by emerging technology, especially ITT

One significant issue of growing concern to international peace and security – including regarding the proliferation of conventional or non-conventional weapons by OCGs/TGs – relates to 'emerging technologies'. These are 'science-based innovations [… which] can arise as an entirely new technology or have a more incremental character, resulting from an existing technology or the convergence of several existing technologies'.[7] In the context of WMDs, for instance, not only do such technologies have the potential to facilitate the development of new pathways, as well as to augment existing ones, but they may 'lead to a meaningful paradigm shift in how policymakers define WMD, view the threat of WMD, and counter WMD in the future'.[8]

One specific area of 'emerging technology' risk that is attracting increasing attention in relation to OCG/TG cooperation or convergence concerns 'dual-use' technologies which may be used for alternative deadly criminal (for example, terrorist) purposes in addition to

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6 See, e.g., EEF and AIG (in partnership with RUSI), 'Cyber Security for Manufacturers' *Report* (2018), *at* <eef.org.uk/resources–and–knowledge/research–and–intelligence/industry–reports/cyber–security–for–manufacturers> (accessed 30 April 2018).

7 Bajema, NE, and DiEulis, D, "Peril and Promise: Emerging Technologies and WMD: Emergence and Convergence Workshop Report, 13–14 October 2016" (National Defense University Press, May 2017) 1, *at* <wmdcenter.ndu.edu/Portals/97/Documents/Publications/Articles/2016%20Workshop%20Report%20FINAL%205–12–17.pdf?ver=2017–05–12–105811–853> (accessed 4 April 2018).

8 Bajema and DiEulis (n 9).

the legitimate (civilian/military) applications for which they were originally developed. Certainly, some OCGs/TGs, including the so-called Islamic State of Iraq and the Levant (ISIL), are already engaged in manufacturing smaller arms, a process which could broaden in scope if emerging technology were to become available to them.[9] Those dual-use technologies currently considered to pose the greatest risk in this respect comprise 'biotechnology, information technology, the development of new energy sources, and nanotechnology'.[10] The related threats are illustrated here by information technology, namely the dual-use of 3D printers. In terms of the key components of this 'additive manufacturing' process, they are 'the manufacturing device or printer, the materials, and the digital blueprint'.[11] One way in which it has been suggested that security concerns may arise is in the following manner:

> In theory, 3D printing will allow state and non-state actors to circumvent the need for engineers and scientists with tacit knowledge. Digital blueprints, designed and tested by scientists and engineers, would embed a certain level of technical expertise in electronic form. This 'embedded expertise' would allow people without traditional manufacturing skills to produce parts or objects by simply loading up a 3D printer with the required raw materials and then pressing the print button. Of course, these blueprints do not include post print finishing or assembly, but a digital build file could come with instructions for finishing and assembly.[12]

It has been further suggested that: '[t]he rapid development of information technologies and the possibility of making real this information through the use of 3D printers have created a new risk scenario, both for the proliferation of weapons of mass destruction[13] and the illicit trafficking in conventional arms.'[14] From a security perspective, though, for instance, 'fissile material cannot be manufactured through a 3D printer, [...] in the future, and as metal 3D printing is developed, centrifuges or missile warheads could begin to be manufactured'.[15] Nor is this possibility fanciful since, for instance, the US defence community is developing the capability to 3D-print non-nuclear components, potentially in the field, to support its nuclear arsenal.[16]

Similarly, this technology could facilitate the development of other Chemical, Biological, Radiological and Nuclear (CBRN) capabilities such as the production of

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[9] Lubrano, M, "Emerging technologies: when terrorists print their own weapons", Global Risk Insights (16 January 2018), *at* <globalriskinsights.com/2018/01/terrorism–additive–manufacturing–weapons/> (accessed 4 April 2018).

[10] del Mar Hidalgo García, M, IEEE, "3D printing: A challenge to the battle against WMD proliferation", Analysis Document 17/2016 (15 March 2017) 3, *at* <ieee.es/en/Galerias/fichero/docs_analisis/2016/DIEEEA17–2016_Impresoras_3D_MMHG_ENGLISH.pdf> (accessed 4 April 2018).

[11] Lubrano (n 11). For a description of additive manufacturing processes see, e.g., Bajema and DiEulis (n 9) 7.

[12] Bajema and DiEulis (n 9) 8–9. Potentially too, components for uranium enrichment programmes may be reverse–engineered (ibid, 9). See too Fey, M, "3D Printing and International Security: risks and challenges of an emerging technology" *in* Hessische Stiftung Friedens–und Konfliktforschung, *PRIF Reports* (Frankfurt am Main 2017), 144, *at* <nbn–resolving.de/urn:nbn:de:0168–ssoar–51867–8 pp1–34> (accessed 30 April 2018).

[13] Equally of smaller arms, where the utilization of technology such as 3D printing is most likely, at least initially. Blueprint designs for some weapons are readily accessed through the internet. Lubrano (n 11).

[14] García (n 12) 3.

[15] García (n 12) 4. Similarly see Bajema and DiEulis (n 9) 10.

[16] Bajema and DiEulis (n 9) 12.

detonators for a Radiological Dispersal Device,[17] or the development of chemical weapons.[18] Though the ability to utilise additive manufacturing to produce WMDs still remains theoretical, the capability to use 3D printers to produce (advanced) conventional weapons is moving ever closer to becoming a reality. For instance, Raytheon – a leading company in defence and security technology and innovation – has stated that it now has the capability to print more than 80% of a guided missile's components, the ultimate goal being that operationally deployed military forces could 3D-print more missiles as and when needed.[19] Clearly there is an accompanying risk, however, that such highly sensitive 'build files' could fall into the hands of OCGs/TGs with potentially catastrophic consequences.[20] Worryingly, a recently published report on cyber security 'pinpoint[ed] the susceptibility of manufacturers to cyber risk, revealing that 41 percent of [manufacturing] companies do not believe they have access to enough information to even assess their true cyber risk. And 45 percent feel that they do not have access to the right tools for the job'.[21] Nor are such risks limited to more advanced weapon systems. 3D printing technology has already been used to manufacture firearms in, for example, Australia and Sweden though it is not yet entirely clear if/how they might function.[22] At the very least, such early attempts demonstrate the existence of criminal intent to exploit such technologies for illicit activities.

B. Limitations inherent within existing international approaches

There is broad consensus across many parts of the international community, including within the forum of the UNSC, that increasing cooperation or convergence between OCGs and TGs currently poses a significant threat to international peace and security.[23] Such recognition of a nexus between OCGs and TGs is not, however, new. For example, UN General Assembly Resolution 55/25 (2000), which adopted the UN Convention against

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[17] Lubrano M, "Emerging technologies: implications for CBRN terrorism", *Global Risk Insights* (4 February 2018), <globalriskinsights.com/2018/02/emerging–technologies–cbrn–terrorism/> (accessed 4 April 2018). Perhaps a more likely scenario is the hacking into critical infrastructure facilities, such as a nuclear power plant or chemical plant, causing the facility itself to become a WMD.

[18] Similarly, see Bajema and DiEulis (n 9) 10–11: "Additive manufacturing is being used to make miniaturized fluidic reaction ware devices that can produce chemical syntheses in just a few hours. This may enable state and nonstate actors to more easily develop chemical agents in the future."

[19] Bajema and DiEulis (n 9) 8–9. Potentially too, components for uranium enrichment programmes may be reverse–engineered (ibid, 9–10).

[20] Bajema and DiEulis (n 9) 9–10.

[21] 'Cyber Security for Manufacturers' report (n 8).

[22] See, e.g., "3D printing, UAVs, and dark web could give terrorists access to WMDs, says UN official", *3D printer and 3D printing news* (29 June 2017), *at* <3ders.org/articles/20170629–3d–printing–uavs–and–dark–web–could–give–terrorists–access–to–wmds–says–un–official.html> (accessed 4 April 2018). Similarly, in Hong Kong where 3D printers were used for weapon modification – Lubrano, M, 'Emerging technologies: when terrorists print their own weapons', *Global Risk Insights* (16 January 2018), *at* <globalriskinsights.com/2018/01/terrorism–additive–manufacturing–weapons/> (accessed 4 April 2018).

[23] See, e.g., UNSC Res 2322 (2016); UNSC Res 2370 (2017). Also, e.g., UNSC Res 2388 (2017) which, while focusing on the trafficking of persons more generally, acknowledges the nexus between OCGs and TGs; more generally too in UNSC Res 2368 (2017). A primary issue is commonly "the need to take measures to prevent and suppress the financing of terrorism, individual terrorists, and terrorist organizations, including from the proceeds of organized crime".

Transnational Organized Crime (UNCTOC), 'call[ed] upon all States to recognize the links between transnational organized criminal activities and acts of terrorism' (para. 6).[24]

Some more recent observations made in the context of a UNSC non-proliferation meeting in June 2017 are revealing in this respect. Izumi Nakamitsu, High Representative for Disarmament Affairs, referred to the relative ease with which those with criminal intent could access 'many of the technologies, goods and raw materials required to produce weapons of mass destruction and their delivery systems [since these] were available through legitimate producers'.[25] Regarding the reality and gravity of any accompanying threats to international peace and security, Joseph Ballard, Senior Officer at the Office of Strategy and Policy at the Organisation for the Prohibition of Chemical Weapons (OPCW), during the same meeting further stated how 'the rising threat posed by non-State actors, the pace of economic development and the evolution of science and technology were all shaping the future of the global disarmament and non-proliferation regimes. Moreover, the use of chemical weapons by non-State actors was no longer a threat, but a chilling reality'.[26] Notably, in terms of specific issues of concern, he emphasized that '[p]reventing non-State actors from acquiring dual-use materials, equipment and technologies was of critical importance to maintaining the global norm against the use of chemical weapons and in favour of international peace and security.'[27]

These concerns are, to some extent, reflected within outputs of the UNSC, illustrated by Resolution 2370 (2017) which stressed the 'paramount need to prevent illegal armed groups, terrorists and other unauthorized recipients from, and identify the networks that support them in, obtaining, handling, financing, storing, using or seeking access to *all types of explosives*'.[28] Such language reflects how the landscape of risk and security threats is evolving regarding the proliferation of WMDs or more conventional weapons by non-State actor groups, including since the creation in 2004 of the non-proliferation regime under UNSC Resolution 1540 (2004) aimed at preventing the proliferation of WMDs by non-State actors. The broader context in which Resolution 2370 was adopted recognized that: 'In tackling drones, 3D printing, the dark web and other emerging threats hindering non-proliferation efforts, States must bolster their efforts as well as technological advances in order to combat the spread of weapons of mass destruction and keep them out of the hands of terrorists and other non-State actors'.[29] More generally, there is recognition of the threats posed by 'the growing nexus between weapons of mass destruction, terrorism and cybersecurity'.[30]

Notably, brief mention is made in Resolution 2370 to the key role played by technology in facilitating the illegal activities of OCGs and TGs, with concern being expressed 'at the increased use, in a globalized society, by terrorists and their supporters of

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[24] UN General Assembly, *United Nations Convention against Transnational Organized Crime*, 15 November 2000, A/RES/55/25. ('UNCTOC')

[25] UN, 'States Must Step Up Efforts to Check Spread of Deadly Weapons as Non–State Actors Exploit Rapid Technological Advances, Speakers Tell Security Council', Press Release SC/12888 (28 June 2017), *at* <un.org/press/en/2017/sc12888.doc.htm> (accessed 4 April 2018).

[26] UN Press Release SC/12888 (n 26).

[27] UN Press Release SC/12888 (n 26).

[28] UNSC Resolution 2370 (2017), Preamble (emphasis added).

[29] UN Press Release SC/12888 (n 26).

[30] UN, 'Eliminating Weapons of Mass Destruction Only Way to Prevent Non–State Actors from Acquiring Them, Deputy Secretary–General Tells Security Council', Press Release DSG/SM/1035–SC/12629–DC/3678 (15 December 2016) *at* <un.org/press/en.2016/dsgsm1035.doc.htm> (accessed 4 April 2018).

new information and communications technologies, in particular the Internet, to facilitate terrorist acts, as well as their use to incite, recruit, fund, or plan terrorist acts'.[31] This is expanded a little more within the body of the resolution where Member States are urged 'to act cooperatively to prevent terrorists from acquiring weapons, including through information and communications technologies'.[32] In terms of what is being referred to, though no further guidance is given by Resolution 2370, some of the comments made prior to the resolution's adoption are informative.

For instance, Emmanuel Roux, Special Representative of the International Criminal Police Organization (INTERPOL) to the UN, expressly identified the use of 'new technologies such as 3D printing to access and use weapons' as an important area of concern.[33] More generally, he commented on the fact that: '"Today's threat landscape is one of unprecedented complexity" […] noting the convergence between organized crime and terrorism, between old and new technologies and between military and law enforcement efforts.'[34] In response to such challenges, he highlighted the importance of 'strengthening and implementing strong national legislation',[35] a common theme of the representations made. In the context of ITT, however, fully realising such legislative priorities is made more difficult by the seeming lack of recognition of the existence of the criminal justice gaps explored in this article. In a similar vein to INTERPOL's perspective, Jehangir Khan, Officer in Charge of the UN Office of Counter-Terrorism, observed that in the context of '[t]he possibility of terrorists obtaining lethal technologies and new weapons, including weapons of mass destruction', particular areas of concern include '[t]he illicit manufacture and uncontrolled flow of arms', noting that '[t]errorists had also improved their capabilities to design and manufacture improvised explosive devices out of commercially available dual-use components'.[36]

Overall, though preventing the acquisition by OCGs/TGs of conventional weapons remains crucial as comprising the most commonly used means of perpetrating terrorist acts,[37] the paucity of express references to technology within UNSC outputs - such as Resolution 2322 (2016) and Resolution 2370 (2017) - is nonetheless noticeable and surprising considering the growing threats attributable to technological advances including ITT. It is evident from the text of Resolution 2322 and Resolution 2370 that the principal focus is still on threats posed by tangible rather than intangible assets and technology, such as 'the illicit trafficking in small arms and light weapons' which are more commonly acquired and/or used by OCGs and TGs. For instance, the term 'transfer' in relation to weapons or materials which could be used to manufacture weapons[38] is being used in the sense of the prevention and control of physical weapons rather than the transfer of intangible

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31 UNSC Res 2370 (2017) Preamble; repeating UNSC Res 2322 (2016) Preamble.
32 UNSC Res 2370 (2017) Para. 13.
33 UN, 'Security Council Urges Greater Collective Effort to Prevent Terrorists from Acquiring Weapons, Unanimously Adopting Resolution 2370 (2017)', Press Release SC/12938 (2 August 2017), *at* <un.org/press/en/2017/sc12938.doc.htm> (accessed 4 April 2018).
34 UN Press Release SC/12938 (n 32).
35 UN Press Release SC/12938 (n 32).
36 UN Press Release SC/12938 (n 32).
37 See, e.g., comment by Fedotov, Y, Executive Director of the United Nations Office on Drugs and Crime regarding the adoption of UNSC Res 2370, UN Press Release SC/12938 (n 32).
38 E.g., UNSC Res 2322 (2016) para 11.

technology which could facilitate the illicit manufacture of weapons.[39] Furthermore, the primary focus of the resolution is still on those areas on which OCG and TG related instruments have traditionally focused and which continue to pose the most commonly recurring challenges, namely on States strengthening their judicial, law enforcement and border-control capacities.

A similar approach to ITT related issues and accompanying threats is reflected too in the context of weapons non-proliferation. For instance, in its most recent report to the UNSC, the 1540 Committee

> took note of the *increasing risks of proliferation in relation to non-State actors* arising from developments in terrorism and *in relation to the potential for misuse arising from the rapid advances in science, technology and international commerce* and the need for States to pay constant attention to these developments to ensure effective implementation of the resolution.[40]

Interestingly too, the report noted a number of academic initiatives regarding complexities attributable to the transfer of intangible technology.[41] This is important, especially since the issue of ITT was not envisaged at the time of adoption of Resolution 1540. That said, and despite the potentially considerable security risks posed by the current lacunae within the legal framework, the report takes a noticeably 'light touch' on these issues, perhaps reflective of accompanying political sensitivities. Certainly, this is evident in the tone of Resolution 2325 (2016) on nuclear, chemical and biological threats (for example, at para. 7) illustrated by the language of '*[e]ncourag[ing] States, as appropriate*, to control access to *intangible transfers of technology* and to information that could be used for weapons of mass destruction and their means of delivery'.[42]

The discussion now turns to examining each of the three research questions posed at the outset, starting first with an examination of existing international instruments governing the criminal activities of OCGs and TGs, including terrorism related ones, to determine whether any gaps exist regarding the illicit acquisition of conventional or non-conventional weapons through ITT.

II. Identifying Gaps Concerning ITT within the Existing Applicable International Legal Frameworks

Where cooperation or convergence occurs between OCGs and TGs and/or their traditional domains of activities for criminal financial gain or terrorist purposes, including in relation to ITT activities, it may not be immediately apparent whether the OCG and/or TG international legal framework should apply. Therefore, both are considered here together

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[39] UNSC Res 2322 (2016) paras 5–7.

[40] UN, 'Letter dated 9 December 2016 from the Chair of the Security Council Committee established pursuant to resolution 1540 (2004) addressed to the President of the Security Council', UN Doc S/2016/1038 (9 December 2016) paras 34, 35 and 174, *at* <un.org/en/ga/search/view_doc.asp? symbol=S/2016/1038> (accessed 4 April 2018) (UNSC Report pursuant to Res 1540 (2004)) (emphasis added). Similarly, this concern was repeated in UNSC Res 2325 (2016), e.g., at para 7, on nuclear, chemical and biological threats.

[41] UNSC Report pursuant to Res 1540 (2004) para 156. An example of such an academic initiative is Bajema and DiEulis (n 9).

[42] UNSC Res 2325 (2016), para. 13 (emphasis added)

with UNSC resolutions, which should also be regarded as forming part of the wider applicable legal framework, especially Resolutions 1373 (2001) and 1540 (2004) which were adopted under Chapter VII of the UN Charter.

A. Current legal framework governing OCGs

The primary instruments governing the activities of OCGs on firearms and weapon related issues are the UN Convention against Transnational Organized Crime 2000[43] (UNCTOC); and its accompanying Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition, which supplements the 2000 Convention (UNCTOC Protocol).[44]

In order for OCGs or TGs to fall within the scope of the UNCTOC, it is necessary that they satisfy the four-limb test established by Article 2(a) UNCTOC: (1) they form 'a structured group[45] of three or more persons, existing for a period of time'; (2) the group 'acts in concert'; (3) the group has 'the aim of committing one or more serious crimes[46] or offences' created by UNCTOC; and (4) and the group exists 'to obtain, directly or indirectly, a financial or other material benefit'. There are four offences created by the UNCTOC: participation in an organized criminal group for the commission of 'serious crime' (Article 5); laundering the proceeds of crime (Article 6); corruption (Article 8); and the obstruction of justice (Article 23).

In terms of the convergence of criminal activities between OCGs and TGs, in some circumstances it is possible that TGs may fall within the scope of the UNCTOC, especially since TGs will normally satisfy the first two limbs of Article 2(a) ('structure group' and 'acting in concert'). An example could be Al Qaeda's alleged criminal activities in the illicit diamond trade in order to fund its ideological terrorist activities[47] since, e.g., money laundering is a prohibited crime under the Convention and the prohibited activities could be linked to a 'financial benefit'. More problematic, however, is where a 'financial benefit' is not clear or present, meaning that the alleged criminal activities must fall within the scope of the undefined 'or other material benefit'. Though this provision has 'the potential of being interpreted very broadly to include non-economically motivated crimes such as

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43 UNGA Res 55/25 (15 November 2000).

44 UNGA Res 55/255 (31 May 2001). For a similar approach see Organisation of American States, Inter–American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials (adopted in Washington, 14 November 1997).

45 Article 2(c) defines "structured group" as meaning "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".

46 Article 2(b) defines "serious crime" as meaning "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".

47 There are differing views on this. E.g., though the 9/11 Commission did not find persuasive evidence in this regard. "Others contend that Al Qaeda used African diamonds to convert cash into an anonymous transportable form of wealth that could be used to launder funds". 9/11 Commission, *Final Report of the National Commission on Terrorist Attacks Upon the United States*, (2004) 170, <https://www.9–11commission.gov/report/911Report.pdf> accessed 5 April 2018; Rabasa et al.; 'For a Few Dollars More: How Al Qaeda Moved into the Diamond Trade' *Global Witness* (April 2003), *at* <globalwitness.org/sites/default/files/import/Few%20Dollars%20More%200–50.pdf> (accessed 5 April 2018).

environmental or politically-motivated offenses',[48] this is unlikely to be the case. It was understood at the time of the UNCTOC's adoption – including to address the concerns of some States (particularly Iran, India and Pakistan) – that the Convention would not be used as a supplementary anti-terrorism tool, but would only deal with TGs when acting as OCGs in seeking financial gain.[49] Certainly, due to the more controversial nature of terrorism related offences, the risk existed that the effectiveness of UNCTOC might be hindered if it extended to terrorism related offences also. Ultimately though, it remains for these issues to be tested in court.

With respect to ITT related activities which, for instance, enable weapons technology to come into the possession of TGs who intend to use it for terrorist purposes, there are two primary hurdles to these activities falling within the scope of UNCTOC. The first is that such transfer of intangible technology would be for non-financial criminal purposes, which do not seem to fall within the scope of Article 2(a) UNCTOC for the reasons already given. The second is that ITT activities are not criminalized under the UNCTOC either as one of the four specified offences provided for under the Convention, or as a 'serious crime' if it is correct that serious terrorism-related crimes are excluded from the Convention's parameters. Though the definition of 'property' as defined by Article 2(d)[50] could extend to intangible technological assets, the concept of 'property' is approached in a narrow manner within the UNCTOC. Significantly, it does not form the basis of a specifically provided for international crime in and of itself; instead, it is used in the context of either being a facilitator for the commission of another expressly provided for crime, such as money laundering (Article 6);[51] or else in the context of the freezing, seizure and confiscation of property[52] following the conviction of persons engaged in activities criminalized under the Convention (Articles 12-14).

In relation to the UNCTOC Protocol again, at first glance, this could extend to ITT related activities. Article 2 states that: 'The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition'. Furthermore, the scope of the Protocol extends to 'the prevention of illicit manufacturing of and trafficking in firearms' (Article 4(1)). Both, the illicit manufacturing and trafficking in firearms are criminalized under Article 5 of the Protocol. However, from the definitions and scope of the Protocol, as provided for in Article 3, it is clear that it was intended to cover physical rather than intangible firearms et al. As to whether the Protocol could extend to situations of, for example, 3D printing resulting in the 'illicit manufacturing'

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48 Orlova AV and Moore JW, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organized Crime in International Law" 27 *Houston Journal of International Law* (2005) 267, 283.

49 Orlova and Moore (n 48) 286.

50 Article 2(d) UNCTOC defines "property" as meaning "assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets".

51 E.g., Article 6(1)(a)(i) UNCTOC provides one of the criminal offences as being: "The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property....". Similarly, see Article 6(1)(b)(i) UNCTOC.

52 Article 2(f) UNCTOC "freezing" or "seizure" of property; and Article 2(g) "confiscation" of property. Such property could include intangible property such as software and patents.

of weapons, this seems unlikely under the Protocol due to its narrow scope as defined by Article 3(d):[53]

> 'Illicit manufacturing' shall mean the manufacturing or assembly of firearms, their parts and components or ammunition:
> (i) From parts and components illicitly trafficked;
> (ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or
> (iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol;

As such, it would appear that the scope of the Protocol is limited to physical firearms which were the product of illicit manufacturing or the parts and components which were subsequently illicitly trafficked once manufactured, but not to the prior transfer of enabling intangible technology, for instance, weapon blueprints or software codes, which facilitated the manufacture of these weapons.

These findings are unsurprising given that the security and technological contexts in which the texts of the UNCTOC and its 2001 Protocol were agreed and adopted, some 18 and 17 years ago respectively, were markedly different to those prevailing today. Certainly, the post 9/11 era has seen the increasing globalization of OCG and TG activities as well as of their ambitions, together with the pace of parallel technological developments, they have far exceeded expectations since the turn of the millennium. Though the text of the UNCTOC, including its broad definitions, was intended to cover existing and future not yet envisaged scenarios of organized crime - and some would argue that the Convention remains successful in this objective - it is respectfully submitted here that 'if' the commission of a 'serious crime' excludes terrorist crimes then it cannot extend to situations of OCG/TG cooperation or convergence for terrorist purposes regarding the use of ITT. Nor does the transfer of intangible assets, such as weapons blueprints, or the use of technology for ITT purposes *per se* currently constitute 'serious crimes' within the existing international criminal justice framework governing organized criminal and terrorist acts. A central argument of this article is that such activities should urgently be criminalized due to the serious threats to international peace and security they pose.

B. Current legal framework governing TGs

The examination now turns to considering whether ITT may fall within the scope of the universal anti-terrorism instruments. The potential applicability of the TG legal framework is of especial importance where the activities of TGs do not fall within the scope of the OCG framework and/or it is, for instance, politically expedient to prosecute certain crimes under an anti-terrorism rather than organised crime legal regime.

A survey of the 19 international legal instruments aimed at preventing terrorist acts adopted since 1963 – categorized as (a) civil aviation, (b) protection of international staff, (c) the taking of hostages, (d) nuclear material, (e) maritime navigation, (f) explosive materials, (g) terrorists bombings, (h) financing of terrorism, and (i) nuclear terrorism – reveals a similar finding as for the OCG framework: very few of these instruments – including those

[53] Similarly, Article 3(e) UNCTOC definition of "illicit trafficking" would seem to be limited in scope to physical weapons.

newer treaties governing terrorist bombings, the financing of terrorism or nuclear terrorism – make provision which potentially could extend to the criminalization of ITT, whether under national or international law.

With respect to terrorist bombings, the 1997 International Convention for the Suppression of Terrorist Bombings[54] (Terrorist Bombings Convention) is concerned with criminalizing the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury or to cause extensive destruction of a public place (for example, Articles 2 and 4). It does not, however, provide for (and therefore criminalize) how terrorists acquired the weapons or technology necessary to carry out such acts.

In relation to nuclear security[55] and threats of nuclear terrorism, generally those instruments adopted under the auspices of the International Atomic Energy Agency (IAEA) regulate physical activities and threats. For instance, the parameters of the 1980 Convention on the Physical Protection of Nuclear Material[56] are limited to criminalizing the unlawful possession, use, *transfer* or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage. As the Convention's title indicates, its focus is on the protection of *physical, rather than intangible*, nuclear assets.

Similarly, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Suppression Convention)[57] was adopted under the auspices of the UN as one of the most recent universal anti-terrorism instruments. It covers a broad range of serious criminal acts, such as threats or attempts to attack nuclear power plants and nuclear reactors (for example, Article 2), as well as dealing with the aftermath of such an attack, bringing perpetrators to justice and so forth. It does not, however, expressly criminalize the means or methods by which TGs are able to acquire or manufacture the weapons needed to perpetrate such crimes. That said, potentially, ITT could fall within the parameters of Article 7(1)(a) which envisages cooperation between States Parties including in the form of criminalizing on their territories inter alia 'illegal activities of persons, groups and organizations that encourage, instigate, organize, knowingly finance or *knowingly provide technical assistance or information* or engage in the perpetration of those offences'. This could catch OCG or TG activities during the preliminary stages of an attack, namely the transfer of technical know-how to TGs who subsequently use it for acts of terrorism prohibited under the Convention. Certainly, none of the definitions specified by Article 1 would appear to impede this.

The same is true of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol).[58] The Protocol was adopted under the auspices of the International Maritime Organization and

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[54] UN General Assembly, *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, A/RES/52/164.

[55] The term "nuclear security" is generally taken to mean: "the prevention and detection of, and response to, theft sabotage, unauthorized access, illegal transfer or other malicious acts involving nuclear material, other radioactive substances or their associated facilities". International Atomic Energy Agency, 'The International Legal Framework for Nuclear Security' IAEA International Law Series No. 4 (IAEA, Vienna 2011).

[56] United Nations, *Convention on the Physical Protection of Nuclear Material* (1980) 1459 UNTS 124.

[57] United Nations, *International Convention for the Suppression of Acts of Nuclear Terrorism* (2005) 2445 UNTS 89.

[58] International Maritime Organisation, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 14 October 2005.

aims to strengthen the existing 1988 Convention of the same name,[59] including regarding the possible use of biological, chemical or nuclear weapons. Though the Protocol extends to both conventional and non-conventional weapon types, once again it is clear from the text (for example, Article 4 of the 2005 Protocol regarding Article 3*bis* of the 1988 Convention) that its primary focus is on physical weapons and substances rather than intangible technological assets. The only provision of the Protocol, which potentially may apply to ITT is Article 3*quater*(e). This states that any person who 'contributes to the commission of one or more offences set forth in article 3, 3*bis* [...] or subparagraph (a) or (b) of this article' also commits an offence within the scope of the 1988 Convention. Under Article 3*bis*:

> (1) Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
> (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
> [(i)-(iv) detail prohibited acts]
> .....
> (iv) any equipment, materials or *software or related technology that significantly contributes to the design, manufacture or delivery* of a BCN weapon, with the intention that it will be used for such purpose.[60]

Potentially, this provision could at least indirectly capture ITT. One way could be in circumstances involving the physical transportation of a device, such as a 3D printer – with or without any accompanying software – with the intention of using it to print components for the manufacture or delivery of a BCN weapon subsequently used to perpetrate a terrorist attack against or from a 'ship' (as defined by Article 1 of the Convention and amended by Article 2 of the Protocol). There is no suggestion from the text of the SUA Convention or Protocol that a link must exist between the transporting ship and the ship from which a subsequent attack was launched or a ship that was itself the object of an attack. With respect to ITT, it is unclear from the Convention's provisions, which do not define 'software', as to whether or not this might extend to an intangible technology asset such as a weapons blueprint. In any event since both technological blueprints and software are copyright protected, an analogy could be made. Furthermore, intangible assets would normally be understood as comprising 'certain types of knowledge [which would include blueprints], technical assistance, *technology and software*.'[61]

Notably too, a provision similar to Article 3*bis* of the SUA Convention exists under Article 1(i)(4) of the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation[62] applicable to the civil aviation transportation context. Furthermore, it mirrors Article 3*quater* with a broad 'catch-all' provision in Article 5(b):

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[59] UN General Assembly, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (1988) 1678 UNTS 201.

[60] Emphasis added.

[61] SIPRI, "SIPRI hosts workshop on Intangible Transfers of Technology" (27 February 2018), <sipri.org/news/2018/sipri–hosts–workshop–intangible–transfers–technology–itt> (accessed 30 April 2018).

[62] International Civil Aviation Organisation, *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, (2010) 974 UNTS 177.

'contributing in any other way to the commission' of the offences specified under the Convention. Potentially, these provisions could apply similarly to ITT in the manner explained regarding the SUA Convention and its 2005 Protocol.

More generally, it is arguable that the IAEA's pivotal role of 'helping States to build capacity to prevent terrorists from accessing nuclear or radiological materials'[63] could extend to ITT related issues, including advising on how the legal gaps and issues that would benefit from further clarification identified here might be addressed at the national legislative level.[64] Ultimately, nuclear, etc., safety, including in relation to terrorist acts, is the responsibility of States.

C. UNSC Chapter VII resolutions

The two UNSC resolutions of especial relevance here are Resolutions 1373 (2001) and 1540 (2004), both of which were adopted under Chapter VII of the UN Charter. Such resolutions are regarded by many to be quasi-legislative in nature as they are binding upon all Member States under Article 25 UN Charter.[65]

With respect to Resolution 1373, its principal focus has been on preventing and suppressing the financing of terrorist acts;[66] ensuring that States do not 'provid[e] any form of support, active or passive, to entities or persons involved in terrorist acts, including by […] eliminating the supply of weapons to terrorists';[67] preventing the commission of terrorist acts;[68] and '[d]eny[ig] safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.' To such ends, Resolution 1373 requires States - using the language of '*[d]ecides* that all States shall' - to take a number of actions, including national legislative action where necessary to criminalize the 'financing, planning, preparation or perpetration of terrorist acts'.[69]

In this context, the related challenges posed by 'traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups' were acknowledged,[70] but without the imposition on States of accompanying obligations by the resolution. Instead, the language of '*[c]alls* upon all States' is used. Significantly, though the resolution referred to the use of 'communications technologies by terrorist groups' – as with subsequent resolutions aimed at preventing terrorism and strengthening criminal justice responses – the primary

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[63] UN General Assembly, *The United Nations Counter–Terrorism Strategy*, 8 September 2006, A/RES/60/288, Annex Part III.9.

[64] This would be consistent with the obligations of States under UN Security Council, Res 1540 (para. 2) whereby the UNSC "[d]ecide[d] also that all States, in accordance with their national procedures, shall adopt and enforce appropriate laws which prohibit any non–State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in then as an accomplice, assist or finance them".

[65] On such issues see further, e.g., Talmon, S, "The Security Council as World Legislature" 99 *American Journal of International Law* (2005) 175; Martinez, LMH, "The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits" 57 *International Constitutional Law Quarterly* (2008) 333.

[66] UNSC Res 1373, para. 1(a).

[67] Ibid, para. 2(a).

[68] Ibid, para. 2 (b).

[69] Ibid, paras. 1 (b), 2(e).

[70] Ibid, para. 3(a).

focus here is on their utilization to 'incite, recruit, fund, or plan terrorist acts'[71] rather than on the pivotal role such technologies may play in the transfer of intangible technology, such as via the Internet or satellite, to facilitate terrorist attacks. Notably too, the nexus was recognized between 'international terrorism and transnational organized crime, […] illegal arms- trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials' thereby necessitating enhanced coordination of efforts at the national, subregional, regional and international levels 'to counter such criminal activities'. Despite the gravity of these activities being recognized in terms of their 'accompanying threats to international peace and security',[72] once again it is intriguing, or indeed perturbing, that such threats are merely '*[n]ote[d]* with concern' with no accompanying requirements upon States to take necessary action to prevent or counter them.

Three years later, Resolution 1540 (2004)[73] sought to further respond to such threats through addressing an identified gap within the existing international framework. It requires all Member States to adopt and enforce laws that criminalize non-State actors who 'manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes',[74] while also prohibiting States from assisting non-State actors in this regard.[75] Of particular relevance to the current discussion is the fact that Resolution 1540 is primarily concerned with the physical proliferation of WMDs and, as such, does not engage with issues such as ITT. Consequently, the framework provided under Resolution 1540 is now considered by at least some to be 'insufficient' on its own to respond to current global threats.[76] Indeed, when Izumi Nakamitsu briefed the UNSC in June 2017, she further highlighted the fact that 'terrorists groups had evolved into cyberspace and, alongside other non-State actors, exploited loopholes to access the technology they needed'.[77] Indeed, as another commentator has observed:

> Threats are becoming less predictable in the 21st century, but even more dangerous is the fact that the international legal framework which has been supporting the international security architecture in regard to non-proliferation might no longer be useful to face the new risks derived from the ITT. For that, the battle against WMD proliferation must advance co-ordinately with the mechanisms they design to control cyber threats.[78]

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71 See, e.g., UNSC Res 2370 (2017) Preamble; UNSC Res 2368 (2017) Preamble, para 23; UNSC Res 1624 (2005) Preamble, para 3.

72 UNSC Res 1373, para 4.

73 UNSC Res 1540 is reviewed and reviewed periodically, most recently for a period of 10 years by UNSC Res 1977 (2011) which extended the mandate of the Committee until 25 April 2021.

74 UNSC Res 1540 (2004), para. 2; see also, para. 3.

75 Ibid, para 1.

76 See, e.g., the related comments of the Russian Federation. UN Press Release SC/12888 (n 26).

77 UN Press Release SC/12888 (n 26).

78 García (n 12) 6.

Some might argue that Resolution 1540 (2004) extends to proliferation threats posed by ITT - such as 3D printers - through its broad definition of 'related materials'[79] (preamble, forming part of the non-operative and therefore non-legally binding part of the Resolution). Even if this is correct, as the earlier discussion (section II.B) of the universal anti-terrorism legal framework revealed, the potential circumstances in which ITT may be covered by existing legal provisions are, at best, relatively few and narrow in scope.

III. Impact of ITT Gaps on International Cooperation

As the OCG and TG conventions, together with other key instruments such as UNSC resolutions,[80] testify, effective international cooperation lies at the core of the current international architecture governing organized criminal activities and terrorist crimes. Such cooperation reflects the same identified priorities mentioned previously, such as prosecuting or extraditing 'any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or who provides safe havens'.[81]

From a criminal justice perspective – which aims to prevent the perpetration of these serious crimes and to bring to account those persons who do commit them, ensuring too that no 'safe haven' exists – judicial and law enforcement cooperation is critical. This is especially true in the areas of extradition (*aut dedere aut judicare*) and mutual legal assistance, which are central to, and the most common forms of cooperation under, the existing OCG and TG legal frameworks.[82] International cooperation is also important in other respects, such as 'at the bilateral, regional and international levels to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition'.[83]

Any such international cooperation is, however, premised on the requirement that the activities in question are criminalized. If they are not, and regardless of how significant a threat to international peace and security certain activities might pose, then transnational criminal justice cooperation will not be possible and other forms of cooperation, such as intelligence sharing, may lack the necessary political will and accompanying resources to be effective. With respect to ITT, with the possible and limited exceptions identified regarding the existing TG legal framework (section II.B), there are two principal areas where international cooperation is needed, but not provided for under the existing legal frameworks governing OCGs and TGs. First, existing treaties do not criminalize the transfer of intangible technology as an asset for criminal purposes, whether for financial gain or to perpetrate terrorist acts. Second, the existing frameworks do not criminalize the utilization

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[79] UNSC Res 1540 defines "related materials" broadly to mean "materials, equipment and technology.... which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery".

[80] For example, UNSC Res 2370 (2017) para 15; UNSC Res 2322 (2016) para 14; UNSC Res 1540 (2004) paras 3(d), 8(c), 9 and 10; UNSC Res 1566 (2004) para 2; UNSC Res 1373 (2001) para 3.

[81] UNSC Res 1566 (2004) para 2.

[82] The UNCTOC, its 2001 Protocol, as well as universal anti–terrorism instruments all have extensive provisions regarding international cooperation, including extradition, mutual legal assistance and police cooperation. Other primary areas for international cooperation are the transfer of criminal proceedings, execution of foreign sentences, recognition of foreign criminal judgements, confiscation of the proceeds of crime, as well as collection and exchange of information between intelligence and law enforcement services.

[83] Article 13(1) UNTCOC Protocol.

of technology – such as cyberspace – for the transfer of intangible technology assets by OCGs or TGs. The implications of these gaps, together with the accompanying inability of States to cooperate fully on these matters, are likely to increase in parallel (and therefore exponentially) with rapidly developing technologies including those relevant to ITT, with the accompanying growing threats to international peace and security.

IV. Possible Solutions and Future Steps

In response to the identified and important gaps in coverage within the existing international legal frameworks governing organized crime and terrorism, a number of possible solutions and future steps are explored here, each of which merits further research and consideration in its own right.

A. UNSC Resolution

The identified gaps represent significant threats to international peace and security, including due to their ability to facilitate the proliferation of both conventional and Chemical, Biological, Radiological and Nuclear weapons by criminal non-State actor groups. Other gaps exist too in the areas of information and communication technologies, regarding matters such as *knowledge trafficking or trading intended inter alia to support or to otherwise assist OCGs or TGs.*

Such gaps are likely to widen in size and effects in parallel with rapid technological advances and increased cooperation and convergence between OCGs and TGs. Accordingly, the Security Council should be apprised of these issues with immediate effect. Specifically, it is strongly recommended that the Security Council consider the adoption of a Chapter VII resolution, in a similar style and format to Resolutions 1373 (2001) and 1540 (2004), which seeks explicitly to address current gaps and complexities attributable to developing technologies, including matters of ITT and related dual-use technologies.

In this way, the focus and reach of existing UNSC resolutions would be extended beyond the current primary focus on issues of incitement, recruitment, financing and planning acts of terrorism which remain important but, by themselves, are insufficient for responding adequately to current and emerging technological sources of threat to international peace and security. Such a resolution would have the further benefit of taking immediate effect. It would require States to not only ratify and implement existing applicable conventions (some of which may have limited application to ITT contexts as previously outlined in Section II), but also to take any necessary legislative action at the national level to criminalize such acts as serious offences. This could be achieved whilst the political appetite for additional protocols is explored (see section IV.B below) and any subsequent treaty negotiations take place. Such a resolution may also serve to further incentivize States to progress the adoption of additional protocols as the preferred longer-term solution for closing current treaty gaps.

If such a UNSC resolution is adopted, then it is strongly recommended that it provides clear definitions of key terms, such as ‘intangible’, ‘technology’, ‘transfer’, ‘dual-use’ and so forth, from the outset to provide adequate levels of legal certainty and to ensure that the existing gaps are closed as fully as is possible. As Orlova and Moore have observed, ‘[w]ithout precise definition, ambiguities are created that allow terrorists and organized crime members to “slip through the cracks” in the law. States, too, can take advantage of

legal uncertainties to expand their room for maneuver'.[84] This would also go some way towards avoiding a repetition of the situation created by Resolution 1373 whereby States were required to take anti-terrorism legislative action in the absence of a working definition of 'terrorism' which was not provided until three years later by Resolution 1566 (2004) in its paragraph 3. One of the unfortunate consequences of this was that States adopted often inconsistent approaches to criminalizing terrorist offences with the potential to impede rather than facilitate international cooperation and rule of law compliance, including on criminal justice issues. Certainly, such an approach would be reflective of ongoing discussions and reform within the European Union (EU) towards the development of common legal definitions and approaches on cybersecurity, including the increased harmonization of national legislative approaches towards countering the use and transfer of technology for criminal purposes.[85]

B. Additional protocol(s) to existing OCG and TG related conventions

As has just been mentioned, the preferred, longer-term, solution is for the international community, through existing UN mechanisms, to explore the feasibility of new protocol(s) to both the UNCTOC as well as to relevant universal anti-terrorism instruments, which address the significant gaps identified in this article. These gaps are the need to criminalize: (1) the transfer of intangible technology as an illicit asset; and (2) the utilization of technology for illicit ITT purposes, where either or both of these activities are intended to be for organized criminal or terrorist purposes. The adoption of such protocols would afford an opportunity to address any other identified gaps (for example, as suggested in Section IV.A) or to provide further definitional clarity for instance concerning the scope of the UNCTOC regarding TGs, particularly where OCG/TG convergence occurs and existing definitional lines and motivations between organised crime and terrorism may become blurred.

Due to the different scopes and underpinning rationales of the UNCTOC compared with anti-terrorism instruments, namely for criminal financial gain opposed to ideological terrorist purposes respectively (see further Section II.A), separate protocols would be needed for the OCG and TG related treaties. As Shelley and Picarelli concluded, though 'transnational criminal organizations and terrorist groups often adopt similar methods, they are inherently striving for divergent ends. Crime is primarily an economically driven enterprise, while terrorism remains rooted in political pursuits'.[86]

Furthermore, as the current UNCTOC and anti-terrorism convention definitional approaches illustrate, the adoption of an 'umbrella approach' in an attempt to develop 'all-inclusive legal definitions of international terrorism and transnational organized crime' has not been entirely successful. This, in part, has been attributable to the inability of the

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[84] Orlova and Moore (n 48) 269.

[85] See, e.g., Council of Europe, "Reform of cyber security in Europe", *at* <http://www.consilium.europa.eu/en/policies/ cyber–security/> (accessed 5 April 2018); European Commission, Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification, Corrigendum, COM(2017) 477 final/2 (4 October 2017).

[86] Shelley, L and Picarelli, J, "Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism" 3 *Police Practice and Research* (2002) 305, 305. Similarly, see E Mylonaki, E, "The Manipulation of Organised Crime by Terrorists: Legal and Factual Perspectives" 2 *International Criminal Law Review* (2002) 213, 213–14 about not lightly conflating the OCG and TG phenomena.

international community to secure universal definitional consensus. Most notably here of the term 'terrorism' as illustrated by the continuing 'stalemate' to finalise the text of the draft UN Comprehensive Convention on International Terrorism. Further, the international community appears to struggle to reach political compromises during treaty negotiations. This is illustrated by the weaknesses inherent in the definitions of Article 2 of the UNCTOC, which were not high priority issues during the Palermo treaty negotiations. They are consequently criticised as being both 'overly broad....[and] at the same time under-inclusive'.[87] In contrast, as, for example, the anti-terrorism sectoral convention approach demonstrates, 'narrow operational legal definitions of specific terrorist and organized criminal conduct' can be more successful,[88] and constitute an approach which could be applied to the drafting of additional protocols to ensure that they are tailored towards the specific needs of the OCGs and TGs contexts in a manner that is more politically acceptable.

In any event, it is further suggested here that it would not be beneficial or desirable to seek to deal with these matters by means of one protocol, including to cover situations of OCG and terrorist convergence – even if technically possible within the parameters of the existing instruments, which is questionable (see further section II.A). Doing so would further complicate the prosecution of related crimes and would be likely to hinder international law enforcement and judicial cooperation too. For instance, not only would linkages between alleged terrorist crimes and an OCG have to be proven, which, evidentially, can already be very difficult to establish, but furthermore, any additional ideological/political element required for the terrorist element of an offence would add a further layer of complexity and difficulty for all parties engaged in criminal justice processes and proceedings.

C. Ratification and implementation of existing OCG and TG treaty instruments

In parallel, it is essential to sustain momentum and existing efforts, such as capacity development, aimed at exhorting and enabling States to ratify and effectively implement as well as enforce the existing UNCTOC and universal anti-terrorism treaty regimes, including as required to by paragraph 3 of UNSC Resolution 1373 and paragraph 8 of Resolution 1540.

Of especial relevance to the current discussion are those limited number of anti-terrorism treaties, discussed in section II.B, which may potentially encompass ITT related crimes, albeit in a limited way. Although the Terrorist Bombings Convention is widely ratified,[89] the current ratification status of the Convention for the Suppression of Acts of Nuclear Terrorism is relatively low.[90] Similarly, the ratification status of the Protocol to the SUA Convention is very poor.[91] The Beijing Convention has yet to come into effect.[92]

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87 Orlova and Moore (n 48) 284, see more widely on this issue pp. 281–87.

88 Orlova and Moore (n 48) 269.

89 170 State Parties out of a possible 193 UN Member States. Ratification status available *at* <treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII–9&chapter=18&clang=_en> (accessed 5 April 2018).

90 Only 113 State Parties. Ratification status available *at* <treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII15&chapter=18&Temp=mtdsg3 &clang=_en> (accessed 5 April 2018).

91 SUA Convention 1988 has 156 State Parties, but there are only 36 State Parties to the SUA Protocol 2005. Ratification status available *at* <imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> (accessed 5 April 2018).

92 Ratification status available *at* <www.icao.int/secretariat/legal/List%20of%20Parties/Beijing_Conv_EN.pdf?TSPD_101_R0=cc59c7a4f7af26cade6d2dd7dc7fff78n5m00000000000000008e895dd1ffff000000000000000000000000000005ac50d0100d0280238> accessed 5 April 2018.

Perhaps an increased realisation by States of the potentially catastrophic consequences of terrorist attacks facilitated through ITT may assist in re-energizing their current ratification and implementation efforts. Notably, the current ratification status of the UNCTOC is almost universal,[93] though that of the UNCTOC Protocol is still relatively low.[94]

D. Increased regulation

Ultimately, due to their gravity including from an international peace and security perspective, illicit ITT and related issues should be expressly criminalized as 'serious' international offences, falling therefore within the auspices of international as well as national criminal law, as proposed above (sections IV.A and B).

In addition, a number of further proposals are made which would also go some way towards strengthening the existing legal architecture governing OCG and TG activities. Indeed, binding national or regional regulations, as well as effective 'soft law' instruments (discussed next in section IV.E below), can act as stepping stones towards the development of binding international obligations under treaty and customary international law whilst also placing these issues more prominently on national and international agendas.

With respect to increased regulation,[95] the EU is probably the most advanced (at least institutionally) in relation to dual-use items of which it controls the export, transit and brokering.[96] Certainly, it has developed principles, together with some limited jurisprudence by the Court of Justice of the EU,[97] which could inform the substantive content of any subsequent UNSC resolution and additional protocols, as well as national law, policy and practice on these issues. Its principal instrument is Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.[98] To ensure consistency of approach throughout the EU's

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93 189 State Parties. Ratification status available *at* <treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII–12&chapter=18&clang=_en> (accessed 5 April 2018).

94 115 State Parties. Ratification status available *at* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII–12–c&chapter=18&clang=_en> (accessed 5 April 2018).

95 See, e.g., Lubrano (n 11) regarding the pressing need for increased regulation for additive manufacturing.

96 Interestingly though, the current EU plan for fighting serious and organised crime (2017–2021) does not identify OCG/TGs linkages as one of its 10 priorities. See European Council, "The EU fight against organised crime", *at* <consilium.europa.eu/en/policies/eu–fight–against–organised–crime–2018–2021/> (accessed 5 April 2018).

97 The case law of the Court of Justice of the EU, while dealing with technology transfer in the context of sanctions regimes, has mostly focused on matters regarding financial assistance and association with regimes and entities. Some principles developed within the context of cases dealing with 'support' for certain political regimes could potentially be applied, by analogy, to the context of transferring technology to those bodies. See, e.g., CJEU, C–385/16 P *Sharif University of Technology v Council* [2017], EU:C:2017:258; CJEU, C□348/12 P *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co.* [2013], EU:C:2013:776; CJEU, C□72/15 *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority* [2017], EU:C:2017:236.

98 Official Journal 2009 L 134/1–269. On occasion, country specific regulations have been adopted too which incorporate "dual–use" technology, e.g., Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L229/1; Council Common Position 2006/795/CFSP of 20 November 2006 concerning restrictive measures against the Democratic People's Republic of Korea Decision 2012/635/CFSP amending Decision 2010/413, OJ L282/58. See too Common Military List of the European Union (adopted by the Council on 11 March 2013) (equipment covered by Council Common Position 2008/944/CFSP defining common rules

Membership together with more effective implementation and enforcement, Council Regulation 428/2009 establishes common EU control rules, a common EU list of dual-use items as well as coordination and cooperation mechanisms. That said, the EU has not yet fully resolved OCG/TG convergence issues within its own normative framework, with proposals currently under review regarding updating its existing legislative framework to better regulate technological developments such as 3D printers.[99]

Existing EU approaches reflect broader international commitments of both itself and its Member States, especially under multilateral export control regimes, aimed at countering inter alia the criminal activities of OCGs and TGs. These include 'dual-use' material and weapon export legal agreements (governing conventional weapons as well as WMDs), notably under the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Arrangement,[100] reflecting too WMD non-proliferation obligations under UNSC Resolution 1540 as well as relevant treaty instruments. Under current arrangements, both the exporter and importer of such technologies are obligated to give full details regarding all possible final uses of the products involved in order to reduce the likelihood of their being used for criminal purposes. That said, even these agreements have not all been kept fully up-to-date with technological advancements. For example, it was recently noted that '[c]urrently, there are no explicit controls on [additive manufacturing] devices or 3D printers in the [Missile Technology Control Regime] control lists. To date, the [Wassenaar Arrangement] is the only multilateral export control regime that has introduced control list items mentioning [additive manufacturing].'[101] Significantly though, these existing trade agreements also do not criminalize the ITT activities of OCGs/TGs explored in this article and, therefore do not currently assist in addressing the identified legal gaps.

There are, though, corresponding risks accompanying any increased regulation which need to be adequately considered and addressed, including to avoid unintended consequences.[102] These may apply similarly to the criminalization of some ITT related issues in the context of the adoption of a further UNSC resolution or additional protocol, as well as the development of any 'softer' framework (section IV.E). One such issue is the related challenges for exporters/importers to be able to determine or anticipate all possible uses of

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governing the control of exports of military technology and equipment, OJ C18/1) which lists certain military equipment and technology but does not contain a separate definition of "technology".

99 See, e.g., European Parliament, "Control of trade in dual–use items: Council Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual–use items", Briefing (September 2016), *at* <europarl.europa.eu/RegData/etudes/BRIE/2016/587340/EPRS_BRI%28 2016%29587340_EN. pdf> (accessed 5 April 2018); also, Communication to the Council and the European Parliament, "The Review of export control policy: ensuring security and competitiveness in a changing world", *at* <trade.ec.europa.eu/doclib/docs/ 2014/april/tradoc_152446.pdf> (accessed 5 April 2018).

100 For further details, see García (n 12) 4.

101 Brockmann, K, and Bauer, S, "3D printing and missile technology controls", SIPRI Background Paper (November 2017) 10, <sipri.org/publications/2017/sipri–background–papers/3d–printing–and–missile–technology–controls> (accessed 5 April 2018). As to whether or not further export control regulation of 3D printers is needed see, e.g., Project Alpha, *Export Controls and 3D Printing*, 21 June 2013, *at* <projectalpha.eu/export–controls–and–3d–printing/> (accessed 5 April 2018).

102 E.g., United States Supreme Court, *Holder v Humanitarian Law Project*, 130 S Ct 2705 (2010) regarding the reach of national legislation adopted pursuant to UNSC Res 1373 extending to humanitarian activities. See further Pantuliano, S, Mackintosh, K, and Elhawary, S, with Metcalfe, V, "Counter–terrorism and humanitarian action: Tensions, impact and ways forward", Humanitarian Policy Group Policy Brief 43 (October 2013), *at* <alnap.org/system/files/content/resource/ files/main/7347.pdf> (accessed 5 April 2018).

'dual technology' with the accompanying risks that any further regulation may hinder or even undermine technological innovation and international trade. Consequently, there is a pressing need for increased legal certainty regarding how to deal with the potential for new technologies to be used illicitly, including by OCGs and TGs. In this regard, it could be helpful to draw a direct analogy between intellectual property and information technology regarding the principle of 'technological neutrality'.[103] With this approach, blame for any illicit use of technology lies with its users rather than with the technology itself which is not at fault as a 'neutral' entity even if it has dual-use (legitimate and illicit) potential.[104] Indeed, as part of the EU's efforts to recast its Dual-use Regulation, intended to ensure increased certainty regarding the application of ITT controls, there have been recurring calls from different commercial sectors for greater 'legal clarification of the coverage of ITT controls and practical guidelines to help with compliance'.[105] To this end, the review of the EU Dual-Use regulation has proposed new guidelines premised on international human rights law, international humanitarian law and terrorism as a tool for States when making assessments on licence applications. This would be accompanied by due diligence obligations on companies 'to establish whether any unlisted dual-use goods that they are planning to export will be used in any of the situations covered by the catch-all clause'.[106]

Another, more sinister, possibility relates to the aggravated consequences of such highly sensitive know-how falling into the hands of OCGs or TGs.[107] Nor are such risks hypothetical as the theft through hacking of 40,000 documents, including 60 classified military files, from Daewoo Shipbuilding & Marine Engineering Co. Ltd, recently acknowledged by the Ministry of National Defense of the Republic of Korea, illustrates. The potential for these stolen intangible technology assets to be utilized for criminal purposes was addressed in the subsequent Report of 5 March 2018 of the Panel of Experts established pursuant to Resolution 1874 (2009) in the following terms: 'The Panel views such activity as constituting evasion of the arms embargo, given that such technological information could directly contribute to the development of the operational capabilities of the armed forces of the Democratic People's Republic of Korea.'[108]

A final area of tension, is how to strike the balance between responding appropriately and effectively to security imperatives, not unduly restricting legitimate trade, whilst also not unduly restricting legitimate fundamental freedoms, such as freedom of expression via the

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[103] The principle aim of "technology neutrality" is to "promot[e] statutory longevity and adap[t] the law to new technologies". In practice, however, it can be problematic, e.g., by being "over–inclusive and speak[ing] poorly to unforeseen technologies. It also, in turn, ... increases uncertainty about whether and how the law will be or should be applied". Greenberg, BA, "Rethinking Technology Neutrality" Minnesota Law Review (2016) 1495, 1562.

[104] An early case on technological neutrality in intellectual property law, regarding which ITT may overlap, is CBS Songs Ltd v Amstrad Consumer Electronics Plc (1988) UKHL15.

[105] S Bauer, K Brockmann, K, Bromley, M, and Maletta, G, "Challenges and Good Practices in the Implementation of the EU's Arms and Dual–Use Export Controls: A cross–sector analysis" (SIPRI, July 2017) 46, *at* <sipri.org/sites/default/files/2017–07/1707_sipri_eu_duat_good_ practices.pdf> (accessed 30 April 2018).

[106] Again, in intellectual property law terms, the case of *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001) illustrates well the perceived 'aggravated consequences' of peer–to–peer technology. See also Bauer et al (n 91) 9, also 38.

[107] García (n 12) 3–4.

[108] UN Doc S/2018/171 (5 March 2018) 47, specifically, its 'submarine–launched ballistic missile programme'.

Internet and other forms of social media.[109] There is a parallel concern to also ensure that exported 'dual-use' technology, such as for cyber-surveillance, is not misused to suppress and undermine human rights protections.[110]

E. Development of new framework of guiding principles/standards

The final proposal made here is for the possible development of a non-binding legal framework (such as guiding principles, or a Code of Practice) which could assist in progressing law and policy development on ITT and related issues, whilst also facilitating, or at least encouraging, greater consistency by States regarding their national approaches.

Certainly, at least historically, opportunities to develop such a framework have been missed, or at least not fully seized. For example, it may be time to put the idea of an International Code of Conduct on the Transfer of Technology, originally negotiated within the UN Conference on Trade and Development following the adoption of UNGA Resolution 32/88 (1977) and Resolution 32/45 (1977), back on the agenda.[111] Although it would not per se be binding or result directly in the criminalization of ITT related crimes committed by OCGs or TGs, it might assist in clarifying related international norms and complexities, as well as in paving the way for a legally binding instrument such as an additional protocol as proposed by this article.

For the development of such a framework, there are a number of existing legal sources which could be drawn upon, notably in the domains of intellectual property, competition and trade regulation, cyber security[112] and cyber financing, as well as terrorist financing and money laundering on which well-developed guidelines, principles, regulations and laws exist at the national, regional and international levels. For example, many of the principles and best practices developed regarding the appropriate use and monitoring of cyber space, tackling crime on the 'dark web' and curbing terrorist financing would be readily transferrable and adaptable to the ITT and related contexts.

In addition, there are a number of collaborative initiatives such as Europol's European Cybercrime Centre (EC3) which aims to assist and strengthen national law enforcement authorities in the EU Member States. These initiatives are identifying and developing good practices, sharing information and so forth which could also be drawn upon.

Conclusion

In conclusion, important gaps have been identified within the existing legal frameworks governing OCGs and TGs which pose significant threats to international peace and security in relation to the proliferation of both conventional and NCBR weapons as well as the increased potential to facilitate terrorist attacks of catastrophic proportions. Such gaps are

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[109] Bauer, S, and Bromley, M, "The Dual–Use Export Control Policy Review: Balancing Security, Trade and Academic Freedom in a Changing World", EU Non–Proliferation Consortium, Non–Proliferation Papers No 48 (March 2016), *at* <sipri.org/sites/default/files/EUNPC_no–48.pdf> (accessed 5 April 2018).

[110] See, e.g., 'Export Controls: The Next Frontier in Cybersecurity?', Microsoft EU Policy Blog (13 April 2017), *at* <blogs.microsoft.com/eupolicy/2017/04/13/export-controls-the-next-frontier-in-cybersecurity/> (accessed 5 April 2018).

[111] See, e.g., Zuijdwijk, TJM, "The UNCTAD Code of Conduct on the Transfer of Technology" 24 *McGill Law Journal* (1978) 562.

[112] E.g., Council of Europe's Convention on Cybercrime, ETS No. 185, adopted Budapest 23 November 2001, came into effect 1 July 2004.

likely to widen in parallel with increased convergence between the two types of criminal groups as well as rapidly evolving technological advancements including on ITT related issues.

A number of concrete proposals have been made here as to how to plug these gaps both in the shorter and longer term. Ultimately, however, whether and to what extent such proposals are progressed is dependent on the existence of the requisite levels of political will, both nationally and internationally. As one commentator recently observed, in relation to security risks and challenges attributable to emerging technology including 3D printing:

> [T]he largest hurdle for comprehensive measures is a lack of political will. Most of these proposals would have adverse effects on the wider [additive manufacturing] industry and will thus probably not resonate well. […] [T]he political will to add [additive manufacturing] machines to dual-use control lists is anything but universal. For one, the technology advances in such a rapid pace […] that the export control regimes would constantly have to chase such developments and amend the control lists. But more importantly, there is no sense of urgency within the regimes, as [additive manufacturing] is still being considered as lacking the maturity for posing serious proliferation challenges. The overview provided in this Report over the technology's state of the art and its global diffusion should at least invite some questions as to whether this is still a valid assessment.[113]

Certainly, it is respectfully submitted here, that an urgent step-change is required, especially in the context of NBCR threats, from the current approach of 'encouraging' to 'requiring' States 'as appropriate, to control access to *intangible transfers of technology* and to information that could be used for weapons of mass destruction and their means of delivery'.[114] The livelihoods, wellbeing and perhaps very existence of many thousands, if not millions, of people may depend upon it.

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[113] Fey (n 14) 33.
[114] See, e.g., UNSC Res 2325 (2016) para 13.

Balancing The State's Right To Regulate with Foreign Investment Protection: A Perspective Considering Investment Disputes in the South American Region

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Keywords
INTERNATIONAL INVESTMENTS; INTERNATIONAL ARBITRATION; DISPUTE SETTLEMENT; INVESTOR-STATE DISPUTE SETTLEMENT; SOUTH AMERICA; UNCITRAL; ICSID: MULTILATERAL INVESTMENT COURT; INVESTMET STRATEGIES

Abstract

Some of the challenges in reforming the international investment framework have derived from investor-state disputes, where host states have been sued for environmental or health regulations. Clauses regarding investor-state dispute settlement mechanisms have been therefore improved in modern investment treaties. However, most developing countries, which tend to be most of the host countries to investments, still have Bilateral Investment Treaties from the 1990s where investor-state dispute settlement clauses remain unchanged. This paper analyses different strategies that host countries are taking in light of these challenges. These are particularly noteworthy in the South American region, where one can identify three different approaches concerning the international investment framework. Reflecting on these approaches, the paper addresses the relevance of the multilateral efforts to reform the framework as a way forward, and a more promising strategy, towards the aim of balancing the states and foreign investors' interests.

I. Balancing the Right to Regulate with Investment Protection

The 'Treaty between two countries concerning the reciprocal Encouragement and Protection of Investment' (what we refer to by the short acronym of BITs), as its name implies, was intended to be used by the parties to encourage investment and mainly to be used as instruments for protection against discriminatory expropriations without compensation.[1] We shall focus on the latter because some of the main criticisms of the international investment framework concerned the *enforcement* of the treaties through investor-state dispute settlement

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1 Substantive and procedural minimum standards of treatment also include part of this protection. Dolzer, R and Stevens, M, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1995); Salacuse, J and Sullivan, N, "Do BITs really work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" 46(1) *Harvard International Law Journal* (2005) 67, <oxfordscholarship.com/view/10.1093/acprof:oso/9780195388534.001.0001/acprof-9780195388534-chapter-5> (accessed 27 May 2018). The other aim pertaining to the encouragement of investment will not be dealt with here. For a discussion on different scholarly works on whether BITs increase FDI see summary in Gwynn 2016,128-135.

mechanisms, like those laid down by BITs, for restricting host countries in one of their primary rights as sovereigns, i.e. to regulate for the welfare of their citizens as the primary goal.[2] However, the case remains that investment disputes in which discriminatory actions were taken still exist, and it is only due to the international investment treaty that actors could obtain a remedy for discriminatory expropriations.

We look at the concluded investor-states disputes in the South American region, as it is where both scenarios are shown.[3] In some cases, BITs have been used in ways that were clearly not intended by host countries when they agreed to them, in a way that restricted a state's freedom to regulate. This is the case resulting from the disputes that involved claims against different kinds of regulations pertaining to an economic crisis,[4] to protect the environment or the health of citizens.

An example of these issues coming to light is the Philips Morris case against Uruguay. The country was implementing the Framework Convention on Tobacco Control of the WHO, which most countries had agreed to. Uruguay was regulating how big the health warnings on cigarette packages had to be, an action that many other countries in the world had already done, and one that clearly has the health of the countries' citizens at its heart. However, because it had signed a BIT with Switzerland (the home state of Phillip Morris), Uruguay faced an arbitration claim for protecting the health of its citizens, something that Switzerland itself did not have to fear when they introduced the same kind of law for cigarette packages sold in Switzerland.[5]

Regarding environmental regulations, Bolivia, in a case that ended up being settled, had an arbitration claim for terminating a water and sewage services concession in a particular region of its country 'after major violent protests' against that concession.[6] Chile faced an arbitration claim for US$ 22 million for imposing a fishing quota on catches off the

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[2] See criticism to the investment framework in Van Harten, G, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); Kaushal, A, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime" 50(2) *Harvard International Law Journal* (2009) 491, <harvardilj.org/wp-content/uploads/2010/09/HILJ_50-2_Kaushal.pdf>(accessed 27 May 2018); Paulsen, L, "Bounded Rationality and the Diffusion of Modern Investment Treaties" 58 *International Studies Quarterly* (2014) 1, < doi.org/10.1111/isqu.12051>(accessed 27 May 2018); Cotula, L, "Do investment treaties unduly constrain regulatory space?" 9 *Questions of International Law* (2014) 19, < qil-qdi.org/wp-content/uploads/2014/11/03_Regulatory-Powers-IEL_COTULA.pdf>(accessed 27 May 2018); Bonnitcha, J, *Substantive Protections under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014); Johnson, L and Sachs, L, "The Outsized Costs of Investor-State Dispute Settlement" 16(1) Insights (2016) 10, < ccsi.columbia.edu/files/2016/02/AIB-Insights-Vol.-16-Issue-1-The-outsized-costs-of-ISDS-Johnson-Sachs-Feb-2016.pdf> (accessed 27 May 2018).

[3] Until March 2017, the ICSID Cases database reported 90 concluded cases and 51 pending, totalizing 141 cases in South America. The UNCTAD Investment cases database, which includes arbitration under UNCITRAL rules reported 107 concluded cases and 52 pending cases, totalizing 159 cases in South America.

[4] For instance, in the cases brought against Argentina due to its 2001 financial crisis, in addition to dealing with the financial crisis, Argentina, the host country, also had to deal with a foreign investor who acted in its own interest rather than considering the interests of the citizens of the country affected by the crisis. Domestic companies, which were equally affected by the crisis, could not sue the state for how it reacted to the crisis. And yet, BITs allowed foreign investors to do just that.

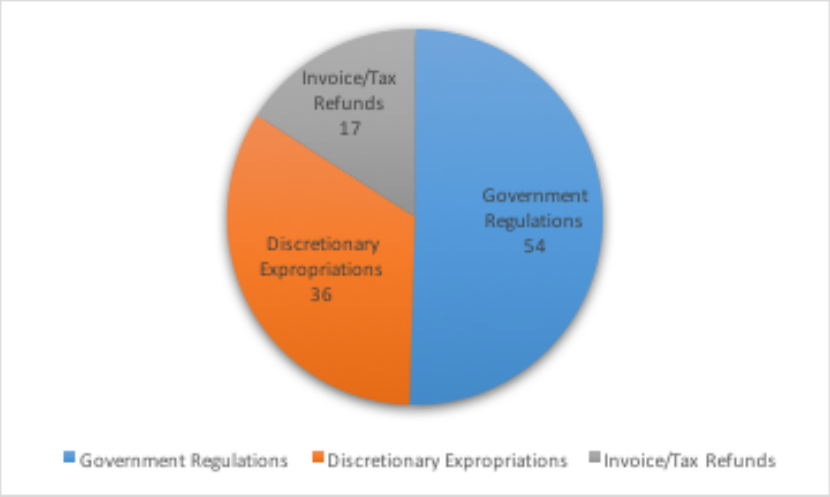
[5] ICSID, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay*, Case No ARB/10/7.

[6] ICSID, *Aguas del Tunari, SA v Republic of Bolivia*, Case No ARB/02/3, 73.

coast of southern Chile.[7] Ecuador was sued for regulating the exploitation of hydrocarbons in the Ecuadorian Amazon forest.[8] Peru was sued for denying the construction permit of an investor who wanted a construction of a development in a protected reserve area.[9] Venezuela lost a case where it was sued after the Ministry of the Environment retracted a construction permit for the investor's facilities to engage in a mining project after declaring it null.[10] These cases illustrate some of the challenges that state regulation in these areas face.

However, the South American region has also faced investment disputes that were brought against a state on the grounds of governmental nationalisation actions where investors were neither treated according to the provisions stated in the treaty, nor to the minimum standards of international law. Of course, *this* is the kind of state action that the treaties were primarily designed to protect investors from, namely cases where foreign investors were unjustifiably denied a remedy, or were unable to obtain them locally. However, although the measures affect both domestic and foreign investors, foreign investors could submit their claims to international arbitration through a BIT and have them settled in fair terms.[11]

Table 1. Concluded Investment Disputes in South America (2017)



Source: ICSID; UNCTAD, and Host Countries' Institutions investment dispute database. March 2017

The classification is based on the subject matter of the existing investment claims in the South American region: i) arbitration claims against government regulations; ii) arbitration

[7] ICSID, *Sociedad Anónima Eduardo Vieira v Republic of Chile*, Case No ARB/04/7, [Chile won the case but what was awarded was not disclosed].

[8] PSA, *Murphy exploration v. Ecuador*, Case No. 2012-16; ICSID, *Occidental Petroleum v Ecuador*, Case No ARB/06/11, [In the latter, Ecuador had to compensate the amount of US$ 1769 millions]; See also PCA, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)* , Case No 34877, [Decided in favour of Investor].

[9] ICSID, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, Case No ARB/03/4, [Decided in favour of State].

[10] ICSID, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* , Case No ARB(AF)/09/1 , [Venezuela had to pay the investor the amount of US$713 million as compensation].

[11] Most examples of these type of cases are those against nationalizations from Bolivia and Venezuela.

claims that involved disputes over invoices or tax refunds; iii) discretionary expropriations or expropriations not in accordance to the specifications provided by the treaty or international law.

In this regard, it is important to distinguish international law and what most investment treaties establish, namely that neither state shall expropriate private property, *except* for reasons concerning: i) public purpose, ii) in a non-discriminatory manner, iii) upon payment of prompt, adequate and effective compensation and iv) in accordance to due process of law. If an expropriation takes place, the four mentioned elements will determine the responsibility of the host state.[12] Alas, the enforcement of investment treaties for this purpose will always be challenging since the fine line between claims regarding investment disputes and indirect and direct expropriations is difficult to draw.

Against this background, numerous reforms and propositions to change the rules of the international investment framework have been put forward. In the following section, we shall describe the developments to change the rules of the investment framework in the South American region, all of which have taken the form of different kind of strategies that states could pursue to change the framework. These include, actions taken to overcome the challenges by an action involving the termination of the treaties, the creation of a regional arbitration institution to solve investor-state disputes to replace existing institutions, or the alternative to keeping the system as it is. We will assess each of these strategies in light of the purpose of the international investment framework, which concerns the balance between states' right to regulate and foreign investment rules or standards of protection in BITs. In the third section, we shall also compare the propositions contained in modern agreements among industrialized countries with older versions of BITs. Under these considerations, our conclusions address a final strategy relating to the ways that multilateral cooperation and participation in changing the rules at multilateral forums are promisingly less costly for host countries, and would also result in a more balanced outcome for all actors in the framework.

II. Propositions and Strategies to Change the Investment Framework

A. Investment-related treaty terminations

As a result of bilateral investment treaties (BITs) enforcement restricting the right to regulate, some South American countries blamed BITs and the international arbitration institutions, like ICSID, for imposing sovereignty costs on them. Bolivia denounced the ICSID Convention and was excluded from it in 2007, subsequently terminating eight of its BITs.[13]

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[12] For example in cases against Venezuela and Bolivia, the existence of public demonstrations and protests against the government's expropriation actions question whether the actions were done for a public purpose. See Wall Street Journal , Kurmanaev, A and Forero, J ,*Commerce Strike to Protest Venezuelan Regime Fizzles Out*, 28 October, 2016, *at* < wsj.com/articles/commerce-strike-to-protest-venezuelan-regime-fizzles-out-1477681252>(accessed 27 May 2018); Council on Foreign Relations, Lapper, R, *Venezuela and the Rise of Chavez: A background Discussion paper*, 22 November 2005, *at* < cfr.org/backgrounder/venezuela-and-rise-chavez-background-discussion-paper>(accessed 27 May 2018); The Economist, *Expropriations in Bolivia. Just when you thought it was safe* , 5 May 2012, *at* < economist.com/node/21554216> (accessed 27 May 2018)

[13] Bolivia terminated its BITs with the Netherlands (2009), United States (2012), Spain (2012), Austria (2013), France (2013), Germany (2013), Sweden (2013), Argentina (2014). UNCTAD; Organization of American States.

Ecuador denounced ICSID in July 2009 and terminated nine BITs,[14] though the total number of BITs the Ecuadorian President asked to be terminated in that year was thirteen. In 2012, Venezuela also denounced and terminated the ICSID Convention and its BIT with the Netherlands.[15] Argentina, the South American country against which most investment disputes were submitted to international arbitration, has in fact only paid five of the awards related to its economic crisis of year 2001.[16] In March 2012, Argentina submitted a draft law in Congress that states the termination of the ICSID Convention.[17] In 2013, Argentina terminated its BIT with India, in 2014 with Bolivia, and in 2016 with Indonesia.[18] Chile has terminated its BITs with Korea and Peru.[19] Brazil, on the other hand, remains reluctant until today to become party to the framework for international investments: it still has not signed the ICSID Convention, nor ratified any modern versions of BITs with industrialised countries.[20]

The termination of the treaties brings to an end all rights and obligations of the parties. This certainly has effects for the host state. The first problem that the host state might face is that the submissions of investment disputes to international arbitration do not end after terminating the treaties or the ICSID Convention. Bilateral Investment Treaties have sunset clauses, which are devised such that the rights and obligations of the treaty remain in force for a certain number of years after the treaty was terminated; the term varies

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[14] Ecuador terminated its BITs with the Dominican Republic (2008), El Salvador (2008), Nicaragua (2008), Paraguay (2008), Romania (2008), Finland (2010), Germany (2010), UK (2010), France (2011). Ecuador's Official Registry No. 632. July 13, 2009; 2011 Investment Climate Statement Report. US Bureau of Economic, Energy and Business Affairs. March 2011 at <www.state.gov/e/eb/rls/othr/ics/2011/157270.htm> (accessed 27 May 2018); Mena Erazo, P. "Ecuador pone fin a los tratados bilaterales de inversion" BBC News report (September 16, 2010); Ecuador's Legislative Brief No. 179 submitted by the "Comisión de Soberanía, Integración, Relaciones Internacionales, y Seguridad Integral de la Asamblea Nacional" discussed in the sessions dated September 9 and 14, 2010; UNCTAD, Denunciation of the ICSID Convention and BITS: Impact on the Investor-State Claims. IIA Issue note No. 2. December, 2010; A request for termination of the BITs with the US and Spain is pending at the Ecuadorian Congress. Author's translation from the report by Carlos Juliá of the IV Americas Social Forum, on August 12, 2010, < bilaterals.org/spip.php?article17879>.

[15] Venezuela denounced the ICSID Convention on January 24, 2012. List of contracting States and Other Signatories of the Convention (as of April 12, 2016) International Centre for Settlement of Investment Disputes.

[16] Kluwerarbitrationblog.com, Vetulli, E and Kaufman, E *Is Argentina looking for reconciliation with ISDS?*, 13 October 13, 2016, *at* < http://arbitrationblog.kluwerarbitration.com/2016/10/13/is-argentina-looking-for-reconciliation-with-isds/>(accessed 27 May 2018); Recently, however, Argentina offered to pay some of these awards in the form of government bonds at a discounted rate. See Investment Treaty News, Calvert, J, *State Strategies for the Defence of Domestic Interests in Investor-State Arbitration*, 29 Februrary 2016, *at* < iisd.org/itn/2016/02/29/state-strategies-for-the-defence-of-domestic-interests-in-investor-state-arbitration-julia-calvert/> (accessed 27 May 2018).

[17] Argentina's Draft of Law, File No 1311-D-2012, H Camara de Diputados de la Nacion, March 21, 2012; For ongoing process see Submission of the Lower Chamber of Congress on March, 30 2016. Parliamentary Process 20/2016; Also Senator's Chamber, Communication 134, No 3646, 2016.

[18] UNCTAD Investment Policy Hub at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/>.

[19] Chile terminated its BIT with Korea in 2004 and with Peru in 2009 but replaced them with new treaties. This is also the case for Peru's BITs with Korea and Singapore.

[20] Brazil has signed a number of BITs with investor state dispute settlement but it has not ratified any of them; However, Brazil has ratified treaties with some investment provisions with Paraguay in the 1957 and in 1975.

from 15 to 20 years.[21] This is aligned with the protection granted by international law against government measures that might terminate a treaty and give a justifiable way for that government to breach international law.[22]

The second problem concerns the fact that when terminating treaties, the dispute settlement clauses, and recourse to international arbitration, are also terminated. This is a two-fold problem since it would affect the foreign investors, who are also actors of the international investment framework, as well as the host state. The termination strategy would also terminate the protections given by the treaty against unfair discriminatory actions: the third-party international settlement mechanism is one of them.

There are scholars that argue the preference of using *only* the domestic dispute settlement system,[23] i.e. courts of the host states and see little advantage on the use of international arbitration because it is claimed that investment disputes have not been de-politized with the international arbitration system.[24] However, discriminatory actions and disregard for the rule of law normally happen in authoritarian systems, where the domestic courts are equally constrained by authoritative impositions. In such settings, a fair assessment of a dispute is not guaranteed by domestic courts, and thus both aliens and nationals risk abuses or breaches of due process and judicial procedure. Although international law provides protection against such practices,[25] investment treaties make it easier and more straight forward for foreign investors to submit such claims to international arbitration when facing discriminatory actions.

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[21] Voon, T and Mitchell, A, "Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law" 31 *ICSID Review* (2016) 413 *at* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2735974> (accessed 27 May 2018).

[22] The commentary to Article 13 of the ARSIWA states: "Once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law." - Commentary to Article 13 of International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 See Nick Gallus *The Temporal Scope of Investment Protection Treaties* (British Institute of International and Comparative Law 2008); Article 70(1) of the United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331; Venezuela for example terminated the ICSID convention in 2012, and yet investment disputes concerning Venezuela are still submitted to ICSID. There are also cases in which the host country's own legal system allows for disputes to continue to be submitted to ICSID.

[23] Rogers (2009) and Poulsen (2015) refer to situations of politization of investment disputes because investors involve their home states in such disputes, a situation that international arbitration was supposed to decrease. See Rogers, C, *The Future of Investment Arbitration* (Oxford University Press, 2009); Poulsen, L, *Bounded Rationality and Economic Diplomacy* (Cambridge University Press, 2015). Following this line of thought, it is also argued that states should return to diplomacy and 'replace' international arbitration, because the home state intervenes in the host state anyway. Jandhyala has argued that a return to diplomatic intervention of home countries in host countries was preferable, alleging that the former would be more favourable than having a dispute settlement mechanism like that of international arbitration to settle investment disputes. In Jandhyala, S, "Why Do Countries Commit to ISDS for Disputes with Foreign Investors?" 16 *AIB Insights* 1; Johnson and Sachs (2016) also concluded that having investor-state dispute settlement mechanism in treaties has more costs than benefits for host countries and that that this mechanism is not effective.

[24] Gertz, G, Jandhyala, S, Poulsen, L "Legalization, diplomacy, and development: Do investment treaties de-politize investment disputes?" 107 World Development (2018) 239-252.

[25] ICJ, *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, ICJ Reports 1970; Paulsson, J, *Denial of Justice in International Law* (Cambridge University Press, 2005).

Every international dispute entails political and legal aspects. Having stages in the dispute settlement clauses represents an awareness of this; however, in the practical processes of settling the dispute there are crucial differences among the initial stages of negotiation, mediation, inquiry and conciliation (where, due to political decisions, the resolution of a dispute rests on the parties), and the later stages involving domestic courts or arbitration (where there is adjudication by an impartial third party body). Trying to mitigate disputes at earlier stages has always been common practice established in the peaceful mechanisms of international disputes settlement and has the advantage of reducing party costs. However, if the dispute does not get solved through the previous stages (such as amicable/diplomatic means, negotiation or conciliation or at domestic courts), having recourse to submit the dispute to international arbitration is a very important guarantee.[26]

Concluded investment disputes in South America show that cases where discretionary actions were taken to expropriate without proper compensation still exist.[27] Although the latter is primarily a concern for foreign investors, terminating the protective component of the treaty could become a problem for the host country if it leads investors to stay away from that country because of fear of arbitrary expropriations. Though Brazil is normally given as an example of a country that does not have this protection, its market size has justified its large amount of investment in spite of this. However, the latest developments and corruption scandals with regard to Odebrecht and Lava Jato make us reconsider the value of a third impartial body; which brings new challenges to the country's reputation, and consequently affects the trust of different investors, nationals or foreigners.[28]

Furthermore, terminating a treaty to rid itself of the sovereignty costs that it brought about due to an international arbitration settlement mechanism may actually bring about higher sovereignty costs, especially in cases where there is power asymmetry. The smaller and weaker a party, the more it would want to rely on legal, fair and impartial institutions in a system that counteracts asymmetric relationships.[29]

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[26] The Hague Peace Conference of 1899 adopted a Convention on the Pacific Settlement of International Disputes, which recommended different stages to solve a dispute: good offices and mediation, commissions of inquiry, and international arbitration. The practices promoted in such conventions are aligned with investment treaties clauses that have stages to solve the dispute. The investor in its own right can inform their home state of such disputes, it is entirely up to the party to do this, with or without a treaty. Should the home state in furtherance of goodwill choose to try and mediate the dispute -some clauses of investment treaties do not prevent this as there are amicable or negotiation stages to solve the disputes in which there is no restriction as to whom the parties appoint to do this- such practices should be welcome if they contribute to solving a dispute at an earlier stage. In fact, even in the draft constitutive agreement of the Dispute Settlement at UNASUR, there is a reinforcement for the parties to use the previous stages before arbitration to solve the dispute, which is no different from the dispute settlement clauses in investment treaties. For disputes settlement clauses in South American BITs see Gwynn, M.A. *Power in the International Investment Framework* (Palgrave Macmillan 2016). See also ICSID Convention. Article 26.

[27] Some examples are in disputes against Venezuela and Bolivia.

[28] Joe Leahy 'A Brazilian bribery machine' Financial Tiles, December 28, 2018 at <https://www.ft.com/content/8edf5b2c-c868-11e6-9043-7e34c07b46ef> accessed 27 May 2018; See also Venezuela for example, which with its government not respecting the rule of law have indeed made that country a less attractive destination for foreign investments. For reputation effects affecting countries, see Kelley, J *Scorecard Diplomacy. Grading States to influence their repuration and Behavior* (Cambridge University Press 2017).

[29] See for example the Itaipu treaty between Brazil and its small neighbouring country Paraguay. Such treaty contains only diplomatic negotiations to solve any dispute and the power asymmetries and dependence of

B. Replacing the international arbitration institution with a regional institution

In South America, UNASUR is a regional South American organization which was created with the aim of integrating regional processes developed by the Mercosur and the Andean Community.[30] Its member states are working on a proposal to create an UNASUR Centre for Settlement of Investment Disputes (UNASUR Arbitration Centre). The main aim of this proposition is to replace the main existing International Centre for the Settlement of Investment Disputes (ICSID), which is dependent of the World Bank.

Immediately after Ecuador terminated its investment treaties and the ICSID Convention, Ecuador's then Foreign Affairs Minister stated that foreign investments will be in danger if Ecuador does not find a new mechanism for dispute settlement.[31] Indeed, in the year following its ICSID termination, Ecuador submitted a proposal to the recently created South American regional organization, UNASUR, to create a new arbitration centre. Until the proposal of the new centre, it was only Bolivia which had terminated the ICSID Convention in 2007. Ecuador denounced and terminated the ICSID Convention in 2009, and Venezuela denounced ICSID in 2012.

Following these terminations, the host countries made statements putting the blame for the sovereignty costs derived from the investment disputes on particular institutions like ICSID. One of Ecuador's members of Congress stated: 'we are defending the sovereignty of our jurisdiction. We want to acknowledge the possibility that our State has to settle disputes at an instance in which it has confidence. In the case of ICSID our data reveal that its awards have been mainly favourable to the foreign companies'[32] and the speaker of the Ecuadorian Government further said: 'ICSID works as a tool for exploitation, pressure and destabilization of our countries.'[33] Similarly, in Venezuela, the Energy and Oil Minister reportedly stated: 'We will pull out of ICSID. It is not a mechanism to settle differences and for that reason we will get out of it.'[34] In the case of Brazil, when ICSID Convention was still

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the landlocked country Paraguay on Brazil have made it very difficult for Paraguay to advanced or resolved any of the claims that were of national interests for Paraguay.

30 UNASUR was agreed to in 2008 and entered into force in 2011. It has 'the aim of integrating regional processes developed by the Mercosur and the Andean Community.' UNASUR, History.

31 Interview with Manuel Chiriboga, former Foreign Affairs Minister. In Mena Erazo, P. "Ecuador pone fin a los tratados bilaterales de inversión" BBC News report (September 16, 2010).

32 Interview with Linda Machuca, Vice-President of the International Relations Commission of the Ecuadorian Congress. In Mena Erazo, P. "Ecuador pone fin a los tratados bilaterales de inversión" BBC News report (September 16, 2010).

33 The justification for the termination of these treaties was that they were against the Ecuadorian Constitution. The National Constitution of Ecuador states that the government cannot give away sovereignty when signing international treaties and based on that article Ecuador denounced the treaties. The speaker of Government was Pedro Páez. In the report by Carlos Juliá of the IV Americas Social Forum, on August 12, 2010, at <bilaterals.org/spip.php?article17879>(accessed) (Author's translation) as cited in Gwynn, M, A, *Investment Disputes, Sovereignty Costs, and the Strategies of States* July 2017, *at* < geg.ox.ac.uk/sites/geg/files/GEG%20WP%20132%20%20Investment%20Disputes%2C%20Sovereignty%20Costs%2C%20and%20the%20Strategies%20of%20States%20-%20Maria%20A%20Gwynn_0.pdf> (accessed 27 May 2018).

34 Statement of Rafael Ramirez, Venezuela's Energy and Oil Minister. *Agencia Venezolana de Noticias (AVN)* (January 15, 2012).

being drafted in 1964, the Brazilian representative stated that the draft raised constitutional problems,[35] and until today Brazil rejects the ratification of the ICSID Convention.[36]

Perhaps the perception of ICSID as a common problem, aided by the current institutional structure, made the creation of a regional UNASUR arbitration institution to replace the existing international arbitration institution, ICSID, an appealing one.[37] In 2012 the first draft of a Constitutive Agreement of the Centre for the Settlement of Investment Disputes of UNASUR was finished; a new version of the draft was presented in 2014.[38] However, the new agreement is not yet in force since there is no consensus on many matters relating to the creation of such a Centre.[39]

However, there are some aspects relating to the content of the Draft Constitutive Agreement of the UNASUR Centre for the Settlement of Investment Disputes that we should reflect upon if they were used to advance the international investment framework.[40] The draft starts by stating that the agreement 'shall not affect the applicability of investment disputes settlement mechanism and other obligations contained in international agreements'.[41] This means that even if the draft is agreed upon, there is not going to be any difference in how disputes are handled if they do not modify or terminate their existing agreements. As previously mentioned, the action of terminating the treaties has its disadvantages as well.[42] Second, the draft states that each party can accept to not submit certain disputes and to exhaust local remedies before a dispute is submitted to the centre. The draft suggestion thus does not differ from what article 26 of the ICSID Convention states in this regard. Third, consultations and negotiations through diplomatic channels are going to be maximized, intending arbitration to only be the last resort. Again, almost all bilateral investment treaties apply the same stages. Interestingly, the draft expressly states the increased effort in using diplomatic channels, which as explained before is in accordance with the existing investment treaties. Furthermore, according to the draft, each member state can object to an arbitrator proposed by the other party, and the objection will prevail over

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[35] Kalicki, J and Medeiros, S, "Investment Arbitration in Brazil. Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration" 24(3) *Arbitration International* (2008) 432, *at* < academic.oup.com/arbitration/article-abstract/24/3/423/198906?redirectedFrom=fulltext> (accessed 27 May 2018).

[36] It is opposed by Parliamentarians. See Investment Arbitration Reporter 2008, Vol 1 No 9.

[37] Though it would also affect some of the UNCITRAL arbitration. For the details of the proposition see Investment Treaty News, Fach, K and Titi, C, *Unasur Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement*, 10 August 2016 at< iisd.org/itn/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine-titi/> (accessed 27 May 2018).

[38] UNASUR VIII Reunion of the Working Group on Investment Dispute Settlement.

[39] UNASUR VIII Reunion of the Working Group on Investment Dispute Settlement. March, 2014; Gwynn, M, A, "South American Countries' Bilateral Investment Treaties: A Structuralist Perspective" 6(1) *Journal of International Dispute Settlement* (2015), 97, *at* <doi.org/10.1093/jnlids/idv006> (accessed 27 May 2018).

[40] Fach, K and Titi, C, *Unasur Centre for the Settlement of Investment Disputes: Comments on the Draft Constitutive Agreement* , 10 August 2016 at< iisd.org/itn/2016/08/10/unasur-centre-for-the-settlement-of-investment-disputes-comments-on-the-draft-constitutive-agreement-katia-fach-gomez-catharine-titi/> (accessed 27 May 2018).

[41] Article 2, UNASUR *Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes.*

[42] The draft in its current form does not disarm all the disadvantages that a termination of the ICSID Convention would bring about, which I mentioned in the previous section.

nomination of the candidate.[43] While there have been propositions to establish a Permanent Tribunal, this is only meant to deal with annulments and there is no consensus on the matter. Although there are certain differences among the rules compared to that of ICSID, the UNCITRAL rules or the investment treaties, some of the most prominent features of the current system are kept. Furthermore, in the proposition, the draft retains some of the rules that actors were initially dissatisfied with, which can cause the same effects of the deficient rules of the current framework, such as those resulting in restrictions to regulate. Thus, adopting the latter version of the draft would not significantly improve the current system.

C. Keeping the system as it is

Not all South American countries have followed the action of terminating the treaties or the ICSID Convention, and despite being members of institutions like UNASUR, there are some South American countries that are keeping the system such as it is. Moreover, some South American countries continue to promote their countries and provide foreign investors with many incentives to engage in investments in their countries.[44]

Many of the countries in the region not only have the current international legal framework supporting foreign investments but they also have domestic laws that protect foreign investments, even in their national Constitutions.[45] In many of these investment laws international arbitration is granted as a mechanism to solve disputes. Thus, disputes can be submitted to international arbitration based on domestic investment laws or particular contracts. This has been the case for Ecuador, Peru and Venezuela, countries with cases at different international arbitration institutions based on their investment laws or contracts.[46]

These facts are compatible with global trends. The information of a 2016 UNCTAD report finds 'that at least 108 countries have an investment law as a core instrument to govern investment, almost all of which are either a developing country or an economy in transition' and that such laws 'often cover the same issues as IIAs and more than half of the laws provide access to international arbitration.'[47]

The explanation for this strategy of keeping and promoting the international investment system as it is can also be analysed from different perspectives. One could think that countries keeping the system as it is are doing so because they were not yet affected as much by the disputes, contrary to countries that have taken some form of action like Argentina, Bolivia, Ecuador or Venezuela. However, this view cannot be upheld since

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[43] Article 34, UNASUR *Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes;* there are no clarifications to limits to such objections so it could potentially also block the system if it is used in bad faith.

[44] See for example the use of Investment Promotion agencies: for example, Red de Importadores y Exportadores (REDIEX) in Paraguay and the ProColombia Centre in Colombia and the one recently created in Chile under their Framework Law for Foreign Invetment. For global trends of countries' investment promotion agencies see UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment' Investment Policy Monitor (22 November 2016) p 9.

[45] See for example the National Constitution of Paraguay, which guarantees equality of treatment between foreign and national investors.

[46] See UNCTAD Investment Policy Hub.

[47] UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment' *Investment Policy Monitor* (22 November 2016).

almost all countries in the region have experienced investment disputes;[48] furthermore, as the previous sections showed, they were well aware of the problems faced by other states, of which they are informed at different regional institutions, such as UNASUR.

On a different perspective, Gruber (2000) has claimed that countries will acquiesce to regimes because they know that otherwise the system will proceed without them.[49] However, this is not the only way for states to act and it is proven by the existence of the strategy of replacing the system with other institutions subject to the host countries' regional organization.

An alternative explanation of why countries follow this strategy, therefore, might have to do with the ability of controlling the supply and distribution of credit takes part in shaping outcomes.[50] Evidence of this sort of interaction has been present since the creation of the framework for international investments and continues to be a factor in the present. Many of the credits from international financial institutions to host countries are coupled to promoting investment policies in those host countries.[51] This explains how this situation would affect the host country's decision towards preferring such a strategy, since it is a source of revenue.

However, the problem of following this strategy is that by not changing the crucial provisions in such treaties, most of which were signed in the 1990s, the risk of future frivolous disputes does not get mitigated. The Philips Morris case against Uruguay for establishing a health warning is an investment dispute that showcases how this kind of risk still persists if rules were to be left unchanged.

III. Evolution of Changes in New Versions of Treaties with Investment Provisions

The current international investment framework has somewhat fulfilled its protective aim for which the rules were designed: it guards investors from discriminatory actions regarding expropriations. However, the enforcement of the early versions of investment treaties also shows that there have been unintended effects that result in sovereignty costs for host states in the form of restrictions to regulate. In order to diminish these sovereignty costs, what has to change are the rules that have such effects.

Considering that none of the aforementioned actions involves an action that effectively modifies the deficient rules of the investment treaties, i.e. those that have caused a restriction to regulate, and considering that protection against discriminatory actions is still needed, it is interesting to note the latest developments to change the rules. Economic shifts have also made industrialised countries subject to some of the restrictions to regulate.[52] As a consequence, industrialised countries have realised the need to change the rules. The

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[48] The two exceptions are Brazil and Suriname. See UNCTAD Investment Disputes database and ICSID cases database.

[49] Gruber, L, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton University Press, 2000).

[50] Strange, S, *States and Markets* (Pinter Publishers Limited 1988).

[51] Baccini and Urpelainen (2015) pointed out the "2003 IMF approved a standby agreement worth us$2.1 billion intended to bolster Colombia's economic program until 2004" that created the climate for FTAs. Baccini, L and Urpelainen, J *Cutting the Gordian Knot of Economic Reform When and How International Institutions Help* (Oxford University Press, 2015) 210; see also supra nt 43.

[52] Gwynn, M, A, *Power in the International Investment Framework* (Palgrave Macmillan 2016).

European Commission comments on the dispute settlement mechanism of investor-state disputes and states that frivolous claims should be avoided by modifying the provisions of their agreements.[53] In many of the negotiations of modern investment treaties, the most important changes are pertaining to the two main clauses of investment treaties: expropriations and the dispute settlement mechanism.

Let us take a closer look at the expropriation provision first. BITs established in the 1990s did not contain exclusions on the expropriation clause. As early as 2012, exclusions of regulatory activities from what constitutes expropriation started to appear. For example, in the latest 2012 US BIT model, it is specifically mentioned that state activities protecting the 'legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations'.[54] In 2016, the EU-Canada Comprehensive Economic Trade Agreement (CETA) explicitly established an article for the right to regulate in the areas of public health, safety, the environment, public morals, social or consumer protection or the promotion and protection of cultural diversity. It further explicitly excluded from the concept of expropriations non-discriminatory measures that are applied to protect legitimate public welfare objectives. Similarly, these same exclusions from the concept of indirect expropriation were recommended to be included in the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP) under negotiation between the US and the EU. (See table below for the evolution of expropriations clauses). If these provisions had been in place in the BITs that South American countries had signed in the 1990s and 2000s, then many of the problematic cases that led South American countries to react against the investment regime could not have been brought to arbitration by foreign investors.[55]

Table 2. Foreign Investment Provisions' Evolution in Expropriations and ISDS clauses

EXPROPRIATION AND COMPENSATION (extracts from the provisions)
SA BITS with the US (1990s): Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-) except for a public purpose; in a non-discriminatory manner; **upon payment of prompt, adequate and effective compensation** (Traditional BIT clause)
2012 Latest US BIT model: Traditional BIT clause. **Addition:** -Clarification for fair market value; excludes compulsory licenses granted in relation to intellectual property rights. -[Expropriation] shall be interpreted in accordance with Annexes A and B. Annex B: […]**non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment,**

[53] European Commission "Investment Protection and Investor-to State Dispute Settlement in EU agreements" 2013; Also, recent suggestions in how to amend the system have introduced changes to allow the host state to counter sue the investor that violates investing in a sustainable manner in the host state. Views expressed in J. Anthony Van Duzer, Penelope Simons and Graham Mayeda Integrating Sustainable Development into International Investment Agreements. A Guide for Developing Country Negotiators (Commonwealth Secretariat 2013).

[54] US 2012 Model BIT. Annex B, 4(b).

[55] For example, a clear South American case that would not have reached the stage of international arbitration if such provisions were in place is the Phillip Morris case.

do not constitute indirect expropriations. -Separate articles on Investment and Environment and Labour
CETA: Traditional BIT clause. **Addition:** -Clarification for fair market value; excludes compulsory licenses granted in relation to intellectual property rights; -Affected investor shall have the right, **under the law of the expropriating Party**, to a prompt review of its claim, by a judicial or other independent authority. - the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS, do not constitute expropriation. - Article 8.9 **right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.** - Annex 8-A: For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, **non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.**
CPTPP/TPP propositions (2016): Traditional BIT clause. **Addition:** -Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner **sensitive to environmental, health or other regulatory** objectives.
TTIP propositions (2016): Traditional BIT clause. **Addition:** -Clarification for fair market value; excludes compulsory licenses granted in relation to intellectual property rights; - the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, **do not constitute expropriation.** -ANNEX I: Expropriation …. **non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity do not constitute indirect expropriations.**

A similar development has taken place in the evolution of dispute settlement clauses: In the 1990s, the Most Favoured Nation (MFN) was applicable to dispute settlement clauses.[56] Though the latter has not always been accepted by tribunals and in fact has caused great academic debate, due to their application in dispute settlement, such clauses were named 'Frankenstein' treaties, because dispute settlement clauses agreed in third party treaties could be used in a dispute with another party.[57] In the 2012 US BIT Model, the MFN was excluded from use in dispute settlement clauses. It also included transparency

[56] Applied when for the same kind of relation indicated in the same kind of treaty, one country has an advantage, more preference or is placed in a more favourable situation as compared to other countries, then the country that is less favourable can claim MFN and benefit from the rights entitled to other countries under those same circumstances.

[57] Price, D, "Chapter 11-Private Party vs Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve" 26 *Can-US Law Journal* (2000) 107, at < scholarlycommons.law.case.edu/cgi/viewcontent.cgi ?article=1481&context=cuslj> (accessed 27 May 2018).

provisions in investor-state dispute settlement clauses. The inclusion of transparency provisions in the arbitral process was pursued at different levels.[58] In 2016, CETA excluded the application of MFN treatment from dispute settlement clauses. It introduces a Permanent Tribunal with an Appeals mechanism, transparency, a conduct of proceeding and a code of conduct for arbitrators, and a fast track system for rejecting unfounded or frivolous claims. Also, in CETA the parties had agreed to pursue 'the establishment of a multilateral investment tribunal' (Art 8.29).[59] Similarly, in the negotiations between the EU and the US, the negotiators proposed to create an 'Investment Court' to make the dispute settlement mechanism evolve much further.[60] This would involve an appeal mechanism and non-state parties would have better access to the dispute settlement mechanism. (See table below for the evolution of dispute settlement clauses).

Table 3. Evolution of Investor-State dispute settlement clauses.

INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM
SA BITS with the US (1990s) 1. Amicably. 2. Consultation or Negotiation. 3. Local Courts, or; 4. International Arbitration (ICSID or UNCITRAL)
2012 Latest US BIT Model 1.Consultation and Negotiation. 2. Arbitration (ICSID or UNCITRAL). Clarifies on standards for consent, selection and conduct of arbitrators. Excluded: Local Courts, MFN from IDS. **Addition:** Transparency
CETA 1.Consultation. 2. Mediation. 3. Permanent Investment Tribunal: 15 members nominated by the EU and Canada. ICSID, UNCITRAL rules. Support of ICSID Secretariat. 4. Appellate Tribunal Excluded: MFN for IDS clause; claims if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process; parallel proceedings at domestic courts and the tribunal. **Addition:** -The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. -Rules on the conduct of investment dispute settlement proceedings and Code of Conduct for Arbitrators and -Mediators -Transparency -Fast track system for rejecting unfounded or frivolous claims
CPTPP/TPP propositions (2016) 1.Consultation and Negotiation. 2. Arbitration (ICSID or UNCITRAL) Excluded: MFN from the dispute settlement mechanism **Addition:** Transparency

[58] See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, at <www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (accessed 27 May 2018).

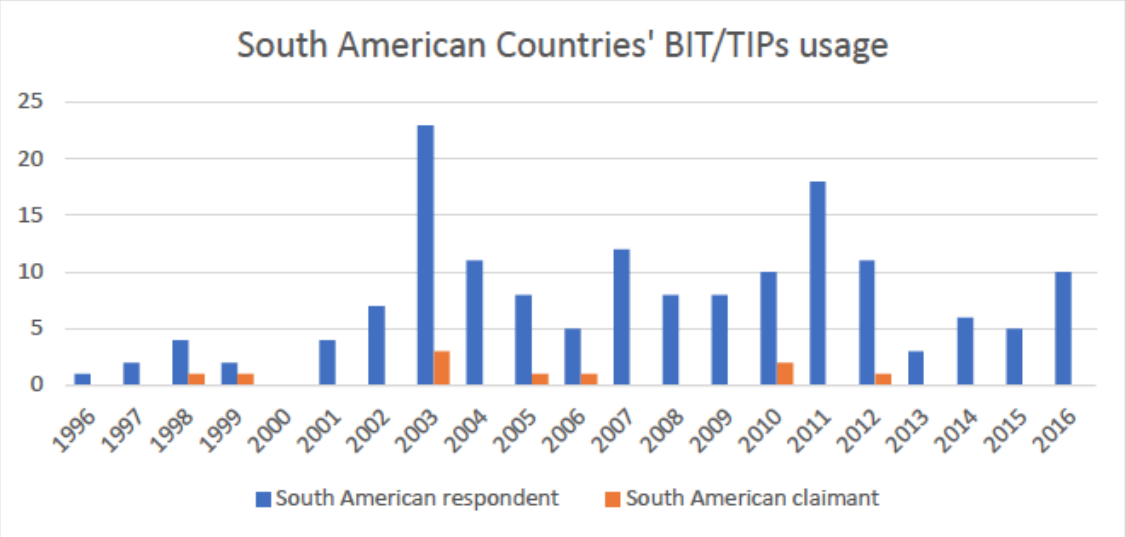
[59] A similar provision was also included in the EU-Vietnam- FTA.

[60] See Sornarajah, M, "An International Investment Court: panacea or purgatory?" 180 Columbia FDI Perspectives (2016), at <http://ccsi.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf> (accessed 27 May 2018), however, claims that an investment court will not cure the illegitimacy of investor-state dispute settlement. He stated that "The establishment of an Investment Court would dissociate that Court from democratic control".

TTIP propositions (2016)
1. Investment Court System.
15 judges (5 each nationality, 5 third party) Appeal mechanism with 6 panellists.

However, some of the improvements of these clauses are made in agreements among industrialised countries. Developing countries still remain in a great majority host countries to foreign investments. In South America for instance, the ratio of how often a BIT has been used by a foreign investor against a South American host country, as compared to how often South American investors in the counterpart country benefited from the same BIT can show us why it is important to have improvement in the framework that effectively reach host countries.[61]

Table 4. ISDS use in South America



Source: UNCTAD and ICSID investment database.

The enforcement mechanisms in BITs have been used in a greater proportion by foreign investors to sue a host South American state than by South American investors using the same benefit towards the counterpart to the treaties. This of course derives from the difference in investment from South American investors abroad, but it is still important to consider the extent to which host states are affected by the rules of the treaty. For these reasons, when changes and improvement are considered in the international investment framework, those should regard changes that can benefit all actors, states, including developing countries, and also foreign investors. Such is the challenging balance that the framework faces. The herein argument is that such balance can be achieved with the

[61] The World bank, Hallward-Dreimeier, M, *Do Bilateral Investment Treaties attract FDI? Only a bit…and they could bite*, August 2003, at <http://documents.worldbank.org/curated/en/113541468761706209/pdf/multi0page.pdf> (accessed 27 May 2018) in her study for the World Bank has claimed that there is no reciprocity in BITs, but this claim was made only in regard to FDIs. Since I am giving a prioritized role to the disputes in this analysis, it is important to see the parties' reciprocity in the use of a BIT but in regard to the investor-state dispute settlement clause.

propositions to reform the framework at the multilateral level, which are explained in the next section.

IV. Towards Multilateral Cooperation and Active Participation in the Changes of the International Investment Framework

The developments taking place directly at multilateral forums to make some changes to the international investment framework are also very interesting. For example, the work of UNCITRAL in regard to the UNCITRAL Transparency Rules in Investor State disputes in 2014.[62] Since its adoption, every arbitration conducted henceforth under UNCITRAL Rules (i.e. derived from BITs concluded after 1 April 2014) must observe the transparency regulations. Transparency rules also establish the creation of a repository, creating a registry of the disputes, all of which becomes available to the public. This information includes the names of the disputing parties, the economic sector involved, the treaty under which the claim is being made, the notice of arbitration, the response to the notice of arbitration, the statement of claim of defence and every other statement or written submission, the exhibits, expert and witness reports, non-disputing party submissions (amicus curiae), transcripts of hearings, orders, decisions and awards.[63] These are much broader than the institutional rules of ICSID, for example.[64]

However, The UNCITRAL Rules on Transparency entered into force in 2014, but most of the existing investment treaties are dated much earlier. Hence, The UNCITRAL Transparency rules would still have encountered the problem of only being applicable to future investment disputes. However, this was overcome by another keystone development concerning the Mauritius Convention.[65] The Mauritius Convention establishes that the transparency rules will be applied retroactively to all the investment treaties. In this way, the Mauritius convention acts as a meta-treaty to modify the existing treaties in regard to transparency provision. Signing it is an easy and costless way for a state to modify the provisions of the existing treaties, so as to include transparency provisions in investor state arbitrations.[66]

By a similar token, a multilateral treaty can be used to amend the provisions of existing bilateral treaties and this is exactly what had been proposed at the last UNCITRAL Annual Congress in July 2017. Such changes implemented through a multilateral treaty would have the advantage of avoiding thousands of bilateral renegotiations, since one multilateral treaty can overcome deficiencies like those referred above. Such an agreement may exclude the state's regulatory activities from what constitutes expropriation, exclude MFN from the dispute settlement clause, add transparency to the arbitration process, and

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[62] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Adopted by the UN General Assembly Resolution 68/109 and came into force on April 1, 2014.

[63] Article 2 and 3 UNCITRAL *Rules on Transparency*,. See however, the exception granted to the parties to exclude confidential information in Article 7.

[64] Gwynn, M,A, 'UNCITRAL and the Possibility of Returning to the Multilateral Regulation of Foreign Investments' Congress Proceedings Vol 4, 274, *at* < uncitral.org/pdf/english/congress/17-06783_ebook.pdf> (accessed 27 May 2018).

[65] UN General Assembly, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, 10 December 2014, (69th Plenary Meeting) A/RES/69/116.

[66] *Ibid*. For a commentary on ratifications of the Mauritius Conventions see Duffy, E "The Mauritius Convention's Entry into Force: High Hopes with Little Impact?" GroJIL blog, May 18, 2017.

have an improved system to solve disputes. Notably, the changes mentioned here are not an exhaustive list of all that could be changed that affect actors in the framework but they are a first step.[67]

Another important consequence resulting from a multilateral treaty is that many developing countries can benefit from such outcome. The new investment rules changes are seen in negotiations of investment treaties among industrialised countries. Those rules are more advanced but the treaty will only be applicable to those parties. On the other hand, having those new rules in a multilateral treaty is more inclusive as they are open to all developing countries. Furthermore, when such rules containing these specific wordings are enforced, host states will no longer experience the degree of sovereignty costs that were derived from the enforcement of the earlier rules.

Such multilateral agreement may take different forms. Perhaps it will be shaped into an Multilateral Investment Court, which the proposition by the EU Commission asking the council to authorize negotiations in this regards show a close reality to it.[68] In any event, the latest developments of the rules being proposed in new versions of Treaties with Investment Provisions (TIPs) or implementing those rules through a multilateral convention shall reflect a more balanced approach to the interests of actors in the framework. They prioritize public interests, which is important for any country, powerful or weak. This is also why rather than restricting actions to regional efforts, cooperation on these issues could be more inclusively achieved through multilateral institutional efforts.

Such rules or changes are only targeted at the provisions that have had the effect of restricting the right of a host state to regulate; the protective part is kept. This is another advantage for all actors. Not all the investment disputes have caused sovereignty costs, since many cases were settled.[69] This might point to situations where the host government admits certain behaviour towards foreign investors in which their treatment was not guaranteed as stated in the treaty. Foreign investors can invest in a sustainable manner in host countries while relying on the fact that in case of discriminatory expropriations without compensation a neutral system to settle such disputes exists. Regional integration zones like the European Union and MERCOSUR can equally participate as entities in the framework. Host countries will no longer be prevented from regulating on matters that advance their policies towards the welfare of its people and communities can also be reassured that, as a consequence, their interests are protected.

Conclusion

Scholars have sometimes referred to winners and losers in the international system and that the losers cooperate because they do not want to be left out of the game, even though they dislike this cooperation.[70] However, when we consider the institutional structures of international regimes, like those that multilateral forums provide, such institutions also give

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[67] There is no mention for example of tax revenues and the role of international institutions in that regard, nor is there a contemplation about the impact of advances of technology (automatization) in this area.

[68] EU Commission submission of Council's authorization in September 2017.

[69] For instance, in 13 nationalization cases against Bolivia, Bolivia settled 12 claims. Similarly, in its 17 nationalization cases against Venezuela, Venezuela settled 12 claims. Cases database in UNCTAD Investment Policy Hub.

[70] Specifically, Gruber, L, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton University Press, 2000).

new capabilities to actors. Actors of the international system might face an increased demand for, and reliance on an efficient enforcement mechanism, legitimized by an international treaty acquired in a forum where all interests are dealt with and voices heard, such as one provided by a multilateral forum. This does not mean that cooperation to achieve those aims will be easy, indeed, cooperation can be conflictual, as Keohane (1984) emphasized.[71] Precisely the ability of a state to adjust to altering conditions is one of the things that characterizes the evolving international system.[72] Thus, if actors of the international investment framework actively participate in changing the rules in a more balanced way, then those who cooperate with each other to bring it about will be the winners. Better yet, the system in this policy issue area has the potential to overcome the entire dialectic that there have to be winners and losers.

All these changes need active participation to be implemented. Most changes are applied in new versions of International Investment Agreements (IIAs), and for them to have an effect on earlier versions of BITs in force, state action will still be required to pursue and adapt the changes that improve the system. Current developments at UNCITRAL, especially with the Mauritius Convention, show how improving changes can be implemented.[73] Countries must actively participate and ratify such treaties, or entertain the possibility of agreeing on something multilaterally that follows these changes. It is an easy and costless way for a state to modify the provisions of the existing treaties, as it is for them to improve provisions in investor state arbitrations, avoid the unintended effects and participate in the evolution of the system into something much more balanced, inclusive and with an investment arbitration system that is in accordance with sustainable development.

The worst scenario is that industrialized countries sign improved IIAs with one another, benefit from mutual investments without suffering from sovereignty costs, while host developing countries are left behind because of not changing the rules effectively. Instead, all countries should join the forefront aiming at changing the investment regime, so as to keep all the advantages of the old treaties, but severely reduce the disadvantages, in particular sovereignty costs in the form of restriction to regulate. The changes, once implemented, can provide certainty and security for international commercial relations, which will entail a relationship that is likely to have more long term beneficial effects, and as such will be more propitious for *all* the actors in the framework.

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71 Keohane, R, *After Hegemony* (Princeton University Press 1984).

72 These ideas have long been pointed out in international relations scholarship, see for example Burton, J, W, *International Relations. A General Theory* (Cambridge University Press, 1965).

73 UN, 'Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-state dispute settlement' Submitted by the Secretariat on 24 May 2016 for the Commission on International Trade Law Forty-ninth session New York, 27 June-15 July 2016. A/CN.9/890.

Interpretation of International Law by National Judges: Opportunities and Challenges. The Case of International Investment Law in Latin America

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Keywords
DOMESTIC JUDGES; NATIONAL AND INTERNATIONAL LAW; LATIN AMERICA

Abstract

The role of national judges in international law is still an undecided subject matter. Most scholars consider the decisions from national judges merely as acts of States, denying the possibility that those judgments constitute an autonomous source of international law. This position is grounded in the idea that national judges do not regularly employ sources of international law, and therefore, their opinion about them is not quite important. Nevertheless, recent phenomena have highlighted and triggered the intervention of national judges regarding the interpretation and enforcement of international law. The growing scope of international rules, which now regulate intra-states issues, as well as the fragmentation of international law, and the internationalisation of national orders, *inter alia*, have demanded domestic courts' intervention in order to face these changes and avoid undesirable consequences. In this context, this article aims to: 1. bring an outlook on the evolution of the role assigned to national judges; 2. explore the phenomena that triggered their intervention; 3. analyse the outcomes of this increasing participation, namely how national judges change the usual dynamics of interpretation and evolution of international law; 4. apply these ideas to explain the intervention of national judges in Latin America regarding the enforcement of foreign investment law; and 5. conclude with some remarks about the future of this relationship between national and international law as well as the importance of a better understanding of the role of national judges.

Introduction

The role of interpretation, and therefore the development of international law as we know it, has always been attributed to supranational or international actors or bodies, particularly those endowed with judicial or quasi-judicial functions.[1] However, nowadays international

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[1] Advisory Committee on Issues of Public International Law, REPORT: *Advisory report on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Advisory Report No 30, November

officers or institutions are not the only actors involved in the application, interpretation, and development of international norms. National actors play an increasingly important role in this regard.

The proliferation of judicial or quasi-judicial actors during the twentieth century was meant to support a whole paradigm of international law, where the role of States yielded in favour of an *international rule of law*. However, this phenomenon entailed certain processes, which pushed other actors to participate in the interpretation and development of international law - the national judges. Many international legal academics such as André Nollkaemper and August Reinisch have examined this endeavour of national actors, trying to demonstrate how these domestic judges could shift the mentioned paradigm.[2]

Considering the aforementioned processes, this article aims to analyse the important role of national judges in interpreting and developing international law, as well as the challenges this new role represents both to national and international law. To do so, first, the context in which this alleged shift has happened will briefly be described. Second, instances when national judges consider international law will be scrutinised. Third, the focus will be on how this proposed shift, namely the intervention of domestic judges, affects international law, especially regarding its interpretation and evolution. Finally, this paper concludes with an overview of this growing dynamic, and the application of these ideas, in the context of international investment law in Latin-American. To conclude, some reflections on the consequences this phenomenon entails, the advantages and challenges it poses, are offered.

I. Breaking off the International Monopoly on International Law

Traditionally it has been understood that the interpretation and application of international law rests exclusively with the subjects of international law, states and international institutions.[3] Under the idea of international law as the law of (and between) sovereign States,[4] there was no point in considering the role that national judges could play in the development of international law.[5]

2017, 13. See also Gourgourinis, A, "The Distinction between Interpretation and Application of Norms in International Adjudication" 2(1) *Journal of International Dispute Settlement* (2011) 31, 40.

2 See among other works from these scholars: Nollkaemper, A, "National Courts and the International Rule of Law" (Oxford University Press, 2011); Reinisch, A, "Challenging Acts of International Organizations Before National Courts" (Oxford University Press, Oxford, 2011). Finally, see the project *Oxford Reports on International Law in Domestic Courts*, 2018 *at* <opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts> (Accessed on 22 May 2018).

3 In the aftermath of World War II, States accepted an array of varied obligations and delegated some decision-making powers to international agencies. In this sense, "the authority to implement, interpret and apply those rules, and to create further rules and/or settle disputes arising out of their implementation, is often delegated". Romano, CPR, "A Taxonomy of International Rule of Law Institutions" 2 *Journal of International Dispute Settlement* (2011) 241, 251.

4 Van Alstine also agrees that the main reason to disregard national judges is the inter-state nature of international law, because, "international law generally does not compel a State either to submit to suit in the domestic courts of another or to permit suit against itself on its own". See Van Alstine, MP, "The Role of Domestic Courts in Treaty Enforcement. Summary and Conclusions" *in* Sloss, D, ed, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, Cambridge, 2009), 556.

5 As noted by Tzanakopoulos and Tams, back in 1935 some argued that, "questions of international law arise comparatively rarely, and often only incidentally, in the work of municipal courts". Brierly, JL, "International Law in England" 51 *Law Quarterly Review* (1935) 24, 25, cited by Tzanakopoulos, A, and

However, the reality that fuelled this idea has changed in the last decades. There are several national and international factors that break the monopoly on international law and open the door to the participation of national judges in its development. On the international plane, several phenomena can be pointed out. The expansion of issues regulated by international law, its process of humanisation, its institutionalisation, and its judicialisation, are some of those worth noting.

As is well known, international law long ago ceased to be a merely an inter-state regime.[6] The issues to be regulated multiplied, so that issues on which States had a monopoly, such as tariffs or the protection of individuals, are now also regulated by international law.[7] In this context, in many cases today, when regulating or resolving a particular issue, national agents must necessarily use international standards.

In addition to this extension of the subjects regulated by the international law, the process of humanisation took place. Humanisation is the process by which human dignity is recognized as a central value on which the legal order is built. Through this process, international law assumed the role of protecting individuals as one of its main task questioning the voluntarist-statist nature of the juridical order.[8] The process of humanisation places individuals and the protection of human rights at the centre of international law. It allows the creation of mechanisms of protection with judges as the pillars of these mechanisms. At the same time, this process allows judges to generate necessary changes in the relationship between international and national law to guarantee the protection offered to individuals.[9]

Due to this process of expansion of international law, its institutionalisation and especially its judicialisation are being consolidated.[10] The need for international authorities to ensure the rule of international law brought about the proliferation of such entities. Thus, from the creation of the Central American Court of Justice in 1907, through the Permanent

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Tams, CJ, "Introduction: Domestic Courts as Agents of Development of International Law" 26 *Leiden Journal of International Law* (2013) 531, 533.

6 As described by Slaughter and Burke-White, the interference of international law in the relationship between the States and its citizens, far away from the classic inter-state regulation, meant a significant change in the evolution of international law. See Slaughter, AM and Burke-White, W, "The Future of International Law is Domestic" *in* Nollkaemper, A and Nijman, J, eds, *New Perspectives on the Divide between International and National Law* (Oxford University Press, Oxford, 2007), 110.

7 In the words of Tzanakopoulos, "globalization has augmented the permeability of domestic legal orders, while at the same time it has led to a considerable increase in international regulation. It was only natural then that domestic courts would be faced ever more frequently with having to apply rules promulgated at the international level". Tzanakopoulos, A, "Domestic Courts in International Law: The International Judicial Function of National Courts" 34 *Loyola of Los Angeles International and Comparative Law Review* (2011) 133 *at* <digitalcommons.lmu.edu/ilr/vol34/iss1/7> (accessed 22 May 2018).

8 According to Celestino del Arenal, humanization implies, "the progressive consideration of human beings as actors and international legal subjects of international society. It marks a break with the Westphalian logic establishing the sovereign character of the State and the exclusivity of its jurisdiction over its population. Likewise, it is the overcoming of the exclusively State-centric character that traditionally has had the international law". Del Arenal, C, *Introducción a las relaciones internacionales* (TECNOS, 2007), 342.

9 Acosta Alvarado, PA, "La humanización del derecho internacional en la jurisprudencia interamericana" 7 *Anuario de acción humanitaria y derechos humanos—Yearbook of humanitarian action and human rights* (2010) 87.

10 According to Cesare Romano, the idea of international law as a set of rules for the correct dispute settlement between States triggered the proliferation of international organizations and bodies. Romano, C, "A Taxonomy of International Rule of Law Institutions", *supra* nt 5, 251.

Court of International Justice in 1922, the multiplication of international institutions has accompanied the expansion of international law in the terms already described.[11]

This institutionalisation implies a close interaction between national and international authorities for two reasons. First, the regulatory capacity of international institutions has direct effects on States and the behaviour of their agents. Secondly, and in relation to the above, the actual effectiveness of international institutionality depends to a large extent on the effective cooperation of national authorities.[12]

The judicialisation, which has led to the creation of more than one hundred courts or quasi-jurisdictional bodies in the international arena,[13] has the same effects. On the one hand, the decisions of international judges often have strong consequences on national institutionality. On the other hand, the effectiveness of decisions necessarily depends on the behaviour of State agents, their application and interpretation of international law (*infra* III.).[14]

All these changes can be summarized in a very particular dynamic; it can be said that today international law and national law share objectives and objects of regulation. This in turn has led to the articulation of normative, institutional, and interpretative tools for the achievement of these common goals. This new scenario necessarily leads to the rupture of the monopoly over international law.[15]

In parallel, and perhaps because of these international phenomena, national law also undergoes a change that contributes to the mentioned rupture; the constitutional opening to international law, or what has been called by some the internationalisation of constitutional law. This opening is evident in the creation of so-called 'constitutional bridge clauses' or 'clauses of articulation', that is, constitutional rules that allow the articulation of international law and constitutional law.[16] Here we refer to the constitutional rules that admit the binding force of international obligations, those which prescribe the interpretation of national rules in the light of international commitments, or those that give some international rules, the status of constitutional rules. Such rules necessarily determine that State agents become agents of international law.

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[11] For a more comprehensive outlook of the evolution and outcome of the international courts see Madsen, MR, "Judicial Globalization and Global Administrative Law: The Particularity of the Proliferation of International Courts" 2015(1) *University of Copenhagen Faculty of Law Legal Studies Research Paper Series* (2015).

[12] Slaughter, AM, & Burke-White, W, "The Future of International Law is Domestic", supra nt 8, 111.

[13] The Project on International Courts and Tribunals (PICT) reported until 2004 73 active international judicial institutions and 8 more in construction. However, latest research in the field report 142 bodies and procedures. Romano, CPR "A Taxonomy of International Rule of Law Institutions", *supra* nt 5, 242.

[14] Sandholtz, W, "How Domestic Courts Use International Law" 38(2) *Fordham International Law Journal* (2015) 595, 596; Kanetake, M and Nollkaemper, A, "The Rule of Law at the National and International Levels: Contestations and Deference" *in* Kanetake, M and Nollkaemper, A, eds, *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing, Oxford, 2016).

[15] This is precisely what allows Slaughter and Burke-White to say that the future of international law is domestic. Slaughter, AM, and Burke-White, W, "The Future of International Law is Domestic", *supra* nt 8, 111.

[16] Here, we refer to the constitutional rules that admit the binding force of international obligations, those which prescribe the interpretation of national rules in the light of international commitments, or those that give some international rules, the status of constitutional rules. For further information about this topic: Acosta Alvarado, PA, "Zombis vs. Frankenstein: Sobre las relaciones entre el Derecho Internacional y el Derecho Interno" 14(1) *Estudios Constitucionales* (2016) 15.

All these national and international phenomena altered and accelerated the dynamics of interaction between national and international law, so that today it is possible to state:

> Times have changed. To an extent almost unimaginable even thirty years ago, national courts … are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.[17]

In other words, changes in international law and national law have led to a rupture of the monopoly over international law and opened the door for national judges, as mentioned by Tzanakopoulos, to exercise an international judicial function.[18] The next section will scrutinise the scenarios in which this happens.

II. From International to National Interpretation of International Law: The Role of National Judges

From the classic perspective of international law, the work of national judges has been considered a matter of minimal relevance.[19] However, the changes that have just been described have led to the recognition of national judges as agents of international law and, [20] therefore, to the possibility of considering them as more than just enforcers of law.[21] Their work is something more than a fact.[22]

In this sense, as several authors have shown,[23] national judges act as agents of international law on different occasions, such as when they resolve disputes using sources of

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[17] Bingham, T, "Preface" *in* Fatima, S, *Using International Law in Domestic Courts* (Hart Publishing, Oxford, 2005), xi, cited by "Introduction: Domestic Courts as Agents of Development of International Law", *supra* nt 7, 533.

[18] Tzanakopoulos, A, "Domestic Courts in International Law: The International Judicial Function of National Courts", *supra* note 9.

[19] Karen Knop express it in the following terms: "the presumption among international lawyers that any particularization of international law in domestic decisions is either isolable (an application of the norm to the facts) or biased (a partial interpretation of the norm) has meant that domestic decisions tend to be given little weight as statements of international law". Knop, K, "Here and There: International Law in Domestic Courts" 32(2) *New York University Journal of International Law & Politics* (2000) 501, 532.

[20] An outcome of this process of interaction between local and international legal orders is the fertile doctrine focused on international law in domestic courts. Nowadays, a great number of academics support the idea that national judges act as agents of international law. See, *inter alia*: Roberts, A, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" 60(1) *The International and Comparative Law Quarterly* (2011) 57, 59. See also O'Keefe, R, "Domestic Courts as Agents of Development of the International Law of Jurisdiction" 26(3) *Leiden Journal of International Law* (2013) 541.

[21] As said by Anthea Roberts: "Domestic court decisions are unique within the international law doctrine of sources because of their ability to wear two hats, representing: (1) practice of the forum State, which may be relevant to the determination of custom and the interpretation of treaties (law creation); and (2) a subsidiary means of determining international law, capable of stating international norms with more authority than attends the practice of a single State (law enforcement)". Roberts, A, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *supra* nt 22, 57.

[22] In fact, for Nollkaemper, the national judges, "may indeed compensate for the lack of international courts as a systemic force in the protection of the international rule of law". *National Courts and the International Rule of Law*, *supra* nt 4, 8.

[23] Among others, see: Waters, MA, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" 93(2) *The Georgetown Law Journal* (2005) 487;

international law, when exercising constitutional or legality control, and when complying or refusing to comply with international obligations or orders of international courts.

With respect to the judges role as arbitrators, the proliferation of international commitments and their growing influence in the domestic legal order increases the occasions in which national judges fail to apply international norms,[24] either to resolve contradictions between them and domestic rules, or to resolve cases using international law.[25] The truth is that there are several occasions in which national judges are confronted with situations regulated by national and international norms, hybrid conflicts for the solution of which parameters of both origins must be considered.

Secondly, considering certain clauses of articulation between national and international law, international standards have become a parameter for the control of constitutionality and for the control of legality at the national level.[26] In this sense, some domestic judges exercise control of the legality of acts belonging to the national and international legal order, in light of international obligations,[27] to guarantee their conformity therewith.[28] In this context, '[t]he sanction of [ir]responsibility thus supports the power of national courts to ensure an act which would be internationally wrongful, were it to take place, does not occur'.[29]

Finally, national courts must necessarily operate with international law when they are the recipients of orders from international institutions. This is the case, for example, when a human rights court orders a national judge to reopen a case to try it in the light of

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Benvenisti, E, & Downs, GW, "National Courts, Domestic Democracy, and the Evolution of International Law" 20(1) *European Journal of International Law* (2009) 59; Tzanakopoulos, A,"Domestic Courts in International Law: The International Judicial Function of National Courts", *supra* nt 9.

[24] As asserted by Tzanakopoulos and Tams: "Both factors – increasing scope, and increasingly inward-oriented reach – explain why domestic courts today routinely engage with international law. It is against this background that inquiries into the law-developing function of domestic decisions are called for." "Introduction: Domestic Courts as Agents of Development of International Law", *supra* nt 7, 534; *National Courts and the International Rule of Law*, *supra* nt 4, 9.

[25] In Colombia, particularly, the use of international rules depends of the regime to which it belongs. The use of human rights law is increasing, mainly those related with the inter-American system for the protection of human rights, thanks to the conventionality control. Instead, the use explicit use of rules regarding to international economic law remains scarce. For a deeper analysis, see: Acosta Alvarado, PA, Acosta López, JI, and Huertas Cárdenas, JE, "Conclusiones generales del proyecto de investigación" *in* Acosta Alvarado, PA, Acosta López, JI, and Rivas Ramírez, D, *De anacronismo y vaticinio: Diagnóstico de las relaciones entre el derecho internacional y el derecho interno en Latinoamérica* (Universidad Externado de Colombia, Bogotá, 2017)

[26] Acosta Alvarado, PA "Zombis vs. Frankenstein: Sobre las relaciones entre el Derecho Internacional y el Derecho Interno", *supra* nt 18, 15.

[27] As asserted Mathias Kumm: "If national constitutional courts are willing to strike down laws passed by the national legislature, then they should have the institutional clout to do the same thing when enforcing international law". Kumm, M, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model" 44 *Virginia Journal of International Law* (2003) 19, 22-24.

[28] Nollkaemper asserts: "First, as organs of the State, national courts may commit an international wrong on behalf of their State by decisions that violate international law or may fail to correct wrongs committed by the organs of the State. Secondly, from the principle that national courts should prevent their States acting in contravention of international obligations, a court may infer that it should assume and exercise jurisdiction to do so". *National Courts and the International Rule of Law*, *supra* nt 4, 42, 43.

[29] *Ibid.* In the same direction: "Domestic Courts in International Law: The International Judicial Function of National Courts", *supra* nt 9, 156.

international protection standards or when a Court of a supranational regime orders the judge to rule on a case involving international standards in a particular way (*infra* IV.).

However, regarding the latter, national courts may also serve to avoid the fulfilment of international obligations. This has occurred, for example, in the cases of Venezuelan[30] and Dominican[31] judges with respect to inter-American obligations or in the event of the Ecuadorian[32] and Colombian courts in relation to the rules of protection of foreign investment or matters of maritime delimitation.[33]

In this context, as Nollkaemper affirms, '[n]ational courts operate neither fully in the national nor fully in the international legal order, but rather in a mixed zone where they are subject to competing loyalties, commitments, and obligations.'[34] In addition, Roberts raises similarly that '[n]ational court decisions alone have the potential to wear both hats and thus their value is often considered to be mixed.'[35]

Now, beyond the features of the various scenarios in which the national judge operates as an agent of international law, the next section seeks to highlight the consequences this has on international law.

III. International Law Under the Lens of National Judges

Yet the international law that is being embraced does not remain unchanged: in the embrace, it is domesticated.[36]

Regarding the effects of the work of the national judge on international law, we can distinguish two different scenarios. On the one hand, the traditional notion that national judicial decisions serve to determine the existence of certain rules of international law or to compromise the international responsibility of the State. On the other hand, a much more active role of national judges, according to which their work is fundamental to determining the content of international obligations and establishing their limits[37], to facilitate the systemic interpretation of the various regimes of international law, to ensure the effectiveness of international law, and, in general, to change the logic of relationship between the two legal systems.[38] In the context of the debate about identification or

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30 Supreme Court of Justice of Venezuela, Constitutional Chamber, 1572/2008.

31 Constitutional Court of Dominican Republic, TC/0256/14.

32 Provincial Courts of Sucumbíos, 14 February 2011; Ecuador National Court of Justice, 6 August 2012.

33 Constitutional Court of Colombia, C-240/14.

34 *National Courts and the International Rule of Law*, *supra* nt 4, 14.

35 "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *supra* nt 22, 63.

36 "Introduction: Domestic Courts as Agents of Development of International Law", *supra* nt 7, 534.

37 As is well known, the rules of international law are generally written in general terms. It is in this context that the work of the national judge plays a fundamental role. Their choices may specify the content of a rule whose scope has not been determined. However, the work of the national judge also serves to prove the existence of norms of international law, such as custom and general principles. On these matters see, among others: UN General Assembly, *Report of the International Law Commission on the Work of Its Sixty-Seventh Session*, 2015, (70th plenary session) A/70/10 Supp No 10, 9, para 4. This report and other ILC documents are available online *at* <legal.un.org/ilc> Accessed on 22 May 2018; Roberts, A, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" Supra nt 22, 57; Tzanakopoulos, A, *supra* nt 9, 154 and further.

38 In the words of Anthea Roberts: "Domestic court decisions are unique within the international law doctrine of sources because of their ability to wear two hats, representing: (1) practice of the forum State, which may

determination of legal international contents, we highlight the capacity of national judges to crystallise the contents of an international obligation, with regard to its application to a particular case.

Regarding the role of the national judge in the traditional reading of international law, there is not much new to say.[39] It is enough to review the classic manuals to figure out that the decisions of national judges can serve as evidence of a State's behaviour when proving one or both of the constituent elements of international custom[40] or in helping to crystallize the general principles of international law.[41] Likewise, no-one questions the possibility that the behaviour of national judges may engage the international responsibility of the State.[42]

However, this is not the discourse this paper seeks to analyse. Instead, the focus is on the increasingly pronounced functions of the national judge's work in international law. In the first place, we would like to highlight that every time national judges operate with international standards in their daily work, they may have the opportunity to determine the content – or even the existence[43] – of international obligations and, sometimes, establish their limits.

In other words, national judges play an important role in the interpretation, determination, and development of international law.[44] In exercising their role of deciding

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be relevant to the determination of custom and the interpretation of treaties (law creation); and (2) a subsidiary means of determining international law, capable of stating international norms with more authority than attends the practice of a single State (law enforcement)". Roberts, A, *supra* nt 22, 59.

[39] As said by Tzanakopoulos, "It is a trite observation that domestic courts, as State organs, produce State practice and utter *opinio juris*, and are therefore capable of creating or contributing to the creation of customary norms." Tzanakopoulos, A,, *supra* nt 9, 155.

[40] Both the International Law Commission and the Dutch Advisory Committee on Issues of Public International Law have recognized that the decisions of domestic courts may be useful for the identification of international customary law, as long as they serve as forms of evidence of the constitutive elements (both of them) of rules of customary international law, or as subsidiary means for the determination of such rules. See: Advisory Committee on Issues of Public International Law, REPORT: *Advisory Report on the identification of customary international law*, Advisory report No 29, November 2017, 9-12. And: International Law Commission, *Identification of customary international law – The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law*, A/CN 4/691, 9 February 2016, 32, observation 23.

[41] It could be enough to look through the d'Aspremont, J and Besson, S, *The Oxford Handbook of the Sources of International Law* (Oxford University Press, Oxford, 2017). It can be seen also, among others: Medelson, MH, "The formation of International Customary Law" *in* 272 *Recueil des course de l'Academie de Droit Internationale de la Haye* (1998); International Law Association, *London Statement for Principles Applicable to the Formation of General Customary International Law* (2000), 9; Cassese, A, *International Law* (Oxford University Press, Oxford, 2001); Brownlie, I, *Principles of Public International Law* (Oxford University Press, Oxford, 2008).

[42] A proof of this are the rules about the international responsibility of States. See: UN General Assembly, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, 12 December 2001, (85th plenary meeting) A/RES/56/83, chapter II, article 4.

[43] In this respect, Nollkaemper shows how the judgements of national judges constitute an autonomous source of authority in international law. In his own words: "The traditional perspective, in which they are part of national law and as such "just" facts, co-exists with a newer perspective, in which the increasing independence and empowerment of national courts allows the international legal order to treat them to some extent as autonomous sources of authority". *National Courts and the International Rule of Law*, *supra* nt 4, 266.

[44] In words of Nollkaemper, "By interpreting and applying international obligations, national courts may facilitate the determination of the contents of such obligations and may contribute to their development.

disputes that involve international norms, they construct jurisprudence that constitutes an input for the development of international law itself. A clear example of this function is the evolution of the rules of international law concerning immunities of States and State officials, whose main input, since the nineteenth century, are the decisions of domestic courts in this regard.[45]

Indeed, the practice of these judges and international judges in assessing the decisions handed down by their domestic peers shows that national decisions often constitute instruments for the evolution of international law by going beyond the mere application according to the current State of international judicial interpretation. Important Cases in the matter, such as that of Pinochet in the House of Lords of the United Kingdom,[46] or the one of Ferrini vs. Federal Republic of Germany before the Italian Supreme Court of Cassation,[47] reflect the creative capacity of these judges as an instrument of legal evolution.[48] Another example of the ability of the national judge to determine the scope of international obligations can be found in the Latin American context in the case law regarding prior consultation. As is well known, Convention 169 of the International Labor Organization stipulates the basic obligations of States with respect to the protection of indigenous and tribal peoples. Article 7.1 establishes the duty to advance what is now known as prior consultation, that is, the duty to consult with indigenous peoples on any decision that may

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Other national courts and to a lesser extent international courts may rely on that practice for their own determination and interpretation of international law". *National Courts and the International Rule of Law*, *supra* nt 4, 10, 264.

45 Van Alebeek, R, "Domestic Courts as Agents of Development of International Immunity Rules" 26(3) *Leiden Journal of International Law* (2013) 559; in this vein, Roberts, A, *supra* nt 22, 69-70. There, Roberts highlights the importance of some judgement from domestic courts for the development of the prohibition of torture as a *ius cogens* rule, and to the evolution of the European Court of Human Rights precedent, among other things.

46 In this case, the Lords Chamber decided, based on some rules of the UN Convention Against Torture, that a head of State could not argue official immunity in the context of torture denouncements. This unprecedented decision back then (1999) determined the evolution of international law in this regard and modified the existing understanding of the immunity for state officials, from then on. Therefore, the decision of a national court in this case fostered the evolution of international law in this regard, what prove our viewpoint about the capacity of national judges to develop and create international law in a particular case. For a deeper analysis, see: Roberts, A, *supra* nt 22, 58.

47 In this case (2004), the Italian court asserted that it was possible to apply universal jurisdiction with regard to civil liability against the German State, because of the nature of the acts committed, particularly international crimes that take the form of serious human rights violations (In the case, Ferrini filed a civil action against the Federal Republic of Germany for the damaged caused on account of his imprisonment, deportation, and forced labour). Moreover, the court found that the rights protected under international criminals and human rights law, prevail over the norms regarding State immunity. As the case of Pinochet, Ferrini was an unprecedented decision in 2006, since it promoted the idea of a universal jurisdiction whenever an international crime was committed. See: *Ferrini v Federal Republic of Germany* (2006) 128 International Law Review 658. Corte di Cassazione (Sezioni Unite), *Ferrini v Federal Republic of Germany,* Judgment No 5044, 6 November 2003, registered 11 March 2004, paras 9, 11.
For more information about this case: Roberts, A *in* "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *supra* nt 22, 64

48 As shown in the cases above, this aforementioned evolution of international law by means of decisions from national courts may produce different results in a way such as to allow *contra legem* interpretations in a particular case. As long as the decision find the need for defeasibility of a rule in the case, it may apply a legal consequence that is no provided by the existing rule, but which may be more suitable for the judgement.

affect them.[49] Given the breadth of this standard, the profile of the prior consultation was quite indeterminate. However, thanks to the interpretation of the national judges of the region,[50] which was adopted by the -Interamerican Court[51] itself which interpreted, in turn, the obligations of the ACHR,[52] it was possible to establish the scope of the State obligation provided for in Convention 169 as well as in the Pact of San José.[53]

Nonetheless, the work of the national judge also serves to set limits to international commitments. Thus, for example, the case-law of European national judges concerning the idea of constitutional identity[54] as a limit to the scope of Community rules,[55] or the decision of an Italian national court to disregard State immunity to consider itself to have jurisdiction in a labour dispute.[56]

Secondly, the national judge acts as a piece of articulation of international law. As is well known, the proliferation of international regimes, and thus of institutions and tribunals, has led to dissimilar and even contradictory applications of international obligations.[57] In this scenario of fragmentation, the national judge serves as a common denominator, who, being bound by all regimes without distinction, must necessarily achieve, as far as possible, a harmonious interpretation of the obligations that bind him. In other words, the work of the national judge is undoubtedly the mechanism par excellence for the systemic interpretation of international law.

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[49] ILO Convention 169. Article 7(1). "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly".

[50] Corte Interamericana de Derechos Humanos, *Pueblo Indígena Kichwa de Sarayaku V. Ecuador*, IACtHR Series C No 245, 27 June 2012, paras 164-167.

[51] *Pueblo Indígena Kichwa de Sarayaku V. Ecuador*, paras 164-167.

[52] Inter-American Specialized Conference on Human Rights, *American Convention on Human Rights*, 22 November 1969, articles 1.1, 4, 5, 13, 21, 23 and 26.

[53] See, also: Corte Interamericana de Derechos Humanos, *Comunidad Garífuna Triunfo de la Cruz y sus miembros Vs Honduras*, IACtHR Series C No 305, 8 October 2015; Corte Interamericana de Derechos Humanos, *Comunidad Garífuna de Punta Piedra y sus miembros Vs Honduras*, IACtHR Series C No 304, 8 October 2015; Corte Interamericana de Derechos Humanos, *Comunidad Indígena Xákmok Kásek Vs Paraguay*, IACtHR Series C No 214, 24 August 2010.

[54] In this respect, the *Solange* and *Gorgülu* cases from the Bundesverfassungsgericht show how a domestic judge denies to give effect to an European judgement in pursuit of the protection of the individual´s fundamental rights under the German constitution. For a deep analysis: Nollkaemper, A, "Rethinking the supremacy of international law" 65(1) *Zeitschrift für öffentliches Recht* (2010) 65, 76.

[55] Among the dozens of documents on this issue, can be checked: Faraguna, P, "Constitutional Identity – A Shield or a Sword? The Dilemma of Constitutional Identities in the EU" 18(7) *German Law Journal* (2017) *at* <ssrn.com/abstract=2995416>(accessed 22 May 2018); Cloots, E, "National Identity, Constitutional Identity, and Sovereignty in the EU" 2 *Netherlands Journal of Legal Philosophy* (2016) 82; Flores Amaiquema, JA, "National Constitutional Identity in the European Union and the Principle of Primacy" (LLM Final Thesis in Natural Resources and International Environmental Law, December 2015) *at* <skemman.is/bitstream/1946/23411/3/Final%20Thesis.pdf> (accessed 22 May 2018).

[56] Court of Cassation, All Civil Sections, *Drago v International Plant Genetic Resources Institute (IPGRI)*, Final Appeal Judgement, No 3718, cited by "Rethinking the supremacy of international law", *supra* nt 56, 77.

[57] Koskenniemi, M, and Leino, P, "Fragmentation of international law? Postmodern anxieties" 15 *Leiden Journal of International Law* (2002) 553, 554.

With respect to this problem, two questions may arise. First, what about dualistic states? Second, does the risk of fragmentation increase if we leave the work of interpretation in the hands of national judges? Regarding the former, the idea of the national judge as the piece of harmonisation between national law and international law does not vary according to the type of State (dualist or monistic), since it depends on whether international law is binding on the national officer, regardless of the way in which such linkage arises. Of course, its role as harmoniser vanishes if it is not linked to the international standard and, in that event, the task of harmonisation depends exclusively on international operators. This leaves aside the debate on the uselessness of the dualism-monism binomial, which we cannot deal with now.Regarding the second, it is worth remembering that the work of national judges has not been done in a vacuum. Their use of international law should always consider what international operators have said on following the rules of interpretation of international law. In this sense, their work is nothing more than the hinge that makes a coherent interpretation possible. Besides, the risks of fragmentation that can occur in facing the dissimilar voice of the different national judges that reproduce the international scenario of never-ending debate. The answer for them is the same, systemic interpretation. From our point of view, what is important is not the longing for the false pretence of uniformity based on the fallacy of the universal vocation of international law, but the adequacy of the use of international law to the scenario and the needs to which it is being applied; and this, without a doubt, can be achieved by the national judge.

In some cases, in view of the need to coordinate, for example, the protection of the environment with the guarantee of the rights of foreign investors, it is necessary for the national court to articulate international obligations to maximise their effectiveness.[58] The same may happen where tension arises between the guarantee of human rights and the rights of foreign investors.[59]

Furthermore, when deciding the constitutionality of the ratification of a treaty, a national court can declare its unconstitutionality due to the failure to fulfil other international obligations.[60] In Colombia, for example, the Constitutional Court has tried to interpret or limit the extent and effect of an international obligation, taking into consideration other international binding rules.[61]

Third, and hand in hand with the above, many times the work of the national judge is indispensable to ensure the effectiveness of international law. In this sense, we must distinguish between effectiveness in the strict and in the broad sense. National judges are

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[58] For example, the Constitutional Court of Colombia decided to forbid the mining activities in sensitive ecosystems, because they provide more than 70% of the drinkable water. See: Constitutional Court of Colombia, C-035/2016.

[59] In another case, the Constitutional Court of Colombia decided to suspend a mining Project to protect the right of some ethnic group to prior consultation under the ILO's Convention No 169. See: Constitutional Court of Colombia, SU-133/2017.

[60] Constitutional Court of Colombia, C-915/2010; Constitutional Court of Colombia, C-196/2012; Constitutional Court of Colombia, C-1051/2012.

[61] See also: Lozada Gomez, M, "Decisiones de la Corte Constitucional relativas a derechos de inversionistas extranjeros: ¿Insumo para la defensa internacional del Estado colombiano en materia de inversión, o fuente de incumplimiento internacional?" *in La defensa internacional de los intereses del Estado en América Latina* (Universitad Externado de Colombia, Bogotá, forthcoming).

often subject to international obligations directly whether they derive from a treaty,[62] custom or other source of international law or, on the contrary, from international authorities.[63] In this context, the behaviour of the national judge depends on the strict compliance with an explicit mandate addressed to him. Consider, for example, those cases in which an international judge orders a national judge to (re-)open judicial proceedings since the rules that served as the basis were contrary to international law or because the international standards of due process were not met. In both events, the international order aims to fulfil international obligation and the non-compliance by national judges would imply the inefficacy of the norm.

In Latin America a very telling example of this dynamic exists; these are the judgments of the Inter-American Court that order national judges to (re-)open processes to investigate, prosecute and punish those accountable for serious human rights violations who have been beneficiaries of an amnesty law.[64] The basis of this order is the compliance with the duty of States to adapt their legal orders to the obligations derived from the covenant(Article 2 of the ACHR) and the guarantee of the rights of victims (Articles 8, 25 and 63 of the ACHR). In these cases, several national judges – these being (Peru,[65] Chile,[66] and even without a direct order Argentina[67]) – responded to the appeal of the Court, but others – (Uruguay and Brazil) – refused to invalidate the amnesty law and, therefore, did not (re-)open the judicial proceedings.[68]

In these cases, there is an international obligation that explicitly attributes a responsibility to the national judge (to control the compliance of the amnesty law with the ACHR), along with a direct order from an international body which is also addressed to the national judge (aimed at reopening the case and prosecuting the possible aggressors). In both events the efficacy of them (norm and order) is in the hands of the domestic judge.

However, even if international obligations or orders are not directed explicitly to national judges, their work is fundamental in securing the ultimate purpose of an international norm. Thus, for example, when national judges determine the unconstitutionality or illegality of a national rule whenever it breaches international

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62 Eg. 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), article 6.1; *American Convention on Human Rights*, article 8.1.

63 For example, the Inter-American Court of Human Rights usually includes in his judgements a set of specific orders for the national judges. This orders often seek the prosecution and judgment of those responsible of human rights violations that entailed the international responsibility of the State. About the importance of national judges to ensure the effectiveness of the orders of international judges, see, *inter alia:* Huneeus, A, "Rejecting the Inter-American court: Judicialization, national courts, and regional human rights" No 1167 *Legal Studies Research Paper Series*, Wisconsin University (2010).

64 IACtHR, *Gelman Vs. Uruguay*, IACtHR Series C No 221, 24 February 2011; IACtHR, *Gomes Lund y otros (Guerrilha do Araguaia) Vs. Brasil*, IACtHR Series C No 219, 24 November 2010; IACtHR, *Almonacid Arellano y otros Vs. Chile*, IACtHR Series C No 154, 26 September 2006; IACtHR, *Goiburú y otros Vs. Paraguay*, IACtHR Series C No 153, 22 September 2006; IACtHR, *Barrios Altos Vs.* Perú, IACtHR Series C No 75, 14 March 2001.

65 Supreme Court of Justice (Peru), Causa No 19-2001-AV, 7 April 2009.

66 Supreme Court of Justice (Chile), Causa No 559-04, 13 December 2006; Supreme Court of Justice (Chile), Causa No 2666-04, 18 December 2006; Supreme Court of Justice (Chile), Causa No 559-04, 13 December 2006.

67 Supreme Court of Justice of the Nation (Argentina), Causa No 17/768, 14 June 2005, paras 23, 27, 29.

68 On this issue, see: IACtHR, *Gomes Lund y otros (Guerrilha do Araguaia) Vs. Brasil*, Resolution of 17 October 2014; IACtHR, *Gelman Vs. Uruguay*, Resolution of 20 March 2013.

obligations, they are ensuring respect for the effectiveness of the latter. In this context, the cases of Beit Sourik Village Council v The Government of Israel[69] and Narmada Bachao Aandolan v India[70] can be mentioned among others.[71]

Something similar occurs when national judges integrate international standards as a basis for the orders they address to other State agents. Thus, for example, the orders of the Colombian Constitutional Court in the context of decisions ordering regulatory, budgetary and institutional adjustments to protect the displaced population or the prison population,[72] the orders of the Bolivian judge ordering the protection of the rights of indigenous peoples,[73] or the decisions of the Argentinian judges who reopened the cases of the dictatorship[74].

Moreover, it is reasonable to think that any order of a national judge which has consequences on the fulfilment of an international obligation have a similar effect, even if that effect is not contemplated or is not obvious. This is the case, for example, with the decisions of national judges who impose fines on service operators whose capital is foreign,[75] or those that prohibit certain types of investment in areas protected by environmental regulation.[76] In these examples the effectiveness of international law may be at risk even without the judicial decisions involving or contemplating the interpretation or application of international norms specifically.

As can be seen, the scenarios in which the national judge must rule on norms of international law, and along with the consequences that this has on international law, are vast. It could even be said, as Nollkaemper affirms, that decisions of national judges in relation to international law outnumber those of the international tribunals themselves. Therefore, 'national case law has a more profound effect on the current application of international law, and the protection of the international rule of law, than on the decisions of international courts and tribunals'.[77]

As has previously been mentioned,[78] in view of this new context, the work of the national judge is essential to construct a new theoretical model and with it new ways to explain and determine the relationship between the two legal systems. The efficacy of international law undoubtedly depends on the profile of this relationship. The following section reviews the particular scenario of foreign investment law in Latin America. This places particular context on what has been said so far.

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69 Supreme Court (Israel), *Beit Sourik Village Council v. The Government of Israel et. al.,* HCJ 2056/04, 20 June 2004.

70 Supreme Court of India, *Narmada Bachao Andolan v. Union of India*, Writ petition (civil) No 319 of 1994, AIR 2000 SC 3751, 18 October 2000.

71 *National Courts and the International Rule of Law*, *supra* nt 4, 7.

72 Constitutional Court of Colombia, T-025/2004; Constitutional Court of Colombia, T-049/2016.

73 Constitutional Plurinational Tribunal of Bolivia, SC 2003/2010-R, 25 October 2010; Constitutional Plurinational Tribunal, SC 0300/2012, 18 June 2012.

74 Supreme Court of Justice of the Nation (Argentina), 14 June 2005, Causa No 17/768, paras. 23, 27, 29.

75 Constitutional Court of Colombia, SU-263/15; Constitutional Court of Colombia, T-783/2013. Same

76 Constitutional Court of Colombia, C-035/2016.

77 N*ational Courts and the International Rule of Law*, *supra* nt 4, 8.

78 *De anacronismo y vaticinio: Diagnóstico de las relaciones entre el derecho internacional y el derecho interno en Latinoamérica*, *supra* nt 27. As well as: Acosta Alvarado, PA, *supra* nt 18, 15.

IV. The Case of Foreign Investment Law in Latin America: A Growing Concern for National Judges

The different causes of the growing and daily engagement of national judges with sources of international law has been analysed. Moreover, the effects of national judges' intervention in terms of the interpretation and development of international law have been explored. In this vein, the case of foreign investment law in Latin America will be utilised to show how national judges are dealing with these rules of international origin and to define the extent to which some of its standards are applied in this region.

As can be discerned from statistics released by the International Centre for Settlement of Investment Disputes (ICSID) in 2017,[79] Latin America has been, and continues to be, one of the most (if not the most) sued region under international investment agreements. Hence, the countries of this region had several investment awards rendered against them and have had to deal with the correct enforcement of foreign investment law in their national legal orders.

Moreover, as shown correctly by Van Harten, these international tribunals have *de facto* taken over the core of the judicial function in public law,[80] due to the large scope of investment standards and the reluctance of these arbitrators to show deference or restraint when overseeing national decisions. This has led to concerns of domestic courts about the effects and scope of international investment agreements, regarding their national legal framework.

In this way, the phenomena of judicialisation and expansion of international law are evident in the features of foreign investment law. Therefore, the national judges are reacting to this process, and have started to make decisions whilst taking into account investment standards. A proof of this reply is the practice of domestic courts in Latin America,[81] which shows that they are applying international investment standards to settle diverse issues and to control the legality of national rules emanating from both the executive and the legislature.[82] Furthermore, some of these judges apply rules from bilateral investment treaties BITs and Free Trade Agreement (FTA) which are binding on their States, and some have even been recognised by the international arbitrators as capable of guaranteeing the rights of foreign investors.[83]

Although the judges' engagement with investment rules depends on the dispute settlement clauses negotiated by each State and the feasibility of the direct application of

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[79] The International Centre for Settlement of Investment Disputes (ICSID), REPORT: *The ICSID Caseload – Statistics* 2017(2) [Washington DC], 30 June 2017, *at* <icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf> 11, 26 (accessed 22 May 2018).

[80] Van Harten, G, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford, 2007), 44.

[81] See: Yimer, B, Cisneros, N, Bisiani, L, and Donde, R, *"Application of International Investment Agreements by Domestic Courts" E780 Trade Law Clinic (2011) at* <academia.edu/8462787/Application_of_International_Investment_Agreements_by_Domestic_Courts_UNCTAD_> (accessed 22 May 2018).

[82] Puig, S, "Investor-state tribunals and constitutional courts: The Mexican sweeteners saga" 5(2) *Mexican Law Review México* (2013), 228.

[83] Saco, V, "The Secret of Peru's Success before the ICSID: Dispelling the Idea that the Investor-State Dispute Settlement System is a Danger for Developing Countries/El secreto del éxito del Perú en el ciadi: destruyendo el paradigma de que el sistema de solución de diferencias inversionista-Estado es peligroso para los países en desarrollo*" in* Tanzi, A, Asteriti, A, Polanco Lazo, R and Turrini, P, *International Investment Law in Latin America: Problems and Prospects / Derecho Internacional de las Inversiones en América Latina: Problemas y Perspectivas* (Martinus Nijhoff, Leiden, 2016), 662.

these kinds of rule in each legal regime, it can certainly be affirmed that national judges are dealing with foreign investment law. In countries such as Argentina, Venezuela and Mexico, judges have found no objection to apply investment provisions invoked by petitioners to rule in a particular case or to decide whether or not to strike down a domestic rule.[84]

In a case ruled by the Mexican Supreme Court[85], the Court decided to invalidate a decree that expropriated some sugar mills in Mexico, affecting the property rights of GAMI Investments Inc., a US corporation. In the case, the Court sided with the petitioners, and ensured the constitutional norms and international rules that banned any expropriation without fair compensation. However, the same corporation brought a claim before the NAFTA tribunal, asking for damages. However, it was the international tribunal which denied the protection, under the consideration that there had been no substantial damage from the Mexican government. Consequently, in this case the national courts enforced the international obligations, even more so than the international body.

In other cases, national judges have shown a lackadaisical attitude in this regard, being reluctant to interpret and directly apply investment provisions of international agreements. Nevertheless, this does in no way mean that they are not interfering with and deciding the extent of the rights of foreign investors. As above mentioned, sometimes national judges do not explicitly use international rules, even though their decisions actually have an impact on the scope of international obligations[86].

In Colombia, particularly, the Constitutional Court has affected the economic rights of foreign investors, while trying to ensure the effectiveness of international obligations outside the foreign investment regime. For instance, in a case regarding the unconstitutionality of a national decree that allowed mining extraction in special - ecosystems which provide most of the consumable water in Colombia (ecosystems called *páramos*), the court declared the unconstitutionality of the rule, and prohibited the exploitations of those territories.[87] However, the court used some rules from international treaties regarding the protection of human rights and the environment, yet never considered the existence of international obligations *vis-à-vis* the protection of foreign investors with valid exploitation licenses. Therefore, a Canadian investor, named Eco Oro Minerals, brought a claim before the ICSID, under some provisions on the FTA between Canada and Colombia,[88] which is still pending for decision. After the decisions of the Constitutional Court, foreign investors have brought claims before the ICSID in at least four times.[89]

Besides the already mentioned processes of judicialisation and expansion of international law, it must be said that the fragmentation of international law can play an important role to trigger the intervention of national judges in the application of the clauses available in foreign investment law. In fact, some of the aforementioned uses of investment

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84 *Investment Treaty Arbitration and Public Law*, *supra* nt 83, 22, 60.

85 SCJN (pleno), Fomento Azucarero Mexicano et al, AR 1132/2004 *at* <scjn.gob.mx> (accessed 22 May 2018). Cited in: "Investor-state tribunals and constitutional courts: The Mexican sweeteners saga", *supra* nt 85, 225.

86 This is the case of the Constitutional Court of Colombia, which have affected in at least 4 judgements the rights of foreign investors under FTA´s and BIT´s, without even mentioning it.

87 Constitutional Court of Colombia, C-035/16, Reporting Judge: Gloria Stella Ortiz Delgado.

88 For more details of the case, see the profile in italaw: italaw, Tribunal, *Eco Oro Minerals Corp. v. Republic of Colombia, ICSID CaseNo. ARB/16/41*, *at* <italaw.com/cases/6320> (accessed May 22 2018

89 These are the cases of: Eco Oro Minerals, América Móvil, Gran Colombia Gold, and Cosigo Resources y Tobie Mining and Energy Inc.

provisions by national judges seek to enforce these kinds of rules in a reasonable manner; that is to say, in a way that seeks to leave room for the guarantee of other international obligations or constitutional values.[90]

In summary, national judges are increasingly determining the scope and effect of foreign investment law in their national legal orders even if this leads to a troubling number of international claims before international tribunals. In this way, the aforementioned phenomena have triggered the intervention of national judges. Nevertheless, a dialogue between the judges of Latin America is desirable, as it will allow them to develop a clearer understanding of investment provisions before arbitral tribunals[91].

Final Remarks

A few years ago, the central question in the debate on the role of national judges with respect to international law was if domestic courts could fulfil some function of international adjudication. Today, however, that debate has been overcome. No one questions that national judges are agents of international law and that the application, interpretation and evolution of international rules largely depends on their work. Thus, as previously stated elsewhere, national judges are not merely one component in a multilevel scheme of adjudicationor,[92] in the words of Tzanakopoulos, an 'integrated [judicial] architecture'.[93]

The advantages of this new scenario are limited. For now, it is worth noting three of these advantages, which stand out throughout this article. To start off with, the work of the national judge facilitates the effectiveness of international law. When national judges interpret international norms, from their reality, considering the characteristics and needs of their legal order, they pave the way for the fulfilment of these international obligations. Moreover, the national judges also ensure the effectiveness of international rules when, in exercise of their jurisdiction, exert control of national and even international standards to guarantee compliance with international obligations. What is more, national judges also improve the effectiveness of international rules, when, acting as direct recipients of an international obligation, decide to execute it. In any event national judges facilitate the compliance of international obligations, even when they give sufficient reasons to 'breach' an international obligation, as the debate around such decision can lead to a more efficient fulfilment of the objectives pursued.

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[90] This is particularly relevant in the cases from Mexico and Colombia, where the domestic courts have decided to protect human rights, constitutional values, or the environment, at the expense of the rights of foreign investors. Off course this has led to an array of claims before investor-state tribunals, but domestic courts are still judging that way.

[91] According to Nollkaemper: "The strengthened position of national courts, including their independence, as well as the apparent quality of decisions from various States, makes it unfruitful to continue to rest the analyses of the legal effect of decisions of national courts on the assumptions. In certain cases, such decisions can be considered as impartial expressions of what these courts believe to be the State of the law. In particular, when these is a certain convergence between decisions of domestic courts, or otherwise a chain of other law-making acts, decisions may achieve a certain authority as to the determination or interpretation of the law that may not be explained in terms of customary law or general principles of law". Nollkaemper, A, *supra nt 4, 278.*

[92] Acosta, PA, *Diálogo judicial y constitutionalismo multinivel. El caso de la Red judicial Interamericana* (Universidad Externado de Colombia, Bogotá, 2014).

[93] "Domestic Courts in International Law: The International Judicial Function of National Courts", *supra* nt 9, 162.

Additionally, national judges can be key in clarifying or even avoiding the harmful effects of the supposed fragmentation of international law. As we have seen, there are many occasions in which the national court faces cases in which the effectiveness of the rules of different international regimes is at stake at the same time. Given these scenarios, it is desirable, or better said, necessary that judges take an active role in the consistent interpretation of international law. The fragmentation of international law has triggered the action of national judges as they are the mediators between different international regimes. Furthermore, the development of national legal orders in a context of fragmentation relies exclusively on the efforts of these domestic judges.

Finally, national judges can be essential in determining the what, when, and how of many abstract international rules. Considering the difficult dynamics of the sources of international law, this work of concretisation cannot be underestimated.

Despite the advantages of this new role of the national judge, this new scenario raises new questions. Now one must worry about the how and what of the national judges' function of international adjudication.

As for 'the what', the question will always be how far national judges can go. Whether their decisions imply evolution or, conversely, rupture of international law? What can national judges do as agents of international law? On this matter one may assume the position of Tzanakopoulos,[94] in the end, everything depends on the reactions generated by the decision of the national judge. What may at first sight be considered a rupture may in fact not be considered as such upon closer examination and may open space for the evolution of international law or at least lead to a dialogue on the matter in question if States or other subjects of international law do not react negatively. At this point the work of the national judge is not different from that of an international judge.

Regarding the how, it is worth to underlining an issue. National judges can no longer function exclusively under the logic and methodology of national law, following old theoretical models. Many of the risks of this new scenario arise from the lack of awareness of the national judges of their role as agents of international law and what it implies as well as their lack of proper methodology. In other words, national judges must recognise that they are agents of international law and, in this sense, that it is not enough to know the criminal, labour and commercial law of their States; They must also be aware of international law and the logic with which it operates. Moreover, national judges cannot continue to operate under concepts as useless as incorporation, hierarchy or any other idea associated with the old zombies of dualism and monism. It is in their hands to generate some order amid chaos, to claim national interests without abandoning international commitments, to nuance the harmful effects of international norms and logics and, to help achieving the effectiveness of international law.[95]

In this respect, it is worth saying that the work of national judges cannot lead to the absolute ineffectiveness of international commitments. Nuances, exceptions, and conditions are allowed, however, never should never be accepted unjustified breaks. In order to achieve a balance, it is fundamental to seek a paradigm shift in the way relations between international law and domestic law are conceived as well as the renewal of national judges'

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[94] *Ibid*.

[95] Nollkaemper has shown the way in which national judges have pushed some changes in international law when reacting to international rules that undermine some constitutional values. See: "Rethinking the supremacy of international law", *supra* nt 57.

knowledge and methodology. However, above all, it is necessary for international law and its authorities to recognise the voice of national judges. Dismissing them saying that their work is just a fact from the perspective of international law will no longer work. International authorities, especially international courts, must engage in a fruitful dialogue with national judges. Perhaps this is the biggest challenge we have at hand.

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ICC and Afrocentrism: The Laws, Politics and Biases in Global Criminal Justice

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Keywords
INTERNATIONAL CRIMINAL COURT; AFRICA; BIAS; WITHDRAWAL; CONTINUED RELEVANCE

Abstract

The International Criminal Court (ICC) was established to prosecute the most serious crimes of concern to the international community as a whole. However, since its inception, the Court has been wholly focused on Africa in terms of indictments and trials. This has led many Africans, including state leaders, to question the integrity of the Court. While most explanations of the ICC's focus on Africa have bordered on the political, this work attempts to find out the reason for the Court's slant towards Africa in the very Statute by which it was established. Therefore, this paper finds that of the four broad crimes that the ICC has jurisdiction to try, three (crimes against humanity, war crimes and genocide) are more likely to occur in Africa, while the fourth (the crime of aggression), will more likely be perpetrated by or at the instigation of individuals in powerful States.

Introduction

The International Criminal Court (ICC) was set up by the international community to deal with cases involving 'the most serious crimes of concern to the international community as a whole'.[1] African countries played a very important role in bringing the Court into existence. After the adoption of the Rome Statute, which establishes the court on the 17th of July 1998, Senegal, an African nation, was the first to ratify the treaty. This treaty was billed to come into force after ratification by sixty (60) countries, and this condition was fulfilled with the ratification of the treaty by the Democratic Republic of Congo on the 1st of July 2002.[2] African countries have thus been highly instrumental in the coming into being of the ICC. Against this background, one would ordinarily expect to see a picture of co-operation and a jolly relationship between the ICC and African countries. However, this is not the case. According to most African leaders and some

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1 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 5.

2 Avocat Sans Frontiere, *Africa and the International Criminal Court: Mending Fences,* July 19 2012, *at* <asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf> (accessed 21 April 2018), 7.

observers, the ICC has cast an unfair and overbearing attention on African States. The ICC on the other hand claims that this is not the case.[3]

A cursory examination of the cases tried so far by the ICC would reveal that they are exclusively African in terms of both the personal and geographical coverage. The question this work seeks to confront is whether the exclusively African focus of the ICC is, as has been claimed by some, a reflection of an anti-African bias or may be explained by some other reasons. And how does the work of the ICC in Africa, whether seen as objective or unfairly biased, affect the effectiveness of the ICC as an International Criminal Court in the coming years?

Agitations by African leaders have begun to take their toll on the support base of the Court as some African States have vowed to withdraw from the Rome Statute. Such withdrawals and other forms of dissent are likely to increase unless the negative perception of the Court, which is fast spreading, is cured. This, therefore, is the aim of this paper: to remedy the progressively negative perception of the ICC with a view to preserving its relevance and existence. In order to achieve the aim of this work, it is taken as an objective to unravel the true reason for the exclusive limitation of ICC activities to Africa. This paper seeks to look beyond the usual assertions and to decipher the specific causes of the tendency of the ICC to prosecute crimes of African origin. Questions to be asked: 1. Are there any reasons, apart from political ones, that explain the ICC's focus on Africa? 2. Does the Rome Statute contain provisions that make it more likely that crimes of African origin would be prosecuted by the ICC, as compared with crimes committed elsewhere? 3. If there are such provisions, do these provisions alone explain the ICC's exclusive pre-occupation with Africa? 4. Are there ways in which African States have contributed to making Africa the exclusive playing field of the ICC?

The scope of this work is delimited by its aim and objectives. As a result, this work focuses on the jurisdictional aspect of the ICC regime, examining the investigative and prosecutorial history of the Court against the background of general principles of individual criminal responsibility in international law, which form the conceptual framework within which the questions raised in this paper are answered. The methodology employed in this work is doctrinal in the sense that the statutory basis and actions of the Court are examined against the background of established principles of individual criminal responsibility in order to achieve the aim and objectives. This work relies on primary sources like the statutes of various international judicial institutions such as the Statute of the International Court of Justice, the statutes of ad hoc International Criminal Tribunals, and, most importantly, the Rome Statute of the ICC. This work also relies on jurist writings, as well as other secondary sources such as books, journals and internet resources. Established principles of individual criminal responsibility in international law are sifted from these sources and form the central standard against which the ICC regime is judged.

I. Admissibility Criteria under the Rome Statute

Under the rules of international law, in order to be admissible before an international court or tribunal, a claim has to be admissible *ratione temporis*, *ratione personae* and *ratione materiae* – it has to be an international claim in all of these three aspects. It has to be admissible *ratione temporis*, that is, it has to be ripe for international jurisdiction, which

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[3] Mbaku, JM, *International Justice: the International Criminal Court and Africa*, Foresight Africa: Top Priorities for the Continent in 2014, (The Brookings Institution Africa Growth Initiative 2016),), *at* <brookings.edu/wp-content/uploads/2016/07/03-foresight-international-criminal-court-africa-mbaku-1.pdf> (accessed 21 April 2018), 9-10.

implies that local remedies had been exhausted. It has to be admissible *ratione personae* in the sense that that the claim espoused by the claimant State has to be owned by a national of that State and not by a national of the respondent State, and it has to be admissible *ratione materiae* in the sense that it has to be based on a *prima facie* breach of an international legal obligation and not on an alleged breach of municipal law. Only if these criteria are met, could one say that one was dealing with an international claim.[4]

Under the regime of the ICC, admissibility is determined as provided for under Article 17 of the Rome Statute. The provisions on admissibility are designed in such a way as to offer States the first opportunity with regard to the prosecution of crimes. However, if States neglect, refuse or are unable to genuinely prosecute crimes, the ICC intervenes. This is the case even where proceedings have been initiated but the ICC determines that the State is not genuinely able to prosecute or that the proceedings are not independent or impartial, or are designed to shield accused persons from justice. The power of the ICC to bypass national criminal jurisdictions is one of the reasons why States are jittery over the ICC.

China, which is not yet a member of the ICC, declared through its representative at the 3rd Plenary Meeting of the Rome Conference of 16 June 1998 that it does not welcome the idea of a court that would be 'a tool for political struggle or a means of interfering in other countries' internal affairs, and that the Court should be mindful of the need to avoid encroachment on 'the principal role of the United Nations, and in particular of the Security Council, in safeguarding world peace and security'. China deemed the principle of complementarity as 'the most important guiding principle of the [Rome] Statute', which should be 'fully reflected in all its substantive provisions and in the work of the Court; hence, the ICC would be able to exercise jurisdiction only with the consent of the countries concerned'.[5]

The controversy that followed the ICC warrant issued for the arrest of Saif al-Islam, son of the late Libyan leader Muammar Gaddafi, revolved around the issue of complementarity.[6] On 26 February 2011, the UN Security Council adopted Resolution 1970 by a vote of 15-0, referring the situation in Libya to the ICC in accordance with Chapter VII of the UN Charter and Article 13(b) of the Rome Statute. On 27 June, the ICC judges authorised three arrest warrants related to the Libya investigation, including one for Saif al-Islam Gaddafi. On the same day, the court directed the ICC Registrar to prepare a request for the arrest and surrender of the three suspects, which was subsequently transmitted, with the arrest warrants, to the Libyan authorities on 4 July .[7] On 18 November 2011, Gaddafi was captured by members of the militia group, Abu Bakr al-Siddiq. The Libyan factional government based in Tripoli sought the trial of Saif Gaddafi in Libya. On 1 May 2012, the Government of Libya challenged the admissibility of the case concerning Saif Al-Islam Gaddafi before Pre-Trial Chamber I. On 31 May 2013, the Pre-Trial Chamber I rejected the challenge to the admissibility of the case against Saif Al-Islam Gaddafi. The Judges acknowledged Libya's efforts to restore the rule of law. However, the Chamber concluded that Libya was unable to genuinely carry out the prosecution of Mr Gaddafi, and found that the evidence submitted was not

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4 Ryk-Lakhman, I, *The Artefact of International Jurisdiction: Concept, History and Reality*, UCL Journal Of Law And Jurisprudence Blog, 19 July 2017, *at* <),blogs.ucl.ac.uk/law-journal/tag/admissibility> (accessed 21 April 2018).

5 Jia, BB, "China and the International Criminal Court: Current Situation*",* 10 *Singapore Year Book of International Law* (2006) 1-11.

6 International Criminal Court (ICC), *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11 -01/11.

7 Human Rights Watch, *Libya: Q & A on the ICC and Saif al-Islam Gaddafi,* 14 July 2017, *at* <hrw.org/news/2012/01/23/libya-qa-icc-and-saif-al-islam-gaddafi> (accessed 21 April 2018).

sufficient to consider that the domestic and ICC investigations cover the same case. On 21 May 2014, the ICC Appeals Chamber confirmed the decision of Pre-Trial Chamber I, declaring the case against Saif Al-Islam Gaddafi admissible.[8] But in March 2014, the Tripoli Court of Assize charged Gaddafi *in absentia* with war crimes and crimes against humanity in relation to the killings allegedly committed during Libya's 2011 uprising. As a result, Pre-Trial Chamber I issued on 10 December 2014 a finding of non-compliance by the Government of Libya owing to the non-execution of the request for cooperation transmitted by the ICC with respect to Saif Gaddafi and decided to refer the matter to the Security Council of the United Nations. The Chamber found that Libya has failed to comply with the requests by the Court: 1) to surrender Saif Al-Islam Gaddafi to the Court; and 2) to return to the Defence of Saif Al-Islam Gaddafi the original documents that were seized by the Libyan authorities from the former Defence counsel for Saif Al-Islam Gaddafi in June 2012 in Zintan, and to destroy any copies thereof.

The Chamber emphasized that its decision was only based on the objective failure to obtain cooperation. It was not intended to sanction or criticize Libya but solely to seek the assistance of the Security Council to eliminate impediments to cooperation.[9] In spite of the Pre-Trial Chamber I's finding, the Libyan Court of Assize on 28 July 2015 convicted Gaddafi on all charges and sentenced him to death by firing squad. However, the decision of the Court of Assize was not followed by the Abu Bakr al-Siddiq group, which refused to surrender Gaddafi to the Libyan authorities.[10] Saif was released in June 2017 as part of a pardon issued by the Libyan parliament, which is based in the country's eastern region.[11]

Meanwhile, on 11 October 2013, Pre-Trial Chamber I decided that the case against Abdullah Al-Senussi, one of the three suspects, was inadmissible before the ICC as it was currently subject to domestic proceedings conducted by the competent Libyan authorities and that Libya is willing and able to genuinely carry out such investigation. On 24 July 2014, the Appeals Chamber unanimously confirmed Pre-Trial Chamber I's decision, declaring the case against Abdullah Al-Senussi inadmissible before the ICC. Proceedings against Abdullah Al-Senussi before the Court hence came to an end.[12]

This case illustrates how complex questions of complementarity operate in reality. The case also exposes the politics that may be intertwined with the work of the ICC in sensitive cases. It has often been rumoured that the Gaddafis had secret relations with high-profile Western governments and individuals, who they have an interest in ensuring that some of their dealings are kept secret. In the case involving Saif Gaddafi, an official of the ICC was at the centre of an alleged attempt to interfere with his trial. When an ICC legal team visited Saif in Zintan where he was being held by the Abu Bakr Battalion, one of the lawyers, Melinda Taylor (appointed by the ICC as Saif's defence attorney), was detained by the militias on grounds of allegations that she had attempted to pass documents from Mohammed Ismail, Saif's fugitive right-hand man, to Saif. The militias insisted that she discloses the whereabouts of Mohammed Ismail before she was

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8 ICC, Case Information Sheet*, The Prosecutor v Saif Al-Islam Gaddafi,* ICC-01/11-01/11, 14 July 2017, *at* <icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf> (accessed 21 April 2018).

9 *Id.*

10 Trial International, *SAIF AL-ISLAM Gaddafi*, 14 July 2017https://trialinternational.org/latest-post/saif-al-islam-gaddafi/, *at* <trialinternational.org/latest-post/saif-al-islam-gaddafi/> (accessed 21 April 2018).

11 Independent, *Saif Al-Islam: Gaddafi's Son Released after More Than Five Years of Detention*, 10 June 2017, *at* <independent.co.uk/news/world/middle-east/saif-al-islam-released-gaddafi-son-more-than-five-years-detention-libya-zintan-Statement-a7784096.html> (accessed 21 April 2018).

12 *Id*.

released.[13] Melinda Taylor was released alongside three other ICC colleagues after the ICC President tendered an apology. By that time, she had spent weeks in detention.[14]

II. Overview of the Work of the ICC

The ICC's work has so far been limited to Africa. All situations for which warrants of arrest have been issued by the Pre-Trial Chambers, or for which prosecutions have commenced or have been completed, are African.[15] A perusal of the list of defendants at the ICC would reveal all who are listed to be of exclusively African origin.[16] Does this mean that these crimes do not occur on other continents? Many commentators have responded to this question by concluding that the Court is being unfair to Africa. This has also been the view of African leaders, many of whom have called for the withdrawal of African countries from the Rome Statute. This has led to the non-implementation of ICC orders in the form of arrest warrants issued against certain Africans, most notably amongst whom is Omar al Bashir, the President of Sudan.[17] The first warrant for the arrest of Omar Hassan Ahmad Al Bashir was issued on 4 March 2009, and the second on 12 July 2010. The suspect is still at large. Until Omar Al Bashir is arrested and transferred to the seat of the Court in The Hague, the case will remain in the Pre-Trial stage. The ICC does not try individuals unless they are present in the courtroom.[18]

During the pendency of the arrest warrant for Omar Al Bashir, al Bashir has visited a number of countries in Africa as well as Jordan but has not been arrested in accordance with the obligation of these countries under the Rome Statute to assist the ICC in carrying its functions. Judges at the International Criminal Court ruled that South Africa failed in its obligations to the War Crimes Court by failing to arrest Sudan's

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[13] Bond, A, *Glamorous Australian Lawyer held on Spying Charge after Visiting Colonel Gaddafi's Son in Prison*, MAIL ONLINE, 13 June 2012 *at* <),dailymail.co.uk/news/article-2158568/Glamorous-Australian-lawyer-held-Libya-spying-charge-visiting-Colonel-Gaddafis-son-prison.html> (availiable 21 April 2018).

[14] Reuters, Al Shalchi, H, *Libya Frees Detained ICC Staff after Apology*, 2 July 2012, *at* <reuters.com/article/us-libya-icc-idUSBRE86118V20120703> (accessed 21 April 2018).

[15] Udombana, N, *Africa and the International Criminal Court*, 13TH JUSTICE IDIGBE MEMORIAL Lecture (2012), 34.

[16] Bahr Abu Garda, Mohammed Ali, Abdallah Banda, Omar al-Bashir, Jean-Pierre Bemba, Charles Blé Goudé, Muammar Gaddafi, Saif al-Islam Gaddafi, Laurent Gbagbo, Simone Gbagbo, Ahmed Haroun, Abdel Rahim Hussein, Saleh Jerbo, Germain Katanga, Uhuru Kenyatta, Tohami Khaled, Joseph Kony, Henry Kosgey, Ali Kushayb, Thomas Lubanga Dyilo, Raska Lukwiya, Ahmad al-Mahdi, Callixte Mbarushimana, Sylvestre Mudacumura, Francis Muthaura, Mathieu Ngudjolo Chui, Bosco Ntaganda, Okot Odhiambo, Dominic Ongwen, Vincent Otti, William Ruto, Joshua Sang, Abdullah Senussi.
The warrants of arrest for Omar Al Bashir list ten counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect (co-)perpetrator including: (i) Five counts of crimes against humanity: murder (Article 7(1)(a)); extermination (Article 7(1)(b)); forcible transfer (Article 7(1)(d)); torture (Article 7(1)(f)); and rape (Article 7(1)(g));)perpetrator including:
1. Five counts of crimes against humanity: murder (Article 7(1)(a)); extermination (Article 7(1)(b)); forcible transfer (Article 7(1)(d)); torture (Article 7(1)(f)); and rape (Article 7(1)(g));
2. Two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (Article 8(2)(e)(i)); and pillaging (Article 8(2)(e)(v)); and
3. Three counts of genocide: genocide by killing (Article 6-a), genocide by causing serious bodily or mental harm (Article 6(b)) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (Article 6-(c)). See Case Information Sheet, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 8 July 2017, *at* <icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf> (accessed 21 April 2018).

[18] ICC, *Omar Al Bashir Case, The Prosecutor v. Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09, 8 July 2017, *at* <icc-cpi.int/darfur/albashir> (accessed 21 April 2018).

wanted president when he visited the nation for a summit of African leaders in 2015. On 28 March 2017, the Jordanian government permitted al Bashir to enter Jordan for an Arab League summit meeting that was held the following day. It did not arrest al Bashir during his stay in Jordan and for that the ICC decided to refer Jordan to the UN Security Council. Jordan entered an appeal against the decision of the ICC. Meanwhile, South Africa announced its intent to leave the court in 2015, after the public disagreement with the court over the Bashir incident.[19] In the same vein, African leaders have adopted a strategy calling for a collective withdrawal from the International Criminal Court. The non-binding decision was taken behind closed doors near the end of an African Union summit.[20] Earlier, in 2016, South Africa, Burundi and the Gambia, all announced plans to leave the Court, leading to concerns that other States would follow.[21] In the case of South Africa, a high court ruled at the instance of the opposition party, Democratic Alliance (DA), that the withdrawal process was null and void because it was not debated in parliament. The ANC government, however, said it was determined to follow through the withdrawal process. In the Gambia, after the exit of former ruler Yahya Jammeh, the decision earlier made to quit the ICC was reversed. Although the resolution calling for the withdrawal of African Union (AU) members from the ICC is not binding and is opposed by certain countries like Nigeria and Senegal,[22] it raises issues that must be seriously considered by the ICC if it plans to maintain and grow its already diminishing legitimacy.

III. Why the ICC Focuses on Africa

The ICC's African bias is frequently attributed to the political inclination of the Court. This assertion is not denied here as it is well known to many scholars of international law that it has so far been impossible to separate international law from politics. However, what this section of the paper seeks to achieve is to reveal other reasons inherent in the provisions of the Rome Statute before turning to the political factor, using the political element as a connecting thread to explain why certain provisions are designed the way they are.

The jurisdiction of the ICC is limited to four crimes: genocide, crimes against humanity, war crimes and the crime of aggression. An examination of the elements of the first three crimes would reveal that these crimes are less likely to occur in affluent societies with highly organised social and political structures, which have evolved over a long period of time. In contrast, some African states with unorganised social and political systems are more likely to witness upheavals that follow these crimes. Most African countries do not have properly built and supported legal and judicial systems to effectively prosecute perpetrators of crimes. This necessarily triggers the jurisdiction of the ICC in accordance with the principle of complementarity. Three African States with a case before the Court have themselves referred the situation to the ICC. They have themselves requested that the Prosecutor investigates the crimes committed on their

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[19] Powell, A, *South Africa Failed Obligation by Not Arresting Sudan's Bashir*, VOICE OF AMERICA , 6 July 2017, *at* <voanews.com/a/icc-south-africa-sudan-bashir-arrest-failure/3930865.html> (accessed 21 April 2018).

[20] The Guardian, Associated Press in Addis Ababa, *African Leaders Plan Mass Withdrawal from International Criminal Court*, THE31 January 2017, *at* <theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> (accessed 21 April 2018).

[21] *Id*.

[22] BBC News, Igunza, E, *African Union Backs Mass Withdrawal from ICC*, 1 February 2017, *at* <bbc.com/news/world-africa-38826073> (accessed 21 April 2018).

territory, thereby acknowledging their lack of capacity to investigate and prosecute these offences.[23]

Of the crimes over which the ICC has jurisdiction, the crime of aggression is the one most likely to be committed by affluent countries because amongst the rank of these are hegemonic States that exercise influence and control over the affairs of other States by means of war and military interventions. However, the provisions of the Rome Statute concerning the exercise of jurisdiction apart from any other contributing factor, have made it impossible so far for persons to be prosecuted for that offence. Firstly, the ICC did not have jurisdiction over the crime of aggression until Resolution RC/Res. 6, annex 1 of 11 June 2010, which inserted Article 8 *bis* that defines the crime of aggression. The coming into force of this amendment was subject to ratification by 30 States Parties.[24] On 26 June 2016, the State of Palestine deposited its instrument of ratification of the amendments to the Rome Statute on the crime of aggression. The State of Palestine thus became the 30th State to ratify the amendments on the crime of aggression.[25] It was stipulated that the Court may begin to exercise jurisdiction over crimes of aggression only with respect to crimes committed one year after the ratification or acceptance of the amendments by 30 States Parties. In addition, a decision to be taken after 1 January 2017, by the Assembly of States Parties, with the same majority of States Parties required for the adoption of the amendment, was needed to activate the ICC's jurisdiction over the crime of aggression.[26] From 4 – 14 December 2017, the Assembly of States Parties held its 16th session where it resolved to activate the jurisdiction of the ICC over crimes of aggression with effect from 17 July 2018.[27]

However, in spite of this decision, the ICC's jurisdiction over crimes of aggression is in reality limited and may in fact prove to be impotent for different reasons. The Rome Statute provides that States Parties may, by a declaration lodged with the Registrar, opt out of the Court's jurisdiction over the crime of aggression.[28] The jurisdiction of the court shall also not extend to crimes of aggression committed by nationals or on the territory of non-State parties. Paragraph 2 of the activating resolution states that '…in the case of a State referral or *propio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments'.[29] This provision represents deference to the position of powerful states like the United Kingdom and France amongst others, as against that of states who wanted the ICC to have jurisdiction

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[23] International Federation for Human Rights, *ICC The International Criminal Court's First Years*, 2009 No.516a, 15; The cases involving Cote d'Ivoire, Mali and Uganda all originated from State referrals.

[24] Article 15 *bis* (2); The exclusion of aggression was in recognition of the differing nature of the crime, which is based on *jus ad bellum* (the legality of the war itself), while crimes against humanity, genocide and war crimes are based on *jus in bello* (the legality of the conduct of the war). The Permanent Members of the Security Council also saw the enactment of such an offence within the ICC framework as contrary to their interests as hegemonic States which are often accused of aggression. See Scharf, MP, "Universal Jurisdiction and the Crime of Aggression", 53(2) *Harvard International Law Journal* 358, *at* <harvardilj.org/wp-content/uploads/2012/10/HLI201.pdf> (accessed 21 April 2018), 361.

[25] ICC, *State of Palestine becomes Thirtieth to Ratify the Kampala Amendments on the Crime of Aggression*, 9 July 2017, *at* <icc-cpi.int/legalAidConsultations?name=pr1225> (accessed 21 April 2018).

[26] The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, *Conditions for Action by the ICC*, 9 July 2017, *at* <crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc> (accessed 21 April 2017).

[27] ICC, 'Trying Individuals for Genocide, War Crimes, Crimes against Humanity and Aggression', *at* <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350> (accessed 10 March 2018).

[28] Article 15 *bis* (4).

[29] Resolution ICC-ASP/16/Res.5

where crimes of aggression are committed by nationals or on the territory of States Parties that did not ratify the Kampala amendments.[30]

Thus, while the jurisdiction of the ICC is independent of State consent in respect of the other three crimes, the possibility of opting out of the Court's jurisdiction over aggression makes its jurisdiction in respect of this crime dependent on the decision of States Parties not to opt out- a form of negative or passive consent. Theoretically, it is possible to bypass this passive consent by means of a Security Council referral made under Chapter VII of the UN Charter. In that case, the ICC would be acting not pursuant to its own jurisdiction but pursuant to the powers of the Security Council. However, since the permanent members of the Security Council form part of the States whose citizens are most likely to be indicted for this crime, it may be assumed that this mechanism would not be frequently utilized. Where the interests of one of the permanent members are not at stake, it is highly probable that those of one of their allies would be. Generally, the records have shown that the P5 (as the UN permanent members are often called) prefer to make referrals, which are convenient to them. An example is the refusal to refer the Syrian situation to the ICC. On 22 May 2014, China and Russia vetoed a draft resolution of referral in the face of a letter sent to the Security Council with the positive signature of 57 States in favour of a referral.[31] It needs to be noted at this point the persons most likely to be indicted for the crime of aggression are leaders and high-ranking government officials. Article 25(3) *bis* of the Rome Statute provides that

> In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

This makes the crime of aggression a leader's crime and less likely that the Security Council referral mechanism would be used, considering the veto powers that the permanent members wield.

Ordinarily, Article 12 requires for the exercise of jurisdiction by the ICC, that either the State of territoriality or the State of nationality be party to the Rome Statute. This is in accordance with the normal rules on 'effects' or 'objective territorial' jurisdiction and is the case with genocide, crimes against humanity and war crimes. Thus, a citizen of a non-State party who commits genocide, war crimes or crimes against humanity on the territory (or having an effect on the territory) of a State Party is subject to ICC jurisdiction. This is not the case with the crime of aggression, despite the fact that aggression can, as a matter of territoriality, take place both in the State where the aggression is plotted, and in the State where it is executed.[32]

The United States, which had earlier signed the Rome Treaty, declared that it did not intend to ratify the Statute and does not have any obligation towards the ICC. On 6 May 2002, the Bush Administration announced that the United States does not intend to become a party to the Rome Statute of the International Criminal Court. In a letter to

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[30] Durr, B, 'The Challenges of Prosecuting Wars of Aggression', Blog of the Groningen Journal of International Law, 29 January 2018, <grojil.org/2018/01/29/the-challenges-of-prosecuting-wars-of-aggression/> (accessed 10 March 2018).

[31] Couture, A, "The Politics of International Justice: the Security Council's Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court", 3(2) *International Human Rights Internship Working Paper Series,* McGill *Centre For Human Rights And Legal Pluralism*, 2015, 15-16.

[32] Clark, RS, "Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala", 31 May – 11 June 2010, 2 *GOETTINGEN JOURNAL OF INTERNATIONAL Law* (2010) 689, 705.

Kofi Annan, the Secretary-General of the United Nations, it was stated that 'the United States does not intend to become a party to the treaty,' and that 'accordingly, the United States has no legal obligations arising from its signature on 31 December 2000.' Defence Secretary Donald Rumsfeld explained that the Administration had:

> a number of serious objections to the International Criminal Court - among them, the lack of adequate checks and balances on powers of the [Court's] prosecutor and judges; the dilution of the U.N. Security Council's authority over international criminal prosecutions; and the lack of any effective mechanism to prevent politicized prosecutions of American service members and officials.[33]

The Bush Administration concluded bilateral immunity agreements (BIAs) known as 'Article 98 agreements,' with most States parties to exempt US citizens from possible surrender to the ICC. These agreements are named for Article 98(2) of the Statute, which bars the ICC from asking for surrender of persons from a State party that would require it to act contrary to its international obligations. The US government is prohibited by law from providing material assistance to the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American Service Members' Protection Act of 2002 (ASPA) (PL, 107-206, Title II). The prohibition covers, among other things, the obligation of appropriated funds, assistance in investigations on US territory, participation in UN peacekeeping operations, unless certain protections from ICC actions are provided to specific categories of personnel and the sharing of classified and law enforcement information.[34] The succeeding Obama administration had a friendlier relationship with the ICC, even ensuring that the United States attended the Kampala Conference, as an observer nation.[35]

Russia also said it was formally withdrawing its signature from the founding statute of the International Criminal Court, a day after the court published a report classifying the Russian annexation of Crimea as an occupation. Russia denounced the ICC's work as 'one-sided and inefficient.' Russia signed the Rome statute in 2000 and co-operated with the Court but had not ratified the treaty and thus remained outside the ICC's jurisdiction.[36] The absence of major powers like the United States and Russia from the ICC fold means that actions and situations involving these hegemonic states, which usually have far-reaching impacts, are excluded from the Court's direct scrutiny. The only avenue for holding them accountable is through the UN Security Council where they also have a strong influence and veto powers. This limits the ICC's jurisdiction to less powerful countries like African states that in turn feel victimised and are spurred to quit the Court. This portends a threat to the continued relevance of the Court.

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[33] Bradley, C, "US Announces Intent not to Ratify International Criminal Court Treaty", 7 (7) *American Society Of International Law* (2002), *at* <*asil*.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty> (accessed 21 April 2018).

[34] Section 2015 of ASPA (22 USC 7433, the Dodd Amendment), however, provides an exception to these provisions. Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

[35] Arieff, A, et al., *International Criminal Court Cases in Africa: Status and Policy Issues*, CONGRESSIONAL RESEARCH Service, 22 July 2011, *at* <*fas*.org/sgp/crs/row/RL34665.pdf.> (accessed 21 April 2018).

[36] The Guardian, Walke, S and Bowcott, O, *Russia Withdraws Signature from International Criminal Court Statute*, 16 November 2016, *at* <theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute> (accessed 21 April 2018).

Where the Prosecutor acts in respect of the crime of aggression, he or she must first ascertain, by means of a notification, whether the Security Council has determined that any particular State has committed a crime of aggression before proceeding with an investigation.[37] Where such a determination has been made, the prosecutor may proceed with an investigation and where none has been made, he/she may also proceed with an investigation, but only after the expiration of six months following the date of notification.[38] In any case, the Security Council may request the Court to defer investigation or prosecution, as pursuant to Article 16 Rome Statute. Such a deferral shall last for a period of 12 months, renewable under the same conditions as the initial request.[39] However, consistent with the existing Rome compromise, contained in Article 16 of the Statute, a single member of the Permanent Five members of the Security Council cannot stop an investigation or prosecution process by exercising a veto. It is only where there are nine supporting votes comprising the votes of all five permanent members and four votes of non-permanent members that proceedings may be stopped.[40] In July 2009, the African Union took a decision not to co-operate with the ICC regarding the arrest warrant issued against the Sudanese President Omar al Bashir while also listing a number of issues it wanted States Parties to consider at the May 2010 Kampala Review Conference among which was a review of the Security Council's referral and deferral powers under Articles 13 and 16 respectively.[41]

Apart from these factors that are inherent in the provisions of the Rome Statute, there is another possible reason why the ICC prefers to concern itself with offences committed on the African continent. This has to do with the bringing into being of the statute. Every law enforcement institution must legitimise its exercise of jurisdiction over parties. Legitimacy helps to ensure voluntary compliance with institutional requirements and to receive the support necessary for effective discharge of responsibilities. The ICC has the need like any other institution to practically legitimise its existence by dutifully carrying out its responsibilities. While pursuing this need, it must have searched for the forum most likely to welcome its jurisdiction. Given Africa's record of early ratification, producing the first and sixtieth State that allowed the Statute to come into force, and support for the Statute, the Court probably saw Africa as a suitable testing ground. Therefore, African countries, by supporting the establishment and activation of the ICC, may have unwittingly presented themselves as lab rats to the ICC. Out of 123 States Parties to the Rome Statute, 33 are African, 19 are Asia-Pacific, 18 are from Eastern Europe, 28 are Latin American and Caribbean and 25 are from Western Europe and other places.

However, even though the European Union has also been a major supporter of the ICC, mandating assistance to the Court in co-operation agreements such as the Cotonou Agreement, activities of the Court in Europe have so far been limited to the investigation of the Russo-Georgian conflict commenced in 2015 with no indictments yet as at the time of writing. Although armed conflicts have been more prevalent in Africa than in other regions (with perhaps the exception of the Middle East); other parts of the

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37 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 15 *bis* (6).

38 *Id*. Article 15 bis (7) and (8).

39 By a resolution adopted under Chapter VII of the United Nations, Charter of the United Nations (1945) 1 UNTS XVI (UN Charter).

40 Clark, *supra nt* 32 at 706.

41 Tendayi Achiume, T, *The African Union, the International Criminal Court, and the United Nations Security Council*, Irvine School of Law ICC-UNSC Workshop 2012, *at* <councilandcourt.org/files/2012/11/ICC-AU-UNSC-Position-Paper.pdf> (accessed 21 April 2018), 3.

world like Asia, the Caribbean and even Europe have also witnessed armed conflicts since the ICC Statute came into force in 2002. Similarly, the ICC prosecutor's request to investigate the Afghanistan conflict is the only one of such in the Middle East and Asia. The absence of ICC activity in relation to Middle-Eastern conflicts is particularly curious. As the major actors in these conflicts usually involve powerful hegemonic states, lack of ICC scrutiny tends to support arguments that the ICC deliberately avoids meddling in the affairs of some select States. Also, preliminary examinations with respect to Colombia, Iraq-UK, Ukraine and Palestine have not yet resulted in requests to investigate. Having said this, it must be added that in its search for practical legitimacy, every institution has the duty to be fair to all stakeholders, seeking to cover the whole field and to carry out their operations without fear or favour. The ICC's work so far is reminiscent of old injustices perpetrated against Africans and the African continent.

Indeed, the fact that Africa is perceived as a weak continent is often capitalized upon politically by more powerful countries, which often use the instrument of supposedly independent and non-aligned international institutions to arm-twist African leaders and States. This is made even easier in the context of the ICC, having in mind the other factors discussed above which predispose African situations to being subject to ICC jurisdiction.

IV. The Effect of the ICC's Afrocentrism on its Global Acceptance

The fact that the ICC has failed to operate outside the African continent may have a range of effects on its ability to properly carry out its functions in the future. For a judicial body to be widely accepted, it has to be perceived as being impartial, dispensing justice equitably with respect to both the weak and the powerful. However, with reference to the ICC's African bias, it appears to be functioning where it is easiest and politically expedient for it to function, thereby enforcing justice with respect to the weak and to the exclusion of the powerful. The suspicion this approach has aroused among African leaders will be seen elsewhere in the future as the Court begins to take tentative steps outside the African continent (probably partly triggered by criticisms about its exclusive focus on Africa) with an on-going investigation concerning the situation in Georgia, a pending request for investigation with respect to Afghanistan and preliminary examinations with respect to Colombia, Ukraine, Iraq-UK and Palestine. The partiality of the Court would be cited as a reason not to co-operate. This is more likely as the ICC has been systematically ignoring contentious issues around the world and it would be difficult to justify its future interest in any particular case unless it is endowed with jurisdiction by means of State referral. Security Council referrals are also likely to be highly controversial in the future considering the number of cases the Security Council has overlooked so far. As a matter of fact, the only Security Council referrals have occurred with respect to African States.

Opposition to the ICC would take different forms. Already, the African Union has passed a non-binding resolution calling for the withdrawal of all its members from the ICC. This followed individual display of resentment by different African States, some of which had earlier vowed to quit the ICC. If these withdrawals, whether individual or bloc, should increase, the ICC would be at the risk of total collapse. Non-compliance with treaty obligations has already been witnessed with regard to ICC arrest warrants due to the Court's poor perception by African States. Omar Al Bashir has travelled to a number of countries who are States Parties to the Rome Statute without being arrested. This is contrary to Article 86 of the Rome Statute, which places an obligation on States Parties to assist the Court in carrying out its operations. The article reads as follows:

> States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Once an investigation is initiated by the Prosecutor, duties arise on the part of States Parties to co-operate with requests from the ICC. It is worthy of note that the ICC demands co-operation by means of requests and non-binding orders.[42] It should be recalled that the ICC has no enforcement machinery of its own, and if this trend continues, it would be reduced to a lame duck.[43] With African countries breaking ties with the ICC, they will no longer complement the ICC's jurisdiction. The ICC on its own part will not be able to operate in Africa because it lacks its own enforcement machinery.[44] This would not be in the interest of justice as this might have an overall effect of encouraging impunity.

The ICC also relies on the financial contributions of members. Therefore, if members refuse to fulfil their financial commitments as a means of showing their displeasure with the way the Court conducts its business, then it may become very difficult for it to function or it may have to rely on financing from a few nations, which might have serious consequences for the independence of the Court. As a matter of fact, eyebrows have already been raised over the European, NGO and individual financial contributions to the Court. Concerns have been expressed about the ICC's acute financial dependence upon Western European funding corrupting the Court's independence. The American commentator, John Rosenthal, states that, 'it is a self-evident principle that the independence and hence impartiality of a court is only as sure as the independence of its financing.'[45] The ICC says it is financed by contributions from its States Parties. The amount payable by each State party is determined using the same method that is applied by the United Nations - each State's contribution is based on the country's capacity to pay, which reflects factors such as national income and population. The maximum amount a single country can pay in any year is limited to 22% of the Court's budget. Despite the fact that the Court theoretically sets a cap on funding at 22% of its budget from any one country, a large share of its 2009 budget came from EU member countries. The EU, through its Member States, paid 60% of the 2009 budget of EUR 94.17 million. If the contributions of EU Member States and potential member states are added, the European contribution rises up to 63%.[46] Although the EU cannot be indicted for carrying a large share of the ICC's financial burden, as this is only a reflection of its numerical representation and the economic strength of EU countries, it does give the EU countries a position of influence in the affairs of the ICC. Therefore, it would be in the interest of the ICC to work out a more balanced contribution scheme, perhaps towing the line of the recommendation made in the following section.

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[42] Seils, P and Wierda, M, *The International Criminal Court and Conflict Mediation*, International Center For Transanational Justice 2005, *at* <ictj.org/sites/default/files/ICTJ-Global-ICC-Mediation-2005-English.pdf> (accessed 21 April 2018), 6.

[43] See Part 9 (Article 86-102) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 dealing with International Co-operation and Judicial Assistance.

[44] Makumbe, D, "African Response to the International Criminal Court. Implications for International Legal Justice", 20(8)(IV) IOSR *Journal of Humanities and Social Science* (2015) 16, 22.

[45] African Business Magazine, *Who Pays for the ICC* (Oct. 1, 2011), *at* <africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/> (accessed 21 April 2018).

[46] African Business Magazine, *Who Pays for the ICC* (Oct. 1, 2011), *at* <africanbusinessmagazine.com/uncategorised/who-pays-for-the-icc/> (accessed 21 April 2018).

Unless the concerns noted in this work are addressed, the ICC will ultimately become moribund as it will be seen as an instrument of oppression and manipulation. As it is, the Rome Statute is increasingly assuming, in the eyes of African States, the same form as the colonial agreements made between Europeans and African leaders that ultimately paved the way for the colonisation of Africa. The ICC is increasingly being perceived as an institution from which to seek emancipation. As has been previously stated, this perception will continue to spread within and beyond Africa if the Court does not change certain aspects of its operations.

Recommendations and Conclusion

The ICC must begin to take advantage of the ample opportunities that are abound in the world today to demonstrate that it is not an International Criminal Court for Africa. It must begin to show that it is capable of functioning independently and fearlessly. This would mean a more even geographical spread of its operations, subject to the frequency of situations that require its attention in different parts of the world, as it has begun to do with the investigation of the Russo-Georgian crisis and preliminary examinations in Colombia, Iraq-UK, Ukraine and Palestine. Having said this, it is less likely to achieve a better balance in the distribution of ICC operations through the mechanism of State referral. This is because advanced countries are less prone to voluntarily refer matters whether domestic or international to the ICC. These nations would rather handle their own affairs without interference from other parties. The same goes for the Security Council whose referrals would most likely be constrained to affairs concerning less dominant States as most powerful States are either permanent members of the Council or have close alliances with the permanent members. For instance, despite the intensity of the Syrian crisis, the ICC has failed to intervene. China had already vetoed three draft resolutions on Syria in the Security Council as of December 2012 and supported the option of dialogue with the Assad regime rather than coercion and punishment. It is therefore unlikely that either China or Russia will consent to an ICC referral concerning their allies in Syria.[47] The same goes for the other permanent members of the Security Council. This means that much rests on the Prosecutor and the Pre-Trial Division. The Prosecutor must be bold enough to consider situations all around the world and the Pre-Trial Division must give the necessary approvals where all stipulated pre-conditions have been met.

African States on their own part must shore up their local capacities to effectively prosecute genocide, crimes against humanity, war crimes and the crime of aggression. It is the inability to genuinely prosecute, combined with sheer unwillingness in some cases that predisposes African situations to adjudication by the ICC. Capacity building is also necessary at the regional stage but capacity development at national levels should be seen as a more urgent need than that at the regional level of the African Union. This is because a complementary relationship does not exist between the AU and the ICC but between the ICC and States Parties. Therefore, the attempt by the AU to set up a court which would handle cases of human rights abuses in Africa will not have a direct impact on ICC determinations whether to prosecutes crimes or not.[48] Notwithstanding, if such

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[47] The Diplomat, Wuthnow, J, *China and the ICC*, (7 December 2012), *at* <thediplomat.com/2012/12/china-and-the-icc/> (accessed 21 April 2018).

[48] In February 2010, pursuant to a decision taken by the African Union (AU) Assembly a year earlier, the AU Commission appointed consultants to work on drafting an amended protocol on the Statute of the proposed African Court of Justice and Human Rights. The draft amended protocol, amongst other key issues, provides for the expansion of the jurisdiction of the African Court to deal with specific criminal matters. On 24 June 2014, the Assembly of the African Union adopted the draft protocol clothing the

an African court is able to function effectively and does not prosecute crimes with the intent of shielding the perpetrators,[49] then the ICC, although it may not be in a complementary relationship with such a court, would most likely defer to the court's jurisdiction. It would be to the overall benefit of Africa if the AU is able to develop a strong and effective criminal justice regime.

Concerning the crime of aggression, it must be admitted that there are situations that truly call for intervention by States in the territory of other States with or without the agreement of States constituting a majority of the members of the UN. This is because with the politics of the United Nations, there may be situations where it is impossible to agree on an intervention despite a genuine need for such an action from the point of view of an interested State. For instance, the Arab bloc of the United Nations would hardly ever agree to a Western intervention in any Arab nation no matter how justified such an intervention might be. This is why the provisions on the crime of aggression have been formulated this way. They are a product of a compromise reached at the Kampala Conference, where the amendments relating to the crime of aggression were adopted. It would be impracticable to attempt a total harmonisation of the rules guiding the exercise of jurisdiction over the crime of aggression in order to make them the same as those guiding the exercise of jurisdiction over the other crimes as they are currently conceived. What is more realistic is to lay a set of rules or conditions that must be met for an intervention not to be construed as a crime of aggression. Even so, the crime of aggression will continue to remain controversial, and politics, not law alone, will continue to be a major factor in determining which particular case of intervention is investigated and prosecuted by the ICC as a crime of aggression.

As regards the influence of donors on the independence of the ICC, it is counselled that the Court should refrain from receiving donations from individuals and NGOs. Although all States might not be reasonably expected to contribute equally as a result of their varying economic strength, efforts should be made to reduce disparity by ensuring that States are given the opportunity to participate financially to the best of their ability. There should be a downward review of the upper limit of contribution by individual States and the deficit resulting from a reduction in contribution from major donors should be spread among other states. Such downward review should be progressive and increasing as more states become part of the ICC regime. It would, however, be impossible to control the total amount of donation coming from different regions of the world as this depends on the number of States Parties belonging to any particular region.

This work has shown that the inordinate attention cast on Africa by the International Criminal Court does not lend itself to a monocausal explanation but is better understood by a comprehension of interweaving factors. Therefore, this paper does not limit its explanation to the political reasons often adduced for the ICC's focus on Africa, that is, that the Court is a tool for oppression and manipulation of African leaders

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African Court with criminal jurisdiction. The protocol awaits ratification by 28 AU Member States for it to come into force. Only 5 states have ratified the protocol at the time of writing this paper. See Du Plessis, M, *Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes*, 235 Institute for Security Studies Paper (2012), *at* <issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf> (accessed 21 April 2018); Cole, RJV, "Africa's Relationship with the International Criminal Court: More Political than Legal", 14 *Melbourne Journal of International Law* (2013) 670, 695. See also Amnesty International, 'Malbo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' (2016), *at* <amnesty.org/download/Documents/AFR0130632016 ENGLISH.PDF> (accessed 25 March 2018).

[49] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 20(3).

and countries by western powers. While not waving this view point aside, this work takes a deeper look at the issue and advances the view that the predilection towards the prosecution of African situations originates partly from the provisions of the Rome Statute, particularly with respect to the kinds of crimes over which the ICC may exercise jurisdiction. It points out that three of these crimes, genocide, crimes against humanity and war crimes, are more likely to occur in countries at the same developmental stage as most African countries. This point is demonstrated by the occurrence of conflicts in such other places like Afghanistan, Myanmar, Colombia, and East Timor.[50] The paper explains that the conditions for exercising jurisdiction over the crime of aggression have made the ICC dormant as far as this crime is concerned with little hope that there will be frequent, if any, practical exercise of this jurisdiction in the future. The paper also acknowledges the political motivation that lies behind the ICC's Afrocentrism by questioning why the Court has been inactive in other climes with a comparable level of development as African States, and where the three crimes that were identified as likely to occur in less developed countries have as a matter of fact occurred. It concludes that unless the undeserved inclination towards African situations is rectified, the Court will continue to experience the resistance from African States, which it has already begun to witness. This uncooperative attitude will spread beyond Africa and become entrenched, leading to the ultimate redundancy and collapse of the Court. Therefore, it is of utmost importance that the suggestions proffered in this work, as well as other adaptations that will be needed as developments unfold and different persons engage this problem, be implemented if at all the ICC is to remain in existence.

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[50] Myanmar, Colombia and East Timor are parties to the Rome Statute. The conflict in East Timor was however resolved before the Rome Statute came into force without retrospective application.

Corporate Liability and Compensation Following the Deepwater Horizon Oil Spill: Is There a Need for an International Regime?

Stephanie Theodotou*

Keywords
ENVIRONMENT; OIL SPILL; LIABILITY REGIME: DEEPWATER HORIZON

Abstract

The purpose of this article is to assess the effectiveness of the current fragmented legal framework regarding corporate liability and compensation following oil spills from offshore installations, in light of the *Deepwater Horizon* oil spill. It evaluates whether *Deepwater Horizon* has signalled the need to adopt a uniform international regime, which will regulate compensation and liability concerning oil spills from offshore oil installations. The first part of this article provides the factual background of the *Deepwater Horizon* oil spill, with an emphasis on the corporate liability and compensation issues that arose in this incident and the response by the U.S. Government. The second part evaluates the effectiveness of the current three-tiered system of compensation in the oil tanker industry, as well as the supplementary voluntary agreements thereto, and assesses whether this legal framework could be adopted to the regime governing oil spills from offshore oil installations. It notes the stark contrast between oil spills from oil tankers and oil spills from offshore oil installations, in that an oil tanker's maximum storage capacity is known which makes the risk of potential spillage calculable. In contrast, it is impossible to make such a calculation for oil spills resulting from offshore oil installations since, although the storage capacity of the installation is defined when it is constructed, the amount of oil that can be spilled directly from the well drilled into the marine environment is unpredictable. The third part discusses the prospects for adopting an international civil liability and compensation regime governing oil spills from offshore installations, with reference to several international and regional attempts that have been made to establish an efficient regime and provides proposals for an efficient and effective international regime.

Introduction

The purpose of this article is to assess the effectiveness of the current framework regarding corporate liability and compensation following oil spills from offshore installations. Has *Deepwater Horizon* signalled the need for the international legal community to cooperate to adopt and enforce a regime tackling corporate liability and

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compensation following oil spills from offshore oil installations applicable on an international basis? The overarching thesis of this article answers this question in the affirmative, since such a regime would ensure prompt, adequate and effective compensation, regardless of the economic power of the State subjected to the oil spill. On the global scale, there is no implemented or enforceable agreement tackling such spills. While there have been attempts to adopt and enforce such a regime, these are arguably insufficient because, for instance, they are not applicable on a worldwide basis, or because they have received an inadequate amount of signatory State Parties in order to enable the legal instruments to enter into force.

This article begins with a factual background of *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*.[1] It highlights BP's corporate liability and compensation issues in the manner it responded to the incident.[2] For the purposes of this article, given the complexity and the magnitude of the issues involved in this case, liability will be assessed as if BP was the sole responsible party in *Deepwater Horizon* with the intention of conducting a deeper evaluation.[3] It will be argued that BP's response was rather superficial, because it prioritised its reputation in accepting liability for the incident. Contrastingly, the U.S. Federal Government has responded in a manner superior to that of BP and made significant claims against the oil giant. In an oil spill of such magnitude as *Deepwater Horizon*, it took a powerful State and prolonged litigation with negotiation to respond; would such responses differ had the incident occurred in a less economically developed State?

The second part of this article emphasises the contrast that, whilst there is a global regime regulating civil liability for pollution damage by oil tankers, there is no uniform and universal regime regulating oil spills from offshore oil installations. It provides a solid overview of an integrated three-tiered regime for the oil tanker industry, followed by supplementary voluntary agreements. Will unifying the two systems be the ideal solution to the issue facing the offshore oil industry? Whilst there are strong positives in the oil tanker regime, there are arguably notable negatives about it. Most importantly, an oil tanker's maximum storage capacity is known and thus the risk of potential spillage is calculable. This is not the case for offshore oil installations since, although their storage capacity is defined at their construction stage, it is impossible to determine the amount of oil that can be spilled directly from the wells drilled into the marine environment.

Finally, this article focuses on the prospects for adoption of an international civil liability and compensation scheme for offshore oil pollution. This encompasses the international and regional attempts made to establish an efficient regime. Therefore, the answer to the question of whether there is an urgent need to implement an international regime mimics a double-edged sword; on the one hand, having a global regime will add efficacy and effectiveness in the regulation of offshore oil production. On the other hand, the global 'appetite' required to build such a regime seems to be lacking. Nevertheless, how would BP's response differ had such a regime been in place at the time *Deepwater Horizon* occurred? Numerous proposals will be presented to conclude this work.

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1 United States District Court, Eastern District Louisiana, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010* MDL No. 2179 (2011).

2 Corporate liability and civil liability are used interchangeably in this article.

3 U.S. Department of Justice, Office of Public Affairs, *Attorney General Eric Holder Announces Civil Lawsuit Against Nine Defendants for Deepwater Horizon Oil Spill*, 15 December 2010, *at* <http://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-civil-lawsuit-against-nine-defendants-deepwater> (accessed 12 May 2018: See the U.S. Department of Justice civil lawsuit filed on 15th December 2010 that identified nine defendants for the Deepwater Horizon Oil Spill: BP, two Anadarko defendants, MOEX Offshore 2007, Triton Asset Leasing GMBH, three Transocean defendants, and QBE Underwriting Ltd/Lloyd's Syndicate 1036.

I. Case Study: In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010[4]

Deepwater Horizon *blowout… spewed nearly five million barrels, making it the world's largest accidental marine oil spill.*[5]

The escape of hydrocarbons from the Macondo well, of which BP was the designated operator, caused an explosion and fire that destroyed the Mobile Offshore Drilling Rig *Deepwater Horizon* around fifty miles from the Mississippi River delta, killing eleven workers and causing widespread leakage of five million barrels of oil into the Gulf of Mexico, reaching Louisiana, Alabama, Florida and Texas. The spillage continued for one hundred and fifty-two days until the well was permanently sealed, but necessitated a U.S.' government response 'unprecedented in size, duration, and expense.'[6]

A. BP: corporate liability and compensation issues

BP made testaments that it will pay all 'legitimate' claims, implying a willingness to waive the liability cap under the U.S. Federal Oil Pollution Act 1990 (OPA) 'but not lose sight of it.'[7] However, provided that numerous Congress members felt uncertain whether claims beyond BP's liability limit will suffice, President Obama exerted enormous pressure on BP to 'set aside whatever resources are required…as a result of [BP's] recklessness'[8] but also to set up an independent claims facility for victims. Consequently, BP established a $20 billion irrevocable Trust financed by incremental payments, to facilitate valid individual and business claims under the Gulf Coast Claims Facility (GCCF).[9]

Arguably, the GCCF was insufficient, since the total number of claims, and hence the total amount of payable compensation, was almost impossible to calculate given the magnitude of the spill and the uncertainties associated with it. Nevertheless, the overall efforts by BP to pay compensation prompted the Congressional Research Service to report that BP accepted liability in *Deepwater Horizon* through the paying of OPA-compensable and OPA non-compensable claims, but for which BP could be liable for to satisfy harmed individuals, businesses and States.[10] This, coupled with BP's 'moral

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4 U.S. Judicial Panel on Multidistrict Litigation, *In Re: Oil Spill by the Oil Rig Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, *'Transfer Order'*, 10 August 2010, *at* <http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/MDL_Transfer_Order.pdf> (accessed 12 May 2018) [hereinafter 'Transfer Order'].

5 Santore, J, "The Gulf of Oil" 218 *National Geographic* (2010) 28, 30.

6 U.S. District Court Eastern District of Louisiana, *Complaint of the United States of America v BP,* Case 2:10-cv-04536, 2, 15 December 2010, at <https://www.epa.gov/sites/production/files/2013-10/documents/deepwater-cp121510.pdf> (accessed 12 May 2018).

7 The Economist, *Black storm rising*, 6 May 2010, at <http://www.economist.com/node/16059982> accessed 12 May 2018.

8 White House, Obama, B, *Remarks by the President to the Nation on the BP Oil Spill*, 15 June 2010, at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-nation-bp-oil-spill> accessed 12 May 2018.

9 University of Essex, Ong, DM, REPORT: *Remedying Oil Spills in the Niger Delta: Systemic Failure or Systemic Abuse of Environmental Law?*, 64-111, at <http://www.essex.ac.uk/ebhr/documents/niger-delta-report.pdf> (accessed 12 May 2018).

10 U.S Government Accountability Office, *Deepwater Horizon Oil Spill: Actions Needed to Reduce Evolving but Uncertain Federal Financial Risks*, 24 October 2011, 14, at<http://www.gao.gov/assets/590/585875.pdf> (accessed 12 May 2018) [hereinafter 'GAO-12-86'].

obligation'[11] to compensate affected individuals, suggests that BP has been forced, rather than volunteering, to accept liability in responding to the incident.

Following the GCCF's closure, further questions have been raised concerning the operation's compensatory effects on injured parties, albeit BP paid $6,667 million to individuals and businesses through its operation.[12] Therefore, in *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in Gulf of Mexico on April 20, 2010,* the Economic and Property Damages Settlement Agreement,[13] between BP and the Plaintiffs' Steering Committee, was approved. Through the Court-Supervised Settlement Program, BP estimated the payment of approximately $7.8 billion, extending its liability to cover claimants who are not 'class members',[14] or opt out of the class settlement, via the BP Claims Program, which operates pursuant to OPA 1990, based on the polluter pays principle.

Additionally, BP has filed an acceptance-of-liability statement[15] as a responsible party of an offshore facility, liable for 'all removal costs plus $75 million' (OPA § 1004(d) (33 U.S.C. § 2704)) for natural resource and economic damages. Such a limitation amount is perhaps useless in large-magnitude oil spills like *Deepwater Horizon*, because they can result in monetary damages extensively exceeding such limits. Nevertheless, since §2704(c) OPA does not apply in cases involving, amongst others, gross negligence or wilful misconduct, it is thus unsurprising that BP had later voluntarily waived the $75 million statutory limit, given the 'regulatory violations'[16] by the company's management personnel.

Although BP denied any gross negligence on its part,[17] internal investigations into BP's communication systems revealed that the well was experiencing drilling problems which adversely affected the well's ability to control the oil.[18] In fact, the drilling process was far behind schedule; every day the drilling was delayed, BP incurred losses exceeding $500,000. This factor arguably urged BP to marginalise its safety and compliance requirements and, to avoid incurring further delay and expense, decided to drill the well 'the fastest possible way'[19]. Yet, the potential of a blowout doubled per every decision that was made to save costs. Moreover, as a UK company bound by the provisions of the Companies Act 2006 (c.46), particularly Section 172, BP's directors should have been more cautious in the degree of supervision applied on the subcontractor's operations onsite.[20]

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[11] McTyre, N, "Protecting Future Claimants in the BP Oil Spill Matter" *SSRN* (2011) *at* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914491> (accessed 12 May 2018).

[12] Congressional Research Service, JL Ramseur, REPORT: *Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments,* 8, 17 April 2015, *at* <https://www.fas.org/sgp/crs/misc/R42942.pdf> (accessed 12 May 2018).

[13] U.S. District Court, Eastern District of Louisiana, *Notice of Filing of the Economic and Property Damages Settlement Agreement as amended on May 2, 2012, and as Preliminarily Approved by the Court on May 2, 2012*, 2:10-md-02179-CJB-SS, 2, 3 May 2012, *at* <http://www.laed.uscourts.gov/sites/default/files/OilSpill/5.pdf> (accessed 12 May 2018).

[14] For a definition of a "class member", refer to U.S. District Court Eastern District of Louisiana (*Ibid*), 3 (Section 1).

[15] U.S. District Court, Eastern District of Louisiana, *Statement of BP Exploration & Production Inc. Re Applicability of Limit of Liability under Oil Pollution Act of 1990*, 2:10-md-02179-CJB-SS, 18 October 2010, *at* <http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/BPStatement.pdf> (accessed 12 May 2018).

[16] Griggs, JW "BP Gulf of Mexico Oil Spill" 32(1) *Energy Law Journal* (2011) 57-80, 68.

[17] U.S. District Court, Eastern District of Louisiana, *supra* nt 15, 1-2.

[18] Bourne, JK, "The Deep Dilemma" 218 *National Geographic* (2010) 40.

[19] *Ibid*, 45.

[20] Alexander, R, "BP: Protection of the Environment is now to be Taken Seriously in Company Law" 31(9) Co Law (2010) 271-273.

1. A superficial response?

BP's initial response to the damaged well has been criticised as inadequate, because it merely attempted to cap the leakage point when it could have sought for assistance[21] and failed to prevent the oil from reaching the land.[22] Conversely, the U.S. Federal Government and BP's corporate responses to oil spill clean-up, remediation and compensation have been characterised as representing 'international best practice'[23] which should be subsequently followed. Notably, BP's refusal to pay a dividend to its shareholders could be justified as responding to pressure by the U.S. Government. However, BP's reputation should not be overlooked; had BP chosen to pay the dividend, it would portray to the public that the incident was part of its 'usual' running of the business.[24] Overall, it seems that BP showed a clear willingness to respond to the incident and compensate victims, yet the extent to which the courts have regarded this is rather minimal.

It is perhaps fortunate that the responsible party for the oil spill was a giant company like BP, because smaller oil companies are unlikely to have the resources for such a responsibility. Oil spills of the magnitude of *Deepwater Horizon* can financially exhaust the parties involved if they do not go insolvent, not to mention that only a fractional number of victims would be compensated, counter to the many compensated victims following *Deepwater Horizon*. Hence, it has been correctly stated that 'BP's unusually deep pockets made appropriate compensation feasible.'[25]

B. U.S. federal government

With regard to the response by the U.S. Federal Government, it has rightfully been argued that *Deepwater Horizon* was the 'first challenge'[26] for the oil spill response and containment network intended under the OPA. The Federal Government's claims for response, pollution removal and cleanup rose from $581 million to $626.1 million within approximately seven months. The Government Accountability Office was concerned that the total expenditures for the *Deepwater Horizon,* under the government-maintained Oil Spill Liability Trust Fund, could exceed $1 billion.[27] Had this happened, the Government's ability to respond to the ongoing impacts of the oil spill could be adversely affected.[28] Thereby, members at the 111th Congress with the Government Accountability Office proposed for the removal of the $75 million expenditure cap, dependant on BP's

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21 *Ibid.*

22 The New York Times, Robertson, C and Lipton, E, *BP Is Criticized Over Oil Spill, but U.S. Misses Chance to Act*, 30 April 2010, *at* <http://www.nytimes.com/2010/05/01/us/01gulf.html?pagewanted=all&_r=0> (accessed 12 May 2018).

23 Ong, *supra* nt 9, 102.

24 Alexander, *supra* nt 20, 272.

25 Viscisi, WK and Zeckhauser, RJ, "Deterring and Compensating Oil Spill Catastrophes: The Need for Strict and Two-Tier Liability" *Vanderbilt Law and Economics Research Paper No. 11-27* (2011) *at* <http://ssrn.com/abstract=1866391> (accessed 12 May 2018).

26 Stefankova, I, "International Regulation v National Regulation on Offshore Oil Exploitation – the USA as an Example" 3 *ELSA Malta Law Review* (2013) 126-139, 136.

27 U.S. Government Accountability Office, REPORT: *Deepwater Horizon Oil Spill: Preliminary Assessment of Federal Financial Risks and Cost Reimbursement and Notification Policies and Procedures*, 12 November 2010, 36, *at* < http://www.gao.gov/assets/100/97169.pdf> (accessed 12 May 2018) [hereinafter 'GAO-11-90R'].

28 U.S. Government Accountability Office, REPORT: *Deepwater Horizon Oil Spill: Update on Federal Financial Risks and Claims Processing*, 18 April 2011, 30, *at* <http://www.gao.gov/assets/100/97443.pdf> (accessed 12 May 2018) [hereinafter 'GAO-11-397R'].

assurance that it will pay all legitimate claims, or amended where financial recovery can be assured. Overall, this reveals a potential weakness and implication when the U.S. regime is applied to unprecedented disastrous oil spills.

Alternatively, it could be argued that the U.S. regime is capable of tackling large spills, since it encapsulates BP's criminal and civil liability for the oil spill. Indeed, even if an international convention was in place, it will still be periodically amended, because international environmental and energy rules are dynamic instruments, which require gradual amendments to respond to their evolving nature. On another perspective, had the oil spill drifted to cause pollution damage to the Mexican shores of the Gulf of Mexico, the U.S. Government would be the prime body involved with response, cleanup and remediation of environmental damage, not BP, consequently raising international law issues.[29] Arguably, had a global regime been enforced with specified amounts of liability, the U.S. Government would not be concerned about the continuous loss of funds, because BP's liability would have been fixed under the control of a unified regime. Hence, it has rightfully been argued that the involvement of international environmental law in enforcing an international regime has become a matter of urgency;[30] *Deepwater Horizon* has revealed the weakness of coastal States, which face fiscal pressure from the petroleum industry, to prevent and defend against such catastrophic spills.

With regard to the U.S. Federal Government's Claims, following pursuit by the US Department of Justice, BP accepted liability as a responsible party for causing natural resource loss and destruction of over $75 million (33 U.S.C. §2701(20) and §2702(b)(2)), contingently exposing BP to unlimited removal costs and damages (Section 1017(f)(2) OPA 1990, 33 U.S.C. §2717(f)(2); §2717(b); Section 1002(a) OPA, 33 U.S.C. §2702(a)). In *United States of America v BP Exploration & Production Inc et al*, BP, as an owner and operator of the offshore facility from which the oil had been discharged, was found liable for civil penalties under Section 311(b)(7)(A) Clean Water Act (CWA 33 U.S.C. §§1321(b)(7)). In addition, BP agreed to pay $525 million for violating Sections 10(b) and 13(a) of the Securities Exchange Act 1934 (*Securities and Exchange Commission (SEC) v BP Plc*).[31]

Overall, whilst U.S. courts settled claims awarding greater damages than English courts,[32] it has been argued that the U.S. authorities seemed to systematically marginalise BP's corporate interests for the broader public interest.[33] This perhaps justifies BP's temporary suspension by the U.S. EPA from entering into new contracts with the US government until it had demonstrated compliance with the Federal business standards.[34] This contract-suspension was arguably used as a weapon against BP, causing it to pay compensation before any official court decision, which posed a contingent financial risk to BP of government monies and opportunities to ensure future earnings. Although the ultimate removal of this suspension highlights that the U.S. Government is satisfied with

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[29] Ong, DM, *Between State Retreat and Intervention: Regulating Environmental Responsibility for Multinational Oil Companies*' paper presented at the Workshop on International Law, Natural Resources and Sustainable Development, Scarman House, Warwick University, 11-13 September 2013, 5.

[30] Beyerlin, U and Marauhn, T, *International Environmental Law* (Hart Publishing, Oxford 2011), 442.

[31] U.S. Securities and Exchange Commission, U.S. District Court Eastern District of Louisiana*, Securities and Exchange Commission v BP plc.* 2:12-cv-02774 (E.D. La. Nov. 15, 2012, *at* <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-231.pdf> (accessed 12 May 2018).

[32] Alexander, *supra* nt 20, 272.

[33] Hannigan, B, "Board failures in the financial crisis: tinkering with codes and the need for wider corporate governance reforms: Part 2" 33(2) *Comp. Law* (2012) 35, 39.

[34] U.S. Environmental Protection Agency, *BP Temporarily Suspended from New Contracts with the Federal Government*, 28 November 2012, *at* <http://yosemite.epa.gov/opa/admpress.nsf/9cee789b9acd641685257720005951b7/2aaf1c1dc80c969885257abf006dafb0!opendocument> (accessed 12 May 2018).

BP's response, this is conditional upon an annual assessment of BP's compliance as to ethics, corporate governance, and process safety.[35]

Corporate liability for BP had since been ongoing; if held strictly liable for each barrel of oil unlawfully discharged into the Gulf of Mexico (CWA, 33 U.S.C. §§1251 *et seq*), for an amount to be determined by the court (Section 311(b)(7) CWA, 33 U.S.C. §1321(b)(7)), BP would face severe financial implications. Moreover, in a recent historic settlement, the oil giant managed to agree with the US Federal Government at a staggering $18.7 billion settling outstanding civil penalties and natural resource damages by the U.S. Federal Government and State claims. This agreement is currently being incorporated into a 'proposed consent decree that will be submitted for public comment and then court approval.'[36] If accepted, the figure will sum BP's oil spill charges to $53.8 billion,[37] an amount approximately eleven times greater than Exxon's corporate liability in the 1989 *Exxon Valdez* oil spill.[38]

1. A superior response?

Arguably, the OPA 1990 regime is a strong regime for the global legal community to adopt, although *Deepwater Horizon* has challenged its liability limits. It is perhaps the offshore oil industry and its legal decision makers' fault that never expected for an oil spill of this magnitude to occur. Moreover, BP's facility-specific oil spill response plan required under the OPA 1990 (33 U.S.C. § 1321(j)(5) (2006)) for containing the spill proved inadequate, while the effectiveness of the OPA regime *vis-à-vis* the spill proved ineffective in making BP liable. BP was forced to accept liability and pay compensation well before official court decisions due to unofficial pressure from the Obama Presidential Administration coupled with the need to preserve its reputation.[39] Nevertheless, the U.S. Government's response has not been 'unduly harsh'[40] on BP, but perhaps understandable. BP's insensitive negligence in oil exploration and production delineates the unfair apportionment of liability, which was at the expense of the continuous sufferance and pollution damage to U.S. seas, coastline and to its nationals' deaths. Therefore, the superior response by the U.S. Government was a logical consequence given the prolonged government financial expenditure. Had an international regime been enforceable before the oil spill, liability would be laid at the responsible parties' feet without financially exhausting the State located nearby the offshore oil installation.

Arguably, had the incident occurred in the waters of a lower economically developed State instead of the Gulf of Mexico, the matter would not have engaged the same worldwide interest and popularity. Contrastingly, Tromans and Norris have argued that had *Deepwater Horizon* occurred west of Shetland, the spill and BP's liability for it would 'inevitably be subjected to far higher levels of public scrutiny.'[41] However, this is

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35 Oil & Gas Journal, Snow, N, *EPA lifts post-Macondo contract suspension in agreement with BP*, 14 March 2014, *at* <http://www.ogj.com/articles/2014/03/epa-lifts-post-macondo-contract-suspension-in-agreement-with-bp.html> (accessed 12 May 2018).

36 U.S. Department of Justice, *Fact Sheet on Agreement in Principle with BP*, 1, *at* <http://www.justice.gov/opa/file/625141/download> (accessed 12 May 2018).

37 The Economist, *A costly mistake*, 2 July 2015, *at* <http://www.economist.com/news/business-and-finance/21656847-costly-mistake> (accessed 12 May 2018).

38 Congressional Research Service, Ramseur, JL, REPORT: *Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments*, 17 April 2015, 6, *at* <https://www.fas.org/sgp/crs/misc/R42942.pdf> (accessed 12 May 2018).

39 Ong, *supra* nt 9.

40 Alexander, *supra* nt 20, 272.

41 Tromans, S and Norris, J, "What if Deepwater Horizon occurred west of Shetland?" 28(7) International Energy Law Review (2010) 7, 220-227.

arguably doubtful, given the tremendous corporate accountability imposed on BP by the U.S. and the countless claims for compensation by victims of pollution damage. Nonetheless, it is apparent that the current legal framework surrounding oil spills from offshore installations likens a 'piecemeal' system where there is no concrete international regime. Since domestic laws regulating offshore oil operations in States have been criticised as inadequate (as in the case in question),[42] poorly developed, or even abused,[43] an international regime apportioning liability and compensation is highly desirable to effectively tackle future catastrophic oil spills. This can make oil spill responses unreasonably inconsistent and, potentially unfair and unjust. This is in stark contrast to the international legal framework on civil liability and compensation for oil pollution damage by the oil tanker industry, examined below. How, if possible, could this apply to oil spills from offshore oil installations?

II. Civil Liability System for Oil Pollution Damage by Ships

> *…the international regime…is limited to oil spills from…(oil tankers). This deficiency highlights the need for a more comprehensive oil pollution liability regime, since the current international regime would not have covered the Deepwater Horizon incident.*[44]

The international liability system currently in place regulates spills from oil tankers under a modern international tort law mechanism,[45] developed under the auspices of the International Maritime Organization (IMO), to promote the 'universal and uniform application'[46] of instruments to prevent ship pollution, ensuring effective and sustainable shipping. Four Conventions have been developed dealing with pollution damage from oil tankers of which only two are in force, the 1992 International Convention on Civil Liability for Oil Pollution Damage, and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

A. The three-tier system of compensation

The primary tier of compensation, the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 CLC),[47] is based on strict liability (Article VI(1)) fairly channeled against a registered tanker owner (Article III(1)) caused by loss or pollution

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[42] Rochette, J, 'Towards an international regulation of offshore oil exploitation' - Report of the experts workshop held at the Paris Oceanographic Institute on 30 March 2012 Working Papers N°15/12 (IDDRI, 30 March 2012) 6, *at* <http://www.iddri.org/Publications/Towards-an-international-regulation-of-offshore-oil-exploitation-Report-of-the-experts-workshop-held-at-the-Paris-Oceanographic-> (accessed 12 May 2018).

[43] See, for example, Ong, D.M., n.d. Remedying Oil Spills in the Niger Delta: Systemic Failure or University of Essex, Essex Business and Human Rights Project, REPORT: *Corporate liability in a new setting: Shell and the changing legal landscape for the multinational oil industry in the Niger Delta,*64-111, *at* <http://www.essex.ac.uk/ebhr/documents/niger-delta-report.pdf> (accessed 12 May 2018).

[44] Schoenbaum,TJ, "Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon" 24(3) *Journal of Environmental Law* (2012) 395: Schoenbaum recognises the "deficiency" in the international legal community, which lacks a "comprehensive" liability regime that would encompass oil spills from offshore installations.

[45] Birnie, P, Boyle, A and Regwell, C, *International Law and the Environment* (3rd ed, OUP, Oxford 2009), 184.

[46] International Maritime Organisation, *Strategic Plan for the Organization (For the Six-Year Period 2012 to 2017*, Resolution A.1037(27), 20 December 2011, 1.1, *at* <http://www.imo.org/About/strategy/Documents/1037.pdf> (accessed 12 May 2018).

[47] International Oil Pollution Compensation Funds, *Liability and Compensation for Oil Pollution Damage*, (2011), *at* <http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf> (accessed 12 May 2018).

damage of persistent oil from his ship (Article I(6)). Although Article I(6)'s compensatory limitation is a relatively restricted provision, International Oil Pollution Compensation Funds (IOPC Funds) damages are based on the actual amount, rather than 'speculative… theoretical calculations'.[48] This is at variance with the U.S. Federal Oil Pollution and Clean Water Acts, which provide for unlimited financial liability, potentially exposing BP to severe monetary implications. Moreover, the channeling of liability is perhaps an unfair apportionment in responsibility, since charterers should also be careful provided they are morally accountable for their corporate activities.[49] This creates a potential imbalance in the allocation of the financial compensation between tanker owners and oil cargo interests, because the tanker owner will be liable unless the damage was not the result of his own fault (Articles III and V).

Claimants under this primary tier of compensation are provided with a compensatory amount that is proportional to the amount that they have claimed for (Article V(4)). Limits on compensation and liability are applicable, dependent on tanker gross tonnage; for a tanker less than or equal to 5,000 gross tonnage, 4.51 million Special Drawing Rights (SDR)[50] provides the maximum limit. For tankers with more than 5,000 gross tonnage, 4.51 million SDR with a 631 SDR per additional gross ton and a maximum of 89.77 million SDR. It should, however, be noted that the tanker owner cannot limit his liability if, for instance, he committed an act or omission with the intention to cause pollution damage, or when he acted recklessly and knew that pollution damage would be a potential consequence arising from his act or omission (Article V(2)).

Additionally, compulsory insurance for ship-owners carrying more than 2,000 tons of oil in bulk as cargo (Article VII(1)), or other financial security (Article VII(4)), ensures the ship-owner always has available a financial endorsement contingent on approval of the claim. Indeed, the cooperation of Protection and Indemnity Associations with the IOPC Funds, in assessing each incident and making joint decisions as to claims settlements, ensure a 'consistent and effective approach'[51] in this regime.

Overall, the oil tanker regime is global and to a great extent far-reaching; for instance, Article I(8) contains a relatively wide definition of 'incident' that ensures compensation from a mere 'grave and imminent threat' that pollution damage will be caused. Moreover, the fact that the oil tanker regime requires compulsory insurance for ships containing a certain amount of oil cargo (Article VII(1)), helps owners to comply with the provisions under the 1992 CLC. Consequently, although the oil tanker regime might not be a perfect one to adopt for the offshore oil installations industry, in comparison to the current fragmented regime on oil spills from offshore oil installations, the oil tanker regime is arguably far more structured, oriented and uniform in its application.

Arguably, had a similar system to the 1992 CLC been applicable in the offshore oil industry, the extent of financial damages which BP could be exposed to, would be

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[48] Angélique de La Fayette, L, « New Approaches for Addressing Damage to the Marine Environment" 20(1) *The International Journal of Marine and Coastal Law* (2005) 167, 201.

[49] Wu, C, *Liability and Compensation for Bunker Pollution* 33(4) *Journal of Maritime Law and Commerce* (2002) 553, 558.

[50] International Monetary Fund, *'SDR Valuation*, *at* <https://www.imf.org/external/np/fin/data/rms_sdrv.aspx> (accessed 12 May 2018): SDR is a currency calculated by the IMF on a daily basis.

[51] The International Petroleum Industry Environmental Conservation Association (IPIECA)/The International Tanker Owners Pollution Federation Limited (ITOPF), *Oil Spill Compensation: A Guide to the International Conventions on Liability and Compensation for Oil Pollution Damage*, February 2007, 1, 8, *at* <http://www.itopf.com/knowledge-resources/documents-guides/document/oil-spill-compensation-a-guide-to-the-international-conventions-on-liability-and-compensation-for/> (accessed 12 May 2018).

considerably lower. This may have been beneficial for BP, though not for the U.S. Government, because although BP would incur damages, the amount of liability and compensation would not be unlimited. However, although the oil tanker regime is not applicable to the offshore oil industry (Articles I, III(1)), the deterrent effect should operate in offshore installations; companies responsible for 'causing immense environmental and economic harm'[52] to States of which companies exploit their natural resources, should face a high amount of liability as a result of their own negligence or misconduct.

The secondary tier of compensation, the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 FC),[53] automatically binds a Member State which ratifies the 1992 CLC (Article 2(2)), acting as a supplementary provision of compensation funds to the tanker owner where the 1992 CLC is inadequate (Article 2(1)). Compensation limits are not dependent on tanker size but provide for 203 million SDR including the value paid by the tanker owner or his insurer under the 1992 CLC. If this is insufficient to meet all valid claims, the compensation will be proportionately reduced to treat all claimants equally (Article 4(5)).

The third (optional) tier of compensation, the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Supplementary Fund)[54] provides additional compensation of 750 million SDR, including the amounts payable under the aforementioned two Conventions (Article 4(2)(a)). This delineates the advantage of the oil tanker regime; the compensation amount will be adequate for most damage claims, compensation payments will rarely be proportionately reduced and consequently, claimants may receive the whole of their claim. This proportional reduction may, however, be insufficient if applied to an incident as catastrophic as *Deepwater Horizon*. Moreover, given that only 31 States are parties to the Supplementary Fund Protocol as in August 2017, it is arguably doubtful that this tier of compensation will prove useful to the non-contracting State Parties in the event that an incident of the magnitude of *Deepwater Horizon* occurs.

B. Small tanker oil pollution indemnification agreement 2006 (STOPIA 2006)[55] and tanker oil pollution indemnification agreement 2006 (TOPIA 2006)[56]

These agreements are part of a voluntary 'compensation package'[57] designed to manage the enhanced financial exposure of oil receivers under the Supplementary Fund. STOPIA provides 20 million SDR limitation amount (Clause IV(C)(1)), where the ship does not exceed 29,548 Tons (Clause III(B)(1)), is insured by an International Group of Protection and Indemnity Clubs' member (Clause III(B)(2)) and is reinsured through Pooling arrangements (Clause III(B)(3)). TOPIA provides 50% contribution of the compensable amount under the Supplementary Fund (Clause IV(C)), where the ship is insured by an International Group of Protection and Indemnity Clubs' member (Clause III(B)(1)).

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52 U.S. District Court Eastern District of Louisiana, *Complaint of the United States of America v BP,* Case 2:10-cv-04536, 2, 15 December 2010, at <https://www.epa.gov/sites/production/files/2013-10/documents/deepwater-cp121510.pdf> (accessed 12 May 2018).

53 International Oil Pollution Compensation Funds, *supra* nt 47.

54 *Ibid*.

55 International Oil Pollution Compensation Funds, *Small Tanker Oil Pollution Indemnification Agreement 2006 and Tanker Oil Pollution Indemnification Agreement 2006*, 2006, *at* <https://www.iopcfunds.org/about-us/legal-framework/stopia-2006-and-topia-2006/> (accessed 27 May 2018).

56 *Ibid*.

57 Wolfrum, R, "Marine Pollution – Compensation or Enforcement?" *in* Basedow, J and Magnus, U, eds, *Pollution of the Sea – Prevention and Compensation* (Springer 2007), 135.

Albeit liability and compensation seem structured under these agreements, some are not obligatory potentially creating a lack of consistency in or acting unfairly towards the oil receivers' financial exposure in States that have ratified the 1992 CLC and the 1992 Fund Convention but not the Supplementary Fund or the STOPIA/TOPIA 2006.

The USA is a significant maritime State that has not ratified these agreements, perhaps because it prefers to impose its own liability standards. Nonetheless, this stresses the lack of a global unanimous consensus in the oil tanker compensation regime; a negative factor to be considered in assessing whether a similar type of regime should be applied to offshore oil installations. Against the current imperfect and non-uniform, yet structured, framework pertaining to the oil tanker industry, it is arguably essential for the offshore oil industry to establish a regime that is unified under the support of maritime superpower States and balances the interests of all the parties involved.

C. Is the 'ultimate unification of the current dual system'[58] the ideal solution?

Determining whether offshore installations are encapsulated within the 1992 CLC is essential to clarify whether a ship-owner is solely liable, can limit its liability, or whether insurance is compulsory to provide sufficient financial security in the case of a blowout. On the one hand, the U.S. regime under the OPA has been described to be 'broader and more comprehensive',[59] encompassing oil spills from offshore oil installations and thus the *Deepwater Horizon* incident. Contrastingly, the oil tanker regime limits its application to oil tanker ship pollution incidents (Article 1 CLC 1992) and thus excludes offshore oil installations.

To assimilate the oil tanker regime to offshore oil installations would result in 'little success'[60] because oil tankers and offshore oil installations are essentially distinct; offshore units and installation types differ. Notably, the tankers' maximum oil carriage capacity is known, making the risk of prospective spillage calculable. Contrastingly, it is impossible to make such a calculation for oil spills resulting from offshore oil installations since, although the storage capacity of the installation is defined when it is constructed, the amount of oil that can be spilled directly from the well drilled into the marine environment is unpredictable.[61] Henceforth, international environmental damage caused can be exacerbated through the enhanced duration and magnitude of oil spills from offshore oil facilities.

Furthermore, the right of interpreting the 1992 CLC and Fund Convention is for each Member State, which may cause 'disputes between the member states and the IOPC Fund'.[62] Additionally, Japan's significant contribution to the IOPC Fund potentially increases its ability to influence decisions. This may create a fear of potential distortion of competition amongst companies in Member States that may strongly oppose Japanese

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58 Kim, I, "A Comparison between the International and US regimes regulating oil pollution liability and compensation" 27(3) *Marine Policy* (2003) 265, 274.

59 Schoenbaum, *supra* nt 44, 395.

60 United Nations Environment Program, Scicluna, N, *A Legal Discussion on Civil Liability for Oil Pollution Damage Resulting from Offshore Oil Rigs in the light of the Recent Deepwater Horizon Incident*, UNEP(DEPI)/MED WG.384/INF.6, 6 June 2013, 54, *at* <http://www.rempec.org/admin/store/wyswigImg/file/News/Forthcoming%20Meetings/Offshore%20Protocol%20WG%20(Malta,%2013-14%20June%202013/WG%20384-%20INF.6%20-%20IMLI%20Doc%20%20Dr%20Sciculna%20%20&%20%20Dr_%20Guiterrez%20-%20E.pdf> (accessed 12 May 2018).

61 Allen, JM, "A Global Oil Stain - Cleaning Up International Conventions for Liability and Compensation for Oil Exploration/Production" 25(1) *Australian and New Zealand Maritime Law Journal* (2011) 90, 104.

62 Cho, D, "Limitations of 1992 CLC/FC and Enactment of the Special Law on M/V Hebei Spirit Incident in Korea" 34(3) *Marine Policy* (2010) 447, 450.

proposals to the IOPC Fund, but which are nevertheless accepted.[63] Arguably, if an international regime is to be enforced, it should specify rules on equality in decision-making to avoid possible influencing of superpower States at the expense of the less economically developed States.

Moreover, the total amount of compensation payable under the 1971 and 1992 Funds (the 1971 Fund being the predecessor to the 1992 Fund) for 135 incidents was U.S. $860 million.[64] In contrast, the single incident of *Deepwater Horizon* has given rise to figures in billions of U.S. dollars incurred by BP. Hence, had such a regime been applicable to *Deepwater Horizon*, the aforementioned value would have clearly been inadequate to provide adequate compensation to its victims. Further, even when the limitation limits were reviewed and subsequently increased under the 1992 CLC and FC to U.S. $310 million, this figure is still insufficient to cover BP's civil liability and compensation under the incident.

However, it is possible to argue that that is the role of the Supplementary Fund; to cover up in cases where the compensation payable under the 1992 CLC and FC is inadequate. Nonetheless, this argument is unsustainable for two reasons. Firstly, the legal framework under the Supplementary Fund is not enforceable in all States Parties to the 1992 CLC and FC since its ratification/enforcement is optional. The Supplementary Fund can only be applicable in incidents that have occurred after the Supplementary Fund Protocol has been enforced. Therefore, retrospective application of its legal framework by States is forbidden.[65] Secondly, the compensation available under the Supplementary Fund has also proven inadequate in certain landmark cases.[66]

If the oil tanker civil liability and compensation regime has these disadvantages, why have States preferred acceptance of the 1992 Protocols to the U.S. OPA regime? The simplest answer is that the 1992 Protocols provide for costs that would otherwise be unbearable nationally or regionally.[67] Arguably, the vast compensatory and liability amounts continuously borne by BP following *Deepwater Horizon* evince this. Overall, strict liability, compulsory insurance, the ship-owners' entitlement to limit their liability, and the channeling of liability against the registered owner, under the 1992 CLC and Fund Convention, have been advantageous to claimants who are unable to finance expensive litigation.

Finally, this article discusses the partial effectiveness of the current regulatory framework: is there a need to implement and enforce a harmonised international regime?

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63 Kim, *supra* nt 58, 268.

64 Jacobsson, M, "The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage" *in* Basedow, J and Magnus, U, eds, *Pollution of the Sea – Prevention and Compensation* (Springer 2007) 139.

65 International Oil Pollution Compensation Funds*, The International Regime for Compensation for Oil Pollution Damage Explanatory Note*, August 2017, *at* <http://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/explanatory_note.pdf> (accessed 12 May 2018) [hereinafter 'Explanatory Note'].

66 Jacobsson, *supra* nt 64, 145.

67 Wall, JF, "Intergovernmental Oil Pollution Activity and Compensation" 17(5) *Marine Policy* (1993) 473, 477.

III. Prospects for the Adoption of an International Civil Liability and Compensation Scheme for Offshore Oil Pollution

In a technologically advanced and advancing society, regulation alone will not be sufficient, since it will likely be directed to yesterday's problems.[68]

The current 'array of regimes and international agreements'[69] accentuates that an international civil liability and compensation regime for oil pollution damage would aid the offshore oil exploration and exploitation industry by adding certainty, clarity and harmony. This has the potential to alleviate the complexity of the current framework. The prospects for adopting an international civil liability and compensation scheme for offshore oil pollution incorporate two main dimensions, international and regional, each of which will be discussed in turn, followed by the way forward for the international legal community and the author's proposals for an international regime.

A. The international dimension

The need to adopt a global framework tackling transboundary offshore oil pollution was regarded at the sixtieth session of the IMO Legal Committee.[70] Following the *Montara* incident, the Indonesian delegation made a proposal (LEG/14/1) during the Committee's ninety-seventh session.[71] Although a uniform global instrument seemed to be the 'preferred solution',[72] the IMO Legal Committee prompted for an intersessional approach by the Indonesian Government, due to 'procedural and substantive' hurdles.[73] Overall, there is a general reluctance in implementing an international liability and compensation regime, which is arguably unjustified; energy developing States need a 'safety blanket' that offshore oil operators will be financially accountable to their governments for future oil spills.[74]

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[75] provides for this, as under Article 235(1) (Part XII UNCLOS) States are responsible, under international law, to protect and preserve the marine environment. This begs the question of whether an international regime governing oil spills from offshore oil

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[68] Viscisi and Zeckhauser, *supra* nt 25: If the international legal community tries to establish an international regime to regulate pollution damage resulting from oil spills from offshore installations, based on the worst incidents up-to-date like *Deepwater Horizon*, this will be insufficient to address the issue in question. Given that engineering and drilling technologies improve day-by-day, we cannot rely on past incidents, but think of potential future incidents and the potential magnitude they could have. To do otherwise will result in a greater *Deepwater Horizon*; an incident that was not predicted but was nevertheless the largest marine oil spill in American history.

[69] Allen, *supra* nt 61, 107.

[70] International Maritime Organization, Maritime Environment Protection Committee, *Report of the Marine Environment Protection Committee on its Sixtieth Session*, 12 April 2010, 1.7, *at* <http://www.gc.noaa.gov/documents/gcil_imo-mepc_60-22.pdf> (accessed 12 May 2018).

[71] I Legal Committee 'Proposal to add a new work programme item to address liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation' (IMO, 10 September 2010) <http://cil.nus.edu.sg/wp/wp-content/uploads/2013/03/Indonesias-proposal-for-a-new-programme-to-develop-an-international-regime.pdf> (accessed 12 May 2018).

[72] International Maritime Organization Legal Committee, *One Hundredth Session of the IMO Legal Committee*, 18 April 2013, 4, *at* <http://comitemaritime.org/Uploads/Publications/ Documents% 20of%20Interest/One%20Hundredth%20Session%20of%20the%20IMO%20Legal%20Committee%205%20(1).pdf> (accessed 12 May 2018).

[73] Stefankova, *supra* nt 26, 132.

[74] Allen, *supra* nt 61, 104.

[75] United Nations, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, 397; 21 ILM 1261.

installations is needed, because there is none having a globe-wide, uniform and consistent application. Article 235(2) affords States with a wide discretion to introduce national laws concerning compensation following marine environmental pollution; this legal requirement is not on corporations, like BP in *Deepwater Horizon*.

UNCLOS is a success and marks a significant departure from the 1958 Geneva Conventions by placing States under an express duty to protect, rather than freely allowing them to pollute, the marine environment. However, the UNCLOS regime is potentially problematic, characterised by an element of generality and incomprehensiveness.[76] In particular, the domestic laws enacted under Article 235 cannot be uniformly harmonised, because some national systems are different or even inadequate compared to others. For example, in *Deepwater Horizon* the national enforcement against BP by the U.S. Federal Government was persistently strong.

The prospects are still to come, as 'States shall cooperate' (Article 235(3)) in implementing and furthering development of international law regarding compensation and liability from offshore installations. Although UNCLOS provides for this under Article 235, there is no actual universal scheme but there should, arguably, be one; the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE),[77] examined below, is the closest to this, yet this is a regional and unimplemented Convention.

Moreover, Wolfrum has argued that these provisions within UNCLOS are rather 'embryonic'[78] and lack sufficient clarity, precision and strength that an international regime requires. It might have been an impressive regime during the time UNCLOS was negotiated and adopted; however, given the fast-pacing technological advancement in offshore oil drilling over the last few decades, it is submitted that if a global regime is indeed enforced, it should be periodically amended to reflect the continuous technologically advancing nature of the industry.

B. The regional dimension

There have been several regional attempts to regulate civil liability and compensation for oil spills from offshore oil installations, each of which will be discussed in turn. To begin with, the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE) has been characterised as a 'forgotten'[79] attempt to regulate compensation standards of liability. This is rather unfortunate because CLEE has been 'undoubtedly the most important and comprehensive'[80] legal framework on civil liability for oil pollution damage from offshore operations. Article 3 clearly specifies that liability for such damage falls on the installation's operator, subject to explicit exceptions. Moreover, CLEE clearly provides for limited liability, compulsory insurance, and insurance claims. Conversely, Article

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[76] Tanaka, Y, *The International Law of the Sea* (1st ed, CUP 2012), 263.

[77] 16 ILM 1450 (1977).

[78] Wolfrum, *supra* nt 57, 130.

[79] Mediterannean Programme for International Environmental Law & Negotiation, Raftopoulos, E, *Sustainable Governance of Offshore Oil and Gas Development in the Mediterranean: Revitalizing the Dormant Mediterranean Offshore Protocol*, 19 August 2010, *at* <http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=4&ArticleId=29&Article=Sustainable-Governance-of-Offshore-Oil-and-Gas-Development-in-the-Mediterranean:-Revitalizing-the-Dormant-Mediterranean-Offshore-Protocol> (accessed 12 May 2018).

[80] Cornell Law School, Agyebeng, K, *Disappearing Acts – Toward a Global Civil Liability Regime for Pollution Damage Resulting from Offshore Oil and Gas Exploration*, 20 February 2006, 29, *at* <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1026&context=lps_papers> (accessed 12 May 2018).

15(2) permits the Controlling State's court to apply domestic law to determine whether an operator may limit his liability (Article 6(1)), and the amount of that liability (Article 15(2)). Arguably, this does not ensure harmonisation, because each domestic law varies. If, therefore, this international agreement is to be implemented, it is submitted that domestic courts should be provided with a test for interpreting and applying Article 15(2).

CLEE was aimed to apply to specific States with 'coastlines on the North Sea, the Baltic Sea or that part of the Atlantic Ocean to the north of 36° North latitude' (Article 18), incorporating Iceland, Sweden and Norway. Hence, it is like there is already a system in place which merely needs to be fully ratified to be effective, yet it will arguably not secure an unvarying application, because States which fall outside of Article 18 will be unable to enforce the Convention. Moreover, CLEE has six signatory States but no parties at all,[81] thereby remaining unenforceable pursuant to Article 20. However, the reason CLEE has not yet been ratified seems unclear; it could be the lack of enthusiasm (or 'appetite') to ratify it, or that existing bilateral agreements between the concerned States make it unnecessary. Alternatively, State disagreement as to whether the liability limits pursuant to Article 6 should be changed or entirely removed might have been an obstacle in implementing the Convention. Debatably, CLEE is the simplest way for enforcing an international convention for offshore installations, yet its liability limits could be revised and consequently increased.

Had CLEE been applicable to *Deepwater Horizon*, BP as the operator of the Macondo well would incur liability for any subsequent pollution damage (Article 3). Liability could subjectively be limited to 40 million SDR (Article 6(1)), unless the operator had actual knowledge that oil pollution damage would flow from his own act or omission (Article 6(4)). If this regime was applicable to *Deepwater Horizon*, BP would arguably be unable to limit its financial liability because the incident was foreseeable, but also preventable, while BP's 'human errors, engineering mistakes and management failures'[82] were primary contributing factors to the disaster.[83]

Furthermore, the Protocol for the protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil (Mediterranean Offshore Protocol),[84] is 'comprehensive and ambitious'[85] given the increasing offshore exploration and exploitation undertakings in the Mediterranean Sea. Parties must take any precautionary measures to avoid pollution in other jurisdictions (Article 26). In addition, according to Article 27, Parties should adopt procedural rules regarding liability and apportionment of compensation, (Article 27(1)) such that operators pay 'prompt and adequate compensation' (Article 27(2)(a)) and possess some financial security to ensure the payment of compensation should a damaging activity occur (Article 27(2)(b)). Perhaps, an international regime incorporating Article 27 of the Protocol could be ideal as, provided the international

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[81] Foreign & Commonwealth Office, *Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources Status List*, 1977, *at* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270187/30._Oil_Pollution_Damage__1977___Status_list.docx> (accessed 12 May 2018).

[82] Rochette, *supra* nt 42, 6.

[83] See, in particular, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, REPORT: *The Gulf Oil Disaster and the Future of Offshore Drilling*, 2011, chapter 4, *at* <https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf> (accessed 12 May 2018).

[84] Official Journal of the European Union, Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Union and the Republic of Seychelles, OJ 2013 L004/15.

[85] Rochette, *supra* nt 42, 13.

environmental framework is a dynamic instrument, it will need to be occasionally reviewed and assessed 'in the light of contemporary developments.'[86] Consequently, the Mediterranean Offshore Protocol delineates that some offshore oil installation areas may be covered by liability and compensation schemes. However, regional application aside, this Protocol has had minimal ratification.

Moreover, the Kuwait Protocol Concerning Cases of Emergency 1978[87] and Abidjan Protocol Concerning Cases of Emergency 1981[88] are regional-seas protocols to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait Convention)[89] and the Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention).[90] They apply to the Persian Gulf and West and Central Africa respectively. They require States to cooperate to deal with and respond to marine pollution. Arguably, the Kuwait Convention is more advanced than the Abidjan Convention by clearly providing for an implementation of a civil liability and compensation regime for damage resulting either from the pollution of the marine environment (Article 13(1)), or from the violation of the Convention and its protocols (Article 13(b)).

Overall, these various scattered attempts to tackle civil liability and compensation following oil spills from offshore oil installations have arguably been correctly characterised as 'unconvincing and unsatisfactory'.[91] Although they leave States with room for flexibility in their application, the fact that each individual State can develop its own regime minimises harmonisation, which is an essential element to a globally-enforceable regime. For instance, Canada has sought to make its national laws stricter[92] whereas other States' laws are not strict.

In addition, the Offshore Pollution Liability Agreement (OPOL)[93] 1975 effective as of 1 April 2015[94] was an interim measure to the aforementioned CLEE Convention in the form of a private agreement between specific operators of offshore oil and gas facilities, which does not seem to address the urgency for establishing an international regime. It stipulates for strict liability, subject to exceptions (Clause IV(B)), to a limit of U.S. $250 million per incident (Clause IV(A)). Such a figure may be well insufficient to tackle large releases of oil; in *Deepwater Horizon* BP incurred billions of dollars liability, while the prolonged multi-district litigations in Houston[95] and Louisiana[96] exposed BP to additional financial liability.

Arguably, OPOL is an incomprehensive agreement mainly because the definition 'Pollution Damage' (Clause I(13)) fails to cover depreciation in the value of the natural

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86 Scicluna, *supra* nt 60, 48.
87 17 ILM. 526 (1978).
88 20 ILM. 756 (1981).
89 17 ILM 511 (1978).
90 20 ILM 746 (1981).
91 Scicluna, *supra* nt 60, 48.
92 Rozmus, A, 'Modernizing Liability for Offshore Oil & Gas Explorations and Operations' (*Bennett Jones LLP*, 15 August 2013) <http://www.bennettjones.com/Publications/Updates/Modernizing_Liability_for_Offshore_Oil___Gas_Explorations_and_Operations/> (accessed 12 May 2018).
93 13 I.L.M. 1409 (1974).
94 The Offshore Pollution Liability Association, *Offshore Pollution Liability Agreement ("OPOL")*, April 2015, *at* <http://www.opol.org.uk/downloads/OPOL-Agreement-From-1april2015.pdf> (accessed 25 May 2018).
95 US District Court, Southern District Texas, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2185.
96 U.S. District Court Eastern District of Louisiana, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010,* MDL No. 2179.

resources caused by the damage to the natural environment. Likewise, it fails to define 'direct loss'[97] which may lead to uncertainties during the filing of compensation claims. Moreover, it seems to have a limited scope of geographical application; the Preamble refers to pollution damage in offshore facilities 'so used and located within the… "Designated State"' (Preamble) yet the definition of a 'Designated State' does not include the U.S., unless it falls under Clause X amendments for the denomination of another State (Clause I(4)). Contrariwise, OPOL is limited to States around the European area. Hence, OPOL is yet another example of the multiple schemes that have been adopted but like the others, it covers certain areas, leaving other significant maritime regions not encapsulated within these schemes. Furthermore, the one-year time frame within which a claimant may file a claim after the incident (Clause VI) is potentially inadequate; BP received claims for compensation by victims of pollution damage even four years after *Deepwater Horizon*.

C. The way forward

There is a strong outcry for a global instrument regulating offshore exploration and exploitation activities due to the contingent environmental risk of polluting the State in which the installation operates and the neighbouring States.[98]

Clearly, the nature of the current legal framework on offshore oil exploitation is 'fragmented and incomplete'[99] based on diverse treaties and legal instruments. Albeit a similar regime to the oil tanker regime is implemented, it will not entirely face the difficulties in local economic recessions caused by catastrophic oil spills such as *Deepwater Horizon*. Indeed, the limited compensatory amount available for environmental damage under the oil tanker regime potentially makes restoration of the affected marine and coastal environment difficult.

Alternatively, there is the undecided issue of whether strict liability should apply if such a regime is to be enforced with unlimited liability. A regime similar to the IOPC Supplementary Fund regime could be adopted, funded by the offshore oil industry itself, providing an additional layer of compensation that will be adequate to compensate victims in need of greater liability limitation amounts than the fixed ones, set 'as high as possible'.[100] Although this may be a good starting point for enforcing an efficient international regime for offshore activities, oil exploration and production corporations may be unwilling to provide such high funding amounts for the regime.

Moreover, the superpower status of States essential to the enforcement of a global regime may oppose its implementation leading to a lack of uniformity in its application. Indeed, the various scattered regional agreements highlight the urgency for a harmonised global instrument tackling civil liability and compensation for oil spills from offshore installations. Each maritime region may require its own approach based on its 'environmental specifications'[101] which arguably outweighs the need for launching an international regime, yet the enforcement of a relatively flexible international regime could enable its application to those specific areas. Additionally, the challenge faced by States lacking human resources and funds to effectively respond to offshore oil spills, increases the need of adopting a written agreement. The more economically developed

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97 Ehlers, P, "Origins and Compensation of Marine Pollution – A Survey" *in* Basedow, J and Magnus, U, eds, *Pollution of the Sea – Prevention and Compensation* (Springer 2007) 118, 119.

98 Scicluna, *supra* nt 60, 21.

99 Rochette, *supra* nt 42, 1, 6.

100 Scicluna, *supra* nt 60, 55.

101 Stefankova, *supra* nt 26, 138.

States with the offshore oil industry's contributions are therefore essential to 'envisage a unique convention'[102] tackling safety and liability issues. Likewise, an international regime will be more resistant to opposition than domestic or regional laws, which can be more flexible and leave room for maneuver, or even where such provisions are non-existent due to a State's inadequate economic resources.

Albeit the argument that the infrequent occurrence of oil spills from offshore installations has provided an excuse for the worldwide community's failure to agree on a uniform regime,[103] the *Deepwater Horizon* was arguably the long-awaited opportunity for the international community to establish an international regime for oil spills from offshore installations, while the ongoing demand for petroleum products poses the potential for a positive correlation to oil spills resulting from offshore activities. Provided that the offshore petroleum industry does not adequately financially contribute in compensating for marine environmental pollution, launching a universal agreement will arguably apportion liability and contribution to compensation on a fairer, just and more reasonable basis compared to the current fragmented regime. Therefore, the broader public interest and affected people who are not compensated in the process should be considered.

Moreover, the continuous lack of a consistent international instrument, highlighted in *Deepwater Horizon,* can financially exhaust the parties involved due to the ongoing complex litigation until BP has provided full liability and compensation. Hence, an international convention could be the ideal approach for the establishment of a global regime, but the negotiation and implementation process will take years to be completed, leaving a timeframe filled with 'uncertainty for operators and… diverse and unpredictable reactions from some regulatory bodies.'[104] However time-consuming, the need to internationally address the urgency for a liability and compensation scheme is crucial. Although the international community should 'act promptly',[105] it is arguably pointless to address this issue if superpower States do not cooperate in its enforcement.

D. Proposals for an international regime

Federalising responses to oil spills and merely billing the responsible oil company is not an ideal solution, as governments usually lack the knowledge and the technological advancement that oil companies have. Thus, the proposed regime needs to ensure the smooth cooperation of oil companies in the process and to have an effective and efficient financing mechanism. Arguably, it should be financed by taxes on operators and parties owning, operating or have a financial interest in the offshore oil installation industry, with fixed amounts depending on the size and scale of the offshore oil installation. In this respect, the proposed regime should define an 'offshore installation' widely, as embracing both fixed and mobile installations.[106] As a response to oil spills, it is usual for governments to spend staggering sums of money for minimizing to the extent possible ecological, environmental and human damage involved whilst knowing that not all of it might be recovered.[107] For this reason, State Parties should be obliged to ensure that the respective taxes are indeed paid into the regime by the respective parties.

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[102] Rochette, *supra* nt 42, 13.
[103] Makuch, KE and Pereira, R, *Environmental and Energy Law* (Wiley-Blackwell, Chichester 2012), 220.
[104] Cameron, P, "Liability for Catastrophic Risk in the Oil and Gas Industry" 6 *International Energy Law Review* (2012) 207, 218.
[105] Allen, *supra* nt 61,107.
[106] Scicluna, *supra* nt 60, 55.
[107] Viscisi and Zeckhauser, *supra* nt 25, 7.

A compensation system is important to ensure prompt and adequate compensation to people whose properties have been damaged as a result of human-induced marine environmental disasters. A liability system should operate and be enforced in a way that deters, or at least minimises the probability of, future human errors. The entire regime should be uniformly interpreted and consistently applied in the manner definitions are interpreted and applied, and in the treatment of compensation claims across all the territorial scope of the regime's application.[108]

In assessing the oil tanker regime above in Part 2, it is perhaps far from perfect for it to be entirely adopted in the proposed regime. For instance, evaluating the definition of 'pollution damage' in Article I(6) 1992 CLC, it is argued that though it is a significant improvement from its 1969 equivalent, it still lacks a sufficient level of precision when it comes to calculating compensation and liability amounts to be paid. Moreover, in contrast to the oil tanker regime where the shipowner tends to be a single party, the proposed regime should take into account that most often, there are multiple, rather than a sole or a predominant owners or operators that may be classified as the responsible parties to an oil spill.[109] Therefore, the apportioning of liability should carefully be adjusted in a manner that is fair, just and equitable for all the parties involved, according to the percentage of contribution to the oil spill.

The dilemma of whether or not to impose limits on the amounts of corporate liability is important, especially if the regime to be adopted is one of strict liability and compulsory insurance for the operators and other responsible parties. On the one hand, the high insurance premium cover for uncapped liability would mean that offshore oil corporations are going to oppose the proposed regime. Contrariwise and reflecting upon *Deepwater Horizon*, liability caps can prove to be miserably inadequate to cover the vast liability and compensatory amounts; had these caps been applied in *Deepwater Horizon*, a significant number of victims would remain uncompensated.

One way to solve this dilemma would be to adopt a similar structure to the tiered system of compensation adopted in the oil tanker industry with the effect that liability caps would exist, but there would be a supplementary tier of compensation which will be triggered as and when liability limits are inadequate to cover all compensatory claims. However, it should be noted that the Supplementary Fund in the oil tanker regime is optional and therefore, not always applicable. Another way to solve the dilemma, as has been proposed, would be to have limits and then revising and updating them according to incidents as they arise.[110] This is arguably not an ideal solution because it leaves the problem at issue unresolved and other incidents similar to, or worse than, *Deepwater Horizon* will challenge the practical efficiency and effectiveness of the regime.

Popper argues that capping liability is not corrective justice and undermines public policy, because it does not provide 'just and equitable compensation for victims in a broad range of fields… caps on damages undermine the deterrent effect of tort liability and fail to achieve economically efficient and socially just results.'[111] Therefore, capping liability would undermine the overall purpose of a civil liability regime. In *Deepwater Horizon*, the incredible sums BP paid could potentially deter future oil spills, but as long as the U.S. and other States continue to be dependent on oil as a primary energy

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[108] Jacobsson, *supra* nt 64, 143-146.

[109] Viscisi and Zeckhauser, *supra* nt 25, 5-6.

[110] Max Planck Foundation for International Peace and the Rule of Law, Mensah, TA, *International Oil Pollution Compensation Funds*, 2011, 7.

[111] Popper, AF, "Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability" *DuPaul Law Review* (2011) *at* <http://ssrn.com/abstract=1805134> (accessed 12 May 2018).

source,[112] oil spills are bound to happen; thus, the international legal community should be adequately prepared.

Adopting a uniform international civil liability and compensation regime for oil spills from offshore oil installations with fixed liability amounts will be beneficial for corporations, yet not for State Parties, particularly if the total liability amount exceeds the fixed liability amount under the regime. Considering the towering financial liability borne by BP, such amounts would cause disadvantage and be anti-competitive to smaller offshore oil exploration and production companies, which do not have a similar capital potential like BP and thus cannot self-insure.[113] Alternatively, it has been argued that small companies that cannot afford such financial implications should not operate.[114] Given the impossibility of predetermining the full extent of an oil spill from an offshore installation due to its technical specifications, the financial magnitude of the harm remains unknown. However, it is submitted that the responsible party should have the financial capability of rectifying the harm; contrary to the Viscusi-Zeckhauser proposal, 'insufficient resources'[115] should not provide an excuse for capping liability amounts.

Arguably, had BP been a small company rather than an 'oil giant' in *Deepwater Horizon*, the majority of victims would remain uncompensated, whilst a significant proportion of the immense amount of expenses incurred by the US Federal Government in response to the oil spill would remain irrecoverable. Hence, such a regime would not provide fairness and justice to the claimants, nor would it take into consideration the broader public interest. This is a forceful argument since recent proposed amendments to Canadian legislation[116] have purported to increase the absolute liability and financial capacity of companies operating in the Atlantic offshore and the Arctic regions to $1 billion, potentially knocking-out smaller private companies operating in the aforementioned regions. Correspondingly, providing the international oil industry comprises of companies with varying business and capital capacity, operators' capacity to pay for oil spillage may not be as competent as was BP's ability to pay the large amount for its liability for *Deepwater Horizon*. Accordingly, if an international regime is to be proposed, should it be limited to large operators or should it be encompassed across all kinds of operators? The latter could be the ideal option for ensuring consistency and uniformity in its application; however, it might act unfairly towards smaller operators and new market entrants with a lower capital available to pay for such catastrophic risks.

The importance of having insurance has been recognised in the civil liability and compensation regime pertaining to oil spills from oil tankers and is equally important for the offshore oil installations industry, because it ensures the necessary financial security in cases where, for example, the responsible party has insufficient resources to compensate victims of pollution damage. Therefore, victims are safeguarded the payment of compensation. However, that suggests that the insurance premium will be very high. Arguably, the principle of 'make whole',[117] to compensate victims in a manner that reverts them back to their financial and welfare (human health) position but for the oil spill, is important in the proposed regime. In this process, the causation principle is

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[112] U.S. Energy Information Administration (EIA), REPORT: *Annual Energy Outlook 2015 with projections to 2040*, April 2015, figure 18, *at* <http://www.eia.gov/forecasts/aeo/pdf/0383(2015).pdf> (accessed 12 May 2018).

[113] Congressional Research Service, Ramseur, JL, REPORT: *Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill*, 11 March 2011, 11, *at* <http://www.fas.org/sgp/crs/misc/R41679.pdf> (accessed 12 May 2018).

[114] *Ibid.*

[115] Viscisi and Zeckhauser, *supra* nt 25, 24.

[116] *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, SC 1988 c.28, Canada (1988).

[117] Viscisi and Zeckhauser, *supra* nt 25, 21.

essential, whilst the burden of proof should perhaps be on the claimant to prove that pollution damage would not have occurred but for the offshore oil spill. In terms of the threshold, a high threshold should arguably be avoided since it will make it difficult for victims to get compensated.

Conclusion

[*Deepwater Horizon*] *is a direct consequence of our global addiction to oil… Incidents like this are inevitable as we drill in deeper and deeper waters.*[118]

This article has examined whether *Deepwater Horizon* has signalled the need for an international regime to be adopted and enforced, regulating corporate liability and compensation following oil spills from offshore oil installations. The examination of this issue has progressed through three parts, beginning with the corporate liability and compensation issues arising from *Deepwater Horizon*, showing the weaknesses and the strengths of the U.S. OPA regime. It has been argued that *Deepwater Horizon* has revealed the limitations in the current fragmented and unconsolidated legal framework pertaining to civil liability and compensation issues arising from oil spills from offshore installations. In my submission, the current regime is inadequate to address important issues of safety, compensation and apportionment of liability.

The argument that oil spills having *Deepwater Horizon*'s magnitude are unlikely to happen is largely unsustainable. Even before *Deepwater Horizon*, there was a common belief that the probability of an oil spill of such magnitude was fractional, if not inexistent, whilst in the unlikely event of a blowout, the oil spill would not be major. Then, *Deepwater Horizon* happened; the magnitude of it and the billions of dollars spent in response to it proved the contrary. The time has come for the international legal community to act; deepwater drilling and the continuous dependence on, and demand for, oil means that further disastrous incidents like *Deepwater Horizon*, or even worse, will always pose an imminent threat. Arguably, *Deepwater Horizon* was the long-awaited call for the establishment of an international regime that is similar to the 1992 CLC and the supplementary IOPC Funds regime currently in force regarding pollution damage from oil tankers, which has been discussed in Part 2, applicable on a compulsory basis regarding insurance, corporate liability and compensation. If a regime similar to the oil tanker regime is implemented covering oil spills from production wells, it should have structural differences that would make it consistent with the varying specifications of tanker vessels and offshore installations.

In examining the prospects for adopting an international regime regulating civil liability and compensation following oil spills from offshore installations, this article proposed for a practically efficient and effective regime with universal consensus. It would bring advantages for under-developed and developing States in standing up to transnational corporations and can help small companies and new market-entrants with fewer financial resources. There will be no room for exploitation and maneuvering the regime that may, at times, allow corporations to disregard victims. Henceforth, global environmental governance will be sharpened by the collective contribution of politicians and scholars in international law to safeguard the marine environment from ruinous oil spills, by bridging the gaps within the current fragmented and deficient legal framework. Optimistically, re-assessing the legal framework pertaining to corporate liability and

[118] Bourne, *supra* nt 18, 53.

compensation applicable to oil spills from offshore oil installations may prove to be merely the beginning. Nevertheless, the international environmental law's contribution in tackling the on-going global environmental crisis has become a matter of urgency. The recent *Deepwater Horizon* oil spill, being the most catastrophic accidental release of oil from an offshore oil installation in the marine environment in American history, has highlighted the need for international law to target corporate liability and compensation issues following oil spills from offshore installations.

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Autonomous Weapons in Humanitarian Law: Understanding the Technology, Its Compliance with the Principle of Proportionality and the Role of Utilitarianism

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Keywords
INTERNATIONAL HUMANITARIAN LAW; LAW OF ARMED CONFLICT; DISARMAMENT; LETHAL AUTONOMOUS WEAPONS; AUTONOMOUS VEHICLES; PROPORTIONALITY; UTILITARIANISM; BENTHAM

Abstract

Autonomous machines are moving rapidly from science fiction to science fact. The defining feature of this technology is that it can operate independently of human control. Consequently, society must consider how 'decisions' are to be made by autonomous machines. The matter is particularly acute in circumstances where harm is inevitable no matter what course of action is taken. This dilemma has been identified in the context of autonomous vehicles driving under the regulation of domestic law and, there, governments seem to be moving towards a utilitarian solution to inevitable harm. This leads one to question whether utilitarianism should be transposed into the context of autonomous weapons which might soon operate on the battlefield under the gaze of humanitarian law. The argument here is that it should because humanitarian law includes the core principle of 'proportionality', which is fundamentally a utilitarian concept – requiring that any gain derived from an attack outweighs the harm caused. However, while human soldiers are always able to come to a view on proportionality, albeit subjective, there is much doubt over how an autonomous weapon might determine what is proportionate. There is a very large gap between our embryonic understanding of utilitarianism in relation to autonomous vehicles manoeuvring around a city on one hand; and what would be required for armed robots patrolling a battlespace on the other. Bridging this gap is fraught with difficulty but perhaps the best starting point is to take Bentham's expression of utilitarian mechanics and build upon them. With conscious effort and, ideally, collaboration, states could use the process of applying his classic theory to this very modern problem to raise the standard of protection offered to those caught up in conflict.

Introduction

'Suppose there is a driver of a runaway tram which he can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is bound to be killed.'[1]

The above extract is the classic iteration of the 'tram problem' and was posed by Foot to demonstrate the ethical conundrum that arises in situations where harm of some

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1 Foot, P, "The Problem of Abortion and the Doctrine of the Double Effect" *in* Foot, P, ed, *Virtues and Vices and Other Essays in Moral Philosophy* (University of California Press 1978).

sort is inevitable, and where a decision must be made to determine which harm is allowed to manifest. In recent years, the problem has come back into focus with the rise of 'autonomous' technology where, instead of a human being having to decide whether to pull the proverbial lever, it will be left to a machine to make the call. The matter is perhaps of greatest moment in the context of autonomous vehicles where manufacturers and governments alike are struggling to come up with definite solutions to this most vexed of problems. The earliest indication available is that states might move towards a utilitarian solution to the tram problem when it comes to autonomous vehicles.[2]

Of course, autonomous technology is not confined to vehicles. The principal question for present purposes is whether a utilitarian solution is right for 'autonomous weapons'. These are machines that can act independently in the battlespace and whose deployment inherently involves artificial intelligence assuming some degree of responsibility for critical assessments.[3] Such weapons used in an international armed conflict will be governed by humanitarian law, a core principle of which is 'proportionality'. In essence, this principle requires that the harm caused by an attack must not exceed the gain garnered from it. While the concept itself is clear, the practicalities of determining whether harm exceeds gain in any particular scenario are not.

This article will explain that the best starting point is to recognise that the principle of proportionality is analogous to the principle of utility – the former requiring more gain than harm; the latter more pleasure than pain. From there, it becomes clear that the various mechanisms developed by Bentham in the eighteenth century to enable application of utilitarianism can now be carried over and used to apply proportionality.[4] Of course, these mechanisms must be taken from their abstract form and given more concrete meaning based on the sorts of harm and gain that might be expected to arise in the context of armed conflict. Thereafter, the matter can be passed to policy makers, military officials and computer programmers to create algorithms that can implement the relevant mechanisms on the battlefield. This process presents an opportunity for states, acting alone or in concert, to hold this emerging technology to tougher standards than presently demanded by humanitarian law. Indeed, amid failure to achieve an outright ban on autonomous weapons, this is perhaps the best compromise available.

It should be noted that the ambit of this article is strictly limited. Proportionality will be considered only in its humanitarian law (*or jus in bello*) sense and as it would apply in the context of an international armed conflict. Proportionality in its other myriad contexts, such as *jus ad bellum*, *jus post bellum*, human rights and so on, will not be considered as, in those areas, it has evolved with nuanced differences in meaning.[5] Similarly, there are other rules of humanitarian law which have a bearing on the use of autonomous weapons. For example, the rule of 'distinction' is a fundamental rule which requires parties to a conflict to discern military objectives from civilians and civilian objects.[6] Clearly, distinguishing targets from non-targets is a prerequisite of any proportionality assessment; however, that is a separate issue for another article, as is the ethical nature (or otherwise) of an attack by a machine.[7] Finally, the article will not

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2 As will be explained below, Germany is the first state to head in this direction.

3 The working definition proposed by the US for autonomous weapons is supplied below.

4 Bentham, J, *The Principles of Morals and Legislation* (Prometheus Books 1988).

5 For full discussion of proportionality, see Newton, M and May, L, *Proportionality in International Law* (Oxford University Press 2014).

6 *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3, Article 48 [*Additional Protocol I*].

7 See Leveringhaus, A, *Ethics and Autonomous Weapons* (Palgrave Pivot 2016).

attempt to specify what the final algorithms should look like, only to elucidate one principle underpinning them.

I. The Technology

A. Understanding autonomous weapons

Humanity's level of technological sophistication continues to grow at an exponential rate and much innovation can currently be found in the area of automation. Indeed, Bagrit predicted decades ago that we would witness an 'age of automation' where machines increasingly take over activities performed by humans.[8] The autonomy phenomenon can be encountered in factory production processes, vehicular transportation and even space exploration, but there are also important developments in military technology. It is important to grasp the meaning, novelty and significance of autonomy in military technology to understand why it has prompted the present line of enquiry.

The starting point is to define what is meant by 'autonomy', yet this effort can quickly deteriorate into a confusing metaphysical conundrum. Donne observed that 'no man is an island, entire of itself'[9] and the same holds true for autonomous weapons which are never completely autonomous – there will always be dependence on some external element such as other machines or soldiers in the field, intelligence operatives scouting locations, trainers or programmers at base and so on.[10] Furthermore, as Bradshaw *et al* put it, autonomy is not a 'unidimensional concept' (which, at its simplest, could be said to be comprised of self-direction and self-sufficiency) and instead has a broad range of potential meanings.[11] As a result of these considerations, states and academics have grown less enthusiastic about trying to define autonomy and there is therefore no accepted international definition of what constitutes an autonomous weapon. Nonetheless, in 2012, the US Department of Defense adopted a useful working definition providing that an autonomous weapon is a 'weapon system that, once activated, can select and engage targets without further intervention by a human operator.'[12] This definition was widely cited and certainly manages to capture the essence of what is meant by an autonomous weapon for the purposes of this article: namely, a machine that can be assembled with hardware, imbued with software and then released into the battlespace to perform its function independently. The point is that it is the absence of direct human involvement in operation that most clearly separates autonomous weapons from the more familiar technology found in 'drones' which, while 'unmanned', are still piloted by a human, albeit from a distant military base.[13] This distinction has led one of the leading actors in humanitarian law, the International Committee of the Red Cross, to comment that the deployment of autonomous weapons represents a 'paradigm shift' in the way hostilities are conducted.[14]

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8 Bagrit, L, "The Age of Automation" 17(1) *British Journal for the Philosophy of Science* (1966) 80.

9 Alford, H, ed, *The Works of John Donne*, Volume III (John W Parker 1839) 574-575.

10 United States Department of Defense, *Task Force Report: The Role of Autonomy in DoD Systems*, 19 July 2012, 59, *at* <bit.ly/2pwXT9C> (accessed 20 March 2018) [*Task Force Report*].

11 Bradshaw, JM, Hoffman, RR, Johnson, M and Woods, DD, "The Seven Deadly Myths of 'Autonomous Systems'" 28(3) *IEEE Intelligent Systems* (2013) 54.

12 United States Department of Defense Directive, "Autonomy in Weapons Systems", Number 3000.09 of 21 November 2012, Glossary, Part II ("Autonomy in Weapons Systems").

13 For a full analysis of the problems posed by drones, see Casey-Maslen, S, "Pandora's box? Drone strikes under *jus ad bellum*, *jus in bello*, and international human rights law" 94 *International Review of the Red Cross* (2012) 597.

14 International Committee of the Red Cross, *Autonomous weapon systems - Q&A*, 2014, *at* <bit.ly/2ixib2p> (accessed 20 March 2018).

Of course, weapons with limited autonomy have already been employed widely by states for *defensive* purposes – even a landmine could be said to fulfil the basic requirements. On a more sophisticated level, there are sentry guns and missile interception technologies that repel incoming targets without the need for any additional human authorisation such as 'Phalanx' and 'Super aEgis-II'.[15] However, when it comes to the more *offensive*, advanced and mobile technologies that are the focus of this article, states have been much more cautious. For potential examples, one might consider 'Taranis', an aerial combat vehicle being developed by BAE Systems plc (a UK-based aerospace manufacturer), or 'Atlas', a humanoid-like machine being developed by Boston Dynamics (a US-based private robotics company).[16] In short, although we are yet to see the completion of any 'offensive' autonomous weapons, there seems little doubt from a technical perspective that they will soon be available.

B. The inevitable deployment of autonomous weapons

Of course, the mere availability of a particular technology does not necessarily mean that states must employ it. For example, 'blinding laser weapons' were developed in the late twentieth century but were pre-emptively banned by a protocol to the Conventional Weapons Convention.[17] Turning to autonomous weapons, the official line of a number of states at present is that 'critical decisions' (ie decisions to strike) will not be delegated to a machine and that there will always be a human 'in the loop' (to authorise a strike) or 'on the loop' (with the ability to abort it). Most recently, in its (somewhat overdue) 2017 Joint Doctrine Publication, the Ministry of Defence confirmed that 'current UK policy is that the operation of our weapons will always be under human control as an absolute guarantee of human oversight and authority and of accountability for weapon usage.'[18] The US, for its part, had earlier affirmed that 'autonomous … weapons systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.'[19]

However, scratch beneath the surface and these assertions become less convincing. The UK has opted to set a very high bar when defining what would actually constitute an 'autonomous system' in requiring that it would need to be 'capable of understanding higher-level intent and direction.'[20] Of course, as discussed below, there is no suggestion of machines such as Taranis or Atlas being able to genuinely 'understand' what is going on around them – that level of artificial intelligence remains confined to science fiction. Therefore, the UK has deftly created a lacuna within which to develop weapons that it does not consider to be 'autonomous'. Similarly, the US language of 'appropriate levels of human judgment' is deliberately ambiguous and has been heavily criticised on the basis that, in some cases, the 'appropriate' level of human judgment may

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[15] Raytheon, *Last Line of Defense for Air, Land and Sea*, *at* <raytheon.com/capabilities/products/phalanx> (accessed 21 April 2018); Dodaam, *Combat Robot (Lethal), at* <dodaam.com/eng/sub2/menu2_1_4.php> (accessed 21 April 2018).

[16] BAE Systems, *Taranis, at* <baesystems.com/en/product/taranis> (accessed 21 April 2018); Boston Dynamics, *Atlas, at* <bostondynamics.com/atlas> (accessed 21 April 2018).

[17] *Protocol IV to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (1980) 1342 UNTS 137, Article 1.

[18] United Kingdom Ministry of Defence (Development, Concepts and Doctrine Centre), *Joint Doctrine Publication 0-30.2, Unmanned Aircraft Systems,* August 2017, 42, *at* <bit.ly/2pvFQkn> (accessed 20 March 2018) [*Joint Doctrine Publication*].

[19] "Autonomy in Weapons Systems", *supra* nt 12, 2.

[20] *Joint Doctrine Publication*, *supra* nt 18, 13.

be none at all.[21] Indeed, recently, a US Department of Defense report has recommended that the US must *accelerate* its exploitation of autonomy on the basis that, *inter alia*, autonomous technology will 'increase the quality and speed of decisions in time-critical operations.'[22] It is difficult to see how there can be space for *any* human judgment in such 'time-critical' cases – rather the implication seems to be that the quality of the determination will be higher *without* human meddling. Keeping the door ajar for autonomous weapons is not unique to the West. The Russian Federation made it clear in a recent position paper that, until there are working examples of autonomous weapons, any regulation is premature and that to stifle the development would be to preclude a whole range of associated technologies that are emerging thanks to automation and that are legitimate and desirable.[23]

The reluctance of states to act decisively on autonomous weapons has bled into proceedings at the UN. It had been decided unanimously in December 2016 at the UN's Review Conference of the Convention on Certain Conventional Weapons to establish a Group of Governmental Experts (GGE) to discuss autonomous weapons. Although the GGE was formed, and talks are indeed being held, very little progress has been made. After being postponed from April 2017, the first meeting in November failed to deliver much in the way of tangible progress and, in the words of one commentator, deteriorated into 'a chaotic and ultimately inconsequential discussion of AI generally.'[24] Indeed, the Campaign to Stop Killer Robots, a leading NGO, went so far as to call the whole of 2017 a 'lost year for diplomacy' and has also criticised the decision to hold further meetings across ten days in April and August 2018 as 'unambitious' and observed that it was 'unlikely to result in significant steps forward'.[25] All of this diplomatic hesitation is encapsulated by the fact, at present, only twenty two states have signalled their support for a ban and none of these are global military powers.[26] This low number should also be read against a backdrop of ninety countries around the world operating unmanned aircraft – all of which could be augmented through the incorporation of autonomy.[27] Furthermore, there has not been any progress towards the looser sort of 'standard of operation', advocated by the likes of Kastan, that might act as a voluntary military manual for the use of autonomous weapons.[28]

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[21] Sauer, F, ''Stopping 'Killer Robots': Why Now Is the Time to Ban Autonomous Weapons Systems", *Arms Control Association*, October 2016, *at* <http://bit.ly/2Goa2rZ> (accessed 20 March 2018).

[22] United States Department of Defense, *Report of the Defense Science Board Summer Study on Autonomy*, Washington DC, 1 June 2016, 1, *at* <bit.ly/2Goa2rZ> (accessed 20 March 2018) [*Report of the Defense Science Board*].

[23] Russian Federation, *Examination of various dimensions of emerging technologies in the area of lethal autonomous weapons systems, in the context of the objectives and purposes of the Convention*, CCW/GGE.1/2017/WP.8, 10 November 2017, *at* <bit.ly/2ufPjSx> (accessed 20 March 2018).

[24] Tucker, P, "Russia to the United Nations: Don't Try to Stop Us from Building Killer Robots" *Defense One*, 21 November 2017, *at* <bit.ly/2B7J8yc> (accessed 20 March 2018).

[25] Campaign to Stop Killer Robots, *2017: A Lost Year for Diplomacy*, 22 December 2017, *at* <bit.ly/2ptumi3> (accessed 20 March 2018).

[26] Algeria, Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, Egypt, Ghana, Guatemala, Holy See, Iraq, Mexico, Nicaragua, Pakistan, Panama, Peru, State of Palestine, Uganda, Venezuela and Zimbabwe.

[27] Sayler, K, "A World of Proliferated Drones: A Technology Primer" *Center for a New American Security*, 10 June 2015, *at* <bit.ly/2G1kR3Q> (accessed 20 March 2018).

[28] Kastan, B, "Autonomous Weapons Systems: A Coming Legal Singularity?" 1 *Journal of Law, Technology and Policy* (2013) 45, 62.

In conclusion, it seems clear that Anderson and Waxman were correct in their prediction that the deployment of autonomous weapons is inevitable.[29] There are many justifications for this conclusion ranging from the existing financial investment in the technology to the tactical benefits it offers. Ultimately, though, the reality is that the freedom to develop autonomous weapons is already viewed by the major military powers as a strategic imperative. As Vladimir Putin said, 'artificial intelligence is the future, not only for Russia, but for all humankind … Whoever becomes the leader in this sphere will become the ruler of the world.'[30]

C. The limits of autonomous cognition

Assuming what has been said above is correct and that the deployment of autonomous weapons is indeed inevitable, we must deal with the full spectrum of challenges that it presents. For the purposes of this article, the focus is on the principle of proportionality in humanitarian law and so this means grasping how autonomous weapons might arrive at proportionate determinations on the battlefield. This is problematic because, hitherto, the application of proportionality has revolved around the decisions of *human* combatants and so replacing these with determinations made by machines would appear to remove a key pillar upon which the principle is based. However, while it is indeed true that autonomous weapons pose some serious challenges, if one is to understand the proper extent of these challenges it is important to be realistic about what autonomous weapons *will* be able to do and what they *will not* be able to do.

There are, of course, many science fiction books and films which depict autonomous machines, usually on the rampage, with human-levels of understanding of their environment. To some extent, this sort of background material has influenced academic consideration of the topic. For example, Wallach and Allen argue that society is on a quest to build a machine that can tell right from wrong with the effect that existing theories of ethics and agency are not adequate and, therefore, that we must begin constructing new conceptual frameworks to provide autonomous machines with even rudimentary ethical sensitivity.[31] However, although there are research projects aimed at producing artificial intelligence which would be equivalent to human intelligence and capable of full moral agency, the attainment of this goal is estimated to be a long way off. To illustrate this, Müller surveyed hundreds of artificial intelligence experts at a series of conferences and asked, 'by what year would you see a (10%; 50%; 90%) probability for … high level machine intelligence to exist?'. The median response for 10% probability was 2022, the median response for 50% probability was 2040 and median response for 90% probability was 2075.[32] In short, according to artificial intelligence experts, advanced robot cognition is at least twenty years away.

In the meantime, what we might realistically expect to see is a more superficial form of artificial intelligence that merely *appears* to make decisions. On this basis, it has been argued that autonomy is not 'a widget or discrete component' but rather a 'capability of the larger system enabled by the integration of human and machine

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[29] Anderson, K, and Waxman, MC, "Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can" *Stanford University The Hoover Institution (Jean Perkins Task Force on National Security and Law Essay Series)*, 10 April 2013, *at* <bit.ly/2pBFnO9> (accessed 20 March 2018).

[30] Putin, V, Speech to Yasoslavl University, 1 September 2017, *at* <bit.ly/2Go1LUS> (accessed 20 March 2018).

[31] Wallach, W and Allen, C, *Moral Machines: Teaching Robots Right from Wrong* (Oxford University Press 2008).

[32] Müller, VC and Bostrom, N, "Future Progress in Artificial Intelligence: A Survey of Expert Opinion" *in* Müller, VC, ed, *Fundamental Issues of Artificial Intelligence* (Springer 2016).

abilities.'[33] The significance of this conclusion for present purposes cannot be overstated. It means that, even if machines physically replace humans on the battlefield, human judgment will remain essential to matters such as determinations on proportionality. In short, human judgments and values will be *implemented* by machines. This has led Bradshaw *et al* to argue that the idea of an 'autonomous *system*' is a myth and what we are really dealing with are, at most, machines with limited autonomous *capabilities*.[34] This focuses the debate about autonomous weapons and brings it back from science fiction to reality. Machines would operate on the battlefield simply by carrying out calculations (albeit very complex ones), without having to understand what the overall concept of proportionality is actually about.

D. Autonomous cognition in autonomous vehicles

Given that, as a matter of technological limitation, autonomous cognition will for the next few decades only extend as far as the implementation of human judgments and values, society must begin to crystallise these into clear, objective, standards with which machines will be able to work. By way of comparative analysis, it is enlightening to explore how this issue is being handled in the context of autonomous vehicles.[35] Interest in this technology has been intense and one prediction has driverless vehicles accounting for 40% of car manufacturers' profits by 2035.[36] Of course, such vehicles also face the conundrum of making determinations about harm with, in the example of an inevitable collision, either the occupant or a pedestrian being injured depending on what action the car takes. It should be noted that the recent tragedy in Arizona involving the death of a pedestrian in a crash with an autonomous Uber vehicle does not appear to have been the result of any 'determination' by the vehicle but, rather, a simple failure of its sensors to detect her. Of course, the investigation is only in its nascent stages.[37]

Until very recently, there has been a legislative vacuum in this area and so it has been left to manufacturers to come up with their own views on what should happen in situations where harm must inevitably fall on someone. The first manufacturer to candidly set out its position on this issue was Mercedes-Benz. Speaking at the 2016 Paris Motor Show, the company's manager of driver assistance systems, Christoph von Hugo, said, 'If you know you can save at least one person, at least save that one. Save the one in the car. If all you know for sure is that one death can be prevented, then that's your first priority.'[38] In other words, if there is a risk of death to both the driver and a third party outside the car, a Mercedes will simply prioritise the driver. The bluntness of this 'prioritisation' approach is quite shocking but, on reflection, it should not be all that surprising. Mercedes is in the business of selling cars and pleasing the people who buy them. Those people would, the company presumes, prefer that they and their families are prioritised over other road users no matter what. Indeed, there is empirical evidence to

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33 *Task Force Report*, *supra* nt 10, 23.

34 "Seven Deadly Myths", *supra* nt 11, 54.

35 For examples of autonomous car development see: Atiyeh, C, "Google's Latest Search is for Automaker Partners" *Car and Driver*, 15 January 2016, *at* <bit.ly/2pFnfD7> (accessed 20 March 2018).

36 Boston Consulting Group, "By 2035, New Mobility Tech Will Drive 40% of Auto Industry Profits", Press Release, 11 January 2018, *at* <on.bcg.com/2I5bInu> (accessed 20 March 2018).

37 National Transportation Safety Board, "NTSB Update: Uber Crash Investigation", News Release, 20 March 2018, *at* <bit.ly/2I3olPQ> (accessed 20 March 2018).

38 Taylor, M, "Self-Driving Mercedes-Benzes Will Prioritize Occupant Safety over Pedestrians" *Car and Driver*, 07 October 2016, *at* <bit.ly/2G9MCU0> (accessed 20 March 2018).

suggest that manufacturers would indeed lose customers if they did not take this approach.[39]

Of course, leaving regulation to corporations is not necessarily the best tack from the point of view of society generally or pedestrians in particular. Governments have been slow to set clear guidelines on the matter with even the US, at the forefront of development, merely requiring that algorithms for resolving these situations should be 'developed transparently using input from Federal and State regulators, drivers, passengers and vulnerable road users.'[40] This *laissez-faire* view may change soon as a result of the events in Arizona. However, a more advanced position has already been reached by Germany which formed a Commission of Experts to investigate the challenges of autonomous vehicles. In 2016, the Commission reported back with twenty rules that car manufacturers must consider when developing automated driving systems.[41] The German rules begin with the sensible position that collisions should be avoided.[42] However, where a collision is inevitable, the protection of human life takes the highest priority, including over damage to animals and property.[43] When it comes to assessing potential physical injury to multiple people, general programming aimed at reducing the *number* of personal injuries is permitted however it is made clear that manufacturers are barred from attaching any weight to personal characteristics such as age, gender, physical or mental constitution.[44] It is important to note one very significant limitation to the German rules – they do not deal with the toughest problems. It is concluded that 'life-versus-life' decisions are so abstract that general *ex-ante* rules cannot be imposed upon them.[45] As a consequence, in such cases the intention is to immediately return control to the driver who is then faced with making the decision – although it is stipulated that such abrupt transfers of control should occur as seldom as possible.[46] The same difficulty has been identified beyond Germany, with Bonnefon *et al* noting that defining the relevant algorithms presents a 'formidable challenge.'[47]

The question for present purposes is whether any of the lessons learned from the debate on autonomous vehicles can be carried over to autonomous weapons. The answer is mixed. The prioritisation model offered by manufacturers can be safely discounted for a number of reasons: autonomous weapons have no passengers to prioritise; the approach appears to have been rejected by the first state actor to set out a definitive position and, as will be explained shortly, the model runs contrary to humanitarian law. The German state's approach, as it stands, is also incapable of adequately regulating autonomous weapons. By stopping short of articulating rules that deal with life-versus-life situations and instead requiring return of control to the driver, the German rules exclude precisely the sort of problems that must be resolved for autonomous weapons. Such weapons are, by their very nature, going to be involved in situations where harm, desired or otherwise, is caused to humans. Furthermore, the option of returning control to a human operator will not always be available if, for example, the timing is too tight or

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39 Bonnefon, JF, Shariff, A and Rahwan, I, "The Social Dilemma of Autonomous Vehicles" 352 *Science* (2016) 1573, 1574.

40 United States, Department of Transportation, *Federal Automated Vehicles Policy: Accelerating the Next Revolution in Roadway Safety*, September 2016, 26-27, *at* <bit.ly/2dgxqJV> (accessed 20 March 2018).

41 Bundesministerium für Verkehr und digitale Infrastruktur, *Bericht der Ethik-Kommission Automatisiertes und vernetztes Fahren*, 20 June 2016, *at* <bit.ly/2IBhZZ8> (accessed 20 March 2018).

42 *Bericht der Ethik-Kommission Automatisiertes und vernetztes FahrenId*, Rules 2 and 5.

43 *Bericht der Ethik-Kommission Automatisiertes und vernetztes FahrenId*, Rules 2 and 7.

44 *Bericht der Ethik-Kommission Automatisiertes und vernetztes FahrenId*, Rule 9.

45 *Bericht der Ethik-Kommission Automatisiertes und vernetztes FahrenId*, Rule 8.

46 *Bericht der Ethik-Kommission Automatisiertes und vernetztes FahrenId*, Rule 17.

47 "The Social Dilemma of Autonomous Vehicles", *supra* nt 39, 1573.

if communication signals are being jammed. Having said that, the work done by Germany is promising. In permitting vehicle manufacturers to take account of the number of personal injuries, we can see the beginnings of a (qualified) utilitarian solution to the problem of competing harm which is compatible with, and arguably mandated by, humanitarian law. As will be explained, the various metrics proposed first by Bentham to explain utilitarianism could be used to provide the clearer picture of proportionality that is so urgently required. However, before turning to that endeavour, the substantive rule of proportionality in humanitarian law requires some exposition.

II. Proportionality

A. The Basics of proportionality

Humanitarian law (or, variously, the law of war or the law of armed conflict) is typically viewed as having two branches. The first branch, 'Hague law', is the elder of the two and seeks to regulate the means (weapons) and methods (tactics) of warfare. The 1868 St. Petersburg Declaration is an early modern example of a Hague rule that we would recognize today as being grounded in the principle of proportionality.[48] The Declaration prohibited the use of projectiles weighing less than 400g that exploded upon contact with soft surfaces such as human flesh. The twenty state parties noted that in war, 'it is sufficient to disable the greatest possible number of men [and] this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable'. The rule itself was later incorporated into the 1907 Hague Convention.[49] Today, by virtue of Additional Protocol I, Hague law takes a much broader view of proportionality and prohibits any means and methods of warfare that cause 'superfluous injury or unnecessary suffering.'[50] The second branch, 'Geneva law', is more recent and seeks to protect victims of conflict such as wounded combatants,[51] civilians[52] and others. In this context, Additional Protocol I prohibits attacks that would cause collateral damage 'excessive in relation to the concrete and direct military advantage anticipated.'[53] Similar iterations of the proportionality principle can be found in a number of other humanitarian instruments such as the Convention on Certain Conventional Weapons[54] and the San Remo Manual (on conflicts at sea).[55] Consequently, in its heavily influential study, the International Committee of the Red Cross confirmed proportionality to be a customary rule of humanitarian law.[56]

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48 *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (adopted and entered into force 11 December 1868) 138 CTS 297, *at* <bit.ly/2Gdwz7I> (accessed 20 March 2018).

49 *Convention (IV) Respecting the Laws and Customs of War on Land* (18 October 1907) 205 CTS 277, *Regulations Concerning the Laws and Customs of War on Land*, Article 23(e), *at* <bit.ly/2pFR3zI> (accessed 20 March 2018).

50 *Additional Protocol I*, Article 35(2).

51 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (12 August 1949) 75 UNTS 31, *at* <bit.ly/2pGIKUg>, (accessed 20 March 2018).

52 *Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (12 August 1949) 78 UNTS 287.

53 *Additional Protocol I*, Articles 51(5)(b) and 57(2)(a)(iii).

54 *Protocol II to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 10 April 1981, 1342 UNTS 137, Article 3(3)(c).

55 Doswald-Beck, L, ed, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995), Article 46(d).

56 Henckaerts, JM and Doswald-Beck, L, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press 2005), 46-48.

The crystallisation of proportionality into a customary rule is certainly to be welcomed. It acts as a restriction on states, encouraging them to adopt more moderate methods and means and, in certain cases, may save the lives of civilians who would otherwise have been caught up as 'collateral damage'. Furthermore, any violation of the principle will constitute a war crime under the Rome Statute which provides the sanction of individual criminal responsibility where the principle has been violated (albeit with the modification to 'clearly excessive' discussed below).[57] However, it must also be remembered that proportionality can act as an *enabler*, providing states with legitimate sanction for particular attacks. For these reasons, and for both attacker and target, a clear understanding of what the principle means is vital. It should be noted that, for present purposes, proportionality does not only have a bearing on autonomous weapons if they are deployed at some point in the *future*. Rather, the principle *already* applies to this nascent technology as states are obliged, in the study, development, acquisition or adoption of new weapons to determine whether their employment would be prohibited by international law.[58]

B. The current approach to proportionality

Vital though it is to have a clear picture of what proportionality means, understanding that the principle is not straightforward.[59] As a starting point, it can be said that Additional Protocol I attempts to ensure that proportionality is assessed in the context of each individual 'attack'.[60] This is an attempt to confine the assessment of proportionality and to ensure that it relates only to the immediate objective in question: for example, the destruction of an enemy fuel depot. This narrow objective can be contrasted with the overall strategic goal of a campaign: for example, to bring about regime change.[61] If the latter was to be used as the yardstick, then a very high number of casualties would seem to be 'proportionate' even for minor military gains. How states have approached this delineation issue is discussed further below. Once the ambit of the relevant attack has been determined, the task is then to perform the proportionality assessment proper. It will be recalled from above that proportionality prohibits attacks that would cause collateral damage which would be 'excessive'[62] or which would cause 'unnecessary' or 'superfluous' suffering.[63] However, these terms possess inherent ambiguity as it is not immediately clear what might be considered excessive, unnecessary or superfluous from one case to the next.

The presence of ambiguity at the most fundamental level of the proportionality principle begs the question of how it has been capable of any meaningful application on the battlefield. The answer is simple - *human beings*. Human judgment has been the agent to imbue a flat concept with substance and to create a fully-formed and workable rule for any particular situation. The individuals exercising this human judgment could be military officers deciding on whether to launch an attack, or judges deciding if an attack was disproportionate. In any event, humans can be thought of as the yeast to proportionality's bread and relatively recent jurisprudence confirms this. The

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[57] *Rome Statute of the International Criminal Court* (1998) 2187 UNTS 90, Article 8(2)(b)(iv), *at* <bit.ly/2pHbk83> (accessed 20 March 2018) [*Rome Statute*].

[58] *Additional Protocol I*, Article 36.

[59] See generally Newton and May, *Proportionality in International Law* (Oxford University Press 2014), chapters 5-12.

[60] *Additional Protocol I*, Articles 51(5) and 57(2).

[61] For a rare, overt, expression of desire for regime change, see: United States Congress, *Iraq Liberation Act of 1998,* PL 105-338, 112 Statute 3178, 31 October 1998, *at* <bit.ly/2pIztuS> (accessed 20 March 2018).

[62] *Additional Protocol I*, Articles 51(5)(b) and 57(2)(a)(iii).

[63] *Additional Protocol I*, Article 35(2).

International Criminal Tribunal for the former Yugoslavia found in *Galic* that, in assessing proportionality, 'it is necessary to examine whether a reasonably well-informed *person* in the circumstances of the actual perpetrator, making reasonable use of the information available to *him* or *her*, could have expected excessive civilian casualties to result from the attack [emphasis added]'.[64] In fact, beyond providing a mere mechanism for resolving the ambiguities inherent in proportionality, it has been argued that human judgments have, over time, helped to *clarify* the principle. As Newton and May put it, repeated application of proportionality by countless individuals over a long period of time has consolidated proportionality and there is, as a consequence, 'a core of *jus in bello* proportionality that has remained fixed for generations.'[65] This, in turn, means that proportionality is no longer a vague notion but, rather, a clear 'fixed standard' setting limits on what commanders and soldiers can do and removing unwanted discretion that might be exploited or abused.[66]

If correct, this assertion is positive in the sense that it means humans operating in this field have a commonly understood meaning of which actions are 'proportionate' and which are 'disproportionate'. There is, of course, a significant problem with the current approach. This tacit understanding shared by people is of little utility in the context of autonomous weapons which sees part of the implementation of proportionality delegated to machines. The question therefore remains as to how proportionality will work in this new context.

C. The need for a new approach to proportionality

It has already been explained above that, for some decades at least, there is no question of truly thinking machines operating in any context.[67] Consequently, what we will certainly not see are instances of machines making 'judgments' about proportionality. Instead, modern artificial intelligence is limited to taking clearly defined rules (whereby any necessary judgments have already been made by humans) and then applying those rules to factual scenarios.[68] The distinction between *making* judgments and *applying* judgments may seem to be a fine one, but it is important. However, in the context of autonomous vehicles, the reality of trying to define algorithms that capture all of those judgments (and might thereby allow machines to replicate human behaviour) has proven to be a 'formidable challenge.'[69] This is what lay behind Germany's retreat when drawing up guidelines on the matter and prompted the requirement that, in life-versus-life cases, the controls have to be passed back to a human.[70] Again though, this option is not practicable in the case of autonomous weapons and so an alternative is needed.

One reaction might be to return to the position proposed by vehicle manufacturers to the effect that some sort of blanket prioritisation model should be adopted –this time favouring one of the actors on the battlefield rather than favouring the occupant of a vehicle.[71] However, it was indicated above that this would not be appropriate and, now that an exposition of proportionality has been supplied, the reason for this should be self-

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64 International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Stanislav Galic*, Judgment (Trial Chamber), Case No. IT-989-29-T, 05 December 2003, paragraph 58, *at* <bit.ly/1kYGPkL> (accessed 20 March 2018).

65 *Proportionality in International Law*, *supra* nt 5, 4.

66 *Id*, 3.

67 "Future Progress in Artificial Intelligence", *supra* nt 32.

68 *Task Force Report*, *supra* nt 10.

69 "The Social Dilemma of Autonomous Vehicles", *supra* nt 39, 1573.

70 *Bericht der Ethik-Kommission Automatisiertes und vernetztes Fahren,* Rule 8.

71 "Self-Driving Mercedes", *supra* nt 38.

evident. Proportionality in humanitarian law involves consideration of, on one hand, any military advantage that an attack would deliver and, on the other, any suffering the attack would cause. There must then be a check to ensure that the harm does not exceed the gain. A blanket presumption in favour of one side – either the target *or* the attacker – would not be compatible with this approach. Furthermore, there has been a suggestion by academics such as Fagnant and Kockelman that the introduction of autonomous vehicles will one day see the reduction of harm on the roads.[72] Bennefon *et al* have even suggested that switching to 'self-driving' vehicles will eliminate 90% of accidents.[73] In essence, the suggestion is that harm on the roads will one day be a moot point. This belief, whether right or wrong, is simply not applicable in relation to autonomous weapons. Attacks are by their very nature dangerous and intended cause harm – eliminating harm to enemy combatants or civilians is simply not an option. Suggestions of incorporating black boxes into autonomous technology to record the circumstances in which harm occurs do not change the fact that harm will always occur.[74]

The conclusion that can be drawn from all of this is that there is a need for a new, bespoke, approach to proportionality in relation to autonomous weapons. Experiences with autonomous vehicles have generally been either inapposite or under-developed. That said, as was noted above, Germany's position permits manufacturers to programme their vehicles to assess the number of casualties that may occur in any potential crash.[75] This opens the door to a quasi-utilitarian solution to the problem that seems to offer a plausible way forward. This is because proportionality is based upon the twin pillars of 'gain' and 'harm' that are analogous to the pillars of 'pleasure' and 'pain' upon which utilitarianism was founded by Bentham. It is to his work that we now turn.

III. Utilitarianism

A. The theory of utilitarianism

The classic utilitarian model of decision making is generally recognised as having first been expressed by Bentham as the basis for a new penal code – although similar notions can be traced as far back as Plato.[76] Utilitarianism is satisfied by any action 'when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.'[77] From the point of view of the individual, Bentham summarised utility as being 'that principle which approves or disapproves of every action … according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.'[78] The parallel between utilitarianism and proportionality is eminently apparent. Just as utilitarianism is satisfied when a given action will furnish an individual with more happiness than unhappiness, so too is proportionality satisfied when an attack will furnish the attacker with more gain than the attendant harm it will cause. The fact that these two principles share the same foundations offers an alluring prospect - that the painstaking work poured into utilitarianism by Bentham at the end of the eighteenth century in a bid to reform English criminal law might be used at the dawn

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[72] Fagnant, DJ and Kockelman, K, "Preparing a Nation for Autonomous Vehicles: Opportunities, Barriers and Policy Recommendations" 77 *Transportation Research Part A: Policy and Practice* (2015) 167.

[73] "The Social Dilemma of Autonomous Vehicles", *supra* nt 39, 1573.

[74] Endsley, MR, "Building Resilient Systems: Incorporating Strong Human-system Integration" 45(1) *Defense Acquisition, Technology and Logistics Magazine* January/February (2016) 6, *at* <bit.ly/ACd2EK> (accessed 20 March 2018).

[75] *Bericht der Ethik-Kommission Automatisiertes und vernetztes Fahren*, Rule 9.

[76] Barrow, R, *Plato, Utilitarianism and Education* (Routledge 2009).

[77] *Principles of Morals and Legislation*, *supra* nt 4, 3.

[78] *Id*, 2.

of the twenty-first century to resolve a vexed philosophical and technological question. There would be some poetry in that.

Before proceeding, it is important to acknowledge that utilitarianism is not without its criticisms. Ayer believed that he had identified a fundamental problem with the principle – that it is not always contradictory to say that some pleasant things are bad, or that some painful things are good.[79] Consequently, he argued, one cannot equate the fact that an action brings pleasure with it being 'right' or 'desirable' or *vice versa* – for example, a doctor might advise a patient of a terminal illness causing the latter emotional pain; but few would regard it as the wrong thing to do.[80] Ayer thus concluded that 'the validity of ethical judgements is not determined by the felicific tendencies of actions, any more than by the nature of people's feelings; but that it must be regarded as 'absolute' or 'intrinsic', and not empirically calculable.'[81] Kant, for his part, favoured moral philosophy grounded in deontology, or the logic of duty, and so created a series of principles which would stand in contradistinction to utilitarianism such as 'act only according to that maxim whereby you can at the same time will that it should become a universal law.'[82] In addition to logical or philosophical criticisms, utilitarianism comes with some heavy baggage owing to its occasional adoption by politicians, medical professionals and others to justify ruthless actions – the eugenics programme of the National Socialist Party being the most heinous example.[83] As a consequence, utilitarianism has seen a backlash that is generally based around the notion that it can be used to compromise the interests of the few for the benefit of the many.[84]

Many of the criticisms of utilitarianism are well-founded, some less so. For example, some policies that purport to follow a utilitarian model are in fact based on a perversion of the principle twisted by those in power to achieve nefarious ends.[85] In this sense, it is unfair to brand utilitarianism itself as inherently immoral. Indeed, Bonnefon *et al* found in the context of autonomous vehicles (through a detailed survey) that members of the public 'overwhelmingly expressed a moral preference for utilitarian AVs programmed to minimize the number of casualties'.[86] Of course, that result should be read against the finding that people would not actually want to *buy* utilitarian vehicles and prefer their vehicle to prioritise their own life in any scenario – although that probably says more about the survival instinct of humans than the morality of utilitarianism.[87] Nonetheless, the overall picture seems to be that utilitarianism may be better received than one might have thought and that people are generally cognisant of the difficult questions new technology can bring. In truth though, the point is not to determine which moral philosophy has the stronger case or to defend utilitarianism – that task has been undertaken in myriad contexts.[88] Instead, the key point is that utilitarianism here needs no defence. Proportionality in humanitarian law, rightly or wrongly, simply *is* a utilitarian principle – this is a *fait accompli*. The most fruitful endeavour is therefore to

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79 Rogers, B, ed, *Ayer: Language, Truth and Logic* (Penguin 2001).

80 *Id*, 107.

81 *Ibid*.

82 Gregor, M, ed, *Kant: The Metaphysics of Morals* (Cambridge University Press 1996).

83 LaChat, MR, "Utilitarian Reasoning in Nazi Medical Policy: Some Preliminary Investigations" 42(1) *The Linacre Quarterly* (1975) 14.

84 Brooks, S, "Dignity and Cost-Effectiveness: A Rejection of the Utilitarian Approach to Death" 10 *Journal of Medical Ethics* (1984) 148.

85 Alexander, L, "Medical Science under Dictatorship" 241(2) *New England Journal of Medicine* (1949), 39.

86 "The Social Dilemma of Autonomous Vehicles", *supra* nt 39, 1574.

87 *Ibid*.

88 Bagaric, M, "In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights" 24 *Australian Journal of Legal Philosophy* (1999) 95.

try to understand how it might operate in the context of autonomous weapons. Germany side-stepped this vexing issue in relation to vehicles, essentially handing the choice back to the driver in difficult cases, and so it remains a lacuna that needs to be addressed. Fortunately, Bentham explored this issue, albeit in a very general way, and his work offers a starting point for ensuring that autonomous weapons comply with proportionality in humanitarian law.

B. The hedonic calculus – gain and harm

For Bentham, the application of utilitarianism was achieved through the 'hedonic' or 'felicific' calculus.[89] This is essentially a simple process of weighing the amount of pleasure and pain a given course of action will cause. To complete the calculation, one is required to total pleasure on one hand and pain on the other – ensuring that all those individuals affected, and all of the resultant effects, are captured. If the balance is on the side of pleasure then the act is 'good' (ie right). Conversely, if the balance is on the side of pain then the act is 'evil' (ie not right). This can be transposed across to proportionality: if the balance is on the side of military gain then the action is proportionate (and permitted); if the balance is on the side of harm then the action is disproportionate (and not permitted). Of course, we must first know what pleasures and pains we wish to weigh against each other. Bentham discussed these matters and made effort to enumerate the various pleasures and pains that one might experience, with some of these 'perceptions' capable of manifesting as either. The pleasures are those of sense, wealth, skill, amity, good name, power, piety, benevolence, malevolence, memory, imagination, expectation, association and relief.[90] The pains are those of privation, senses, awkwardness, enmity, ill name, piety, benevolence, malevolence, memory, imagination, expectation and association.[91] Some thought must be given to how these 'pleasures' and 'pains' might manifest in a conflict involving 'gains' and 'harms'.

Turning first to 'gain' or, more properly, 'military advantage'. The starting point for understanding what is included here is Additional Protocol I which makes it clear that the parties to a conflict must distinguish between civilians and combatants and between civilian objects and military objectives and only direct operations only against military objectives.[92] In other words, there is no military advantage to be had from killing or injuring civilians or damaging their property, so nothing of that nature would qualify as 'gain' for the purposes of the hedonic calculus. Civilians are defined negatively as any individuals who are not members of the armed forces, militias, volunteer corps or organised resistance movements and who do not spontaneously take up arms to resist invading forces.[93] Persons falling within those categories are generally combatants and so are legitimate targets.[94] On the other hand, military objectives are articles which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[95] Special protection is afforded to cultural objects, places of worship, objects indispensable to the survival of the civilian population,

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89 *Principles of Morals and Legislation*, *supra* nt 4, 34.
90 *Id*, 34-37.
91 *Id*, 37-41.
92 *Additional Protocol I*, Article 48.
93 *Id,* Article 50(1).
94 Zimmermann, B *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987), 620.
95 *Additional Protocol I*, Article 52(2).

the natural environment and sites containing dangerous forces.[96]

Of course, it is necessary to move beyond these broad notions of military advantage and refine them into narrower rules if the goal is to lay down clear standards with which autonomous weapons might comply. However, this is difficult because, as Dinstein put it, 'the spectrum of military advantage is necessarily wide' and there is ambiguity over whether certain results or effects should be considered as rendering legitimate military advantage. [97] For example, there is some doubt over whether political or economic advantage garnered from an attack should be considered. At first blush, the answer would appear to be 'no' as such benefits are not strictly 'military' in nature.[98] However, it has been argued by Fleck that the purpose of any military action 'must always be to influence the political will of the adversary.'[99] Indeed, this argument was cited by the Eritrea-Ethiopia Claims Commission when it found that an Ethiopian attack on a power station was proportionate partly because it was intended to exert political pressure on Eritrea to agree to a cease fire.[100] Even if the Commission was wrong, there remains ambiguity over which particular articles are 'military'. Some articles are military by their very nature such as tanks, command centres and munitions centres.[101] However, ostensibly neutral articles may be capable of military use. For example, a vacant site which could be used as barracks for enemy combatants still qualifies on the basis of its potential military use in the future.[102]

Turning next to 'suffering' and 'harm', again the starting point for understanding what is included is Additional Protocol I which provides that death, injury and property damage qualify.[103] Again though, there are ambiguities as there is no exhaustive definition for what sorts of 'injury' fall to be measured under humanitarian law. For example, conflict not only causes injury by kinetic weapons but can also expose victims to toxic air produced by burning buildings and to psychological harm as a result of witnessing the aftermath of attacks. On the latter point, Additional Protocol I includes reference to 'health' as being something distinct from injury so this suggests that there is scope for consideration of impact on mental health.[104] Furthermore, the Protocol prohibits 'all acts or threats of violence the primary purpose of which is to spread terror' and this might be seen as alluding to psychological harm.[105] However, it is important to bear in mind that this instrument was drafted at a time when the level of attention paid to mental health generally was much lower than it is today and so there are limits on just how much one can read into these provisions without simply indulging in speculation. Indeed, there is good reason for states being reluctant to include psychological harm in the hedonic calculus as 'from a military medical point of view the most obvious defect of the concept of "suffering" is that it cannot be … related to wounding' and so is inherently

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96 *Additional Protocol I*, Articles 53-56.

97 Dinstein, Y, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd ed, Cambridge University Press 2016), 106.

98 *Id*, 107.

99 Fleck, D, ed, *The Handbook of Humanitarian Law in Armed Conflict* (Oxford University Press 1995), 157.

100 Eritrea-Ethiopia Claims Commission, *Partial Award: Western Front, Aerial Bombardment and Related Claims*, 19 December 2005, Volume XXVI, 291-349, 335, *at* <bit.ly/2uDOLGc> (accessed 20 March 2018).

101 *The Conduct of Hostilities*, *supra* nt 97, 104.

102 *Id*, 107.

103 *Additional Protocol I*, Article 51(5)(b).

104 *Id*, Article 85(3).

105 *Id,* Article 51(2).

harder to forecast.[106]

The consequence of the above is that, although there is a relatively definite core when it comes to deciding what might constitute gain and harm in humanitarian law, lingering ambiguities remain. It will be a matter for each individual state to resolve these difficulties when defining algorithms for any autonomous weapons – making countless decisions on what qualifies for inclusion in the hedonic calculus and what does not. However, utilitarianism offers a clear starting point – that *all* gain and *all* harm should be considered otherwise the result of the hedonic calculus and in turn, the application of proportionality, may be flawed. In short, the default position must be inclusion. Admittedly though, even if states do adopt this position, further difficulties remain to be overcome.

C. The hedonic calculus – context

While the task of identifying each of the various gains and harms to be included in the hedonic calculus presents a very complex task for states in its own right, it is not the end of the process. Before a utilitarian answer can be supplied, those gains and harms must be weighed against each other. Weighting depends on two key points: context and quantification.[107] Context will be considered first and, in essence, it must be recognised that proportionality assessments cannot be made in a vacuum. As Bradshaw *et al* put it, 'autonomy is relative to the context of activity. Functions cannot be automated effectively in isolation from an understanding of the task, the goals, and the context.'[108]

Perhaps the most significant contextual problem with assessing proportionality arises when attempting to ascertain the context within which the anticipated level of military gain is to be measured. Again, proportionality is violated by '*an attack* which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof [emphasis added].'[109] This indicates that, for example, the gain from the destruction of an 'enemy' tank should be the 'friendly' lives and property which might otherwise have been destroyed by that specific tank. However, a number of states have made declarations in respect of Additional Protocol I, or inserted text into their military manuals, to the effect that 'anticipated military advantage' is to be interpreted more broadly than this. For example, the UK has stated that 'the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered *as a whole* and not only from isolated or particular parts of the attack [emphasis added]'.[110] Similarly, Canada has indicated that an advantage exists if the attack 'will make a relevant contribution to the success of the *overall operation* [emphasis added]'.[111] Many other states have promulgated this view including Australia, Belgium, France, Germany, Italy, the Netherlands, New Zealand, Nigeria, Spain and the US.[112] Under this approach, it is not the gain from the destruction of the single tank that

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[106] Scott, R, "Unnecessary Suffering? A Medical View", *in* Meyer, MA, ed, *Armed Conflict and the New Law* (British Institute of International and Comparative Law 1989), 277.

[107] Barber, RJ, "The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan" 15(3) *Journal of Conflict and Security Law* (2010), 467.

[108] "Seven Deadly Myths", *supra* nt 11, 56.

[109] *Additional Protocol I*, Article 51(5)(b).

[110] United Kingdom, *Reservations and Declarations made upon Ratification of the 1977 Additional Protocol I*, 28 January 1998, paragraph 1, *at* <bit.ly/2rj4Z1M> (accessed 20 March 2018). United Kingdom, *Declaration of the United Kingdom of Great Britain and Northern Ireland in respect of Additional Protocol I*, 2 July 2002, *at* <bit.ly/2E8eOVx> (accessed 20 March 2018).

[111] Canada, Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Levels*, 13 August 2001, 415.1, *at* <bit.ly/2H1VrR6> (accessed 20 March 2018).

[112] *Customary International Humanitarian Law*, *supra* nt 56, 46-49.

is considered but, rather, the gain from the whole operation. The operation might have involved the destruction of an entire military base and so that is the gain to be considered. It should be noted that general, as opposed to multilateral, support for this position can be found in the Rome Statute which refers to the 'direct overall military advantage anticipated'.[113]

It seems clear that a truly utilitarian approach to proportionality favours the broader reading of military gain – anything less would warp the hedonic calculus by underestimating the potential advantage. Of course, this is a controversial position as it is likely to justify greater levels of harm and, in turn, might be viewed as contrary to the object and purpose of humanitarian law to reduce suffering when interpreted under the Vienna Convention.[114] Furthermore, in relation to the parallel with the Rome Statute, it must be conceded that this is technically only relevant to the determination of individual criminal responsibility and one might naturally expect a higher threshold than for 'normal' international wrongs which occasion only state responsibility. Indeed, during the drafting stages of the Rome Statute, the International Committee of the Red Cross made clear that the inclusion of the word 'overall' for the purposes of international criminal law must not be interpreted as modifying the standard under humanitarian law.[115]

However, it is submitted that adopting the broader reading of military gain will not, in fact, lower the level of protection offered by humanitarian law *provided* that the overall *harm* caused by an attack is also considered. This would involve taking a much broader view of the damaging effects an operation might have including, for example, the long-term physical and mental health implications for civilians who might become caught up in the conflict. This approach would help to rebalance the equation and ensure that the result produced by the hedonic calculus remains accurate. The problem at present is that states are incredibly reluctant to take a broader view of harm; but their position is simply perverse. As Barber put it, there is a 'logical inconsistency' in taking a broad view of military advantage but a narrow view of suffering.[116] Similarly, as McCormack and Mtaharu stated, 'to the extent that mid to longer term civilian damage resulting from an attack is expected, such damage should be taken into account in the application of the proportionality equation just as the campaign-wide military advantage is.'[117] In short, taking a fully utilitarian approach to the matter of context should favour neither the attacker nor those in the firing line, it should merely paint a clearer picture of the consequences of an attack and, in turn, permit better determinations to be made whether by humans or autonomous weapons.

D. The hedonic calculus – quantification

Once the relevant gains and harms expected to result from a strike have been identified and once they have been adequately contextualised, the final task for an autonomous weapon would be to quantify these factors and make the final proportionality assessment. However, like apples and oranges, gain and harm would appear to be incommensurable.

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[113] *Rome Statute*, Article 8(2)(b)(iv).

[114] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Articles 31-32.

[115] International Committee of the Red Cross, "Paper Submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the International Criminal Court", 13 February 1997, paragraph 190.

[116] "The Proportionality Equation", *supra* nt 107.

[117] McCormack, T and Mtharu, P, "Expected Civilian Damage and the Proportionality Equation" *Third Review Conference of the States Parties to the Convention on Conventional Weapons*, CCW/CONF.III/WP.9, 9, *at* <bit.ly/2pRAaSG> (accessed 20 March 2018).

Therefore, as Walzer put it, 'proportionality turns out to be a hard criterion to apply, for there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured.'[118] A number of authors have taken this apparent incommensurability to mean that proportionality assessments will remain vague undertakings. For example, Schmitt stated that, while there will be situations at each pole of the proportionality spectrum on which there will be broad consensus, 'the complexity emerges when one moves … along the proportionality continuum toward the centre'.[119] This would be a most undesirable position as it is precisely the sort of stumbling block that might undermine the ability of autonomous weapons to comply with humanitarian law. However, there is a solution as, according to Newton and May:

> The key to making proportionality manageable is to have weighing that can be done between things that are similar, not dissimilar whenever feasible. It is much easier if the value of the military objective can be couched in terms of lives to be protected or saved so that the costs of such an operation, also often drawn in stark terms of the risk of loss of non-combatant lives, can be assessed more straightforwardly.[120]

In other words, the solution to the incommensurability problem is, first, to measure harm as usual with reference to lives *lost* and injuries *inflicted* and, second, to express gain in terms of lives *saved* and injuries *prevented*. This is an incredibly useful mechanism, but it only takes one so far. It leaves open the finer detail of how to perform the proportionality balance. Certainly, the gains and harms are now much more amenable to comparison, but how, for example, is the loss of one life to be compared to the prevention of a dozen serious injuries? Again, we can turn to Bentham for guidance as he recognised that metrics were crucial to utilitarianism and created lists of 'circumstances' (now more commonly referred to as 'dimensions of value') to be used when measuring the pleasure and pain resulting from an action. The dimensions of value are as follows: 1. intensity; 2. duration; 3. certainty or uncertainty; 4. propinquity or remoteness; 5. fecundity (the chance of a sensation generating a later sensation of the same kind); 6. purity (the chance of a sensation not generating a later sensation of the opposite kind); and 7. extent (the number of people affected).[121]

Bentham's dimensions offer a very useful starting point to those tasked with developing autonomous weapons that are capable of complying with proportionality in humanitarian law. Each pleasure or pain is expressed by magnitude in terms of 'hedons' and 'dolors' (or 'positives' and 'negatives'). These are, in a sense, the raw figures that form the basis of the hedonic calculus. Admittedly, quantification in this way may seem crude, but there are two important points to bear in mind. Firstly, as explained above, it is not the autonomous weapons themselves that will determine the values attached to, for example, intensity or duration of harm. Machines are incapable of that level of understanding and will remain so for decades; instead, human beings will be tasked with setting these values.[122] Secondly, we should recall that precise values are already placed on highly sensitive matters such as human life. In the context of statistics, there is the 'cost of life' concept which is used to represent the cost of preventing death in different

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[118] Walzer, M, *Just and Unjust Wars* (Basic 1977).
[119] Schmitt, M, "The Principle of Discrimination in 21st Century Warfare" 2 *Yale Human Right Development Law Journal* (1990) 143, 170.
[120] *Proportionality in International Law*, *supra* nt 5, 285.
[121] *Principles of Morals and Legislation*, *supra* nt 4, 30.
[122] "Future Progress in Artificial Intelligence", *supra* nt 32.

circumstances. For example, in 2016 the US Department of Transportation put the 'value of a statistical life' at USD 9.6 Million.[123] The US Environmental Protection Agency also uses the 'Value of a Statistical Life', although it is at pains to explain why this is not the same as placing a value on individual lives and, indeed, is seeking to move away from the concept.[124]

The point to be taken from this is that operating the hedonic calculus in the context of autonomous weapons *is* possible. More than that, it presents significant opportunities as quantification removes the subjectivity associated with an individual's judgment and replaces it with something more objective. Currently, proportionality assessments are made by human beings whose assessments might be coloured by the fact that they are operating in the fog of war and at personal risk. However, quantification in the context of autonomous weapons would be completed *before* the machine is deployed, with the input of policy makers, lawyers, ethicists, military officers and others and can therefore be achieved in a more considered manner. If the results of this process can be brought into the light in the same way that rules of engagement are publicised, it might even be possible to encourage the voluntary placement by states of heavier weight on the side of harm and therefore reduce collateral damage. Going a step further, in working to protect their citizens and improve their humanitarian credentials, states could reach agreement on quantification either multilaterally in peacetime or bilaterally at the outbreak of war. Moreover, this sort of international agreement may be essential in securing *domestic* support for autonomous weapons with, for example, the US identifying 'trust' of autonomous technology as a central priority for development in this area.[125] Military operations are increasingly under the media spotlight and it is easier than ever before for populations to find out what actions their respective states are undertaking in their names. Disproportionate attacks by autonomous systems would inevitably be uncovered and criticised by the press; lower the perceived trustworthiness of such machines in the estimation of the public (as well as military personnel using them) and could potentially compel states to remove them wholly or partially from the field. [126] In this sense, a transparent, utilitarian approach to autonomous weapons might simultaneously benefit both states and those caught up in armed conflict.

Conclusion

Autonomous weapons are those which can be built, programmed and then deployed to the battlefield to serve their function without further human involvement. The hitherto lack of political will to impose a pre-emptive ban, coupled with the recent deterioration in relations between Russia and the West, seems to confirm the inevitability of their adoption. This raises *inter alia* the difficult problem of how to ensure that their actions will comply with the principle of proportionality in humanitarian law. Proportionality requires that attacks do not result in superfluous or unnecessary suffering and, so far, the principle has only been applied by human beings who are able to give the abstract concept practical meaning in any given scenario. While autonomous weapons are certainly impressive pieces of technology, no software presently exists that might endow them with human levels of intelligence. Instead, these machines are limited to making

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[123] US Department of Transportation, *Revised Departmental Guidance 2016: Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analyses*, 8 August 2016, *at* <bit.ly/2HiGOaI> (accessed 20 March 2018).

[124] US Environmental Protection Agency, *Mortality Risk Valuation*, *Online Questions and Answers*, *at* <bit.ly/2GrXaOk> (accessed 20 March 2018).

[125] United States Department of Defense, *Report of the Defense Science Board*, *supra* nt 22, 14-21.

[126] "Seven Deadly Myths", *supra* nt 11, 56.

fairly rudimentary calculations, albeit with vast amounts of information and at blistering speed. The question is therefore whether machines with this limited cognitive capability might be capable of applying proportionality.

The answer is a tentative 'yes'. The starting point is that proportionality and utilitarianism are expressions of the same concept: they seek to promote pleasure over pain and gain over harm respectively. As a result, proportionality can learn much from utilitarianism. In particular, utilitarianism shows us that assessments can be made using the 'hedonic calculus' but that, in order for the result to be accurate, there must be a willingness to include all of the relevant gains and harms rather than cherry picking some and ignoring others. Thus, while the current approach of certain states in assessing the 'overall' military advantage is appropriate, it must be matched with an assessment of the overall harm caused too. Utilitarianism also requires that those developing autonomous weapons must be able to assign values to each element on a battlefield if the calculus is to be completed. This can be achieved in terms of lives saved and lives lost, and there are past examples of states having ascribed specific values to human life, so the task is possible.

Aspects of utilitarianism might seem cold, however that is simply the law as it currently stands – proportionality is a utilitarian concept. Having said that, in this context it does in fact present an opportunity to raise the protection afforded to those embroiled in conflict. Rather than having proportionality assessments conducted by individual humans whose judgment will inevitably be clouded by the fog of war, the parameters are set in advance of the conflict by teams of individuals working together calmly as a collective. Hopefully, the necessary debates and conversations would result in a trend toward greater emphasis on humanitarianism. Furthermore, autonomous weapons would merely implement those parameters without the same desire for self-preservation or survival that can skew the application of proportionality when undertaken by humans. This more precise, mathematical, approach to proportionality could be exploited to its fullest if states work together to place greater weight on harm and thereby raise the bar that must be met before an autonomous weapon would engage in an attack. These sorts of agreements might represent a more achievable goal than the seemingly doomed discussions of a ban.

Funnily enough, Bentham himself did not think it would ever be possible to apply utilitarianism with mathematical precision to every judgment. Of course, he was writing well before an 'information age' in which calculations can be performed at high speed by machines fitted-out with microprocessors. Technology has finally caught up with Bentham; and society should make the most of it.

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The Obligation on an Intervening State to Respect the Host State's IHL and IHRL Obligations in an Intervention by Invitation: An Analysis of the Saudi Intervention in Yemen[*]

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Keywords
CONSENT, VARIATION OF INTERNATIONAL OBLIGATIONS, INTERNATIONAL HUMANITARIAN LAW, INTERVENTION BY INVITATION

Abstract

Interventions by invitation of the government have been attracting increasing interest from legal scholars in recent years. This increased interest can be attributed to the increasing frequency at which States, including Saudi Arabia in Yemen, use such invitations as a justification for the use of force in the territory of the host State. This paper considers these scholarly contributions and goes on to assess the limits of consent on which comparatively less scholars have focused. The paper concludes by arguing that the intervening State is constrained in its actions, within the host state, by the IHL and IHRL obligations binding on the host state.

Introduction

Consent, within the sphere of international law, has been argued to play three specific roles: 'to create, amend and excuse other States' wrongdoings.'[1] Explained in these terms, consent can be said to be both the pathway in which to create international law obligations, as well as the tool which releases States from certain obligations. As the complexity of armed conflicts in the world has changed drastically in the past several decades, so has the issue of consent and increasingly what constitutes valid consent and how far consent goes in excusing wrongdoing. A main point of contention arises surrounding the application of International Humanitarian Law (IHL) and International Human Rights Law (IHRL) either separately, or concurrently, and how this affects the enforceability of certain international law agreements by both consenting and intervening States.

This paper will briefly explore some of these issues with reference to the specific example of Saudi Arabia's intervention by invitation taking place in Yemen. Firstly, the relationship between consent and the use of force, in rendering the use of force lawful in as far as it removes the use of force from the *jus ad bellum* framework. Secondly, it must

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[1] Deeks, A., "Consent to Use of Force and International Law Supremacy", 54 *Harvard International Law Journal,* (2013), 1-60, 7.

be examined whether a use of force that has been removed from the framework of *jus ad bellum* would per se be lawful under *jus in bello*. Thirdly, this paper will argue that although it appears to be possible for States to alter their international obligations, as between itself and a third state, through an agreement such alterations are not possible in the case of an obligation *erga omnes* or where the obligation in question can not truly be seen as one regulating the strictly bilateral obligations between States. Lastly, the suggestion that a distinction between positive and negative international obligations should be made, and at very least, both parties in the example should be bound to the negative obligations, to prohibit consent from being used as an avenue for unlawful use of force and contravention of international law.

I. Intervention by Invitation and *Jus Ad Bellum*

International Law generally prohibits the use of force against the territorial integrity or political independence of any State.[2] There are, however, exceptions provided in *jus ad bellum* such as self defence and Security Council approval.[3] The granting of consent by one State to another is also regarded as a lawful use of force.[4] This use of force is not, however, rendered lawful by the operation of *jus ad bellum* but rather removes the use of force from its framework.[5] This is as *jus ad bellum* largely provides an excused violation of sovereignty whereas the use of force pursuant to valid consent does not violate sovereignty as it is 'a manifestation of that state's agency and political independence',[6] to the extent that the actions remain within the limits of that consent.[7]

A. Article 20 DASR

Article 20 of the International Law Commission's Draft Articles on State Responsibility (DASR) specifically sets out that consent by a state is assumed to carry the capacity necessary to preclude wrongfulness of acts that would have otherwise been wrongful in international law.[8] This is not intended to suggest that consent by one state gives license to another state to do as it pleases, even when there was an invitation to intervene. An example of this can be found in the *Nicaragua* case, where the ICJ mentioned that intervention even by invitation is wrongful where coercion is used and, due to a States' weak bargaining position, that State finds itself unable to make choices freely.[9] This reiterates the basis for consent in Article 20 of the DASR which states that for consent to

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

3 Choquette, R., "A Rebuttable Presumption against Consensual Nondemocratic Intervention", 55 *Columbia Journal of Transnational Law*, (2016) 138-177, 144.

4 See International Court of Justice (ICJ), *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. U.S.*), ICJ Reports 1986, June 27 1986; and ICJ, *Armed Activities on the Territory of the Congo* (*Dem. Rep. Congo v. Uganda*), ICJ Reports 2005, 19 December 2005, paras 42-54.

5 Byrne, M., "Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen." 3(1) *Journal on the Use of Force and International Law*, (2016), 97-125.

6 *Ibid*.

7 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), Article 20.

8 Fox, G., "Intervention by Invitation" in Weller, M. ed., *The Oxford Handbook on the Use of Force*, (Oxford University Press 2015), 821.

9 *Ibid*.

truly be valid, the consent itself must at least a true and voluntary representation of the States' will.[10]

B. Consent during a civil war

The legal literature on consent has increasingly been focused on the prerequisites for valid consent and the controversy surrounding the capability of a State to consent to an intervention in the midst of a civil war.[11] There has been broad support amongst international legal scholars for the principle that consent cannot be granted in the midst of a civil war since the adoption of the Institute du Troit's 1975 resolution on 'The Principle of Non-Intervention in Civil Wars' and Louise Doswald-Beck's seminal paper on consent in 1986 where she opined that 'there is, at least, a very substantial doubt whether a State may validly assist another government to suppress a rebellion.'[12] The increasingly frequent occurrence of states requesting the assistance of other states during the subsistence of in internal armed conflicts,[13] although the extent to which such conflicts can be classified as a 'civil war' remains unclear, warranting a brief discussion on State practice in this area in as far as it relates to the situation in Yemen.

Le Mon examined several interventions by invitation in his paper on this topic including, amongst others, Lebanon, Chad, Sri Lanka, and Tajikistan in which almost all of these interventions received 'near-unanimous support for the intervention's legality'.[14] This support came despite many of these conflicts arguably being considered a civil war. Vermeer and Akande have also pointed to the intervention by France in Mali in recent years in support thereof that state practice seemingly does not confirm any general prohibition on a states ability to intervene on behalf of the legitimate government in the midst of a civil war.[15] Other scholars in turn have, however, argued that the intervention in Mali was only against terrorist groups and not those groups that may legitimately be seen as liberation movements.[16]

State practice in this area thus seems somewhat inconsistent and the extent to which a state may intervene in a civil war remains unclear. The underlying rationale behind the alleged prohibition on accepting an invitation to intervene in the midst of a civil war as respecting people's right to self-determination is, however, clear.[17] It is submitted that if such a prohibition exists it clearly exists only in instances where the rebel group represent a clear manifestation of the will of the people. It is further

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[10] Byrne, M., "Consent and the Use of Force: An Examination of 'Intervention by Invitation' A a Basis for Drone Strikes in Pakistan, Somalia and Yemen",3 *Journal on the Use of Force in International Law*, (2016), 97- 125, 105.

[11] See, Byrne, *Supra* nt. 5, Visser; L., "Russia's Intervention in Syria" 2015 *at* <ejiltalk.org/russias-intervention-in-syria/> (accessed 25 May 2018); Akande, D. and Vermeer, Z., "The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars" 2 February 2015 *at* <ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/> (accessed 25 May 2018) and Nenadic, S., "Lawfulness of New Zealand's Military Deployment to Iraq: Intervention by Invitation Tested", 12(3) N.Z. Y.B. Int'l L., (2014), 3-78.

[12] Doswald-Beck, L., "The Legal Validity of Military Intervention by Invitation of the Government" 56 *British Yearbook of International Law*, (1986), 189–252.

[13] See *inter alia* Byrne, *Supra* nt. 5, 115 and Le Mon, C., "Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested" 35 *Journal of International Law and Politics*, (2003), 741-792.

[14] Le Mon, *Supra* nt. 13, 791.

[15] Akande, D. and Vermeer, Z., *Supra* nt. 11.

[16] See amongst others Ruys, T. and Ferro, L., "Legality and Legal Implications of the Saudi-led Military Intervention in Yemen" at <ssrn.com/abstract=2685567> (accessed 15 April 2018).

[17] Ruys, T. and Ferro, L, *Supra* nt. 16.

submitted that the mere fact that an armed group is capable of taking up arms against the State would not in itself imply that the group represents the will of the people.[18]

C. Consent and legitimacy

It is trite that valid consent can only be given by the legitimate government of the state concerned.[19] The most significant question in the determination of the legitimacy of the government rests upon its control over the state.[20] Traditionally, the focus had largely been on *de facto* control over the territory of the state.[21] The International Law Association (ILA) more recently opined that a government is capable of consenting if it is the *de jure* government by virtue of being the constitutional government and/or democratically elected power.[22] The ILA nevertheless still seems to imply that territorial control is the point of departure but that in instances where the *de jure* government still enjoys broad international recognition it will be capable of consenting.[23]

In the case of Yemen there is little dispute that President Hadi's government was *de jure* recognised as the legitimate government of Yemen with President Hadi having assumed office trough elections as required by Article 106(a) of the Constitution of Yemen.[24] He had, however, ostensibly lost *de facto* control over the state when he fled to Saudi Arabia, after his resignation, when the Yemeni capital, Sanaa, and later his last refuge in Aden was captured by Houthi rebels.[25] President Hadi later rescinded his resignation and invited Saudi Arabia and its Gulf Cooperation Council (GCC) partners to use military force against the rebel forces.[26]

The International Community as a whole, except for a few states such as Iran,[27] did not question the legitimacy of the invitation by President Hadi and broadly continued to recognise his government as the legitimate government of Yemen. Furthermore, the United Nations Security Council (hereafter the Security Council) in the preambular paragraph of Resolution 2216 reaffirmed its support for the legitimacy of President Hadi and called on 'all parties and Member States to refrain from taking any actions that undermine…. the legitimacy of the President of Yemen.'[28] It can therefore be concluded that despite President Hadi having lost *de facto* control over the territory of Yemen he was

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18 Byrne, *Supra* nt. 5, 115.

19 Byrne, *Supra* nt. 5 107; ILC Articles and Commentary, par 6.

20 *Ibid*.

21 Fox, *Supra* nt. 8, 831.

22 Byrne, *Supra* nt. 5, 107 see also International Law Association Committee on the Use of Force, Washington Conference 'Report on Aggression and the Use of Force' (2014), (ILA Report) <www.ilahq.org/download.cfm/docid/DA12E88E-5E44-4151-9540DC83D4A0EA78>

23 ILA Report, *Supra* nt. 22, states at footnote 88 that "*As a matter of international law, effective control is arguably the determinative factor for governmental authority. As stated in the Tinoco case, it is 'independence and control' that entitles an entity to be classed as a national personality: see Aguilar-Amory and Royal Bank of Canada Claims (1923) 1 RIAA 369, 381 (William H Taft). James Crawford has also noted, in reference to this arbitral decision, that '[i]n the case of governments, the "standard set by international law" is so far the standard of secure de facto control of all or most of the state territory': Crawford, Brownlie's Principles, at 152.*" Byrne, *Supra* nt. 5, 107, however, opines that the ILA does not seemingly prefer either *de jure* or *de facto* control over the other.

24 Byrne, *Supra* nt. 5, 116.

25 Reuters, Ghobari, M. and Mukhashaf, M., "Yemen's Hadi flees to Aden and says he is still president", 21 February 2015, *at* <reuters.com/article/us-yemen-security/yemens-hadi-flees-to-aden-and-says-he-is-still-president-idUSKBN0LP08F20150221> (accessed 12 April 2018).

26 BBC News, "Yemen's President Hadi asks UN to back intervention", 25 March 2015, *at* <bbc.com/news/world-middle-east-32045984> (accessed 13 April 2018).

27 Wall Street Journal, Eqbali, A. and Fitch, A., "Iran Condemns Saudi Arabia's Military Intervention in Yemen", 26 March 2015, *at* <wsj.com/amp/articles/iran-condemns-saudi-arabias-military-intervention-in-yemen-1427366776> (accessed 13 April 2018).

28 SC Resolution 2216, 14 April 2015.

capable of consenting to the intervention in light of the widespread international recognition of his government as the *de jure* government of Yemen.[29]

II. The Removal of The Use of Force from the Framework of *Jus Ad Bellum* Does Not Per Se Render It Lawful Under *Jus in Bello*

It is an established principle of international law that *jus ad bellum* and *jus in bello* are theoretically distinct bodies of law and remain separate.[30] The use of force that is lawful under *jus ad bellum* would not therefore automatically be lawful under *jus in bello*.[31] Similarly, it is submitted that the mere fact that the use of force has been removed from the framework of *jus ad bellum* would not similarly remove it from the framework of *jus in bello*. The obligations arising from *jus in bello* are nevertheless ostensibly not excluded from the wording of Article 20 of the ILC Articles on State Responsibility.

A. Consent will not exclude wrongfulness where consent to a violation is excluded *lex specialis*

The ILC Articles on State Responsibility are widely considered to be the most authoritative statement on state responsibility and broadly forming part of customary international law.[32] The principles that consent can exclude State responsibility were also regarded as forming part of customary international law well before the adoption of the ILC Articles,[33] wherefore it is not in dispute that consent can in certain instances exclude wrongfulness. It is, however, also clear that the provisions of the ILC Articles on State Responsibility can be excluded *lex specialis*.[34] Article 55 of the DASR also clearly provides that it does not 'apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.'

It is therefore trite that treaties containing special provisions on responsibility for internationally wrongful acts may exclude the application of the DASR. The responsibility arising from grave breaches of IHL is a prominent example where Article 20 of the DASR will be excluded *lex specialis*. It is common to the Four Geneva Conventions of August 1949 that no State may excuse itself or any other state of any liability incurred by itself or by another 'High Contracting Party' in respect of grave breaches.[35]

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[29] The striking similarities between the consent given by President Hadi and President Yanukovych of Ukraine and the diametrically opposed reaction of the international community falls beyond the scope of this paper. Suffice it to say that international law seemingly recognises the ability of a *de jure* government to consent only up until the point where a single new government has been established. In the case of President Yanukovych an interim government had already been established at the point when he fled to Russia. See in this regard Byrne, *Supra* nt. 5, 117 and Vermeer, Z., "The *Jus ad Bellum* and the Airstrikes in Yemen: Double Standards for Decamping Presidents? EJIL Talk, 30 April 2015, *at* <ejiltalk.org/the-jus-ad-bellum-and-the-airstrikes-in-yemen-double-standards-for-decamping-presidents/> (accessed 13 April 2018).

[30] Moussa, J., "Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law" 90 *International Review of the Red Cross*, (2008), 963-990, 965.

[31] *Ibid*.

[32] See ICSID, *Corn Products International Inc., v The United Mexican States*, Case No. ARB(AF)/04/01, decision on responsibility (2008) (hereafter "*Corn Products International*").

[33] *Nicaragua v. U.S.*, *Supra* nt. 4.

[34] *Corn Products International, Supra* nt. 32.

[35] See Article 52, International Committee of the Red Cross (ICRC), *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85; Article 51, ICRC, *Geneva Convention (I) for the Amelioration of the Condition of the*

B. Consent will not exclude wrongfulness in respect of a *jus cogens* norm

It is uncontroversial that any consent granted violating a jus cogens norm is void.[36] The Court of First Instance of the European Community has also held that:

> International law […] permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.[37]

Therefore, not even the Security Council may take actions that violate a *jus cogens* norm. Yemen is therefore, even more so, clearly not capable of granting Saudi Arabia and/or its GCC partners the right to violate *jus cogens* norms within its territory. It is not necessary for purposes of this paper to establish an exhaustive list of jus cogens norms. Article 3 Common to the Four Geneva Conventions of 1949, however, enjoys wide acceptance as a *jus cogens* norm,[38] wherefore Yemen and its allies are at a minimum required to comply with the obligations arising therefrom.

III. A Consenting State Can in General Not Consent to Acts That It Itself Cannot Perform

In the foregoing discussion it had been established that at a minimum consent cannot be given to acts that would violate a *jus cogens* norm, nor can the wrongfulness of an act be excluded in instances where the obligation in question, as *lex specialis*, provides that a State cannot excuse any states non-compliance. International legal scholars also increasingly agree that a state cannot generally consent to actions which it itself could not lawfully undertake.[39] The extent to which an intervening state's action is constrained by the host state's international obligations, however, in turn depends to some extent on whether or not a host state can alter its existing international obligations as between itself and the intervening State through a subsequent agreement.

A. States ability to alter international obligations

It is trite that States generally have the ability to alter their international obligations through the operation of consent[40] which form the basis of international law.[41] In the case of a bilateral treaty, the ability to alter treaty obligations is generally uncontroversial where the parties thereto agree. It is also 'well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties.'[42] It is thus possible for Yemen to alter some customary

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Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Article 148, ICRC, *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287.

36 Deeks, *Supra* nt. 1.

37 Judgment of the Court of First Instance of 21 September 2005 in Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities and Case T-315/01,* para 281.

38 Byrne, *Supra* nt. 5, 122 at footnote 182 and the authorities therein.

39 Deeks, *Supra* nt. 1 and Byrne, *Supra* nt. 5, 116.

40 Deeks, *Supra* nt. 1.

41 *Ibid*.

42 See ILC, "Report of the Study Group of the International Law Commission- Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law" 2006 *at* <legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf> (accessed 13 April

international law obligations binding on it through the conclusion of an 'agreement' with Saudi Arabia granting it consent to intervene.[43]

The extent to which a State may alter its international obligations arising from a multilateral treaty through the conclusion of a subsequent agreement, however, gives rise to significantly greater controversy.[44] The ICJ has held in this regard that it is:

> a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention.[45]

This statement seemingly confirms what is, at least in our minds, a sound principle of international law that Yemen cannot simply alter the entirety of its multilateral obligations trough granting Saudi Arabia consent.

Article 30 of the VCLT, however, appears to favour the *lex posterior derogat lege prior* rule in its provisions that where a State concludes a successive treaty, relating to the same subject-matter, with a State that is only a party to the latter treaty the parties' mutual rights and obligations shall be governed by the latter treaty.[46] These provisions are nevertheless without prejudice to any question of state responsibility that may arise as a result of the breach of an international obligation through the conclusion or application of such subsequent treaty.[47] Yemen could therefore still incur international responsibility in instances where Article 30 applies[48] if the subsequent treaty violates its obligations vis-à-vis another state.

It is furthermore clear that the provisions in Article 30 only apply to the extent that the agreement relates to the same subject matter. The legal literature on what constitutes the 'same subject-matter' is increasingly supportive of a relatively broad interpretation that is not limited thereto that the subsequent treaty must deal with the same branch of law, for example *jus in bello*. The test on whether an agreement falls within the same subject matter thus turns on 'whether the fulfilment of the obligation

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2018) (hereafter "ILC study on the Diversification and Expansion of International Law"); ICJ, *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, 20 February 1969, para 72. and *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Merits)*, ICJ Reports 1982, 24 February 1982, para 24.

43 This would for obvious reasons not apply to principles of customary international law having obtained the status of a *jus cogens* norm. In light of the ICJ's relatively broad interpretation of what constitutes an agreement there is also an increasing consensus amongst legal scholars that the granting of consent by one state to another would constitute an international agreement. See in this regard *inter alia* Deeks, *Supra* nt. 39.

44 ILC study on the Diversification and Expansion of International Law, *Supra* nt. 42, 121.

45 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case (hereafter "*Reservations to the Genocide Convention*"), Advisory Opinion, ICJ Reports 1951, 28 May 1951, see also ILC study on the Diversification and Expansion of International Law, *Supra* nt. 42, 123.

46 Article 30(4)(b), Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

47 *Ibid*, Article 30(5) these provisions, however, apply to the state breaching the obligation. In instances where the host state thus violates an obligation binding on it, it would not affect the intervening state.

48 Interventions by Invitation are rarely initiated trough the conclusion of a 'treaty' in the strict sense of the word as defined in the VCLT. Given the I.C.J's broad application of the VCLT to other sources as an interpretive guide, including Security Council Resolutions, it is possible that Article 30 may find application in relation to the letter exchanged by the President of Yemen and the Saudi government initiating the Saudi intervention by invitation. See inter alia Kosovo Advisory Opinion.

under one treaty affects the fulfilment of the obligation of another'.[49] If a subsequent agreement thus prevents the fulfilment of the obligations arising from the previous agreement or undermines its *raison d'être* the latter agreement will thus generally apply to the obligations arising between two states.

It would therefore seem that, to a certain extent, Saudi Arabia may rely on a later agreement concluded between itself and Yemen even where such agreement would conflict with other obligations binding on Yemen. This is, however, an oversimplified view and will ultimately be affected by the nature of the obligation intended to be altered and the limits on the underlying rationale behind the international community's support for the *lex posterior* principle.

B. Alteration of integral obligations and obligations *erga omnes*

Although there is generally no strict hierarchy of norms in international law, the ILC has opined that there has 'never been any doubt about the fact that some considerations in the international world are more important than others and must be legally recognized as such.'[50] It is submitted that obligations *erga omnes* are such norms considered more important than other strictly bilateral norms and a strict presumption against it being derogated from by *lex posterior* or modification should exist.[51]

In the course of the ILC debates on the VCLT it was already emphasised that there are certain obligations that are of a more integral or interdependent character.[52] These obligations were considered to be incapable of being reduced in any significant way to a reciprocal bilateral relationship between states.[53] The more integral obligation, it was further explained, would then be less easily derogated from through a subsequent alteration or *lex posterior*.[54]

It is to these obligations of a more integral nature that the ICJ was also seemingly referring to in its *Reservations to the Genocide Convention* Advisory Opinion, in which it held that a party to such multilateral convention may not reach particular agreements that frustrate the purpose and *raison d'être* of the convention.[55] It is therefore submitted that Yemen cannot alter its obligations under international law, having the status of an obligation *erga omnes* or if such obligations are incapable by their very nature of being reduced to operate in the bilateralist sense, through the conclusion of a subsequent agreement with Saudi Arabia.

The ICJ in the *Palestinian Wall Case* has also held that considering the importance of the rights concerned there is an obligation on all States not to recognise any conduct inconsistent with an obligation *erga omnes*.[56] This obligation would therefore also apply to Saudi Arabia and, in turn, require it not to conclude an agreement with Yemen that would lead to Yemen violating its *erga omnes* obligations. It is submitted that Saudi Arabia would thus also have to interpret the limits of the consent granted by President

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49 ILC study on the Diversification and Expansion of International Law, *Supra* nt. 42, 130.

50 *Idem*, p 167.

51 This is not, however, to suggest that obligations *erga omnes* create the same 'hierarchical' relationship between norms such as a *jus cogens* norm, which would clearly take preference over other norms.

52 Fitzmaurice, Third Report, *Yearbook … 1958* vol. II, p. 44, para. 91 see also *Idem*, 195.

53 ILC study on the Diversification and Expansion of International Law, *Supra* nt. 42, 195.

54 *Ibid*.

55 *Reservations to the Genocide Convention*, *Supra* nt. 45, 21.

56 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* reproduced in document A/ES-10/273 and Corr.1. See also ILM vol. 43 (2004) p. 1009, paras. 155 and 159.

Hadi consistently with Yemen's *erga omnes* obligations and will not be able to rely on the subsequent agreement where such agreement violates Yemen's obligations.

C. Treating consent in violation of international obligations as *ultra vires*

It is submitted that where a State grants consent such consent, it must generally be consistent with its international law obligations.[57] The law of treaties as aforementioned, however, seems to favour an approach in which a subsequent agreement, although violating the consenting states international law obligations, concluded with a third state will be valid in as far as the relationship between the parties are concerned. In as far as obligations such as *erga omnes* obligations are concerned, which cannot be confined to as between the parties, the third state should not, however, be able to rely on the subsequent agreement.

Deeks has argued that '[c]onsent – at least when it is used to affect legal relationships – generally contemplates a transfer only of those rights, privileges, powers, or immunities that the consenting entity itself possesses.'[58] This principle finds broad support in the common law principle that no person can give more rights than he himself possesses.[59] The relative broad support this principle enjoys worldwide could see it considered a source of international law forming part of the law of civilised nations.[60]

The use of force by an intervening state that violates IHL and/or IHRL would therefore fall beyond the scope of consent granted by the inviting state. This is so particularly in light thereof that important obligations arising from IHL and IHRL are considered to be amongst the most prominent examples of obligations *erga omnes*.[61] Wrongfulness for the use of force in such instances would not be precluded even where the consenting State expressly consented to such operation. It is submitted that such responsibility, for the intervening State, arises as a failure by a state in its obligation not to recognise any action inconsistent with an obligation *erga omnes* is arguably in itself a breach of an international obligation.

D. The international rule of law

The international community has furthermore repeatedly emphasised its commitment to the rule of law.[62] The Secretary General has also emphasised that the rule of law is at the core of the UN's mission and requires, amongst others, measures to 'ensure adherence to the principles of supremacy of law' by both State and private actors.[63] At the international level, the rule of law does not yet have a strictly defined scope but at a minimum requires that States honour agreements entered into in good faith and fulfil all obligations binding on them under customary international law.[64] It is submitted that if a State was capable of

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57 Byrne, *Supra* nt. 5, 124.
58 Deeks, *Supra* nt. 39, 34.
59 *Ibid*.
60 Article 38, United Nations, *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 933; The principle forms part of the domestic law of amongst others South Africa, The United States, The United Kingdom, Kenya etc. see in this regard Dukeminier, J. *et al*, *Property* (Wolters Kluwer Law & Business 2017), 707.
61 ILC study on the Diversification and Expansion of International Law, *Supra* nt. 42, 195.
62 See *inter alia* UN General Assembly Resolution 67/1.
63 Report of the Secretary General, "The rule of law and transitional justice in conflict and post-conflict societies" S/2004/616 par 6.
64 Chesterman, S., "An International Rule of Law?" 56 *American Journal of Comparative Law*, (2008), 331-361.

granting what Ashley Deeks refers to as 'unreconciled consent',[65] the international rule of law would be rendered nugatory.

IV. Is Saudi Arabia Under A Duty to Respect IHL and IHRL Obligations Binding on Yemen?

From the conclusion that Yemen cannot in general consent to actions which it itself cannot take, it follows that the Saudi Arabian government would to some extent be constrained by the IHL and IHRL obligations binding on Yemen. It is increasingly accepted in international law that certain IHRL treaties such as the International Covenant on Civil and Political Rights (ICCPR) operate extraterritorially.[66] Saudi Arabia is, however, neither a party to the ICCPR nor to the International Covenant on Economic, Social and Cultural Rights (ICESCR) whereas Yemen is a party to both these IHRL treaties.[67] The Saudi Arabian intervention in Yemen thus presents a unique case study on the extent to which an intervening state has a duty to respect the IHL and IHRL obligations of the inviting state.

The extent to which the obligations under the ICCPR and the ICESCR are also binding on Saudi Arabia in the ordinary course of international relations, i.e. outside of the intervention by invitation in Yemen, falls beyond the scope of this paper. Suffice it to say, however, that in its operations in Yemen, Saudi Arabia would clearly have to comply with all IHL and IHRL obligations binding on it to the extent that such obligations apply extraterritorially.[68]

A. The *res inter alios acta* principle

The Permanent Court of International Justice (P.C.I.J) established that treaties generally only create obligations as between the parties thereto and that in the case of doubt no rights or obligations can be deduced from it in favour of third states.[69] A treaty to which a State is not a party thus remains *res inter alios acta* in respect of that State. The fact that the intervening State is, however, constrained thereby that it cannot perform any acts that the host state cannot itself perform indicates that the intervening state is constrained by the negative obligations of the host State to the extent that the agreement providing consent cannot deviate from such negative obligations.[70] It is, however, submitted that this does not violate the principle that third states are not affected by something that remains *res inter alios acta* as the intervening state ultimately agrees to accept the invitation to

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[65] Deeks, *Supra* nt. 39.

[66] The UNHRC has held that States can "be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it." See *inter alia Lopez Burgos v Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3; and *Celiberti de Casariego v Uruguay,* U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3.

[67] See UN, State Parties to the ICCPR, at <treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en> (accessed 15 April 2018) and UN, State Parties to the ICESCR, available online at <treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> (last accessed 15 April 2018).

[68] See *inter alia Pereira Montero v. Uruguay*, U.N. Doc. CCPR/C/18/D/106/1981, 31 March 1983, para 5 in which the UNHRC held that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."

[69] *Certain German Interest in Polish Upper Silesia* case (1926), *ibid.*, *Ser. A*, No. 7 par 82.

[70] The constraints upon the scope of consent are that of actions which the host state itself cannot perform wherefore positive obligations, such as those arising from certain of the provisions of the ICESCR, would ostensibly remain *res inter alios acta*.

intervene and may not act beyond the scope of the host states consent. The intervening state therefore agrees to assume such obligations by accepting the invitation to intervene.

B. IHRL and IHL obligations are generally not Ccpable of being reduced to operate in the bilateral sense

In the foregoing discussion it had been established that there are instances in which a third State can rely on a subsequent agreement regulating the relations as between itself and another state. This does not, however, apply to obligations *erga omnes* or those obligations that cannot be meaningfully reduced to operate in the strictly bilateral sense.[71] The extent to which IHL and IHRL obligation can operate in the bilateral sense would thus impact the extent to which the intervening state must respect the host states IHL and IHRL obligations.

A number of obligations arising from IHL and IHRL do not create reciprocal obligations between States in the bilateralist manner.[72] This is as the obligations assumed by the State is rather a responsibility a State assumes 'in relation to all persons under its jurisdiction'.[73] It is submitted that where an obligation, such as for example the obligation on the state not to arbitrarily detain persons within its jurisdiction, does not create reciprocal obligations between states in the bilateralist manner, because of the very nature of the obligation, it would not be capable of being excluded in a subsequent agreement. The vast majority of negative IHL and IHRL obligations to which individuals within Yemen are entitled would therefore in turn place legal constraints upon Saudi Arabian operations in Yemen.

The negative obligation not to impair existing access to adequate food arising from the ICESCR,[74] for example, would thus be binding on Saudi Arabia in its operations in Yemen. In the midst of an armed conflict, such right should, however, be interpreted with reference to the principles of IHL as *lex specialis*.[75] If the Saudi Arabia-led blockade, which is widely reported as having impaired access to adequate food,[76] is therefore acting inconsistently with the rules of IHL pertaining to blockades it would also amount to a violation of the right of access to adequate food.

Conclusion

It can therefore be said that the Saudi Arabia-led intervention has seemingly met all formal requirements for a lawful intervention by invitation. Yemen's invitation to Saudi Arabia and the rest of the GCC should nevertheless be consistent with its international law obligations and the scope of its consent strictly limited to actions that it itself could lawfully have undertaken. It is, however, also true that Yemen can alter its international law obligations as between it and Saudi Arabia where the obligation in question is

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71 *Jus cogens* is not mentioned here but any agreement violating a *jus cogens* norm would clearly be void.

72 ILC study on the Diversification and Expansion of International Law, *Supra* nt. 42, p 198.

73 *Ibid*.

74 UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999 recognises that states have both negative and positive obligations arising from Article 11 of the CESCR.

75 General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia, para 32, *at* <www.achpr.org /files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf> (accessed 15 April 2018).

76 Human Rights Watch, "Yemen: Coalition Blockade Imperils Civilians", 7 December 2017, *at* <hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians> (accessed 15 April 2018).

capable of operating in the bilateralist sense. Where it has so altered its international obligations, it would nevertheless remain internationally responsible for the breach of another obligation, binding on it, through this subsequent agreement. In this instance, Saudi Arabia and its GCC partners would, however, be able to rely on this subsequent agreement and would not bear Yemen's responsibility for any breach.

Where the obligation is an obligation *erga omnes* or by virtue of the nature of the obligation is incapable of being meaningfully reduced to operating reciprocally between two States, the Saudi Arabian government and its coalition partners would not be able to rely on such an agreement. Any consent given by Yemen permitting Saudi Arabia and/or the GCC to violate such obligations are to be rejected as *ultra vires*. The rejection of such consent given as *ultra vires* would, in turn, exclude the application of Article 20 DASR and may give rise to the international responsibility of a State acting pursuant to such consent.[77] In accepting the invitation to intervene in Yemen, Saudi Arabia and its GCC partners also became bound to honour the negative obligations under IHL and IHRL to the extent that such obligations are impacted by the military intervention and the use of force in the territory of Yemen.

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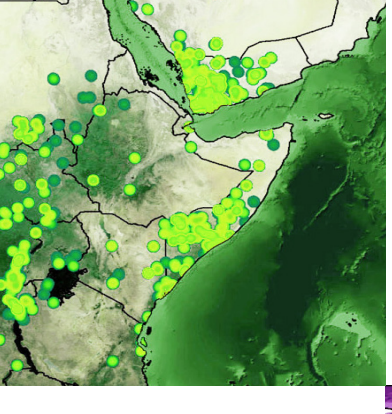
[77] The extent to which individuals, who are the beneficiaries of most IHL and IHRL rights, lack standing before many international tribunals is a relevant question for the enforcement of responsibility but is ultimately a question falling outside the realm of state responsibility.



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