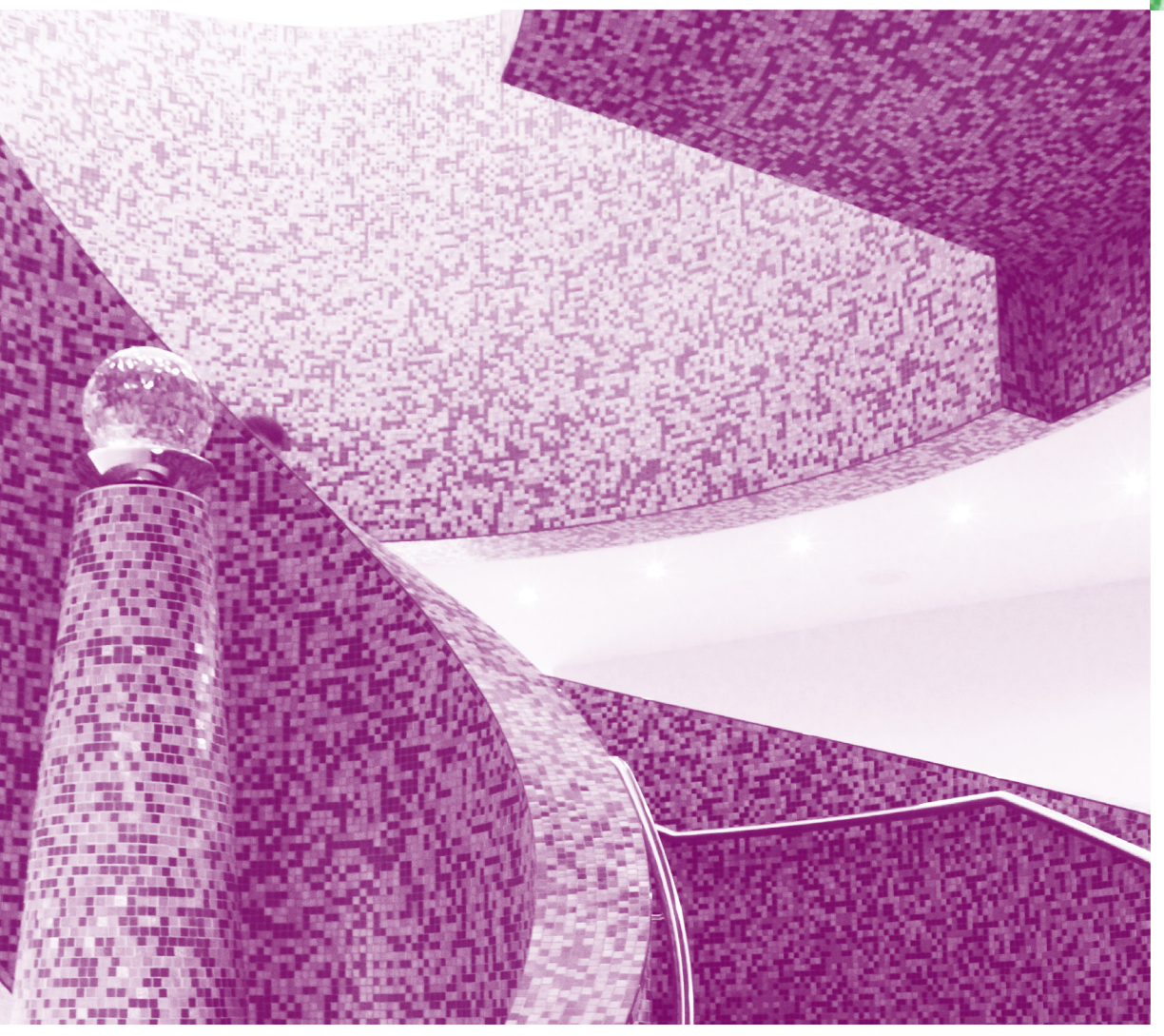
Groningen Journal of International Law



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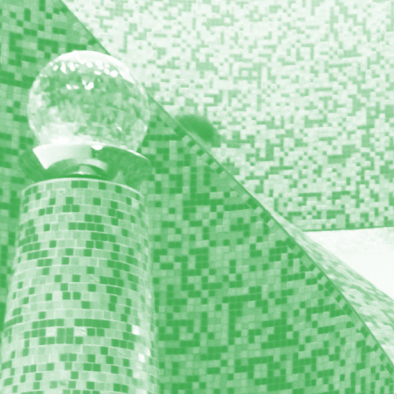
International Legal Reform



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CRAFTING HORIZONS

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PRESIDENT'S NOTE

Dear reader,

I am proud to introduce Issue 2 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>.

GroJIL 6(2): International Legal Reform introduces a minor shift in the general presentation of our publications. As the Journal slowly transitioned to open calls for papers our publications have also become more open in terms of their central theme. Therefore, publications from Volume 7 and onwards will generally be considered to be open issues unless specified otherwise. The covers for these open issues will highlight buildings and sights from in and around our hometown of Groningen. The current issue introduces this change and features the colourful staircase of the Groningen Museum by Alessandro Mendini which deserves to be admired in its full splendour during a visit to the city.

As for the content of *GroJIL* 6(2), our Publishing Director Jochelle Greaves Siew has the following to share:

In the opening contribution, Joel Adelusi Adeyeye offers a critical appraisal of the Constitutive Act of the African Union in light of its precursor, the Charter of the Organisation of African Unity. By challenging the African Union's present modelling after the EU and addressing its record, recommendations and suggestions are made for potential improvements ahead of the African Union's 20th anniversary. In the second article and coincidentally their second publication with GroJIL, Empire Hechime Nyekwere reviews the debate on environmental governance reform, along with the most prominent issues and policy options. He advances the establishment of a World Environment Organisation and proposes certain specifications for its framework and mandate. Juraj Majcin takes a critical view on social media's effect on peace negotiations and national reconciliation in the third article, describing it as both confidence-building platform and a tool for prolonged conflict through the proliferation of disinformation and propaganda. He contends that in order to achieve national reconciliation and sustainable peace, it is necessary that modern peace agreements contain rules on the regulation of social media content that may threaten peace. The fourth submission sees Hasanali Pirbhai examine the flaws in Investor-Treaty Arbitration and derived legitimacy concerns – chiefly within the ICSID and UNCITRAL systems – and evaluates the EU's proposal through the Draft TTIP for a permanent court to address these issues. The fifth article is from early GroJIL Blog contributor Jenny Poon who highlights the vulnerabilities faced by forced female migrants when crossing international borders in order to flee persecution or rights violations linked to gender violence and further argues that such vulnerabilities are exacerbated by the misapplication or disregard of international instruments designed to protect them. In the following contribution, Dhruv Sharma focuses on the impact of the standard of specific direction before the International Criminal Court, highlighting its rejection by the Rome Statute and the lack of judgments effectuated by it. He further argues that the standard of specific direction is counter-intuitive to the objectives of the ICC as it unreasonably increases evidentiary requirements and consequently makes the fight against impunity, an already challenging task, even more difficult. And lastly, Themistoklis Tzimas analyses solidarity as a principle of international law in relation to consensual intervention. He puts forth the argument that a direct reference to solidarity is necessary as a criterion of lawful consensual intervention, taking into account both the inviting and intervening sides and compliance with both internal and international law.

On the organisational side, a lot has happened since *GroJIL* 6(1). Most notable among these is that last November the Journal collaborated with the University of Groningen's Centre for Religion, Conflict and Globalisation (CRCG) to organise an interdisciplinary workshop on human rights in

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commemoration the 70th anniversary of the Universal Declaration of Human Rights. The event was attended by scholars from various countries and featured a keynote lecture by Prof. Conor Gearty. We are immensely grateful to Méadhbh McIvor, PhD, from the CRCG for reaching out to the Journal and making this a reality. I am incredibly proud GroJIL was able to play a small role in this successful event.

Additionally, we have welcomed the Executive Blog Editor of our blog as a new member of the Board. 'International Law Under Construction' started as a project initially under the supervision of then Publishing Director Vincent Beyer and myself, and has become such an important branch of our organisation that, considering its continued success and increasing self-reliance, should have a much larger influence on our future direction.

I naturally want to thank the Editing Committee for their work on this issue and everyone else involved within the different branches of the Journal for their continued efforts, and last but not least, the Department of Transboundary Legal Studies at the University of Groningen for their financial support.

Lastly, on a semi-personal note, I must admit this editorial was particularly difficult for me to write because this is my final issue as Editor-in-Chief of GroJIL. When I first joined GroJIL as a member of the Events Committee I never expected to end up as Editor-in-Chief of the Journal. GroJIL had only been around for a couple of years and I was just excited about the project and simply wanted to help it grow. As I am a bit of a tech enthusiast and digitally quite adept I had a few thoughts on where GroJIL should go next being an online-only journal and I am thankful for the opportunity and trust given to me first as Technical and Promotional Director on the Board and later as President and Editor-in-Chief. Along the way, I have met and worked with many amazing people whom I admire greatly. We shared countless laughs and persevered through many moments of relative despair all because we believed in what the Journal was and what it could become. For the foreseeable time, I will stick around in a supporting role to ensure a smooth transition, but I believe it is time for me to hand over the proverbial reins and I am confident the current team will make GroJIL even better. It has truly been an amazing privilege and I will surely miss it. But for now…

Happy reading!

Thank you.

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

Groningen Journal of International Law, vol 6(2): International Legal Reform

A Comparative Analysis of the Charter of the Organization of African Unity (OAU) and the Constitutive Act of the African Union (AU)

Joel Adelusi Adeyeye, Esq*

DOI: 10.21827/5bf3e9b80d885

Keywords
COMPARISON; OAU; AU; ACHIEVEMENTS; FAILURES

Abstract

This article takes a critical look at comparative analysis of the Charter of the Organization of African Unity (OAU) and the Constitutive Act of the African Union (AU). In doing so, the article will compare the organs and institutions of both the OAU and the AU. It will also access the achievements and failures of the two bodies and in doing this, the article will argue that if OAU has been performing as expected, there will be no need for the AU. It will in addition go further to list some provisions in the Constitutive Act of the AU that were not included in the Charter of the OAU. It will also argue that in modeling the AU like the European Union (EU), there has been no linkage in the achievements of this continental body that can make it comparable to the EU. Also, in accessing the AU, this paper will proffer answer to the question, whether there has been any significant change since AU come on board, or if it was just a name change. Finally, the article will conclude by making recommendations and suggestions for better performance of the continental body before it clocks twenty (20) years.

I. Introduction

The end of the Second World War precipitated the creation of the majority of independent States in Africa. Most of the colonial powers, including Britain and France, were weakened and devastated by the war and relinquished the majority of their colonies in the continent. In addition to that, colonialism became internationally regarded as inappropriate in the post Second World War era.[1] Political history of Africa is one of struggle. From struggle against colonialism to that of achieving continental unity, the continent has had to struggle to make impact in global politics with no sign of that abating soon in sight.[2] Effort made at addressing these struggles in the past, saw to the formation of a continental group such as the Organisation of Africa Unity (OAU) in 1963. The group saddled with the responsibilities of combating colonialism and racial discrimination in Southern Africa, was also to bring about

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1 Francis, DJ, *Uniting Africa: Building Regional Peace and Security Systems* (Aldershot, Ashgate Publishing Ltd 2005), 11.

2 Jiboku, PA, "The Challenge of Regional Economic Integration in Africa" 3(4) *Africa's Public Service Delivery and Performance Review* (2015), *at* <https://apsdpr.org/index.php/apsdpr/article/view/96> (accessed 15 December 2018).

political development of the continent. However, years on, and plagued by institutional frailties, the OAU before its demise was seen by many to have failed to provide Africa the needed political platform to chart the course of unity needed for continental development.[3] With varied reasons adduced for the failure among scholars, the erstwhile continental body was seen as a failure.[4] Others leaning on Ajala's conclusion hold that the failure of the continental body, birth vices such as wars and poverty that became dominant across the continent.

Failure of the OAU to effectively represent the interests of the common people on the continent leads to such conclusion. It did not stand for peace, unity and people-centered development as wars and poverty become dominant across continent and as such, the O.A.U was seen an old boys' club where the so-called leaders met annually to showcase their ill-gotten wealth and rival each other for the control of African continental political body.[5] Their main focus seemed to be protecting each other, no matter the circumstances in line with the so-called 'principle of State sovereignty'. This retarded rather than promoted the quest for African development.[6]

Africa is made of diverse ethnic, religious and socio-cultural background and colonial territorial boundaries which are obstacles that divide Africa. In addition, 54 independent States that constitute Africa are diverse and vast with important ecological, demographic, racial, socio-cultural, ethno-religious and political differences.[7] There are for instance, wide racial and cultural differences between the Maghreb North and sub-Saharan Africa.

There are also striking demographical differences as reflected in the population and size of States such as Sudan, Democratic Republic of Congo (DRC) and Nigeria on one hand, and other micro-States like the Gambia, Lesotho and Swaziland on the other hand. There is also a vast disparity in resource endowment as illustrated by the mineral-rich States of Nigeria,

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3 Eghweree, CO, "From O.A.U.: The Politics, Problems and Prospects of a Continental Union" 4(24) *Developing Countries Studies* (2014)218; "The Perspective, Hodge, T, *From OAU to AU: Same Old Lady*, New Dress" 29 July 2002, *at* <https://www.theperspective.org/oautoau.html> (accessed 15 December 2018); Maurizo, C, "From OAU to AU: Turning Pages in the History of Africa," *The Courier* September-October (2002) 30-31, *at* <http://aei.pitt.edu/39229/1/Courier.194.pdf> (accessed 15 March 2018).

4 Ajala, A, "Background to the Establishment, Nature and Structure of the Organisation of African Unity" 14(1) *Nigerian Journal of International Affairs* (1998) 35.

5 Maurizo C, "From OAU to AU: Turning a Page in the History of Africa", *supra* nt 3.

6 Abutudu, MIM, "The Development Crisis" in Ikelegbe, AO, ed, *Introduction to Politics* (Benin City, Imprint Services, 2005), 298.

7 Maurizo C, *supra* nt 3; These differences are in themselves major obstacles to unity in Africa. However, these perspectives on the heterogeneous nature of Africa downplay the relevance of socio-political unity in diversity. In spite of these differences, African States, at independence, shared important commonalities that were to serve as the stimulus for unity. The newly independent States shared the common experience of having been subjected to slavery, colonialism and imperialism. On securing political independence as sovereign States, they were thrust into an international economic and political system, in which the rules and regulations were not designed by and for them, and were called to participate on terms disadvantageous to their progressive development. Their collective historical experiences and memories of marginalization and socio-cultural and racial affinities developed a collective solidarity – a sense of oneness and the consciousness of belonging to Africa. This became a powerful mobilizing and unifying force for African peoples and societies rooted in Pan-Africanism. See Murithi, T, "The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur" 14(4) *Journal of Peace, Conflict and development* (2009), *at* <https://www.bradford.ac.uk/social-sciences/peace-conflict-and-development/issue-14/theafricanunionsforay.pdf> (accessed 12 October 2016).

Sierra Leone, Libya and South Africa as opposed to the resource-poor countries on the continent, such as Chad, Niger and Mauritania.[8]

Furthermore, there is a huge gulf between the stable and relative prosperous States like Botswana, Cape Verde, Mauritius and Tunisia and economically weak and war-torn countries such as Sierra Leone, Angola, Democratic Republic of Congo (DRC), Liberia, Somalia and Sudan.[9] These differences are in themselves major obstacles to unity in Africa.

Even a sub-regional organisation, like the Economic Community of West Africa States (ECOWAS), is made up of diverse colonial heritage, like Anglophone, Francophone and Lusophone divide.[10] The West Africa sub-region was portrayed by Kaplan as having the potential to become the 'real strategic damage' threatening international peace and security.[11]

The inauguration of the OAU on 25th May 1963 represented the institutionalization of pan-African ideals.[12] There were heated debates about the shape and functions of the organisation. The radical (the Casablanca group) point of view promoted by leaders such as Kwame Nkrumah of Ghana, Julius Nyerere of Tanzania and Nasser of Egypt who pushed for even closer political unification. On this, Nyerere, argued, that the boundaries dividing Africa States were 'nonsensical' as they had been arbitrarily drawn by Europeans in the 1885 'scramble for Africa'.[13]

The more conservatives (Monrovia group),[14] African leaders such as William Tubman of Liberia, Felix Houphovet Boigny of Ivory Coast and Leopold Sedar Senghor of Senegal[15] were unwilling to take such a step and preferred to retain the 'illusion' of national independence.[16] As a result of these differences, OAU was in effect impotent in its efforts to positively influence national policies, monitor the internal behaviour of member States and prevent human rights abuses. The preamble to the OAU Charter of 1963 outlined a commitment by member States to collectively establish, maintain and sustain peace and security in Africa.

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8 Francis, *supra* nt 1, 24.

9 *Ibid.*; See also Alao, A, Mackinlay, J and Olonisakin, F, *Peacekeepers, Politicians and Warlords: The Liberian Peace Process* (United Nations University Press 1999), 101.

10 See Francis, DJ, "Peacekeeping in a Bad Neighbourhood: The Economic Community of West African States (ECOWAS) in Peace and Security in West African" 9(3) *African Journal on Conflict Resolution* (2009) 90; The Anglophone countries include: Sierra Leone, Ghana, The Gambia, Liberia and Nigeria. The Francophone States include: Guinea (Conakry) Senegal, Mali, Niger, Côte d'Ivoire, Burkina Faso, Mauritania, Benin and Togo; whilst the Lusophone countries comprise Guinea Bissau and Cape Verde. Note that Mauritania withdrew their membership in 2000.

11 The Atlantic, Kaplan, R, *The Coming Anarchy*, February 1994, *at* <https://www.theatlantic.com/magazine/archive/1994/02/the-coming-anarchy/304670/> (accessed 15 December 2018).

12 Olonisakin, F, *Conflict Management in Africa: The Role of OAU and Sub-regional Organization* (ISS Monograph Series 46, 1996), 1.

13 Nyerere, J, *Crusade for Liberation* (OUP 1979), 2; Murithi, T, "The African Union Evolving Role in Peace Operations: The African Union Mission in Burundi, The African Union Mission in Sudan, and The African Union Mission in Somalia" 17(1) *African Security Review* (2008) 71; Eghweree, *supra* nt 3.

14 *Ibid.*

15 Francis, *supra* nt 1, 18.

16 *Ibid*.

However, in parallel, the same OAU Charter contained the provision to defend the sovereignty, territorial integrity and independence of the member States.[17] This was later translated into the norm of 'non-intervention'.[18] The key organs of the OAU-the Council of Ministers and the Assembly of Head of States and Governments could only intervene in a conflict situation if they were invited by the parties to the dispute.[19] Regrettably, due to the doctrine of non-intervention, OAU became a silent observer to the atrocities committed by some of its member States.[20] Eventually, a culture of impunity and indifference became entrenched in the international relation of African countries during the era of the 'proxy' wars of the Cold War. Others describe OAU as a 'club of dictators' that generally made no pretense of playing any role in protecting human rights, focusing instead on securing the sovereignty of the African States as they emerged from colonial rule.[21]

Historically, the OAU's record indicates that the policy of non-intervention was applied to the extreme.[22] African nations oppressed their own people with impunity and did little or nothing to prevent massive human rights abuses in neighbouring countries.[23] The OAU was perceived as a 'club of African Heads of States, most of whom were not legitimately elected representatives of their citizens, but self-appointed or imposed dictators and oligarchs. It was viewed as an organisation that had no genuine impact on the daily lives of Africans, a 'toothless talking shop' a 'silent observer' to the atrocities being committed by its member States.[24]

II. Success and Failure of OAU

As earlier started, the OAU came into being on the 25th May 1963 when 31 government representatives from across Africa signed the OAU Charter in Addis Ababa, Ethiopia. Twenty-one other States and South Africa later joined the regional body bringing the membership to 53 as at 1994 when South African apartheid regime ended, and became 54

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17 Art. II(1), Organization of African Unity, *Charter of the Organization of African Unity* (1963).

18 Kioko, B, "The Right of Intervention under the African Union's Constitutive Act: From non-interference to non-intervention" 85(852) *IRRC* (2003) 807, *at* <http://www.operationspaix.net/DATA/DOCUMENT/5868~v~The_right_of_intervention_under_the_African_Union__8217s_Constitutive_Act__From_non-interference_to_non-intervention.pdf> (accessed 15 December 2018).

19 Francis, *supra* nt 1, 4.

20 Murithi, *supra* nt 13, 65.

21 Gottschalk, K and Schmidt, S, "The African Union and the New Partnership for Africa's Development: Strong Institutions for Weak States" 4(3) *Internationale Politick and Gesellscheft* (2004) 138; Adam, K, "The African Union in Darfur: An African Solution to a Global Problem" *Journal of Public and International Affairs* (2007), 153.

22 Simons, PC, "Humanitarian Intervention: A Review of Literature" 1-2 *Ploughshares Working Paper 3, at* <http://ploughshares.ca/pl_publications/humanitarian-intervention-a-review-of-literature/> (accessed 16 March 2018).

23 Centre for Conflict Resolution, Stiftung, FE, REPORT: *The African Union at Ten; Problems, Progress and Prospects*, 30-31 August 2012, 10; The OAU's policy of non-intervention led to serious violations of human rights being ignored in 'Biafra' (during the civil war in Nigeria from 1967 to 1970); Uganda (in particular under the rule of Idi Amin from 1971 to 1979, during which an estimated 300,000 people were killed); and Sudan (where civil war broke out again between the North and the South in 1983 after a ten-year interval resulting eventually in over three million deaths).

24 Murithi, *supra* nt 13, 74.

when South Sudan got her independence and joined in 2011.[25]The OAU fought and secured independence for Zimbabwe, Namibian, Angola and also an end to the apartheid regime in South Africa.As plausible as the whole machinery of OAU as a regional organisation seems, it was however bugged by some salient and fundamental problems that necessitated its overhaul as at when it was overhauled. These were among other things, ideological differences among leaders as evident in the sharp divide between English speaking and French speaking countries, poor organisation due to inadequate funding and the much-vilified principle of non-interference the continental body embraced at formation.[26] It became clear as early as 1979 that the whole essence of regional organisation which the OAU represented, needed to be reconsidered. This prompted the formation of a committee to review the OAU Charter so as to streamline it to brace-up with the challenges of a changing world order[27] if African voice is to be heard in the scheme of things. Perhaps because of the change the European Union brought to the political landscape in Europe, which was so luring to the admiration of African leaders, there was then a need to reposition the continental body.[28]

Consequently, the Charter Review Committee was able to formulate amendment to the flawed OAU Charter by recommending that the Chapter be augmented through ad-hoc decisions of the summit such as the Cairo Declaration that established a mechanism for Conflict Prevention, Resolution and Management.[29]It also recommended that urgent steps be taken to enhance the organisation to achieve the needed platform for a more efficient and effective regional body. The need to integrate the political activities of the OAU with the economic and developmental issues as articulated in the Abuja Treaty, was also canvassed. The Abuja Treaty birthed the African Economic Community in 1994.[30] Another effort made to strengthen the OAU for the challenges of the present world realities, was the Sirte Summit in September, 1999. The Sirte Summit which was the 4th extraordinary summit held at the instance of the Libyan leader, Col Ghadaffi, purposed to amend the OAU Charter.

Dubbed 'Strengthening OAU capacity to enable it to meet the challenges of the new millennium,'[31]the Summit sought to make the OAU as a regional body more efficient and effective. Here, African leaders declared their commitment to accelerate the establishment of regional institutions, including an African Parliament, Court of Justice and Central Bank as

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25 Ajala, *supra* nt 4, 38.

26 Williams, PD, "Peace Operations in Africa: Lessons Learned since 2000" 25(7) *African Security Brief* (2013) 25.

27 Eregha, EE, "Democratic Governance in Africa: Challenges of African Union" 14(3) *Journal of Social Sciences* (2007) 205.

28 Sore, SZ, "Establishing Regional Integration: The African Union and the European Union" 25(13) *Malacaster International* (2010) 1, *at* <https://digitalcommons.macalester.edu/macintl/vol25/iss1/13/> (accessed 15 December 2018).

29 Organization of African Unity (OAU)*, OAU Declaration on a Mechanism for Conflict Prevention, Management and Resolution (Cairo Declaration)*, 28 June 1993, *at* <https://www.dipublico.org/100609/oau-declaration-on-a-mechanism-for-conflict-prevention-management-and-resolution-cairo-declaration/> (accessed 15 December 2018) (Cairo Declaration).

30 Organization of African Unity (OAU), *Treaty Establishing the African Economic Community* (1994), *at* <https://au.int/en/treaties/treaty-establishing-african-economic-community> accessed on 17th March, 2018 (Abuja Treaty).

31 Ajala, *supra* nt 4, 40.

the A.U is presently composed of. The Sirte Summit stressed the following declarations: The need to effectively address new social, political and economic realities in Africa and the world fulfils the people's aspirations for greater unity in line with OAU objectives.[32] The resulting treaty addressing the need of the people as well as eliminate the scourge of conflict within the African continent. Other focus was meeting global challenges and harnessing both human and natural resources of the continent to improve the living condition of the people for sustainable development.[33]

To achieve these lofty ideas, the Summit while concluding, decided to take some key steps which included the following to enhance the hitherto moribund OAU. First was the establishment of an African Union in conformity with the objectives of OAU so as to strengthen ability of the continental body to meet present continental political challenges. Consequently, other measures such as establishment of the African Economic Community to accelerate implementation of the Abuja treaty that paved way for the creation of African Central Bank, African Monetary, Union Parliament. The decision to convene an African Ministerial conference on Security, Stability, Development and Cooperation in the continent was also reached. Curious mind would want to know why all these measures were taken if the OAU lived up its billing? As Olufemi noted, the failure of the OAU necessitated formation of the AU in 2002.[34] All these laid the foundation stone for the eventual formation of the African Union. Because of the need to make more assertive continental body out of the OAU in the face of global political pressure that made it necessary for African voice to be heard.[35]

III. Reasons for the Transformation to AU

The establishment of the African Union (the Union) was inspired and influenced by a number of factors, ranging from historical to socio-economic, as well as by developments around the world. For a start, frustration was expressed with the slow pace of socio-economic integration on the African continent.[36] Secondly, African leaders felt that the many problems the continent was confronted with required a new way of doing things; such a new approach should include building partnerships between governments and all segments of civil society, in particular, women, youth and Non-Governmental Organisation (NGO) as well as strengthening the common institutions and providing them with the necessary powers and resources to enable them to discharge their respective mandates effectively.[37] Furthermore, the leaders were of the view that there was an imperative need to find collective ways and means of effectively addressing the many grave problems of the continent such as endemic poverty, HIV/AIDS and armed conflicts, as well as responding to the challenges posed by a globalising and integrating world. The leaders were generally in agreement on the need to promote and consolidate African unity, to strengthen and revitalise the continental organisation to enable

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32 *Ibid.*

33 Hodge, *supra* nt 3.

34 Olufemi, B, "The EU as a Model for the African Union: The Limits of Imitation" 7(2) *Jean Monnet/Robert Schuman Paper Series* (2007).

35 *Ibid.*

36 Kioko, *supra* nt 18.

37 Preamble, Organization of African Unity (OAU), *Constitutive Act Establishing the African Union*, adopted by the OAU Assembly of Heads and Government, 11 July 2000, *at* <https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf> (accessed 15 December 2018).

it to play a more active role and keep pace with the political, economic and social developments taking place within and outside the continent. It was also to eliminate the scourge of conflicts on the continent, and to accelerate the process of implementation of the Treaty Establishing the African Economic Community.[38]

While many scholars would have us accept that seeming failure of OAU to give Africa a political voice in global affairs necessitated the transformation,[39] many are silent about the internal political battle for supremacy among African leaders.[40] Events that shaped the change of name and focus of the continental body showed that politics was at the Centre of the transformation. Seen as a high-wired one, the transformation politics has both historical and practical necessity angles to explain it. The historical angle of it has to do with the quest of some African leaders such as late Kwame Nkrumah of Ghana and Muhammed Gadhafi of Libya to be president of a United States of Africa. Essence of the transformation was thus dwarfed by the subtle quest by these leaders to form a continental government with them as sole leaders.[41]

A peep into history, trace politics of the transformation can be traced to the Pan African movement which late Nkrumah gave a vent with renewed vigor prior to independent Africa. Though African leaders agreed on the need to form a continental body prior to the formation of OAU, they however differed on the steps to take in bringing it to fruition and the extent to which the integrative measure would take. As discussed above the differences among the rank and file of African leaders birthed the Casablancan and Monrovian groups, with each holding diametrically opposing views. While the Casablancan group (the radicals) favoured unhindered continental political integration, [42] the Monrovia group (the conservatives) squared up with a gradualist approach to continental integration.[43] The logjam was resolved to birth the erstwhile regional body, OAU, on the altar of compromise.[44] Nkrumah played an active role in seeing to it that a United States of Africa was made possible. To confirm his political intention of heading a united continental political body, he however wanted and overtly too, to be the pioneer president. This did not work out as the compromisedCharter that birthed OAU indicated. While it is enough to conclude that the emergence of OAU put paid to the politics that trailed the formation of the continental body realities years after revealed the contrary. Today, there is still deep-seated political contest for relevance among African leaders.

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38 Kioko, *supra* nt 18.

39 Mtimkuku, B, "The African Union and Peace Support Operations" 4 *Conflict Trends* (2005) 6; Neethling, T, "Working Towards an African Peacekeeping Capability: Key Issues, Challenges and Dilemma in Darfur" 34(2) *South African Journal of Military Studies* (2006) 105.

40 Francis, *supra* nt 1, 24.

41 Eghweree, *supra* nt 3.

42 Nyerere, J, *Crusade for Liberation* (OUP 1979), 2; The radicals were Kwame Nkrumah of Ghana, Julius Nyerere of Tanzania and Nasser of Egypt.

43 Francis, DJ, *Uniting Africa: Building Regional Peace and Security System* (Andershot, Ashgate, 2005), 9; The conservatives were William Tubman of Liberia, Felix Boigny of Ivory Coast and Leopold Sedan Sengor of Senegal.

44 Adejo, MA, "From OAU to AU: New Wine in Old Bottles?" 4(1-2) *African Journal of International Affairs* (2001) 119; Adekunle, A, "Background to the Establishment, Nature and Structure of the OAU, 14(1) *Nigerian Journal of International Affairs* (1983) 56.

Such played out in the formation of the AU in 2002. The string of political struggle for continental leadership is still very pronounced.[45] Apparently condemning the domineering posture of Col Ghadaffi of Libya in the formation of the AU, Maurizo had observed thus:

> After his failure with Arab League, Ghadaffi turned his attention to the AU project, hoping to expand his leadership in the region. He even envisages becoming the first president of the United States of Africa and hoped to establish the headquarters in Sirte (Libya).[46]

A situation like the one painted above is certainly capable of serving as an albatross that will derail the AU and thus, make mockery of the essence of continental integration it intends to achieve. If Africa must get it right, conscious effort must be made to obey the spirit of the AU Charter. Personal interest such as that Ghadaffi espouses, must be jettisoned to promote continental goals of regional integration. While it can be said that great challenge lies in wait for the AU including paucity of funds, poor economic fortune and disarticulated economies and the challenge of democratic governance, that of political rivalry among African leaders and their blind quest for power to assuage their selfish craving, remains one potent force that could pull the continental body down.

Besides the practical necessity to overhaul the arguably ailing OAU with a view to evolve a more pragmatic continental political platform to give Africa a voice in global politics, other factors equally played role in the transformation. Intricate politics and the quest for political dominance of African political affairs as seen in the pan-Africanist movement tilted to gratify interest of Africa's political elites necessitated the transformation.Another factor that led to the transformation, was the success recorded in the near perfect union of the European Union, (EU). Voicing his fear, Olufemi had expressed worries about futility of mere imitation of the EU by Africa in the quest of the former to evolve a continental political platform that can be likened to the latter. Added to these, the continued slip of the African continent into political irrelevance in global affairs, made it all compelling for the OAU to be overhauled.[47]

Hodge ably captured what I can be called essence of the transformation when he observed that the regional body became "an old boy's club where the so-called leaders meet once a year to showcase their ill-gotten wealth".[48] What this portrays, is abuse of the original purpose of continental unity by those that should promote it. In addition, crucial issues of continental development suffered, as personal interest dominated the transformed continental body. If the founding fathers and those that came after them had placed high premium on African unity as a leeway to continental development; the precarious development condition of Africa would have been helped.

From all we have seen above, OAU was an idea whose time for change was long overdue. This was evident in the quest for its overhaul by African leaders. A careful look at the structure of the AU as a regional body reveals a wide range of differences between the former regional body and the new one. If for nothing, scope and objectives of AU far more

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45 Hodge, *supra* nt 3; Maurizo, *supra nt 3*.

46 Maurizo, *supra* nt 3.

47 Olufemi, *supra* nt 34.

48 Hodge, *supra* nt 3.

surpass that of the OAU. Kofi Annan was apt when hinted on the compelling need for Africa to integrate for development when he observes thus:

> The continent continues to face numerous daunting developmental challenges. Economic growth is still far below what is needed to meet the MDGs of reducing poverty by half by the year 2015…[49]

A. Some Basic Provisions in the Constitutive Act of AU not found in the Charter of the OAU

Due to the inability of the international community to provide effective peacekeeping missions in Africa, as it bears no geopolitical interest and does not pose a grave security threat, there is a new approach to safety in Africa,

frequently branded as "African Solutions for African Problems".[50] The basic idea of this approach is that African countries should bear the primary responsibility for the conflicts in Africa and should take a leading role in resolving these conflicts.[51]

In its set up, the Constitutive Act (CA) of the AU amounted to an institutionalisation of the ideals of Pan-Africanism.[52] As it stands, it represents a radical departure from the political, legal and institutional set up of the former Organization of African Unity (OAU).[53] In sharp contrast to the OAU, which had only four organs, the AU possesses no less than 17 institutions. These include the Assembly of the Heads of State,[54] the Peace and Security Council, [55] the African Standby Force (ASF), [56] the AU Commission, [57] the Executive

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[49] Annan, K, *UN Secretary-General Speech*, 21 September 2004, *at* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/464/64/PDF/N0446464.pdf?OpenElement> (accessed 15 March 2018); The African Economist, "The OAU: From Establishment to AU, 4(12) *The African Economist,* 7, *at* <http://unpan1.un.org/intradoc/groups/public/documents/idep/unpan012275.pdf> (accessed 15th March, 2018).

[50] Vlaisavljevic, M, "Pan-African Organizations and Peacekeeping Missions" *Faculty of Humanities and Social Sciences Publication, Zagreb, Central European University* (2016), *at* <https://www.researchgate.net/publication/300392437_Pan-African_organizations_and_peacekeeping_missions> (accessed 1 November 2017); The African Solution for African Problem is what David termed 'Try African First Approach' to conflict management and resolution, see David, DJ, *Uniting Africa (*Aldershot, Ashgate Publishing Limited 2005*),* 96.

[51] Williams, PD, "Keeping the Peace in Africa: Why African Solution are not enough" 22(3) *Ethics and international Affairs* (2008*)* 309, *at* <onlinelibrary.wiley.com/doi/10.1111/j.1747-7093.2008.00158.x/abstract> (accessed 15 December 2018).

[52] Murithi, T, "Institutionalising Pan-Africanism: Transforming African Union Values and Principles into Policy and Practice" *ISS Paper* 143 (2007), *at* <https://issafrica.org/research/papers/institutionalising-pan-africanism-transforming-african-union-values-and-principles-into-policy-and-practice> (accessed 15 December 2018).

[53] Maluwa, T, "The Constitutive Act of the African Union and Institution-Building in Post-Colonial Africa" 16 *Leiden Journal of International Law* (2003) 157; Francis, *supra* nt 1.

[54] Article 6, OAU, *Constitutive Act Establishing the African Union*, adopted by the OAU Assembly of Heads and Government, 11 July 2000, *at* <https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf> (accessed 15 December 2018).

[55] Article 5(2), OAU, *Constitutive Act*.

[56] *Ibid.*; Article 13, African Union (AU), *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 9 July 2002.

[57] OAU, *supra* nt 37*,* Article 5(1)(e).

Council,[58] the Pan African Parliament,[59] the Court of Justice,[60] the Permanent Representatives Committee,[61] seven Specialised Technical Committees,[62] the Economic, Social and Cultural Council[63] and three financial institutions, that is, the African Central Bank, the Monetary Fund and the Investment Bank.[64]

Having elaborated the historical processes as well as the political and legal discourses underpinning the new AU framework earlier on, we shall now analyse the powers and responsibilities of the institutions that were created through the Constitutive Act as amended by several Protocols. A close examination of the main component of the AU's evolving mechanism for peace and security demonstrates that the current system is grounded upon a robust security system comprised of the organs listed above and the continent's sub-regional organisations. As shall be shown below, the AU's institutional framework also constructs relationships with the UN and the wider international community.[65]

What will become clear is the extent to which the current system departs from the previous practice under the OAU regime. This work shall also highlight the increased roles of African regional and sub-regional organisations, as well as elaborate on the evolving relationship with the UN, and other international organisations. Finally, it also aims to assess the longer-term prospects that the emerging AU's relationship will have with the UN, including the prospects of a formalised division of labour.

B. The African Union Peace and Security Architecture (APSA)

To some, the speedy negotiation and elaboration of the Constitutive Act seems to have led to the adoption of a sketchy instrument which failed to cover certain issues that merited inclusion'.[66] In particular, the Act was severely criticized as wanting in respect to the functional attributes, institutional powers and interrelationships between the different organs of the Union.[67] In order to reveal its true picture with regard to peace and security, the intended scope of this work does not allow a detailed examination of all the bodies within the AU. Suffice to say here that while all the institutions remain central to the running of the Union, priority is given to the key organs of the Union that form the basic apparatus of Africa's regional system for peace and security.

After identifying the institutions that are most relevant to the area of regional peace and security, this work then engages in a comparative analysis of the similarities of roles and

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58 Article5(1)(b), OAU, *Constitutive Act*.

59 Article5(1)(c), OAU, *Constitutive Act*.

60 Article5(1)(d), OAU, *Constitutive Act*.

61 Article5(1)(f), OAU, *Constitutive Act*.

62 Article5(1)(g), OAU, *Constitutive Act*.

63 Article5(1)(h), OAU, *Constitutive Act*.

64 Article5(1)(i), OAU, *Constitutive Act.*

65 Article 3(e), OAU, *Constitutive Act* provides that one of the objectives of the AU shall be to encourage international cooperation, taking due account of the Charter of the UN and the Universal Declaration of Human Rights.

66 Maluwa, T, "Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union" 51(2) *Netherlands International Law Review* (2004) 195.

67 Parker, C and Rukare, D, "The New African Union and its Constitutive Act" 96 *American Journal of International Law* (2002) 365.

functions, as well as the differences in the AU's internal composition, working and organisation. In doing so, it also assesses the linkages between the AU's internal mechanisms and their relationship with the UN and other international and regional organisations.

This work shall also identify and examine the key institutions of the AU. Precedence is given to the AU Commission, the African Standby Force[68] and the Early Warning System.[69]The rest are the Panel of the Wise[70] and the Special Fund.[71] The selection of these organs is based on their connection to the subject of African regional peace and security, particularly given their designated functions during grave circumstances.[72]

As stated above, the AU's institutional framework creates formal linkages with the traditionally recognised Regional Economic Communities (RECs). This arrangement is discussed later which elaborates on the role of RECs in the promotion and maintenance of regional peace and security. Given the background of weak linkages in the past between the OAU and sub-regional organisations, this will not only assist in measuring the extent to which the AU has set right previous deficiencies but also highlight the direction that such cooperation must take in order to meet contemporary peace and security demands. The issue of funding of the Union deserves special mention as it touches on the working of the old and new institutions within the AU. This in turn impacts on the viability, accountability and credibility of the Union.

In particular, it addresses the serious questions that have emerged in regard to the AU's budget requirements particularly given the dramatic increase in the AU's institutions and mandate. This work also highlights how the current system differs from the practice of the OAU, whose over-reliance on membership dues meant that it was hampered by chronic funding problems. Fortunately, what becomes clear from this discussion is that the shortcoming brought about by Africa's resource requirements opens the way for a deeper relationship with the UN.

Indeed, a central theme that runs through this study is that of an evolving relationship of cooperation and coordination between the AU and the UN. On this point, Abass notes that, at present, the developing relationship of cooperation between the AU and the UN has been largely shaped by chances and opportunism rather than by a carefully considered *modus operandi*.[73] Therefore, this work later dedicates itself to an analysis of the harmonisation between the two institutions and suggests the structural institution linkages that should be put in place between the two organisations in order to meet the demands of regional peace and security.

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68 Article 13, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

69 Article 12, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

70 Article 11, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

71 Article 21, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*; see also Desmidt, S, "Peacebuilding, Conflict Prevention and Conflict Monitoring in the African Peace and Security Architecture" *European Center for Development Policy Management (ECDPM)* (2016) 5, *at* <ecdpm.org/publications/peacebuilding-conflict-prevention-monitoring-apsa> (accessed 15 December 2018).

72 Article 2 (2), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

73 Abass, A, "The Security Council and the Challenges of Collective Security in the Twenty-First Century: What Role for African Regional Organizations?" *in* Lewis, ND, ed, *Global Governance and the Quest for Justice* (Hart Publishing, Oxford, 2006), 93.

According to Onditi and Okoth,[74] a key problem with the Constitutive Act is that it fails to articulate the legal status of AU decisions. Nevertheless, the Assembly's Rules of Procedure provide that, regulations and directives are legally binding while its declarations and recommendations remain merely persuasive.[75] However, the latter may acquire a status in international law and thereby become binding if their provisions amount to custom by way of State practices and the opinion of jurists.[76] The AU Assembly decisions are particularly significant as they include the power to make a ruling in regard to the Union's right to intervene. On this point, Okumu*et al* observes that:

> If a decision to intervene is issued as a regulation or directive, then it will be binding to the member states and all measures will be taken to ensure that it is implemented within 30 days. However, if a decision is taken as a 'recommendation, resolution or opinion,' then it will not be binding.[77]

In addition to possessing the authority to decide on intervention, the Assembly possesses a wide array of powers which are spelt out in Article 9 of the AU's Constitutive Act.[78] Chief amongst them is the power to determine the common policies of the Union; to receive, consider and take decisions on reports and recommendations from the other AU bodies, including the Peace and Security Council which, as will be shown below, may recommend the use of sanctions and military intervention by the Union against member States.[79] This work will now discuss some of the organs.

C. The AU Commission

The AU Commission, in similar fashion to the EU Commission, constitutes the Secretariat of the Union. The Commission, being the AU's bureaucratic wing that manages the day to day work of the Union, requires considerable skill for the effective management of continental affairs, particularly in the area of peace and security.[80] For this reason, the institution is headed

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74 Onditi, F and Okoth, PG, "Civil-Military Relations and the African Standby Forces' Multidimensionism" 3(1) *Journal of African Conflicts and Peace Studies* (2016) 19, *at* <scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1087&context=jacaps> (accessed 15 December 2018).

75 See Rule 33, African Union, *Rules of Procedure of the Assembly of the African Union, adopted during the First Ordinary Session*, 9-10 July 2002, ASS/AU/2(I) - a; See also Onditi, and Okoth, *ibid*; Viljoen, F; Louw, L, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation" 48(1) *Journal of African Law* (2004) 9.

76 International Court of Justice (ICJ), *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* ICJ Reports 1969, 20 February 1969, para 77; See also Shabtai, R, *Practice and Methods of International Law* (Oceana Publications, London, 1984), 201-205.

77 Okumu, W, "Dynamics of The African Union (AU), the New Common African and Defence and Security Policy (CADSP) and the New Partnership for the Development of Africa (NEPAD)", *in* Fitz-Gerald, A and Lala, A, eds, *Networking the Networks: Supporting Regional Peace and Security Agendas in Africa* (GFN-SSR, London, 2004), 85.

78 Article 9(g) – (i), OAU, *Constitutive Act*.

79 See Article 4, African Union (AU), *Protocol on the Amendments to the Constitutive Act of the African Union*, 3 February and 11 July 2003; See also Rule 4(e), Assembly of the African Union, *Rules of Procedure of the Executive Council*, 9-10 July 2002.

80 Cilliers, J, "From Durban to Maputo: A Review of 2003 Summit of the African Union" *ISS Paper* (2003) 76.

by a Chairperson and a number of Commissioners dealing with several different areas of policy.[81] The Chairperson and vice-chair of the Commission are elected by the AU Heads of State while the remaining commissioners are appointed by the Executive Council.[82]

Currently headed by Moussa Faki, a Chadian politician, the Chairperson of the Commission is mandated to act under the authority of the AU PSC.[83] However he may through his 'own initiative' 'use his/her good offices, either personally or through special envoys, special representatives, the Panel of the Wise or the Regional Mechanisms, to prevent potential conflicts, resolve actual conflicts and promote peace-building and post-conflict reconstruction.[84] In doing so, the Chairperson is required to engage 'in consultation with all parties involved in a conflict, to deploy efforts and take all initiatives deemed appropriate to prevent, manage and resolve conflicts.[85] Thus, the Chairperson is able to play a key role in the pursuit of pacific settlement of disputes in similar fashion to that of the UN Secretary General under Chapter VI of the UN Charter.[86] In this regard, the chairperson had previously appointed a Special Representative of the Chairperson of the Commission for both Ivory Coast and the Democratic Republic of Congo.[87]

The Chairperson is also designated to bring to the attention of the AU PSC or the Panel of the Wise any matter that may threaten peace, security and stability in the continent.[88] Subsequently, the Commission is under the mandate to ensure the implementation and follow-up of the decisions of the AU PSC, including mounting and deploying duly authorised peace support missions.[89] Significantly, the Commission is obliged to ensure the implementation and follow-up of the decisions taken by the Assembly in conformity with Article 4 (h) and (j) of the Constitutive Act with respect to intervention by the Union.[90] Furthermore, the Chairperson is also required to prepare comprehensive and periodic reports and documents, as required, to enable the Peace and Security Council and its subsidiary bodies to perform their functions effectively.[91] As will be shown further below, the Chairperson of the Commission is responsible for raising and accepting voluntary funds from sources within and

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81 The Commission has its headquarters in Addis Ababa, Ethiopia. Its departments include the Directorate of Peace and Security; Directorate of Political Affairs; Directorate of Women and Gender Development; Directorate of Infrastructure and Energy; Directorate of Social Affairs; Directorate of Conferences and Events; Directorate of Trade and Industry; Directorate of Rural Economy and Agriculture; Directorate of Programming, Budgeting, Finance and Accounting; Directorate of Economic Affairs; Directorate of Administration and Human Resources Development and Office of the Legal Counsel.

82 Rule 5(e), Assembly of the African Union, *Rules of Procedure of the Executive Council*, 9-10 July 2002.

83 Article 10(1), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

84 Article 10(2)(c), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

85 Article 10(1), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

86 See Chapter VI, United Nations, *Charter of the United Nations* (1945) 1 UNTS XVI (UN Charter).

87 Peace and Security Council, *Communique of the Peace and Security Council*, 13 April 2004, PSC/AHG/COMM.(CDLV), paras D(7) and E(4).

88 Article 10(2)(a) and (b), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

89 Article 10 (3)(a), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

90 Article 10 (3)(b), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

91 Article 10 (3)(c), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

outside Africa that goes to the Peace Fund.[92] Other key functions include the appointment of the Panel of the Wise[93] as well as acting as the head of the chain of command of the African Standby Force,[94] which is discussed further below. It is important to note that in the exercise of the designated functions and powers described above, the Chairperson of the Commission is assisted by the AU commissioner in charge of the Directorate of AU PSC within the Secretariat.[95]

Currently headed by Dr. Admore Kambudzi, from Zimbabwe, the AU commissioner in charge of peace and security is responsible for the affairs of the AU PSC in its role of dealing with conflict prevention, management and resolution.[96] The fact that the Peace and Security Directorate is the largest of the eight substantive Directorates 'reflects the, inevitable focus of the AU on more expensive conflict management as opposed to much cheaper conflict prevention'.[97] This is a matter of regret as more emphasis ought to have been placed on conflict prevention with key roles assigned to the Panel of the Wise for reasons discussed further below. Finally, the Commission also receives Information from the Continental Early System,[98] which is going to be our next discussion.

D. THE PEACE AND SECURITY COUNCIL OF THE AU

1. The Continental Early Warning System

In sharp contrast to the OAU's regional mechanism of peace and security, the AU framework consists an early warning system. The Continental Early Warning System (CEWS) is a mechanism which is aimed at locating potential threats to peace and security and recommending appropriate responses with the intention of forestalling crisis before their escalation. Instituted against the background of Rwanda crisis, the Early Warning System is designed to anticipate and prevent disputes and conflicts, as well as policies that may trigger the commission of genocide, crimes against humanity, war crimes and threats to legitimate order.[99] This is primarily meant to be achieved by warning the AU PSC of impending threats to State and regional security.[100] Despite some obvious similarities, it deserves to be mentioned from the onset that the concepts of early warning and conflict prevention are different from the concept of traditional intelligence and State security.[101]

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92 Article 21(3), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

93 Article 11, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

94 Article 13(6), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

95 Article 10 (4), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

96 *Ibid*.

97 Cilliers, J, and Sturman, K, "Challenges Facing the AU's Peace and Security Council" 13(1) *African Security Review* (2004) 64.

98 AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*; the African Union's Continental Early Warning System was established by article 12(1) of the Protocol Establishing the Peace and Security Council, 2002.

99 OAU, *Constitutive Act*; These situations are designated as grave circumstances under Article 4(h) of the Constitutive Act of the African Union.

100 Cilliers and Sturman, *supra* nt 97.

101 Cilliers, J, "Towards a Continental Early Warning System for Africa", *Occasional Paper 102, ISS* (2005) 15.

The Continental Early Warning System consists of an observation and monitoring centre, known as 'The Situation Room. This early warning System is located at the Conflict Management Directorate of the Union, and is responsible for data collection and analysis on the basis of an appropriate early warning indicators module.[102] The Continental Early Warning System is linked to situation rooms in each of the five sub-regions in order to disseminate and share information with the AU PSC.[103] This information will be relayed from monitoring units situated in sub-regional mechanisms under the guise of agencies such as the Economic Community of West African States (ECOWAS), the Inter-Governmental Authority on Development (IGAD) and the Southern African Development Community (SADC), which have established early warning units and are discussed below.

The transmission of information is made possible by virtue of the fact that the Continental Situation Room consists of 'observation and monitoring units of the Regional Mechanisms' which are 'linked directly through the appropriate means of communications to the 'Situation Room' which in turn collect and process data at their level and transmit the same to the Situation Room.[104] It is under this mechanism that the Chairperson of the Commission is mandated, as shown above, to 'use the information gathered through the Early Warning System timeously to advise the Peace and Security Council on potential conflicts and threats to peace and security in Africa,[105]and recommend the best course of action'.[106]

Significantly, member States are under the obligation to commit themselves to facilitate early action by the AU PSC and or the Chairperson of the Commission based on early warning information.[107] It has been observed that the effective functioning of the Early Warning System depends on the political will of member States to alert the Union during looming crisis such as those in Darfur and Somalia rather than the technical, financial or sociological obstacles.[108] In maintaining the theme of cooperation between the AU and the UN, the Commission is required to 'collaborate with the United Nations and its agencies' to facilitate the effective functioning of the Early Warning System.[109] In this regard, there lies the possibility of the African early warning information being included in the UN standby databases and also gain access to information such as the UN peace operations mechanisms as suggested below.[110]

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[102] Article 12(2)(a), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[103]Cilliers and Sturman, *supra* nt 97.

[104] Article 12(2)(b), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[105] Vlaisavljevic, *supra* nt 50.

[106] Article 12(5), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[107] Article 12(6), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[108] Cilliers and Sturman, *supra* nt 97; Cilliers, *supra* nt 101.

[109] Article 13, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[110] Ndulo, M, "United Nations Peacekeeping Operations and Security and Reconstruction", *Cornell University Faculty of Law Publication* (2011) 13; It is like the Preventive Diplomacy by the UN. This means taking actions that are aimed at easing tensions before they result in conflict. It also means early warning of impending conflicts based on information gathering and fact finding. It is clear that early warning systems are not working as effectively as they should; otherwise, such tragic situations as Darfur could have been foreseen and prevented. Rather, it seems that civil society (non-governmental organisations and the media) often do a better job than the AU or the UN systems. Indeed, it was the NGO, Human Rights Watch that first warned the world about Darfur; See Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing By Government And*

Finally, the 'Chairperson of the Commission is required to consult with member States, the regional mechanisms, the United Nations and other relevant institutions,[111] including research centers, academic institutions and NGOs, in order to facilitate the effective functioning of the Early Warning System.[112] The inclusion of civil society organisations is significant because as discussed above, the AU PSC may invite persons or entities involved or interested in a conflict or a situation under its consideration to participate, without the right to vote, in the discussion relating to that conflict or situation.[113] Finally, the reliance on information from the Early Warning System, as well as the collaboration of the AU PSC and the AU Commission may lead to the invocation of the African Standby Force System discussed below.

2. The African Standby (ASF)

Interestingly, the AU, while awarding itself the right to intervene did not at that time 'provide for the tools or mechanisms that would implement, monitor, or advance its ambitious but lofty ideas'.[114] Significantly, it neither possessed a standing force or rapid reaction force available to key regional organisations such as NATO.[115] However, African leaders had learnt from the weaknesses of the UN whose failure to establish an armed force[116] in support of its collective security system had catastrophic consequences on the continent,[117] most notably Rwanda.[118] The ASF is designed to enable the PSC to prevent and managed conflicts by containing their spread or escalation, to support peace processes and to enforce its decisions in cases of grave circumstances.[119] Hence, the AU subsequently established the African Standby Force,[120] in order 'to enable the Peace and Security Council perform its responsibilities with respect to the

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Militia Forces in Western Sudan, May 6, 2004, *at* <https://www.hrw.org/reports/2004/sudan0504/> (accessed 15 December 2018).

111 Article 12(7), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

112 Article 13, AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

113 Cilliers and Sturman, *supra* nt 97; Cilliers, *supra* nt 101.

114 Udombana, NJ, "Can the Leopard Change its Spots? African Union Treaty and Human Rights", 17 *American University International Law Review*, (2002) 1177.

115 On NATO's Rapid Reaction Force see Riggilo, D, "EU-NATO Cooperation and complementarily between the Rapid Reaction Forces", *The International Spectator* (2003) 12.

116 See force envisaged under Article 43 of the Charter of the UN.

117 Baker, DP, "The AU Standby Force and the Challenges of Somalia, 16(2) *African Security Studies* (2007) 120. See also Kobbie, JPM, *The Role of the African Union in African Peacekeeping Operations* (Unpublished), A Research Project Submitted to the United States Army War College for the award of Master of Strategic Studies, Carlisle Barracks, Pennsylvania (2009) 10, *at* <handle.dtic.mil/100.2/ADA500610> (accessed 21 November 2017).

118 Dersso, SA, "The Role and Place of the African Standby Force within the African Peace and Security Architecture" 209 *Institute for Security Studies Papers* (2010) 24.

119 It is also to support peace building activities and to undertake humanitarian actions, disaster management and reconstruction. The ASF is organised in five regional standby forces and is composed of multidisciplinary contingents on standby in their country of origin, raised and maintained by the five Regional Economy Communities or the Regional Mechanisms, see generally Desmidt, *supra* nt 71.

120 See Denedikt, F, "A Pan-African Army, The Evolution of an Idea and Its Eventual Realisation in the African Standby Force" 15(4) *African Security Review* (2006) 2.

deployment of peace support missions and intervention pursuant to article 4 (h) and (j) of the Constitutive Act.[121]

This was a highly significant development for a number of reasons. Firstly, it will be recalled that the late Col. Ghadaffi of Libya had proposed a single African Army with a single joint command, in order to secure peace and stability, avert the outbreak of any internal armed dispute and safeguard the sovereignty, security, and safety of the Union.[122] These calls were reminiscent of the earlier calls by Nkrumah of a common military and defence strategy during the 1960s. Thus, the creation of the African Standby Force seemed to be a step in the direction advocated for by the federalists. However, as stated before, both Nkrumah's and Libya's proposals for a Union government were out rightly rejected. It should therefore be made clear from the onset that the concept of a 'force' is misleading.[123] In fact, the African Standby Force does not, as yet, constitute an army.

Instead as will be shown below, it is a standby system since the components remain in their countries of origin pending an authorised deployment.[124] Rather than intending to create an African standing army, it was indeed the lessons drawn from the horrors of Rwanda (1994) that compelled the African Peace and Security structure to envisage the creation of an African Standby Force.[125] The modalities for the proposed force were subsequently worked out at a meeting of African Chiefs of Defence Staff held in Addis Ababa in May 2003.[126]

The establishment of the Standby Force is an ongoing project. It is based on brigades to be provided by the five African Regions consisting of 'military, police and civilian components and will operate on the basis of the various scenarios under the African Union mandates' and ought to have been available since 2010.[127] In order to prevent imminent catastrophe, multidisciplinary contingents of 15,000-25,000,[128] troops are designated to be ready for rapid deployment at appropriate notice.[129] For this reason, member States are required 'to establish standby contingents for participation in peace support missions decided on by the Peace and Security Council or intervention authorised by the Assembly.[130]

In this regard, several States from several sub-regional organisations have embarked on a collaborative implementation of the African Standby Force Framework. They include

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[121] Article 13(1), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[122] Maluwa, *supra* nt 66.

[123] De Coning, C, "Refining the African Standby Force Concept" 2 *Conflict Trends* (2004) 22; De Coning, C, "A Peacekeeping Standby System for SADC: Implementing the African Stand-by Force Concept in Southern Africa" *in* Hammerstad, A, ed, *People, States and Regions. Building a Collaborative Security Regime in Southern Africa* (South African Institute of International Affairs (SAIIA), Johannesburg, 2004).

[124] *Id.*, 22.

[125] Maluwa, *supra* nt 66.

[126] African Union, *First Meeting of the African Ministers of Defence and Security on the Establishment of the African Standby Force and the Common African Defence and Security policy*, 17-18 January 2004, EXP/Def & Sec (IV) Rev. I.

[127] Section A(1)(iii), African Union, *Solemn Declaration on a Common African Defence and Security Policy, Second Extra-Ordinary Assembly of the Union,* 28 February 2004, 19.

[128] African Union, *Policy Framework for the Establishment of an African Standby Force and the Military Staff Committee (Part 1)*, 12-14 May 2003, Exp/ASF-MSC/2(l).

[129] Article 13(1), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[130] Article 31(2), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

Intergovernmental Authority on Development (IGAD), which established the East African Brigade Force (EASBRIG)[131] in 2005 in line with the requirements of the AU PSC.[132] Similarly, the Southern African Development Community (SADC) Brigade of the African Standby Force (SADCBRIG) was launched in August 2007[133] while the Economic Community of Central African States (ECCAS) has agreed to create a brigade-sized sub-regional standby force.[134] As will be seen below, while the ECOWAS Standby Brigade[135] remains the most developed amongst the five sub-regions, some such as Arab Maghreb Union (AMU) and Community of the Sahel-Saharan States (CEN-SAD) which operates in northern Africa, has hardly established a peace and security mechanism and some States remain uncommitted to a particular brigade.

The framework of the African Standby Force is designed around various operational Scenarios with scenarios designed to prevent the recurrence of another Rwanda by providing for the invocation of article 4(h) of the Constitutive Act. It will be shown that this provision allows the AU to embark on intervention in a member State without necessarily waiting for the consent of neither the country in question nor the UN Security Council's authorisation.[136] Furthermore, in addition to acting on intervention that is authorised by the AU with respect to grave circumstances the African Standby Force is also empowered to intervene at the request of an AU member State, in order to restore peace and security in accordance with article 4 (j) of the Constitutive Act.[137]

The African Standby Force may also be mandated inter alia, to engage in observation and monitoring missions,[138] and other types of peace support missions.[139] The Standby Force can also embark on preventive deployment, in order to prevent (i) a dispute or a conflict from escalating (ii) an ongoing violent conflict from spreading to neighbouring areas or States, and (iii) the resurgence of violence after parties to a conflict have reached an agreement.[140] Furthermore, the mandate of the African Standby force is extended to peace-building, including post-conflict disarmament and demobilisation; humanitarian assistance to alleviate the suffering of civilian population in conflict areas; and any other functions as may be mandated by the AU PSC or the Assembly.[141]

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131 Contributing forces include Djibouti, Kenya, Rwanda, Somalia, Sudan, Uganda, and Ethiopia.

132 Alusala, N, "African Standby Force: East Africa Moves" 13(2) *African Security Review* (2004) 56.

133 See Mwanawasa, LP, *Speech by His Excellency the President to of the Republic of Zambia and SADC Chairperson Mr. Levy Patrick Mwanawasa, SC, on the Occasion of the Official Launch of the Southern African Development Community Brigade (SADCBRIG)in Lusaka Zambia*, 17 August 2007, *at* <http://polity.org.za/article/zambia-mwanawasa-launch-of-the-sadc-brigade-17082007-2007-08-17/> (accessed 15 December 2018).

134 De Coning, C, "Refining the African Standby Force Concept" 2 *Conflict Trends* (2004) 22; UNOCHA Integrated Regional Information Network (IRIN), Weekly Round-up for Central and Eastern Africa, 25-31 October 2003, *at* <https://www.unocha.org/sites/unocha/files/ocha_ar2003.pdf> (accessed 15 December 2018).

135 Cilliers, J and Malan, M, "Progress with the African Standby Force" *Occasional Paper 98, ISS*, (2005) 82.

136 Dersso, *supra* nt 118.

137 Article 13(3)(c), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

138 Article 13(3)(a), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

139 Article 13(3)(b), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

140 Article 13(3)(d), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

141 Article 13(3)(g), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

Once again, in maintaining the theme of complementarity between the AU and the UN, the African Standby Force is required to take certain measures. Firstly, in undertaking the functions listed above, the African Standby Force 'shall, where appropriate, cooperate with the United Nations.[142] Preferably, the African Standby Force would act under a UN Security Council mandate. However, the AU PSC is authorised to deploy troops during grave circumstances, particularly when a Security Council mandate is subject to delay or not forthcoming.[143] What is important to note here is that the AU PSC is able to deploy the Standby Force both under Chapter VIII of the UN Charter and under the AU's constitutional framework. It is thus hoped that the evolving relationship of cooperation which has been evident in recent practice will open opportunities for a clear division of labour between the two organisations.[144]

Meanwhile, it is worth noting that there are serious challenges that face the African Standby Force, particularly given the stringent time frames and in particular its goal of five regional brigades by 2010.[145] One of the hurdles the African Standby Force faces is the difficulty that might be encountered by large UN troop contributors such as Nigeria, South Africa, Kenya, Ghana and Zambia. These States may find it hard to maintain their current deployment levels at the UN and at the same time participate in standby regional brigades under the ASF framework.[146] However, De Coning argues that this may be appeased by synchronising the AU sub-regional standby initiatives with the UN's operational deployments such as its standby system.[147] However, in spite of the above, a key problem with the African Standby Forces is that they are not solely under the control and authority of the AU but are instead under the direction of the regional mechanisms.[148] This is particularly worrisome, given the occasional competition between the AU and the regional mechanisms. What is clear at this point is that this decentralised approach potentially creates or reinforces additional layers of bureaucracy which may in turn lead to major repercussions due to slow responses to conflicts. Other problems that may arise as a result of the current arrangement relate to the lack of standardised training of the Standby Force, regional politics and the issue of funding that is discussed further below.

One of the issues ailing the ASF structures is the lack of ideological orientation and the inability of peacekeepers within the ASF structures to adopt new mindset. While we do not

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[142] Article 13(4), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[143] Durch, W, *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis* (St Martin's Press 1993), 155.

[144] De Coning, C, "A Peacekeeping Standby System for SADC: Implementing the African Stand-by Force Concept in Southern Africa" *in* Hammerstad, A, ed, *People, States and Regions. Building a Collaborative Security Regime in Southern Africa* (South African Institute of International Affairs (SAIIA), Johannesburg, 2004).

[145] Dersso, *supra* nt 118; See also De Coning, C, Dessu MK and Gjelsvik, IM, "The Role of the Police in the African Union Mission in Somalia: Operational Support, Training and Solidarity" *Training for Peace Report* (2013) 14, *at* <https://trainingforpeace.org/wp-content/uploads/2014/10/The-Role-of-the-Police-in-AMISOM-TfP-Report-by-de-Coning-Dessu-and-Gjelsvik.pdf> (accessed 22 November, 2017).

[146] De Coning, *supra* nt 123.

[147] This was envisaged in the 2005 World Summit Outcome Document, 2005 World Summit, *2005 World Summit Outcome*, 20 September 2005, UN Doc A1601L; See also United Nations, Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 21 March 2005, A/59/2005, para 13; *Ibid*.

[148] Cilliers and Malan, *supra* nt 135.

necessarily suggest that the military and police are not completely liberal, a recent study has uncovered several fault lines in the relationship between civilians and the military and that the principle of the melted pot anticipated among this generation of peacekeepers has not been realised and is not likely to be realised in due time.[149]

Nevertheless despite the setbacks, Murithi maintains that the African Standby Force possess the potential to prevent future Rwanda and promote and maintain the concept of shared responsibility for stability in Africa.[150] Having said so, it deserves to be mentioned that the envisaged completion of the process establishing the African Standby Force remains extremely ambitious with little hope that this will indeed be achieved.[151] And even when completed, the invocation of the African Standby Force requires clear command and control structures, a well trained personnel, communications, logistics and equipment ensuring that the AU's right to intervene can be matched by the necessary capability. Nevertheless, in line with the theme of cooperation between the AU and the UN, the Security Council has recently underlined its support for the operationalisation of the AU Standby Force.[152]

3. The Panel of the Wise

As stated above, both the AU PSC and the Commission are authorised to utilise their discretion and convene the Panel of the Wise. This is in order to take initiatives and action they deem appropriate during situations of potential conflict, as well as to those that have already developed into full-blown conflicts.[153] The Panel consists of five highly respected African personalities[154] who must have contributed to the cause of peace, security and development of the continent.[155] The idea of a Panel was borrowed from the - ECOWAS peace and security structure which includes a Council of Elders.[156] Also the UN under its multi-dimensional peacekeeping have what is called peace making process which addresses conflict in progress, attempting to bring them to a halt, using the tools of diplomacy and mediation.[157] The members of the Panel are selected by the Chairperson of the Commission, to serve for a

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[149] Onditi and Okoth, *supra* nt 74; See also Segui, NR, "PSC Retrospective: Appraising the role of the AU in Somalia" 42 *ISS Peace and Security Council Report* (2103) 55, *at* <academia.edu/2315973/appraising_ the_role_of_the_African_Union_in_Somalia_Amisom> (accessed 15 December 2018).

[150] Murithi, T, *The African Union: Pan-Africanism, Peace Building and Development* (Aldershot, Ashgate 2005), 101.

[151] Cilliers and Malan, *supra* nt 135.

[152] See UN Security Council, *Security Council Resolution 1809 on Cooperation between the United Nations and Regional Organizations, in Particular the African Union, in the Maintenance of International Peace and Security*, 16 April 2008, S/RES/1809.

[153] Article 9 and 10(b), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[154] The current members of the Panel of the Wise for 2018-2022 are Hifikepunye Pohamba, former President of the Republic of Namibia, Ellen Johnson Sirleaf, former president of Liberia, Dr. Specioza Wandira Kazibwe, former Vice President of Uganda; Mr. Amr Moussa, Former Secretary General of the League of Arab State and finally Mrs. Honorine Nzet Bitéghé, Minister of Social Affairs in Gabon. See <http://www.peaceau.org/en/page/29-panel-of-the-wise-pow> (accessed 16 January 2019).

[155] Article 11(1), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

[156] Article 20, Economic Community of West African States (ECOWAS), *Protocol on the Establishment of the Mechanism for Conflict Prevention, Management Peacekeeping and Security* (1999) Protocol A/P.1/12/99.

[157] Ndulo, M, "United Nations Peacekeeping Operations and Security and Reconstruction" *Cornell Law Faculty Publications paper 188* (2011), *at* <scholarship.law.cornell.edu/facpub/188> (accessed 1 November 2017).

period of three years, after consultation with the member States and in accordance with the principle of equitable regional representation.[158]

The Panel's mandate is primarily advisory, mainly in the areas of peace and security.[159] However, the Panel is authorised to take appropriate actions to support the AU PSC and the Chairperson of the Commission in their efforts to prevent conflicts.[160] In this regard, despite the fact that the Panel reports to the Assembly through the AU PSC,[161] it may on its own initiative, pronounce on issues relating to the promotion and maintenance of peace and security in Africa.[162] However, a key problem with the Panel is that the requisite modalities for the operationalisation of its work have not been implemented.[163] Furthermore, the current set up lacks a robust mediation support unit within the African Union Commission and lacks political officers who have experience in bilateral and multilateral negotiation settings.[164] These are vital in order for the Panel to be effective in its roles of preventive diplomacy and peacemaking.[165]

Furthermore, the absence of system-wide coordination means that there is a real danger that the activities of the Panel will be routinely undermined.[166] Nevertheless, the role of the Panel remains vital, particularly in the prevention of conflicts and in the role of advising and supporting the AU PSC and the Commission once conflicts have escalated, as well as engaging in mediation and overseeing agreements.[167] Certainly, the working of the Panel was able to build on the noteworthy personal roles of eminent African personalities, such as Nelson Mandela and Mwalimu Julius Nyerere, who were prominent in situations of armed conflicts where massive violations of fundamental human rights were taking place. Indeed, it was the mediation process led by the two aforementioned leaders that culminated in the Arusha Agreement for Peace and Reconciliation for Burundi, which was signed on 28 August 2000.[168]The resulting agreement subsequently led to the deployment of the first African Union Mission in Burundi (AMIB) in 2003.

More recently, the function of mediation as a strong African tradition was witnessed in Kenya where the former UN Secretary General Kofi Annan, himself an eminent African personality, was able to embark on reconciliation efforts between warring parties and

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158 Article 11(2), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

159 Article 11(3), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

160 Article 11(1), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

161 Article 11(5), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

162 Article 11(4), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

163 Murithi, T, "Panel of the Wise: Operationalising the African Union's Mediation Framework" *Institute for Security Studies* (2007) 64.

164 *Ibid.*

165 Nathan, L, "Mediation and the African Union's Panel of the Wise" *Discussion Paper No 10: A Submission to the Commission for Africa* (2005).

166 Murithi, *supra* nt 163.

167 Nathan, *supra* nt 165.

168 See the Transitional Government of Burundi (TGoB) and the Burundi Armed Political Parties and Movements (APPMs), *Ceasefire Agreement*, signed on 7 October 2002; TGoB and the National Council for the Defence of Democracy - Forces for the Defence of Democracy (CNDD-FDD) of Pierre Nkurunziza, *Ceasefire Agreement*, signed on 2 December 2002.

opposition amidst violence over a disputed election in early 2008. It is primarily for this reason that, as suggested above, more attention should have been given to the function of the Panel. Undoubtedly, given Africa's respect for elders, the Panel may succeed in reconciling warring parties and promote peace and security.[169]

Nevertheless, the scarce attention and resources awarded to the Panel is somewhat appeased by the increased role that is envisaged for sub-regional organisations in the promotion of regional peace and security.

4. The Peace Fund

The Peace Fund is meant to provide necessary financial resources for peace support mission and other operations related to peace and security. The Fund is also to be governed by relevant Financial Regulations of the AU through financial appropriations from AU regular budget, voluntary contributions from Member States, and other sources within Africa, including the private sector, civil society and individuals, and through appropriate fundraising activities.[170] The Chairperson of the Commission is mandated to raise and accept voluntary contributions from outside Africa, in conformity with the objectives and principles of the Union. There shall be established, within the Peace Fund, a revolving Trust Fund. The appropriate amount of the revolving Trust Fund shall be determined by the relevant policy organs of the Union upon recommendation by the Peace and Security Council.[171] Given this scenario therefore, if the Fund is properly monitored, it will ease the quick deployment of the Standby Force as may be necessary.

IV. Prospect and Challenges of AU

While it is gratifying that the OAU was overhauled to birth the AU due to the aforementioned reasons above, one is however still bothered about the future of this new continental political group. Consequently, the question of whether the AU can weather the storm of giving Africa a continental political body like the European Union gave continental Europe, com nes readily to mind. While time and events in the coming years would answer, it is however important that we consider key issues that may either aid the AU to succeed or fail. One of such conceptual issue is the structure of the new continental body considered against what obtained in the transmuted continental body. Unlike the OAU which was overly State centric in character, the AU was designed to be a regional organisation that aims to achieve economic integration and social development of Africa. In an apparent reference to the desirability of the AU as a functional regional body capable of advancing the African cause, former Nigerian President Olusegun Obasanjo had posited that;

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[169] Kindiki, K, "Intervention to Protect Civilians in Darfur: Legal Dilemmas and Policy Imperatives", Monograph 131, in Rethinking the Role of the United Nations and the African Union in Darfur, *Institute of Security Studies*, May 2007, *at* <files.ethz.ch/isn/117818/M131FULL.pdf> (accessed 22 November 2017).

[170] Desmidt, *supra* nt 71.

[171] Article 21(3)(4), AU, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

> It has rightly been seen as a necessity rather than a choice. It has been seen as an essential instrument for faster collective growth and prosperity for the people of this continent.[172]

This can be said to have captured the mind of the founding fathers of the AU for Africa. To them, developing Africa and bringing about her political unity, was a sacred task all Africans must support by supporting the AU framework.

Modelled after the European Union, the AU was envisaged by the founding fathers to be something new from the former OAU and capable of reflecting the African experience. That explained why it was meant to embrace all shades of opinion on the African soil. For instance, the Constitutive Act incorporated African NGOs, Civil Societies, Labour Unions and Business Organisations in the process of cooperation and implementation of the *Abuja Treaty* which remains the watershed of the AU today. This was expressed in the *Ouagadougou Declaration* and provided for in the *Sirte Declaration*. This remains a novel innovation when compared to what obtained under OAU. Again, the AU made provision for gender issues as women were accommodated in the constitutive act. Many see this as a semblance of the EU model that gave women pride of place in the European model of continental political union.

Remarkable changes introduced in the AU as seen in the *Constitutive Act Establishing the African Union* (CAAU), were embraced to dwarf OAU's appalling record seen by many to be too restrictive and as such; were ill-prepared to develop Africa. To this end, AU is expected to provide Africa the opportunity to brace up for the multifaceted challenges posed by globalisation in a rapidly changing world. Adejo observed,

> The constitutive Act of the AU envisages the establishment of a supranational type of executive body that can promote integration and sustainable development more effectively that the former OAU.[173]

A charge like the one above represents clarion calls for a collective and a determined African effort to seek solution to her developmental problems in a manner that the OAU never did. Though it's doubtful whether AU ambitious agenda differed from the template the OAU operated with, it's noteworthy that the desire to extricate Africa from squalor, prompted founding fathers of the AU, to evolve a more pragmatic agenda for the continental body. These include promoting and protecting human and peoples' rights, consolidating democratic institutions and culture as well as ensuring good governance and the rule of law at all levels across the continent. To achieve the latter, African Peer Review as an internal inter-governmental checks Mechanism, was launched. By this token, AU can be said to have broken new grounds when mirrored against what OAU Charter provided for.

Furthermore, what can be seen as sweeping changes were introduced in the core objectives of the AU as can be seen from the avowal of the union to engage international community on how to eradicate preventable diseases and promote health care? Article 4 of the AU embodied all that there is in the AU. It contained some basic elements that bordered on the issues of sovereign equality and interdependence, respect of existing borders, peaceful

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[172] Obasanjo, Olusegun, "The African Union: The Challenges of Cooperation and Integration", *The News*, Lagos, August 20, 2001. See <https://www.researchgate.net/publication/242743445_The_African_Union_PanAfricanist_Aspirations_and_the_Challenge_of_African_Unity> (accessed 16 January 2019).

[173] Adejo, *supra* nt 44, 54.

resolution of conflicts, prohibition of use of force, non-interference, peaceful co-existence, rejection of political assassination and acts of subversion. However, the Act broke new grounds in what many considered as weak point of OAU in inter-African relations. The Union in her Constitutive Act, agreed to operate in accordance with the following *principles*: Participation of the African peoples in the activities of the Union; establishment of a common defence policy for the African continent; the right of the Union to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; the right of Member States to request intervention from the Union in order to restore peace and security; promotion of self-reliance within the framework of the Union; promotion of gender equality; respect for democratic principles, human rights, the rule of law and good governance; promotion of social justice to ensure balanced economic development; condemnation and rejection of unconstitutional changes of government.

To come to grips with the new vision of the Union, existent organs were expanded with novel changes that reflected the fundamental objectives of the Union, were introduced. This according to late Kwame Nkrumah;

> Salvation for Africa lies in unity…for in unity lies strength and I say that African states must unite or sell themselves out to imperialist and colonialist exploiters for a mess of pottage or disintegrate individually.[174]

B. Challenges Before the AU

Unconstitutional changes of government have triggered a number of rapidly escalating conflicts in 2014 and 2015, with Burkina Faso and Burundi amongst the more prominent examples. This has put the AU's implementation of the AU Charter on Democracy, Elections and Governance to a test. The Arab Spring already showed how these tensions could rapidly emerge to the fore, such as the case of Egypt showed. A number of attempts by African Heads of State to run for unconstitutional third bid (or more) are putting additional pressure on the AU and Regional Economic Councils. Currently, these are the Democratic Republic of Congo, Rwanda, the Republic of Congo and Burundi all following the example of Uganda where President Museveni who is meanwhile in his fourth term and seeking a fifth term in office. Often, these bids go against the constitutional provisions. Going against AU Member States which are challenging the constitutional provisions and thus acting according to the AU's adopted principles of the AU Constitutive Act and other agreed charters, such as the AU Charter on Democracy, Elections and Governance, would help shed the impression that the AU holds a protective hand over AU Heads of State and Government. In Rwanda for example, there is now offing that the current President Paul Kagane will rule till 2034 after a referendum must have been conducted.[175]

According to observers, the low ratification rate of the AU Charter on Democracy, Elections and Governance limits the ability of AU to respond effectively to crisis situations.

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[174] Nkrumah, K, *Africa Must Unite* (London, Heinemann 1963), 72, *at* <chateaunews.com/wp-content/uploads/2017/06/Africa-Must-Unite-Kwame-Nkrumah.pdf> (accessed 15December 2018).

[175] The Guardian, McVeigh, T, *Rwanda votes to give Paul Kagame right to rule until 2034*, 20 December 2015, *at* <https://www.theguardian.com/world/2015/dec/20/rwanda-vote-gives-president-paul-kagame-extended-powers> (accessed 4 April 2018).

While the AU Constitutive Act is signed by all 54 AU Member States, the AU Charter on Democracy, Elections and Governance[176] has been signed by 46 but ratified by only 23 States.[177]Though the quest African leader is to birth a regional political platform that can give the continent a political voice in global political affairs, this is however not coming without a price. No doubt, the AU faces a lot of challenges. Some of these are already manifesting such as paucity of funds for the Union's activities, why others such as cut-throat rivalry for political leadership of the continental body, would become more pronounced as time progresses. On the basis of these perceptible dangers on the path of the AU to full blown political union for the continent, one postulate that the AU may go the way of the OAU if the bobby traps that drowned the OAU, are not avoided.

This can however be averted if conscious effort is made by African leader in sync with informed civil public on continental basis. Of the numerous challenges before the AU, the under listed would suffice for the sake of time and space. Some of the challenges includes: Unwillingness of African leaders to honour the spirit and letter of the crucial Articles of the Union such as the one that stipulate suspension for any member that comes to power through unconstitutional means.[178]

Peace building also remains incomplete in Liberia, though there has been a recent successful handover to an opposition party, Sierra Leone, Ivory Coast, Guinea, Algeria, Angola, Rwanda and Burundi. Military coups took place in Madagascar in 2009, and in Mali and Guinea-Bissau in 2012, and conflicts have continued in parts of the Democratic Republic of the Congo (DRC), the story has been the same in Central African Republic (CAR).[179]

Language divide as the Francophone and Anglophone divide symbolises as well as the issue of xenophobia in Southern Africa, would hinder integration process in Africa. While this sounds laudable, it is however expected that African leaders with their sit-tightest hold onto political power, would make mockery of the provision, thus making it the albatross that would aid the fall of the Union.

Hodge was apt when he expressed his fears that the AU would likely become docile like the erstwhile OAU which he described as an "old boys' club for corrupt African leaders".[180] Bobby traps on the path of the AU, remains its inherent failure to make provisions that will making seating governments, accountable. What came close to this was the compromised peer review mechanism that has failed to achieve expected result till date. Checks such as this will propel member States to create an enabling environment needed to integrate marginalised sections of society and the interests and views of minority groups. Anything outside an inclusive continental body, would retard progress and shift the base-line of African political development.

Issue of internal crisis in Africa, is another challenge that AU would face. No continent can achieve meaningful development in the face of constant turmoil like the continent faces

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[176] African Union (AU), *African Charter on Democracy, Elections and Governance*, 30 January 2007.

[177] Amandine Gnanguenon Cooperation between the African Union and the Regional Economic Communities: a challenge for the operationalization of the APSA, *at* <https://www.academia.edu/35088838/Cooperation_between_the_African_Union_and_the_Regional_Economic_Communities_a_challenge_for_the_operationalization_of_the_APSA> (accessed 15 January 2019).

[178] Article 30, OAU, *Constitutive Act*.

[179] Centre for Conflict Resolution, Stiftung, *supra* nt 23.

[180] Hodge, *supra* nt 3.

at the moment. The conflicting regional agreements are an omnibus sign lurking to wreak havoc of the infant Union; dearth of basic infrastructural facilities to achieve the lofty dreams of the Union among other necessities, would plague the Union. Decay of infrastructure on continental scale as absence of good roads, reliable telecommunication facilities and other basic needs, will stifle the dream of achieving an AU that can play the role EU plays for Europe. Until these hurdles are crossed, AU as a vehicle for achieving sustainable continental political integration would be a tall dream indeed. It is also the view of this writer that the condemnation of the Military takeover that ousted President Mugabe of Zimbabwe by the AU was feeble. Africa does not need the intervention of the military before her leaders are changed. It is humbly submitted that it was because the economy of Zimbabwe was shambles, which made the military to handover to the civilian after the takeover

V. Conclusion

Politics and what it entails to be politically relevant in a globalizing world is unity of purpose either as a nation or continent. African continent hashad it bad in the past especially in the colonial days with domination of the continent in global political affairs. Effort at changing the trend, led to the formation of the OAU which was to be changed to AU later due to practical exigencies discussed above. In an age of globalisation, need for an apt response of the African continent to emerging political trends in the world, can never be over-emphasised. It's thus clear that the need for regional integration for Africa, necessitated formation of the AU. Though with similar name and orientation like the EU, the former however have different historical trajectory from the latter. It is thus expected that the AU would focus on core issues peculiar to the African continent and not just cosmetic imitation of the EU. Focus must be on need to evolve a pragmatic framework beyond mere name, with which Africa can engage the political world.

If Africa must get it right with the vehicle AU expects to provide, sacrifices need to be made. To this end, intrigues that tended to serve personal interest in the past especially in the days of the OAU, must give way and come under the platform that can bring about sustainable development for Africa. When this happens, AU would then be able to give Africa a voice in the present global political scene that needs collaborative efforts for regional and continental development. In addition, Africa and Africans through their leaders, must rise to the occasion by blurring lines that divides Africa across religious and cultural lines and see Africa as home to all. Personal leadership interest of African leaders must be submerged under the larger continental interest. The Yaoundé Declaration of 1996 on Africa that saw her as "indeed the most backward in terms of development from whatever angle it is viewed, and the most vulnerable as far as security and stability are concerned", can only be ignored at continental peril. This was equally re-echoed by Adejo when he observed thus;

> The success of the AU would require mature African statesmanship that strikes a balance between the desires of member states to pursue their individual interest, and the political will to forgo certain aspects of national sovereignty and independence for the common good of the continent.[181]

[181] Adejo, *supra* nt 44, 54.

AU as a continental body is a welcome development. For it to succeed, Africa needs the political will to ensure that spirit of the charter, comes alive. To this end, all organs so provided, needs to be active for any meaningful impact to be made. It is only then that Africa can be said to have acquired the needed pedigree to favourably compete in the present world political order where the continent is vulnerably exposed to exploitation and manipulation by developed and powerful countries of the West. Anything outside this, would amount to mere imitation of the EU which Olufemi cautioned against.[182]

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[182] Olufemi, *supra* nt 34.

Social Media Challenges to Peace-making and What Can Be Done About Them

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SOCIAL MEDIA; PEACEMAKING; DISINFORMATION; INFORMATION WARFARE; CYBERSECURITY; INFORMATION SECURITY; CONFLICT; PEACE

Abstract

Social media has changed the way how wars are fought, organised and ended. During peace negotiations, social media can serve as confidence-building platforms but also as a tool used to prolong the conflict by spreading disinformation and propaganda. Therefore, for a conflict to come to its end, it is necessary that the parties to peace negotiations refrain not only from physical hostilities but also from any forms of information warfare. Pursuing the objective of national reconciliation, modern peace agreements should contain rules on the regulation of social media content that may disrupt the peace. Special commissions should be established to review the content on social media and take adequate steps when a specific post, video or image spreads bellicose narrative or hate speech. We can imagine a whole range of measures that can be adopted by such commission ranging from labelling the content on its own social media channels as potentially dangerous to peace up to a removal request addressed to a concerned social media platform. Such mechanisms should be based on full respect for human rights in general and the right to freedom of opinion and expression in particular. Without such regulations, the goal of sustainable peace and successful national reconciliation seems almost unrealistic given the ever-increasing power of social media.

I. Introduction

"I can do more damage on my laptop sitting in my pajamas before my first cup of Earl Grey than you can do in a year in the field."[1]

Q to James Bond, *Skyfall* (2012)

Societies worldwide are slowly but steadily heading to the fourth industrial revolution which will fundamentally alter the way we live, think and work. The main characteristic of this process is the fusion of our digital and physical worlds thanks to the massive advancement of technology, social media, artificial intelligence and science as a whole.

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1 Sam Mendes, *Skyfall* (Eon Productions, MGM 2012), DVD.

Such an enormous transformation will undoubtedly affect the nature of political and military conflicts throughout the world. There are two main challenges to peace negotiations coming from a cyber domain: disinformation campaigns waged on social media by the parties to the conflict with the aim to fuel the conflict or disrupt the peace that has been established and the increased possibility for different actors benefiting from the conflict to influence or even halt the peace negotiations. Admittedly, these challenges seem to be difficult and sometimes almost impossible to overcome, however, we must always keep in mind that a task of an intellectual is not to fight the problem but to shape the solutions. Therefore, the primary objective of this article is not only to explain a conflict side of social media and its impacts on peace negotiations, but also to explore the possible ways to find legally-sound and politically-acceptable solutions to these issues.

In the first section, we look at the current transformation of military conflicts and hybrid warfare that combines a set of political, military and cyber means with the aim of gradual destabilisation of the enemy. Notably, we examine the methods offered by social media to achieve this objective. The second section is concerned with the impact of the above-mentioned transformation of military conflicts on peacemaking efforts shedding more light on disinformation campaigns spread on social media platforms. First of all, we describe the role that social media can play in facilitating or obscuring peace negotiations. Secondly, we draw upon potential mechanisms that can be established by national reconciliation provisions of the peace agreements to counter the conflict narrative on social media. In this regard, we pay particular attention to human rights implications of such mechanisms since there is a risk of interference with the right to freedom of expression.

In the end, the concluding remarks are offered with the summary of the essential findings and recommendations for peace negotiations and national reconciliation process.

I. Transformation of Military Conflicts and Social Media

A. Developments Paving the Way to Information Warfare

Carl von Clausewitz, a general of the Prussian army and a famous military theorist of the 19th century, defined three main pillars within a State in times of war as follows: the government defining overall political and military strategy, the army obeying the government and waging war on a tactical level and civilians contributing by their day to-day work to military objectives but otherwise separated from war efforts.[2] Such a description matches well with the wars of the 19th century and, to some extent, also those of the first half of the 20th century.

After World War II, in the polarised world of the Cold War, we saw a decrease in State-to-State violence marked by a proliferation of civil wars and wars of national liberation against then-colonial powers. The tactics employed by various non-State actors included mostly guerrilla operations but also traditional military techniques depending on the level of training and equipment. From a geopolitical perspective, civil wars of this period had a significant proxy war taste since usually it was the United States and the Soviet Union settling their accounts through their allies and clients far away.

The end of the Cold War was a huge watershed in the history of the world. After the collapse of the Soviet Union, many nations of Central and Eastern Europe solidified their regained freedom by joining European and transatlantic organisations. Many scholars and authors such as Francis Fukuyama predicted a bright future with liberal democracy and capitalism spreading throughout the world. Nonetheless, not all developments in the

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[2] Carl von Clausewitz, Michael Howard, Peter Paret, and Bernard Brodie, *On war* (Princeton University Press 1984), 89.

post-Cold War era were happy or positive. Although State-to-State violence was still in a decrease, we saw several bloody and ferocious civil wars and internal military conflicts based on ethical motivations with brutal crimes, such as genocides in Srebrenica, Rwanda or Darfur. These changes were well-depicted by a Dutch-Israeli military theoretician Martin van-Creveld. In his book entitled *Transformation of War*, he emphasizes the fact that the traditional three pillars of warfare developed by von Clausewitz cannot be applied to modern military conflicts. [3] This transformation stems mainly from a widespread engagement of civilians in war efforts, decline in organised State violence and use of more primitive techniques and weapons rather than sophisticated heavy weapon systems. Nonetheless, the main point of van Creveld's analysis of new conflicts lies in the change in the nature of conflict itself. In the period of von Clausewitz, war was merely a 'continuation of politics', however, in the post-Cold War world, war can easily become politics itself. In practice, this means that it might be useful for a State or a non-State actor to pursue a low-intensity armed conflict based on an asymmetrical relation between the warring parties. The goal is not to reach an overwhelming military victory but to continuously destabilise and exhaust the enemy.

B. Cyber and Information Warfare

In the recent decade, this transformation of warfare has been accelerated by new technological developments such as innovations in cyber technology and social media. Social media offers a whole new platform for conflicting parties to wage the war aiming to win 'the hearts and minds' of 'enemy' populations by spreading information, propaganda, and disinformation online. On this note, in 2013, General Valery Gerasimov, the chief of General Staff of Russian Armed Forces wrote the following words: 'The very rules of war have changed. The role of non-military means of achieving political and strategic goals has grown, and, in many cases, they have exceeded the power of force of weapons in their effectiveness.'[4] There is some truth in what Gerasimov puts forward. If we look at current military conflicts and expressions of public discontent, we find that each of them has important social media and cyber components. In 2011, sharing videos and images on Facebook, Twitter and YouTube played a crucial role in spreading the wave of anti-government protests throughout the North Africa and Middle East known as the Arab Spring.[5] In 2012, we saw a massive cyber and social media war between Israel and Hamas that continues to a lesser extent until these days. [6] In 2014, Russia started a military campaign against Ukraine heavily relying on cyberattacks against Ukrainian infrastructure and spread of disinformation and propaganda on social media.[7]

The first widely-reported military confrontation with a large role played by social media in fuelling the conflict was the Gaza war of 2012 between Hamas and Israeli Defense Forces (IDF). In parallel to military operations, there was a war on Twitter where the two parties where exchanging threats and sharing their military successes and failures of the

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[3] Creveld, M, *Transformation of War* (The Free Press 1991) 58.

[4] Gerasimov, V, "The Value of Science Is in the Foresight" 96(1) *Military Review* (2016), *at* <armyupress.army.mil/Portals/7/military-review/Archives/English/MilitaryReview_20160228_art008.pdf> *quoted in* Politico Magazine, McKew, MK, *The Gerasimov Doctrine* September/October 2017, *at* <politico.com/magazine/story/2017/09/05/gerasimov-doctrine-russia-foreign-policy-215538> (accessed 20 November 2018).

[5] Wilson, Ch and Tufekci, Z "Social Media and Decision to Participate in Political Protest: Observations from Tahrir Square" 62(2) *Journal of Communication* (2012) 375.

[6] Zeitzoff, T "Does Social Media Influence Conflict? Evidence from the 2012 Gaza Conflict" 62(1) *Journal of Conflict Resolution* (2018) 31.

[7] Helmus, T C, Bodine-Baron, E, *et al.*, *Russian Social Media Influence*, (RAND Corporation 2018) 2.

other party. Moreover, ordinary civilians joined the war on social media by tweets and Facebook posts with bellicose content catalysed by the involvement of radicals and extremists on both sides.[8] In fact, social media allowed for greater civilian participation in the war since ordinary citizens did not only share the content made by the military but also proactively fabricated their own militant posts, tweets, and images.

The example of Arab Spring shows how powerful social media are in inciting peaceful protests but also large-scale violent demonstrations resulting in lengthy military conflicts such as the war in Syria. The whole popular movement started in Tunisia in 2010 when a street vendor Mohamed Bouazizi set himself on fire in protest against his ill-treatment and harassment by Tunisian authorities. The word of his act with disturbing images started to circulate on Facebook and Twitter sparking nationwide protests against then Tunisian president, Ben Ali, which later spilled over to other Arab countries such as Egypt, Libya, Yemen or Syria. In the first days of Arab Spring, many commentators and scholars praised social media as a new technology of liberalisation and democratisation. However, after a short period, we started to look more critically on their role in political discourse since the events in the Arab world led neither to democracy nor to liberalisation.

Today, we treat social media more as a technology undermining democracy rather than supporting it. The most recent trend that has been pointed to by many security policy experts is the so-called weaponisation of social media to achieve certain political goals. In practice, this means that the conflicting parties try to manipulate public opinion on the opposite side in order to undermine the trust of the people in their government. In theory, using information campaigns for war purposes is nothing new. We have seen propaganda in multiple cases before the era of social media. For instance, Radio Cairo was a valuable propaganda asset of Egyptian president Gamal Abdel Nasser in his war efforts against Israel. However, it lost credibility after the Six Day War of 1967 when it reported an overwhelming victory of Arab forces, whereas the opposite was true.[9]

Social media campaigns are different from 'traditional' media campaigns. First of all, unlike radio or TV, they allow their users not only to consume but also to create and spread their own information.[10] On the one hand, this makes social media more democratic since everyone can produce their own content, on the other hand, there is a high risk to society coming from anonymity and non-transparency as everyone can create a fake account or pretend to be someone else with the objective to manipulate public opinion. Also, recently, we have seen organised disinformation campaigns waged by Russia using botnets - automated systems (or robot computers) designed to post disinformation content in a targeted manner throughout all relevant social media platforms. In this regard, GLOBSEC, Slovak security policy think-thank, claims in its Megatrends 2018 report that: *'[m]illions of automated botnets and fake accounts on social media create an assumption that the popularity of a political candidate, an idea or a narrative is much higher than it actually is. In doing so, they create an information and impression bubble and stir public debate or public perception.'*[11] In addition to botnets, these campaigns often include armies of internet trolls - individuals whose main task is to design particular disinformation content based on current needs of political leadership. A famous example is the Russian Internet

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8 Kuntsman, A and Stein, RL, *Digital militarism: Israel's occupation in the social media age* (Stanford University Press 2015) 34.

9 Noueihed, L and Warren, A, *The Battle for the Arab Spring* (Yale University Press 2012) 47.

10 Zeitzoff, T "How Social Media Is Changing Conflict" 61(9) *Journal of Conflict Resolution* (2017) 1980.

11 Globsec Policy Institute, REPORT: *GLOBSEC Megatrends 2018*, April 2018, *at* <globsec.org/wp-content/uploads/2018/05/Globsec_Megatrends_2018.pdf> (accessed 20 November 2018) 31.

Research Agency which organises and trains these individuals to wage disinformation campaigns against the EU and NATO.[12]

In the context of the war in Ukraine, Russia resorts to hybrid warfare - a combination of traditional military means such as arming, financing, and training of pro-Russian separatists as well as disinformation campaign trying to influence Russian-speaking minority in Ukraine and undermine the trust of citizens of EU and NATO States in these institutions.[13] The method used is not only a 'simple' spread of pro-Russian content on social media, which is also done by numerous Russian news outlets such as RT, but it is a much more sophisticated process. The main feature of Russian information warfare is the so-called *maskirovka* which is dissemination of conflicting news. The primary objective of this strategy is not to persuade the target audience to accept the arguments of the adversary but to create an environment of uncertainty and insecurity leading to a loss of trust in the government and mainstream media.[14] This strategy is not limited only to Russia since other countries or non-State actors can find inspiration in these tactics and use it for their own needs.

Nowadays, there are four billion active Internet users worldwide, and this number is expected to grow in the future.[15] In addition, two billion of them are also active Facebook users.[16] Thus, quantitatively, we see that social media have immense power in reaching large groups of people allowing for the spread of non-political but also highly controversial and political content. Moreover, it is important to highlight that social media does not always serve as a neutral platform for creation and sharing of content. The debate about the neutrality of social media gained prominence in March 2018 when major newspapers such as *The New York Times* and *The Guardian* brought disconcerting information about the abuse of Facebook users' data by the company Cambridge Analytica. The company had been collecting data about millions of Facebook users and subsequently used them in targeted micro-campaigns to support the Donald Trump candidacy and pro-Brexit vote in the United Kingdom.[17] Both of these developments, the election of Donald Trump and British decision to leave the EU, have a significant impact on current international order. Therefore, there is a hypothetical possibility that a similar company like Cambridge Analytica (which has already ceased to exist) could do the same to undermine peace and security in a particular country by fuelling internal tensions online, to perpetuate an ongoing military conflict or to obstruct peace negotiations. Therefore, in the following section, we look more closely at the implications of "weaponised" social media for peacemaking.

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12 Prier, J "Commanding the Trend Social Media as Information Warfare" 11(4) *Strategic Studies Quarterly* (2017) 67.

13 European Values, Kremlin Watch REPORT: *Prague Manual*, 30 April 2018, *at* <europeanvalues.net/wp-content/uploads/2018/04/Prague-Manual_b.pdf> (accessed 20 November 2018) 6.

14 Wither, JK "Making Sense of Hybrid Warfare" 15(2) *Connections: The Quarterly Journal* (2016) 82.

15 We are Social, Kemp, S REPORT: *Digital in 2018: World's Internet Users Pass the 4 Billion Mark*, 30 January 2018, *at* <wearesocial.com/blog/2018/01/global-digital-report-2018> (accessed 20 November 2018).

16 Statista, *Number of monthly active Facebook users worldwide*, May 2018, *at* <statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (accessed 20 November 2018).

17 Brookings – Robert Bosch Foundation, Polyakova, A and Boyer, SP, REPORT: *The Future of Political Warfare: Russia, the West and the Coming Age of Global Digital Competition*, March 2018, *at* <brookings.edu/wp-content/uploads/2018/03/fp_20180316_future_political_warfare.pdf> (accessed 20 November 2018) 11.

II. Peacemaking and Social Media

Peacemaking is a complex process aiming to end the conflict between two or more warring parties. According to Article 33 of the United Nations Charter, '[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'[18] In light of this provision, we see that parties to the conflict have a wide range of possible ways to arrive at a mutually acceptable solution to their disputes. This section deals with peacemaking in two subsequent parts. First of all, we examine potential impact of social media campaigns on peace negotiations. Secondly, we discuss threats to national reconciliation coming from militant rhetoric spread through social media platforms.

A. Peace Negotiations and Social Media

Peace negotiations are a very difficult political and diplomatic exercise with multiple stakeholders directly or indirectly involved. Before the negotiations even start, the main question that needs to be resolved is who gets a seat at the table. In case of an international armed conflict, the answer is quite straightforward since usually it is the highest representatives of States or governments that participate in such negotiations. The situation is different in non-international armed conflicts where, on one side, we have the government and militant rebels and various opposition groups on the other. Although there is rarely a problem with defining who gets to represent the government, when it comes to armed opposition and other stakeholders, the choice of representatives is much more difficult. Firstly, to persuade the government to enter into talks with a particular actor or set of actors is often problematic due to political disagreements and ongoing confrontation. Secondly, there is a problem of legitimacy as some actors may have been involved in war crimes. In this regard, UN Guidelines on Contacts with Persons Subject of Arrest Warrants of ICC limit contacts between such persons and UN officials to necessary minimum.[19] Thirdly, with contemporary peace negotiations getting more inclusive, more and more representatives of civil society, trade unions and marginalised groups demand not only to play a role in these processes but to have a seat at the table.

From the above, we see that it is not easy for parties to decide who will participate directly in peace talks and who will stay out. Social media can have a significant impact on this choice as it gives every group a possibility to project its influence over the population, and other stakeholders, by means of information and propaganda campaigns. In addition to local actors, opposition groups can use social media to reach out to foreign governments and their citizens. This was the case during the first upheavals of the Arab Spring when international media outlets such as CNN or BBC were broadcasting videos and images posted on Facebook, YouTube and Twitter by protesters. Similarly, we can imagine a marginalised group fighting in a civil war that seeks to extend its influence over the population by a massive online information campaign. Although the influence of this group on the ground may be small, it can become a key player in the conflict and even get a place at peace talks thanks to the targeted use of social media. Furthermore, this group does not have to do it on its own, but it can hire a company with necessary skills and

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[18] United Nations, *Charter of the United Nations*, 24 October 1945, Article 33.

[19] United Nations General Assembly Security Council, *Guidance on contacts with persons who are the subject of arrest warrants or summonses issued by the International Criminal Court*, 8 April 2013, A/67/828–S/2013/210, *at* <digitallibrary.un.org/record/747189/files/A_67_828_S_2013_210-EN.pdf> (accessed 20 November 2018).

capabilities like Cambridge Analytica to design such a campaign. For example, in proxy war settings, a foreign power can support its 'allies' on the ground by developing or financing such operations on social media.

Another important aspect of peace negotiations, besides who gets a seat at the table, is the choice of issues to be discussed. Every group has its own priorities and red lines. Therefore, the final choice of agenda items is often a carefully crafted diplomatic compromise. After getting their place in peace talks, the parties would undoubtedly try to weigh in with their priorities as much as possible. In this process, they can put forward their suggestions and ideas in a formal way but also through informal channels of background talks reaching out to other parties bilaterally. However, social media offers another space for the parties to promote their agenda. For instance, one of the parties pushing for the protection of indigenous groups may orchestrate a broad social media campaign with emotionally-charged images of hard living conditions of members of these groups. By doing so, it is possible to attract the attention of local population and the international community to this issue and thus create an external pressure on all negotiating parties. Mass media has also a role to play in drawing attention to a particular topic. It has been proved by Jessica T. Feezell that information campaigns related to political agenda setting are more successful when combined with social media.[20] There is also a risk that the conflict spills over into a cyber arena with different counter-narratives circling on social media. Therefore, campaigns on social media must be carefully designed with special consideration given not only to their content and form but also their potential effects on the public debate.

Social media offers an unprecedented space to civil society and ordinary citizens to support peace efforts, or to catalyse the conflict even more as we saw in the Gaza war of 2012. As to the first case scenario, a little-known initiative, Caucasus Conflict Voices, organised by a group of NGOs focusing on a cross-border dialogue between citizens of Armenia and Azerbaijan in the context of the Nagorno-Karabakh conflict, is a good example. Besides organising 'physical' meetings between people living in the border regions, local NGOs have also launched an online campaign on Facebook showing examples of peaceful coexistence of Armenians and Azerbaijanis in Georgia.[21] Besides awareness-raising, this project allowed also for online exchange between the two groups. Even though the initiative has not resulted in the end of the war, it showed a possibility of coexistence in peace. Such an alternative social narrative calling for peace instead of war can play an essential role in putting external pressure on negotiating parties to end the hostilities and come to a final agreement. Our analysis would be incomplete without the assessment of risks to the success of peace negotiations coming from social media campaigns organised by domestic or foreign actors that are interested in prolongation of the conflict. There are multiple methods how these can actors can manipulate the peace process in their favor. For instance, they can launch a social media campaign in support of negotiation spoilers (parties unwilling to end the conflict) or draw the attention of the public to the most controversial topics for the parties to make the negotiations more difficult. There is also a possibility of discrediting the parties that are supportive of peace so that they lose their standing in the eyes of the public and international community.

Sometimes even well-intentioned social media campaigns may end up having an opposite effect as it was originally desired. This has been well illustrated by oversaturation

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[20] Feezell, JT "Agenda Setting through Social Media: The Importance of Incidental News Exposure and Social Filtering in the Digital Era" 71(2) *Political Research Quarterly* (2018) 485.

[21] Organisation for Security and Co-operation in Europe, *Preparing for peace - Communications in conflict resolution*, December 2012, *at* <osce.org/networks/98116?download=true> (accessed 20 November 2018) 44.

of information and news from the Syrian civil war on social media platforms. The social media boom related to this conflict started during the first days of the Arab Spring with a large number of Facebook users worldwide clicking likes on the news from anti-government protests and sharing the content posted by various local opposition groups. However, the situation on the ground in some of the countries concerned by this movement did not have a happy ending. The initial demonstrations of public discontent did not bring democracy and the rule of law but have turned into violent military conflicts. Syria has been at war for seven years, and we still do not see an end coming. Thanks to social media, we are confronted on a daily basis with the immense human suffering of Syrian people on our Facebook walls, and Twitter feeds. However, due to this massive and constant flow of information via social media we, as citizens of our countries, have become somehow indifferent to what is happening in this unhappy country that is facing such heinous crimes. Thus, there is no substantial pressure from ordinary citizens and civil society on the warring parties or other stakeholders in the region to end the bloodshed and come to an agreement either in Geneva or Astana. Staffan de Mistura, chief UN mediator for Syria, in his lecture given at the Graduate Institute, described this situation as a 'lack of constructive outrage'[22] with respect to what is happening in Syria. In this example, we see how social media can downgrade the importance of an issue if it is over-reported, over-shared and sometimes even over-liked.

Another example of a social media campaign with good intent but an ambiguous result is that the film *Kony 2012* spread through social media platforms depicting terrible crimes committed by Joseph Kony, the leader of the Lord's Resistance Army (LRA), in Uganda and other countries in East Africa. The main objective of the movie was to compel the US government to get involved militarily in an international effort to arrest Kony and hand him to the International Criminal Court (ICC) that had issued an arrest warrant against him. Although, we cannot dispute the relevance of the objective of the movie, Kamari Maxine Clarke, a professor at Carleton University, is of a different opinion. According to her assessment, Kony 2012 has skewed the reality of peacemaking in Uganda as it suggests that criminal justice and foreign intervention in the form of US engagement is a silver bullet solution to end the conflict between LRA and local governments, which is an oversimplification of a somewhat complicated peace negotiation process.[23] Therefore, the calls of people worldwide for US involvement in Kony's arrest seem to be built on superficial grounds since it is the ICC warrant that is one of the most significant obstacles in achieving a peace agreement as naturally Kony does not want to end up on a trial in the Hague as a war criminal.

We have demonstrated how significant the impact of social media can be in supporting or obstructing peace negotiations. In the following, sub-section, we examine the possible threats to national reconciliation after a peace agreement is signed.

B. National Reconciliation and Social Media

In peace agreements, we often find provisions establishing specific mechanisms of national reconciliation to uncover the truth about the conflict and prevent its future repetition. Such reconciliation can have different forms. Undoubtedly, the most rigorous one is transitional justice punishing those responsible for violations of rules of war as well as national laws. Transitional justice can be pursued in a formal way by national or international courts, or

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[22] de Mistura, S "Creativity - A New Tool For International Diplomacy?" Lecture, Graduate Institute of International and Development Studies, Geneva, 19 March 2018.

[23] Clarke, KM "Kony 2012, the ICC, and the Problem with the Peace-and-Justice Divide" 106 *Proceedings of the Annual Meeting (American Society of International Law)* (2012) 310.

it can be done employing means of traditional justice that are typical for a given geographical region such as reconciliation rituals.[24] There are also mechanisms focused more on reconciliation by discovering the truth for the benefit of future coexistence than on punishment of war criminals. Among these, we find truth commissions, history lessons, reparations or guarantees of non-repetition.[25] These mechanisms have higher legitimacy when combined with media reporting on their work due to greater transparency and openness to the public. As it has been suggested by Annelies Verdoolaege, a member of the board of the Africa Association of Ghent University, a TV series called *Special Report* has contributed to the success of the Truth and Reconciliation Commission (TRC) in South Africa. The TV series contributed to this success by nationwide broadcasting of the proceedings before the TRC, which gave an equal media space to both victims and perpetrators of apartheid crimes. The creators of *Special Report* achieved this in an objective but also slightly emotionally-biased manner since many journalists were victims of the previous regime themselves.[26]

Social media can play an equally important role in national reconciliation as mass media did in the case of South Africa. For instance, a truth commission can have its own public relations team running a pro-peace campaign on multiple social media platforms. There can be live broadcasting of proceedings via Facebook or Youtube combined with a Twitter feed with quotes of the most interesting parts of the deliberations before the commission. In case of history lessons, a ministry of education or any other entity can use its own specialised Youtube channel or Instagram account to spread videos and photos with reconciliation content that would be easily accessible and comprehensive to school children.

Nonetheless, there are important threats to national reconciliation coming from entities and actors that are not satisfied with the outcome of peace negotiations and would rather disrupt the peace and return to war. These actors may resort to an overt counter-peace campaign by disseminating their political and social narrative throughout social media under their own name. Also, they can use covert social media tactics such as engaging internet trolls and botnets, as we have seen with the case of Russia in Ukraine. These trolls can be tasked with designing specific disinformation content attacking the message of national reconciliation. Subsequently, the texts, videos and images produced by these trolls could be disseminated by the use of botnets and fake accounts.[27] Also, this content can be used by the trolls and their 'sympathizers' among ordinary citizens to incite conflictual exchanges on social media in comment sections under articles published by traditional media and national reconciliation mechanisms.

Such manipulation of public opinion is not limited only to social media but it can be communicated also by traditional media such as radio, as we saw in the Rwandan genocide of 1994. In this case, the government-supported radio station *Radio Télévision Libre des Mille Collines* (RTLM) broadcasted incredibly hateful propaganda against the Tutsi population, presence of the United Nations peacekeeping force in Rwanda (UNAMIR) and called for Hutu domination of the country. According to the research by David

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[24] Afako, B "Reconciliation and Justice: 'Mato Oput' and the Amnesty Act" in Lucima, O (ed.), *Protracted Conflict, Elusive Peace* (Accord, Conciliation Resources 2002) 67.

[25] United Nations, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, (2004) paras 17, 38, 50, 54.

[26] Verdoolaege, A "Media Representations of the South African Truth and Reconciliation Commission and Their Commitment to Reconciliation" 17(2) *Journal of African Cultural Studies* (2005) 196.

[27] Biały, B "Social Media—From Social Exchange to Battlefield" 2(2) *The Cyber Defense Review* (2017) 83.

Yanagizawa-Drott, a professor at the University of Zurich, the broadcasting of RTLM accounted for 50,715 cases of killing and 9.9% of the total participation rate in genocide.[28]

The example of Rwanda is even more striking if we look at it from today's perspective when information is not processed and transmitted solely by centrally-regulated media such as radio or TV. Nowadays, it is quite common for people to rely on information coming from questionable sources on social media platforms. Additionally, as has been already emphasised, social media allow for direct creation of content by their users. This gives any individual or an interest group a possibility to spread any informational or disinformation just by using a smartphone, without the necessity to own a sophisticated radio or TV equipment. Therefore, a fragile peace in a country that is going through an arduous process of national reconciliation can be easily destroyed by the increasing role that social media play in today's politics. In light of this new reality, in the following section, we offer a series of solutions aiming at containment and prevention of the adverse use of social media to obstruct the peace negotiations or disrupt the achieved peace settlement.

III. Disarmament of Social Media

When we talk about countering social media abuse, the word that instantly appears in the discussion is regulation. However, any attempt to regulate social media provokes significant disagreements and political fights since it is often viewed as an interference with fundamental human rights, especially with the right to freedom of expression. Moreover, the origin of many conflicts stems from human rights violations and abuses by dictatorial regimes or brutal non-State actors.[29] Therefore, modern peace agreements contain provisions guaranteeing respect for human rights of individuals and various minority groups forming the population.[30] In this regard, it is essential to find a right balance between the legitimate interest of peacemaking and human rights protection. Following the structure of the debate above, in the first sub-section, we discuss potential solutions to fight against the use of social media to undermine the peace negotiations. Secondly, we propose legal mechanisms to counter propaganda and disinformation aimed to disrupt the national reconciliation process.

A. Countering Social Media Threats to Peace Negotiations

Before entering the peace talks, usually, the parties to the conflict lay down their arms in a ceasefire. Most of the times, 'physical' ceasefire is not difficult to verify since flying bullets and explosions are quite noticeable. However, the behavior of the parties and actors interested in prolongation of the conflict on social media is not easy to control. We can say that if there is a genuine willingness to end the war the on all sides, the parties will naturally refrain from any harmful acts on social media. Nonetheless, if a party wants to wage a covert information war against other parties, there are no means to prevent it from doing so. This difficulty is primarily due to a problematic attribution of such campaigns to their genuine authors. Furthermore, even with a credible attribution, we cannot say that spreading disinformation online is illegal *per se*. There are States where certain types of statements such as hate speech or public support for fascist or Nazi ideology are

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[28] Yanagizawa-Drott, D "Propaganda and Conflict: Evidence from the Rwandan Genocide" 129(4) *The Quarterly Journal of Economics* (2012), Table VI.

[29] Thoms, O and Ron, J "Do Human Rights Violations Cause Internal Conflict?" 29(3) *Human Rights Quarterly* (2007) 683, 695.

[30] Bell, C, *Peace Agreements and Human Rights* (Oxford University Press 2000) 294.

criminalised.[31] However, practically speaking, it is difficult to imagine such rules to be enforced in a war-torn country. Therefore, when dealing with social media in a negotiation context, we are left with two simple but rather weak solutions. Firstly, there might be a provisional code of conduct on social media agreed by the parties that would define the basic rules of external communication related to the peace talks. Secondly, parties can decide to set up a joint communication channel on social media that would provide information consensually agreed by the parties themselves. These two solutions would not help in countering anti-peace campaigns such as false accusations of other parties or spread of militant rhetoric, but would create a meaningful and credible flow of information, on which local population and the international community could rely on.

B. Pacification of Social Media as National Reconciliation

As we said earlier, social media campaigns based on militant rhetoric or disinformation content can endanger the process of national reconciliation. Therefore, it is necessary to examine the possible ways to counter and prevent such adverse operations.

Before we deal with the concrete proposals to tackle these threats, we have to emphasise that certain regulation of traditional media has already made its way into a number of peace agreements. For instance, the Arusha Agreement of 1992 ending Rwandan civil war states that cessation of hostilities 'shall mean the end of all military operations, all harmful civil operations and denigrating and unfounded propaganda through the mass media.'[32] Although this agreement comes from the 1990s, it is quite progressive as it deals with information warfare as a form of hostility. Another example can be found in the Dayton Agreement of 1995 putting an end to the war in Bosnia. With respect to media, the Agreement obliges the parties to take the following measures: 'the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, of ethnic or religious hostility or hatred'[33] and 'the dissemination, through the media, of warnings against, and the prompt suppression of, acts of retribution by military, paramilitary, and police services, and by other public officials or private individuals.'[34]

Reading the previously-cited examples, one may argue that we can add the word 'social' before the word 'media' and our problem would be solved. However, regulating social media by provisions of peace agreements could be more difficult since their content is usually created by individual users, therefore, such regulations must be based on serious human rights considerations. The right that can be infringed upon is undoubtedly the right to freedom of expression which is proclaimed in the Universal Declaration of Human Rights of 1948 and guaranteed by the International Covenant on Civil and Political Rights (ICCPR) of 1966. Article 19 of ICCPR gives everyone the right 'to hold opinions without interference'[35] and further defines that the right to freedom of expression 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'[36] Since ICCPR was adopted in the 1960s, thus long before the era of Internet and social media, it does not explicitly entitle an individual to the freedom of expression

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[31] Lobba, P. "Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime" 26(1) *The European Journal of International Law* (2015) 238.

[32] Article VII, *Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front*, 4 August 1993.

[33] Article 30(b), *General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995.

[34] Article 30(c), *General Framework Agreement for Peace in Bosnia and Herzegovina*, 14 December 1995.

[35] Article 19(1), *United Nations General Assembly, International Covenant on Civil and Political Rights* (1973) 999 UNTS 71 (ICCPR).

[36] Article 19(2), ICCPR.

online. This gap was filled in 2012 by the United Nations Human Rights Council when it adopted a consensus resolution affirming that 'the same rights that people have offline must also be protected online, in particular, freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.'[37]

As we have seen, international law provides the right to freedom of expression with a relatively high level of protection. Therefore, peacemakers find themselves in a difficult position if they want to fight against information warfare on social media that is aimed to undermine the fragile peace that has been established. However, the right to freedom of expression is not absolute since even Article 19 of ICCPR says that it may be 'subject to certain restrictions.'[38] This article contains the so-called three-part test to justify the restriction of the right to freedom of expression. First of all, the restriction in question has to be 'provided by law'[39] which is 'clear and accessible to everyone'[40] and not 'arbitrary or unreasonable'[41] and which includes 'adequate safeguards and effective remedies'[42]. Secondly, the restriction must protect a legitimate interest. In this respect, Article 19 allows the government to restrict the freedom of expression only to ensure 'respect of the rights or reputations of others'[43] or to protect 'national security or […] public order (ordre public), or […] public health or morals'[44]. In a national reconciliation scenario, we can imagine the resort to the objective of national security or public order. However, the threshold to justify any restriction of the right to freedom of expression by one of these two objectives is quite high. For instance, the protection of national security can be invoked only 'to protect the existence of the nation or its territorial integrity or political independence against force or threat of force'[45]. Public order is not an 'easier' option for the regulator since it is defined rather vaguely as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded'[46].

Thirdly and lastly, the restriction must be 'necessary'[47] to achieve the protection of the legitimate interest. Put simply, there must be a clear link between the restriction and achieving the desired aim in the least restrictive manner, which is sometimes called also as the requirement of proportionality.[48]

Having the above-presented legal toolkit in mind, we can imagine having a provision in the peace agreement defining main features of social media content that may be considered a form of information warfare and thus a threat to national security or public order. However, such definition should fulfill the high threshold that has been described earlier.

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37 Para 1, United Nations Human Rights Council, The Promotion, *Protection and Enjoyment of Human Rights on the Internet* (2012) A/HRC/20/L.13 (UNHRC Rights on the Internet).

38 Article 19(3), ICCPR.

39 Article 19(3), ICCPR.

40 Para 17, United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984) (The Siracusa Principles).

41 Para 16, The Siracusa Principles.

42 Para 18, The Siracusa Principles.

43 Article 19(3)(a), ICCPR.

44 Article 19(3)(b), ICCPR.

45 Para 29, The Siracusa Principles.

46 Para 22, The Siracusa Principles.

47 Article 19(3), ICCPR.

48 PoKempner, D "Cyberspace and State Obligations in the Area of Human Rights" *in* Ziolkowski, K, ed, *Peacetime Regime for State Activities in Cyberspace* (NATO CCD COE Publications 2013) 244.

Also, there can be a commission established by the peace agreement composed of independent experts delegated by the parties to the peace agreement that would be tasked with controlling the content on social media platforms. Such commission would have the authority to decide that specific content violates the provision on information warfare and to issue a notification to the author with a request for modification of the content or its removal. In case of a non-compliance on the side of the author, the commission, as a State organ, could issue a request for removal of the content to a relevant social media platform. However, before taking such action, the commission shall conduct the earlier-described three-part test to avoid any possible violation of the right of an individual to freedom of expression. In addition, before such request is addressed to a relevant social media platform, the author of the content shall be given a possibility to defend his or her position. Nonetheless, the final decision would be still in the hands of a concerned social media platform since governments have no means to remove the content from social media on their own. In general, social media platforms have their own internal policies regarding unauthorised content such as child abuse or hate speech, which can be reported by any user of the platform. In case of content that does not violate these internal policies but is illegal under the domestic law of a country and its removal has been requested by a State organ, a social media platform usually proceeds with restricting the access to the content only in this particular country. Thus, the content would still be accessible in other States, but the local population of a State in question would be restricted from viewing it.

Practically speaking, this process seems quite complicated and expensive, and indeed it would not lead to the removal of all peace-unfriendly content. Nonetheless, some measures can be adopted to make the system more efficient. For instance, there shall be a nationwide awareness-raising campaign about disinformation, fake news and hate speech so that ordinary users of social media would be able to identify such adverse content and report it. In 2017, in Slovakia, a large number of such reports coming from ordinary citizens made Facebook block (until this day) the fanpage of a parliamentary far-right party and the account of its leader who was posting fascist and anti-Semitic material.[49]

As to the actions available to the commission established by the peace agreement, issuing a request for access restriction should not not be the only option. The commission could be authorised to proceed also in a softer manner by designating a specific profile or content as disinformation on its own social media page. An excellent example of such practice can be found in the Czech Republic by its recently-created Centre Against Terrorism and Hybrid Threats tasked to search for and depict adverse disinformation material on social media.[50]

Furthermore, the safeguard requirement by allowing the author of the content to present its defense can be fast-tracked by an online process similar to Online Dispute Resolution system (ODR) used by eBay.[51] In this process, a specially designed software reviews the main features of the dispute between the client and seller and proposes several solutions. If a mutually acceptable resolution is not achieved than a process of an online facilitated mediation follows. Such a sophisticated process would inevitably generate

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[49] The Slovak Spectator, *Facebook Blocks Main Fanpage of the Kotleba's Far-right ĽSNS Party*, 10 April 2017, *at* <spectator.sme.sk/c/20505651/facebook-blocks-main-fanpage-of-the-kotlebas-far-right-lsns-party.html> (accessed 20 November 2018).

[50] Ministry of Interior of the Czech Republic, *Center Against Terrorism and Hybrid Threats*, May 2016, *at* <mvcr.cz/cthh/clanek/centre-against-terrorism-and-hybrid-threats.aspx> (accessed 21 November 2018).

[51] Civil Justice Council, *Online Dispute Resolution*, February 2015, *at* <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> (accessed 7 January 2019) 12.

significant financial costs. Therefore, representatives of social media platforms and IT sector should be consulted or directly engaged during the preparation of such mechanisms so that a way of combining an interest of peace with a financial and technological efficiency could be found.

IV. Conclusion

We have demonstrated that social media can be used by the warring parties as a part of information warfare which has become an indispensable part of modern military conflicts. However, social media have their role also during peace negotiations as well as the subsequent process of national reconciliation. Since there is no regulation on how social media may be used in military conflicts or in its ending, the parties may resort to overt or covert propaganda or disinformation campaigns to undermine the peace talks or to obstruct national reconciliation. For this reason, our main conclusion is that to come to a successful end of a military conflict, it is not enough to cease 'physical' hostilities, but it is equally important to refrain from adverse social media campaigns.

During peace negotiations, mutual trust is not yet well established. Therefore, the mechanisms that can be used to turn down the rhetoric on social media are more of a soft law character. In this respect, we propose a provisional code of conduct on social media or a joint communication channel on social media reporting on ongoing peace talks with content agreed upon by the parties themselves.

As to the process of national reconciliation, there is a whole range of solutions how to 'disarm' social media. The reached peace agreement should include a provision defining social media content that may be considered a form of information warfare aimed to destabilise the country and disrupt the peace. Also, on the enforcement side, there should be a commission charged with controlling the content on social media and issuing requests for access restrictions if the content violates the principles defined by the peace agreement. Nonetheless, this whole process shall be in line with the so-called three-part test principles laid down by Article 19 of ICCPR on the freedom of expression. Furthermore, the local population should be educated to recognise hate speech and distinguish between credible information and fake news and disinformation campaigns. Such media education would also allow ordinary citizens to fight against these issues themselves since many social media platforms provide an option for their users to report the content that is in violation of local law or internal policies of a social media platform.

In the end, it is essential to emphasise that the influence of social media in wartime and in peacetime to manipulate public opinion will increase in the future due to rapid development of technology, even in the least developed countries of the world. When I was doing my research the phrase that struck me the most was by a former guerrilla fighter of Revolutionary Armed Forces of Colombia who said that the Samsung S7 is their 'new weapon'[52]. We cannot allow this progress to be ahead of our political and legal thinking about peace, otherwise, we will be unable to respond adequately to these new challenges providing 20th-century solutions to 21st-century problems.

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[52] Mobilisation Lab, Iriarte, RC, *The revolution will be whatsapped*, 15 August 2017, *at* <mobilisationlab.org/colombia-path-revolution-whatsapp> (accessed 21 November 2018).

Global Environmental Governance Reform: The Emerging Debate on the Need for a World Environment Organisation

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Abstract

Environmental problems, such as climate change, ocean pollution, the depletion of fisheries, and loss of biological diversity, have come to demonstrate most openly our current global interconnectedness. Governments continue to set-up international mechanisms for tackling global-scale environmental problems which has led to a complex international bureaucracy, significant burdens on national administrative capabilities in both the developed and the developing world, and, most importantly, inability on the part of existing international or national bodies to successfully deal with the problems at hand. In this context, the question of the most suitable governance architecture for the scale and scope of contemporary global environmental problems has become an important focus of both policy and academic debates. Scholars and politicians alike have argued that if we do not address governance failures, our stewardship of the environment will persist to be ineffective and inequitable, with little possibility of finding a pathway toward sustainability. Consequently, national governments, civil society groups, and experts on global environment policy have called for the reform of the global environmental governance structure. This paper reviews the most prominent policy options for environmental governance reform that have received attention in the literature, and identifies key points of contention and convergence. To achieve its aim, the paper is divided as follows: introduction, core issues of debate on the need for a World Environment Organization, models of global environmental governance reform, arguments against a World Environment Organization and the concluding remark.

I. Introduction

In spite of the proliferation of institutions, multilateral treaties, mechanism and processes since the end of the 1990's, charged with stewardship of the global environment; the health of the global environment continues to deteriorate.[1] As encouraging as the

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1 See Harada, N, *Campaign for a Global Environmental Organization: A French Perspective*, Prepared for *Global Environmental Governance: the Post-Johannesburg Agenda*, Yale Centre for Environmental Law and Policy New Haven, CT, 23– 25 October 2003, *at* <agirpourlenvironnement.org/pdf/harada.pdf> (accessed 18 November 2018) 6; See International Environmental Governance Stakeholder Forum for Our Common

growing involvement of many different United Nations bodies in environmental matters is, what we have at present is duplication, fragmentation and inefficiency[2] in the governance of the global environment. International environmental problems, such as climate change, biological diversity, drastically depleted fisheries, catastrophic droughts, devastated forests, disappearing freshwater resources, pollution of coastal zones and international waters, increase in the volume of waste (including radioactive waste), deforestation and desertification, privatization of natural genetic resources, progressive exhaustion of natural resources and the dispersion of persistent hazardous chemicals, remain largely unresolved which threatens delicate ecosystems and, indeed, the inhabitants of the earth.[3]

A comprehensive and systematic global environmental policy does not yet exist.[4] The proliferation of weak international environmental treaties and national laws has failed to address the problem of global environmental decline. The various bodies that address environmental issues in some cases have conflicting mandates and lack sufficient authority and funding to prioritise the environment. Additionally, in contrast for instance, to the structure of the World Trade Organization (WTO) or International Labour Organization (ILO), the system of International Environmental Governance (IEG) has weak enforcement and compliance mechanisms.[5] In this context, the question of the most appropriate governance architecture for the scale and scope of contemporary global environmental problems has become an important focus of both policy and academic debates. Scholars and politicians alike have argued that if we do not address governance failures, our stewardship of the environment will continue to be ineffective and inequitable, with little chance of finding a path toward sustainability.[6] As a result, national governments, civil society groups, and experts on global environment policy have called for the reform and strengthening of the global environmental governance system.[7]

Future Briefing Paper, 1, 5, at <https://sf.stakeholderforum.org/publications/reports/IEG-SFpaper.pdf> (accessed 4 January 2019).

2 See Oberthür, S and Gehring, T, "Reforming International Environmental Governance: An Institutionalist Critique of the Proposal for a World Environment Organization", 4 *International Environmental Agreements: Politics, Law and Economics* (2010) 359, 360; See Horta, Korinna, REPORT: *The Global Environment Facility: The First Ten Years - Growing Pains or Inherent Flaws?*, August 2002, *at* <Halifaxinitiative.org/content/global-environment-facility-first-ten-years-growing-pains-or-inherent-flaws-august-2002> (Accessed 17 November 2018); Gustave, S, *Red Sky at Morning* (Yale University Press 2004).

3 Oberthür and Gehring, *supra* nt 2, 360; United Nations Environment Programme (UNEP), *Annual Report*, 2000, *at* <wedocs.unep.org/handle/20.500.11822/7731> (accessed 17 November 2018); Pace, WR and Clarke, V, The Case for a World Environment Organization-Comments from the Federalist Debate, 2003, *at* <http://www.federalist-debate.org/index.php/current/item/575-the-case-for-a-world-environment-organization> (accessed 3 January 2019); Harada, *supra* nt 1.

4 Wissenschaftszentrum Berlin für Sozialforschung (WZB), Biermann, F and Simonis, UE, *Needed Now: A World Environment and Development Organization*, WZB Discussion Paper No. FS II 98– 408, Berlin, 1998, *at* <hdl.handle.net/10419/49574> (accessed 17 November 2018).

5 Oberthür and Gehring, *supra* nt 2.

6 Clapp, J and Dauvergne, P, *Paths to a Green World: The Political Economy of the Global Environment* (The MIT Press 2005); Young, OR, "The Institutional Dimensions of Environmental Change: Fit, Interplay and Scale" *in* Choucri, N, ed, *Global Environmental Accord: Strategies for Sustainability and Institutional Innovation* (The MIT Press 2002); Berruga, E and Maurer, P, *Co-Chairmen's Summary of the Informal Consultative Process on the Institutional Framework for the UN's Environmental Activities*, New York, 2006.

7 Yale School of Forestry and Environmental Studies (Yale F&ES), Ivanova, M, *Can the Anchor Hold? Rethinking the United Nations Environment Programme for the 21st Century*, Publication Series Report

One response for international environmental governance reform is to create a World Environment Organization (WEO) that would be a designated and empowered advocate for the environment that could serve to ensure effective policy and decision-making and provide an adequate response to environmental management.[8] Proposals to create an international agency on environmental protection have been debated for over forty years[9] beginning with US foreign policy strategist George F. Kennan, who argued for an International Environmental Agency encompassing 'a small group of advanced nations' to bore the responsibility for solving international environmental problems.[10] Several authors supported this idea[11] at that time and as one outcome of this debate, the United Nations established in 1972 the United Nations Environment Programme (UNEP),[12] following a decision adopted at the 1972 Stockholm Conference on the Human Environment. The creation of United Nations Environment Programme was a more modest reform than the strong international environmental organisation that some observers had called for at that time. Nonetheless, this reform altered the context of the organisational debate in international environmental politics and effectively halted it.[13]

The debate about a larger, more powerful agency for global environmental policy was revived in 1989 with The Declaration of The Hague, initiated by the governments of The Netherlands, France and Norway, which called for an authoritative international body on the atmosphere that would include a provision for effective majority rule. This declaration helped to trigger more proposals for a world environment organisation that could replace United Nations Environment Programme.[14] At the June 23, 1997 Special Session of the United Nations General Assembly on environment and development, Brazil, Germany, Singapore, and South Africa submitted a joint proposal for a 'global umbrella organisation for environmental issues, with the United Nations Environment Programme as a major pillar'.[15] In the words of Germany's chancellor at the time:

Number 7, September 2005, *at* <environment.yale.edu/publication-series/documents/downloads/o-u/report_7_unep_evaluation.pdf> (accessed 17 November 2018), 11–12; Bharat, D, *Institutionalizing International Environmental Law* (Transnational Publishers 2004); Esty, DC, and Ivanova, M, eds, *Global Environmental Governance: Options & Opportunities* (Yale School of Forestry and Environmental Studies 2002); Norichika, K and Haas, PM, eds, *Emerging Forces in Environmental Governance* (United Nations University Press 2004); Speth, JG, *Worlds Apart: Globalization and the Environment* (Island Press 2003); Vogler, J and Imber, M, *The Environment and International Relations* (Routledge 1996).

8 Pace and Clarke, *supra* nt 3.

9 Biermann, F and Bauer, S, eds, *A World Environment Organization: Solution or Threat for Effective International Environmental Governance?* (Aldershot, UK: Ashgate 2005); See Lodewalk, Magnus and John, Whalley, *"Reviewing Proposals for a World Environmental Organization"* (2002) 25(5) *The World Economy,* 601– 17.

10 Kennan, GF, *To Prevent a World Wasteland: A Proposal*, *Foreign Affairs*, (1970) 48 (3), 401– 413, *at* <foreignaffairs.com/articles/1970– 04– 01/prevent– world– wasteland> (accessed 17 November 2018); Steffen, Bauer, *The Catalyst Conscience: UNEP's Secretariat and the Quest for Effective International Environmental Governance.* Global Governance Working Paper No 27, 2007, Amsterdam et al.: The Global Governance Project, *at* <www.glogov.org> (accessed 3 January 2018).

11 Stakeholder Forum, Biermann, F, *Reforming Global Environmental Governance: The Case for a United Nations Environment Organization (UNEO),* February 2011, *at* <ieg.earthsystemgovernance.org/sites/default/files/files/publications/Biermann_Reforming%20GEG%20The%20case%20for%20a%20UNEO.pdf> (accessed 17 November 2018), 4–5.

12 UNEP is not an intergovernmental organization, but a subsidiary body of the United Nations General Assembly reporting through the United Nations Economic and Social Council (UNESC).

13 Biermann, *supra* nt 11.

14 *Ibid.*

15 *Ibid.*

'Global environmental protection and sustainable development need a clearly-audible voice at the United Nations. Therefore, in the short term ... it is important that cooperation among the various environmental organisations be significantly improved. In the medium-term this should lead to the creation of a global umbrella organisation for environmental issues, with the United Nations Environment Programme as a major pillar.'[16]

Similar calls came subsequently from several leading politicians,[17] academics, governments, expert commissions, as well as several international civil servants, and others.[18] For example, in 1999, Renato Ruggiero, the Executive Director of the World Trade Organization (WTO), caused a stir by calling for a World Environment Organization as a counterbalance to the World Trade Organization – an unlikely proposal coming from a top-level bureaucrat (administrator) in view of the common preference of bureaucracies (organizations) to widen their own competences when in doubt. No doubt the debate on the need to integrate environmental standards into the World Trade Organization regime played a role here.[19] In 1998 the French President Jacques Chirac joined the proponents of a world environment organisation by advocating a 'World Authority...as an impartial and indisputable global centre for the evaluation of our environment',[20] and on 6 June 2000, the French environment minister, Dominique Voynet, announced that she would now use the French presidency of the European Union, started on 1 July 2000, to launch the idea of establishing an organisation mondiale de l'environnement.[21]

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16 Chatham House (the Royal Institute of International Affairs), Ivanova, M; Draft Report: *International Environmental Governance Reform: Options and Implications*, September 2007, *at* <chathamhouse.org/sites /default/files/public/Research/Energy,%20 Environment%20and%20 Development/260707ieg2.pdf> (accessed 17 November 2018); Helmut, K, Special Session United Nations General Assembly (23 June 1997); The Global Governance Project, Biermann, F and Bauer, S, *Does Effective International Environmental Governance Require a World Environment Organization? The State of the Debate Prior to the Report of the High-Level Panel on Reforming the United Nations,* Global Governance Working Paper No. 13, December 2004, *at* <glogov.org/images/doc/WP13.pdf> (accessed 17 November 2017), 11.

17 Jospin, L, "French Prime Minister Calls for Creation of New World Environment Organization" 25(5) *International Environment Reporter* (2002) 213; Newsweek, Gorbachev, M, *The American and Russian People Don't Want a New Confrontation*, April 27 2001; Speth, JG, "A Memorandum in Favor of a World Environment Organization" *in* Rechkemmer Baden-Baden, A, ed, *UNEO-Towards an International Environment Organization* (Nomos Verlagsgesellschaft 2005); Panitchpakdi, S, "The Evolving Multilateral Trade System in the New Millennium" 33(3) *George Washington International Law Review* (2001) 419–449.

18 Charnovitz, S, "A World Environment Organization" 27(2) *Columbia Journal of Environmental Law* (2002) 323, 323– 362; Charnovitz, S, "The Emergence of Democratic Participation in Global Governance" 10(1) *Indiana Journal of Global Legal Studies* (2003) 45,45– 77; Charnovitz, S, "Toward a World Environment Organization: Reflections upon a Vital Debate" *in* Biermann, F, and Bauer, S, eds, *A World Environment Organization* (Ashgate 2005); UN General Assembly, *Report of the High– Level Panel on Financing for Development*, 26 June 2001, (55th session) A/55/1000.

19 WZB, Biermann, F and Simonis, UE, *Institutional Reform of International Environmental Policy: Advancing the Debate on a World Environment Organization*, WZB Discussion Paper No. FS II 00– 401, Berlin, 2000, *at* <econstor.eu/bitstream/10419/49554/1/319098338.pdf> (accessed 17 November 2018), 4; Ruggiero, R, Address to the Royal Institute of International Affairs, A Global System for the Next Fifty Years (1998).

20 Biermann and Simonis, *supra* nt 19; Chirac, J, Congress of the World Conservation Union (3 November 1998).

21 Biermann, F, "The Case for a World Environment Organization" 42(9) *Environment: Science and Policy for Sustainable Development* (2000) 22, 22-31.

This renewed political attention to global environmental governance reform among some governments spurred a vibrant debate and furthered academic input to the discourse that culminated at the 2002 World Summit on Sustainable Development in Johannesburg which helped to reinvigorate the debate. In an impassioned speech, then French President Jacques Chirac declared that the 'house is burning' and that a World Environment Organization is imperative for attending to the urgent ecological pressures on a global scale.[22] The idea of a World Environment Organization is rooted in dissatisfaction with the current arrangements of international environmental governance and, more importantly, with the lack of effective environmental protection it has achieved so far.[23]

II. Core Issues of Debate on the Need for a World Environment Organisation

What are the main arguments put forward in support of a world environment organisation? Essentially, advocates of this new entity point to the following major shortcomings of the present state of global environmental governance: deficiencies in the coordination of distinct policy arenas, deficiencies in the process of capacity-building in developing countries, deficiencies in the implementation and further development of international environmental standards[24] and absence of Democracy in International Environmental Governance.

A. Better Coordination of Global Environmental Governance

First, many observers claim that there is a coordination deficit between the international governance architecture that results in substantial costs and suboptimal policy outcomes. When the United Nations Environment Programme was set up in 1972, it was a comparatively independent player with a clearly defined work area. Since then, however, the increase in international environmental regimes has led to a considerable fragmentation of the system.[25] According to the background paper for the 2010 consultative group, 'There are now more than 500 international treaties and other agreements related to the environment, of which…302 date from the period between 1972 and the early 2000s'.[26] Norms and standards in each issue area of environmental policy are set-up by separate legislative drafting parties of the environmental treaties-the conferences of the parties to the environmental treaties without much respect for repercussions and linkages with other policy fields. This situation is made worse by the organisational fragmentation of the various convention secretariats that have evolved

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22 Ivanova, *supra* nt 16; Biermann and Bauer, *supra* nt 16.

23 Oberthür and Gehring, *supra* nt 2.

24 Development and Peace Foundation, Biermann, F and Simonis, UE, "A World Organization for Environment and Development: Functions, Opportunities, Issues" Policy Paper No. 9, Bonn, 1998; WZB, Simonis, UE, *Global Environmental Governance: Speeding Up the Debate on a World Environment Organization*, WZB Discussion Paper, No. FS II 02– 404, Berlin, 2002, *at* <econstor.eu/bitstream/10419/ 49568/1/351004734.pdf> (accessed 17 November 2018), 10; Haas, PM, Keohane, RO, and Levy, MA, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Harvard University Press 1993).

25 Biermann, *supra* nt 21; Biermann and Bauer, *supra* nt 18.

26 UNEP, *Implementing the Clustering Strategy for Multilateral Environmental Agreements: A Framework. Background Paper By The Secretariat*, UNEP/IGM/4/4 (2001); Perry, C, *Strengthening International Environmental Governance: System-Wide Responses* (International Peace Institute 2012), 5.

into distinct medium-sized bureaucracies with strong centrifugal tendencies. For good reasons, there are no functionally different secretariats for the many conventions on labour standards, which are administered instead by a single specialized organisation, that is, the International Labour Organization (ILO).[27]

Streamlining environmental secretariats and negotiations into one body would especially increase the voice of the Global South - the "Developing World," "Developing Countries," "Less Developed Countries," "Less Developed Regions" (i.e., Africa, Latin America, and the developing countries in Asia, including the Middle East)[28] in global environmental negotiations. The current system of organisational fragmentation and inadequate coordination causes special problems for developing countries. Individual environmental agreements are negotiated in a variety of places, ranging, for example in ozone policy, from Vienna to Montreal, Helsinki, London, Nairobi, Copenhagen, Bangkok, Nairobi, Vienna, San José, Montreal, Cairo, Beijing and Ouagadougou. This nomadic nature of a 'travelling diplomatic circus' also characterises most sub-committees of environmental conventions. Developing countries lack the resources to attend all these meetings with a sufficient number of well-qualified diplomats and experts.[29] The creation of a World Environment Organization could help developing countries to build up specialised 'environmental embassies' at the seat of the new organisation, which would reduce their costs and increase their negotiation skills and respective influence.[30]

More so, most specialised international organisations and bodies with some relation to environmental protection, such as the UN Food and Agriculture Organization (FAO) or the UN Educational, Scientific and Cultural Organization (UNESCO), have initiated environmental programs of their own over the years. Yet there is not much coordination among these organisations and their policies. If compared to national politics, the current international situation might come close to abolishing national environment ministries and transferring their programs and policies to the ministries of agriculture, industry, energy, economics, or a trade-a policy proposal that would not find many supporters in most countries.[31]

For global environmental policy, no central anchoring point exists that could compare to the World Health Organization (WHO), International Labour Organization (ILO), or World Trade Organization (WTO) in their respective fields, but there is an overlap in the functional areas of almost all bodies involved. An international centre with a clear strategy to ensure global environmental sustainable development thus seems to be the need of the hour. Just as within nation States, where environmental policy was institutionally strengthened through the introduction of independent environmental ministries, global environmental policies could be made stronger through an independent

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27 Biermann, *supra* nt 21; Biermann and Simonis, *supra* nt 19.

28 See Mitlin, Diana, and Satterthwaite, David, *Urban Poverty in the Global South: Scale and Nature* (Routledge 2013), 13; See also Braveboy-Wagner, Jacqueline Anne, *The Foreign Policies of the Global South: Rethinking Conceptual Frameworks* (Lynne Rienner Publishers 2003), 11.

29 The Global Governance Project, Biermann, F, *Global Environmental Governance: Conceptualization and Examples*, Global Governance Working Paper No. 12, November 2004, *at* <glogov.org/images/doc/WP12.pdf> (accessed 18 November 2018), 16; Rajan, MG, *Global Environmental Politics: India and the North- South Politics of Global Environmental Issues* (OUP 1997).

30 Biermann *supra* nt 29.

31 Biermann, *supra* nt 21.

World Environment Organization that helps to contain the special interests of individual programs and organisations and to limit double work, overlap, and inconsistencies.[32]

B. Promoting Capacity-building and Improved Financial and Technology Transfers in Developing Countries

Secondly, supporters of a World Environment Organization argue that such a body could assist in the build-up of environmental capacities in developing countries. Capacity-building has become the key phrase of development cooperation and strengthening the capacity of developing countries, to deal with global and domestic environmental problems, has certainly become one of the most essential functions of global environmental regimes.[33]

Yet the current organisational setting for financial transfers to developing countries suffers from an adhocism and fragmentation that does not fully meet the requirements of transparency, efficiency, and participation of the parties involved. At present, most industrialised countries strive for a strengthening of the World Bank and its affiliate, the Global Environment Facility (GEF), to which they will likely wish to assign most of the future financial transfers (e.g., the phase out of persistent organic pollutants). Many developing countries, on the other hand, view this development with concern, given their perspective of the World Bank as a Western-dominated institution ruled by decision making procedures based on contributions.[34]

A potential solution would be to move the tasks of overseeing capacity-building and financial and technological assistance for global environmental policies to an independent body that is specially designed to account for the distinct character of developed-developing world relations in global environmental policy. Such a body could link the normative and technical aspects of financial and technological assistance and could be strong enough to overcome the fragmentation of the current system. Such a body could be a World Environment Organization. The organisation could be empowered to coordinate various financial mechanisms and to administer the funds of sectoral regimes in trust, including the Clean Development Mechanism and the emissions trading system under the Kyoto Protocol.[35]

These responsibilities do not need to imply the setup of large new bureaucracies. Instead, a World Environment Organization could still make use of the extensive expertise of the World Bank or the United Nations Development Programme (UNDP), including their national representations in developing countries. However, by designating a World Environment Organization as the central authoritative body for the various

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32 *Ibid*; Ivanova, M, "Global Governance in the 21st Century: Rethinking the Environmental Pillar" *Stakeholder Forum Think Piece Series* (2012) 6; Inge, Kaul, Public Goods: Taking the Concept to the 21st Century, 2001, *at* <http://www.yorku.ca/drache/talks/pdf/apd_kaulfin.pdf> (accessed 3 January 2019); Biermann, F, "Reforming Global Environmental Governance: From UNEP towards a World Environment Organization", *in* Swart, L and Perry, E, *Global Environmental Governance. Perspectives on the Current Debate* (Centre for UN Reform Education 2007), 105–108.

33 Biermann, *supra* nt 21; Keohane and Levy, *supra* nt 23; Connolly, B and Keohane, RO, "Institutions for Environmental Aid: Politics, Lessons, and Opportunities" 38(5) *Environment: Science and Policy for Sustainable Development* (1996), 12, 12–20, 39–42; Biermann, F, Global Environmental Policy between North and South: The New Bargaining Power of Developing Countries (Nomos 1998), 129–273; Ott, HE, "The Kyoto Protocol: Unfinished Business" 40(6) *Environment: Science and Policy for Sustainable Development* (1998), 16, 16–20, 41–45.

34 Biermann, *supra* nt 21.

35 *Ibid.*

financial mechanisms and funds, the rights of developing countries over implementation could be strengthened without necessarily giving away advantages of the technical expertise and knowledge of existing organisations.[36]

Several years ago, the term capacity-building became a new catchword of development cooperation. Seen in empirical terms, the building of capacity, particularly in developing countries, is apt to be one of the essential functions of environmental regimes as well. Financial and technical cooperation on environmental problems nevertheless differs from traditional development cooperation: in particular the transfers effected by the Multilateral Ozone Fund or the Global Environment Facility (GEF) serve not only to build environmental capacities in the South, they also provide compensation for the full 'agreed' incremental costs incurred by developing countries in connection with global environmental policy, in accordance with the principle of the 1992 Rio conference on 'common but differentiated responsibilities and capabilities' of the parties. In this context, Hans Peter Schipulle, division head of the German Ministry for Economic Cooperation and Development, noted:

'Unlike classical development aid ..., these transfers, effected by environmental conventions, are obligations that are binding under international law.... If these obligations are not met by the industrialised countries, the developing countries can advance this as grounds for not meeting their own obligations, which in turn would harm the interests of the international community, i.e. including the industrialised countries. These stipulations become national law when the Convention is ratified and thus constitutes a new legal frame of reference for the cooperation with developing countries.'[37]

C. Development and Implementation of International Environmental Law

Thirdly, supporters of a World Environment Organization argue that this organisation would be in a much better position to support regime-building processes, especially by initiating and preparing new treaties. Again, the International Labour Organization could serve as a model. The International Labour Organization has developed a comprehensive body of conventions that come close to a global labour code. In comparison, global environmental policy is far more disparate and cumbersome in its norm-setting processes. It is also riddled with various disputes among the United Nations specialised organisations regarding their competencies, with United Nations Environment Programme in its current setting being unable to adequately protect environmental interests.[38] In addition to norm-setting, some argue that a World Environment Organization would also improve the overall implementation of international environmental standards. This responsibility does not necessarily require an organisation with 'sharp teeth', as some environmentalists recommend. Instead, the implementation of standards could already be facilitated, for example, by a common comprehensive reporting system on the state of the environment and on the state of implementation in different countries as well as by stronger efforts in raising public awareness.[39]

The organisation should, for instance, have the right to collect, evaluate, and publish in a suitable form, information on the state of the environment and on the state of

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36 *Ibid.*
37 Biermann and Simonis, *supra* nt 19.
38 Biermann, *supra* nt 21; Biermann, *supra* nt 32.
39 Biermann, *supra* nt 21.

environmental policy in the United Nations member States, especially with regard to the international commitments assumed by individual States. Like most other specialised agencies of the United Nations, a World Environment Organization should therefore foster problem consciousness and seek to improve the state of the world's knowledge, including information on the earth system, existing environmental and development problems, as well as information on the state of implementation of international and national policy with a view to controlling global change.[40]

Clearly, the wheel does not need to be reinvented. Several environmental regimes already require their parties to report on specific policies. Specialised organisations, such as the World Meteorological Organization (WMO), the International Maritime Organization (IMO), or World Health Organization (WHO), collect and disseminate valuable knowledge and promote further research and the Commission on Sustainable Development makes important contributions by developing indicators for sustainable development. However, there remains a prevailing lack of comprehensive coordination, bundling, processing, and further channelling of this knowledge in a policy-oriented manner. The myriad contributions made by various international actors are clearly in need of a central anchoring point. This task could be much better carried out by an institutionally independent and sufficiently funded World Environment Organization that could then be entrusted, among others, with coordinating the reporting mechanisms of the various regimes[41] and having more possibilities to support regime-building processes, particularly by initiating and preparing international treaties.[42]

D. Promotion of Democracy in International Environmental Governance

Fourthly, supporters of a World Environment Organization argue that global environmental governance can no longer be left in the hands of the rich countries alone; it has to include the Global South - the "Developing World," "Developing Countries," "Less Developed Countries," "Less Developed Regions" (i.e., Africa, Latin America, and the developing countries in Asia, including the Middle East)[43] on the one hand, and civil society and local authorities on the other. Developing countries are marginalised in the decision-making process of global environmental governance. As Pierre Calame states, in international negotiations, only the agenda of rich countries is effectively taken into account. Poor countries have no choice but to have recourse to deliberations without real impact 'When the American president said at the 1992 Earth Summit that the American way of life was not negotiable, he nullified the negotiations. As long as what can be negotiated is decided only by the rich countries (for example, free movement of goods, yes, free movement of people, no; terms and conditions for the development of poor countries, yes, questioning rich countries' way of life, no; tradable permits for exchanges of carbon dioxide emissions, yes, property of natural resources, no; etc.), global environmental governance and its constraints will hardly be accepted.'[44]

Another problem is the proliferation of complex international conferences that impose a heavy burden on negotiators and especially those from the Global South - the "Developing World," "Developing Countries," "Less Developed Countries," "Less Developed Regions" (i.e., Africa, Latin America, and the developing countries in Asia,

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40 Biermann and Simonis, *supra* nt 19.
41 Biermann, *supra* nt 21.
42 Biermann and Simonis, *supra* nt 19.
43 Mitlin and Satterthwaite, *supra* nt 28; Braveboy-Wagner, *supra* nt 28.
44 Harada, *supra* nt 1.

including the Middle East)[45] who are fewer, less specialised, and sometimes without access to proper translation. These organisational problems could be solved by topic clustering and an agenda-setting process determined through a vote of delegates from different regions. Participation of civil society is also increasingly important. The UN recognises that a 'global public policy network' is 'the most promising partnership in the age of globalisation.' At the global environmental governance level, representative democracy has reached its limits, notably because of a retreat of the state confronted by the power of the market and a lack of transparency. Citizens, NGOs, local authorities and the private sector need to be represented in an institution like the World Environment Organization. Legitimacy and transparency are at stake. In this regard, a World Environment Organization could provide a new model for a world organisation, promoting participative democracy.[46]

If we want environment consciousness to emerge in our society, the World Environment Organization has to be close to the citizen. Various means can be explored, including sending 'environment presenters' to schools, organising global conferences for citizens, public information campaigns, including citizens in the decision-making organs of the World Environment Organization, or creating a mechanism for the public to initiate a law- as can be found in the constitution project for the European Union, access environmental information, participate in environmental decision-making and access justice in environmental matters. Participation of NGOs in a more constructive and 'official' capacity could include granting access to NGOs to the Global Court for the Environment to denounce a treaty violation or intervene in judicial proceedings with an expanded *amicus curiae* status. Local authorities must not be forgotten. They are the central actors in implementation of sustainable development policies.[47]

Finally, the private sector must certainly play a part in the Global Environmental Governance. This can be achieved through a World Environment Organization that will bring in transnational companies as partners in global environmental governance. Multinational and national businesses have faced both internal and external pressures to become more environmentally friendly. Transnational corporations have long been regarded as perpetrators of international environmental degradation, moving investment and production to nations with the lowest environmental standards in search of higher profit margins. Nevertheless, since the 1990s, the United Nations (UN) and some civil society actors have changed tactics by engaging the private sector in partnerships to become part of the solution through voluntary corporate social responsibility. The private sector has also begun to respond with initiatives such as the World Business Council on Sustainable Development (WBCSD).[48]

At the same time, clean technologies are getting cheaper and it has been shown that carefully crafted, moderately demanding regulations can inspire businesses to create profitable, environmentally friendly innovations.[49] However, more needs to be done.

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45 Mitlin and Satterthwaite, *supra* nt 28; Braveboy-Wagner, *supra* nt 28.

46 Harada, *supra* nt 1.

47 *Ibid.*

48 See Najam, A, Papa, M and Taiyab, N, *Global Environmental Governance: A Reform Agenda* (International Institute for Sustainable Development 2006), 64; See Najam, A, "*World Business Council on Sustainable Development: The Greening of Big Business or a Greenwash?"* Yearbook of International Co-Operation on Environment and Development, 1999/2000 (Earthscan 1999), 65– 75.

49 Najam, Papa and Taiyab, *supra* nt 48*;* See Porter, M.E. and Van Der Linde, C., "*Toward a new Conception of the Environment-Competitiveness Relationship." Journal of Economic Perspectives,* (1995) 9(4), 97–118.

There is need for a World Environment Organization that will encourage various countries to formulate strong national regulatory frameworks that integrates environmental considerations into private sector investment since integration of environmental considerations into investment and development is crucial to effective environmental governance.[50]

III. Models of Global Environmental Governance Reform

Improving global environmental governance has been an issue of dynamic debate in academic and policy-making circles ever since environmental issues entered the international agenda in the 1970s. Since then, both environmental threats and international responses to them have increased in their number and complexity. The key challenge of global environmental governance has, however, remained the same: how to design an institutional framework (system) that would best protect the global environment.

A. The Compliance Model

The Compliance Model advocates creation of a body that could provide binding decisions to hold States and private actors accountable for non-compliance with Multilateral Environmental Agreements (MEAs) and resulting environmental damage.[51] At the core of this proposal lies the recognition of the need for enforcement powers in the international system relating to the environment. Currently no environmental organisation possesses such authority or dispute settlement mechanism for environmental matters exists.[52]

Several potential bodies with such enforcement powers have been proposed. First, a World Environment Court[53] with non-discretionary competence and broad legal access is envisioned as a permanent institution along the lines of the European Court of Human Rights, to ensure compliance with Multilateral Environmental Agreements and upholding the new right to a healthy environment. Until a World Environment Court is put in place, some of its supporters, which include legal experts and environmental protection agencies, propose a Permanent Court of Arbitration (PCA) which would be responsible for solving disputes linked to the environment. This court would be "a body which would be able to investigate all aspects of a case however overlapping or international they may be, … which could go and question those really responsible behind their company fronts …, would denounce governmental complacency … which finally would be able to judge and also condemn those really responsible to restore the areas that are damaged and bring them back to a condition which is as close as possible to what they were initially".[54]

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50 Najam, Papa and Taiyab, *supra* nt 48, 59.

51 Najam, Papa and Taiyab, *supra* nt 48, 17.

52 Ivanova, *supra* nt 16.

53 Najam, Papa and Taiyab, *supra* nt 48.

54 Le Prestre, P and Martimort-Asso, B, "Issues Raised by the International Environmental Governance System (Draft Version)"Institute for Sustainable Development and International Relations (IDDRI) Conference *International Environmental Governance*, Paris, March 2004, 39; see also petition launched by The Cousteau Team during the conference of the International Organization of Bio-Politics entitled "Resolving the Ecological Crisis: The Need to Create an International Criminal Court for the Environment", Athens, January 20–22nd, 2001, *at* <https://biopolitics.gr/biowp/wp-content/uploads/2013/04/bionews26.pdf> (accessed 10 January 2019).

Second, upgrading the Trusteeship Council[55] to have authority over global commons and also represent interests of potential beneficiaries of the trust, especially future generations. Third, reinterpreting the mandate of the United Nations Security Council to include environmental security, having accommodated non-traditional threats such as, humanitarian emergencies and gross violations of human rights.[56] Members of the United Nations Security Council declared in 1992 that 'peace and international security are not simply the result of the absence of wars and armed conflict. Other, non-military threats to peace and international security are based on instability that exists in various economic, social, humanitarian and ecological domains'. Certain legal elements indicate that the mandate of the Security Council could be reinterpreted to include non-traditional aspects of threats to peace and security. Through this declaration, the members of the Security Council were indicating that non-compliance with Multilateral Environmental Agreements could be subject to Article 39 of the United Nations Charter and thereby give rise to sanctions against the countries concerned.[57]

Ideally, it is believed that the compliance model would solve the free rider problem, ensure care for the global commons, match judicial enforcement available elsewhere (especially in the World Trade Organization), enhance predictability and intergenerational concern of environmental law and directly impact compliance with Multilateral Environmental Agreements. In practice, States are reluctant to expose themselves to the compliance body's oversight and value judgments. There is a history of avoiding third party adjudication in international environmental law, inability to punish global commons' violators by exclusion or fines and low support for the exercise of 'enforcement' provisions. Finally, the probability of all States voluntarily accepting the compliance model is extremely low.[58]

B. The New Agency Model

The New Agency Model, also referred to by some authors as the Centralization Model, advocates for the creation of a new organisation outside of the United Nations Environment Programme with concentrated environmental responsibilities and the ability to steer United Nations agencies in relation to environmental issues.[59] Proponents of this model call for a more fundamental reform to address the substantive and functional overlap between the many international institutions in global environmental governance. These advocates of a more centralised governance architecture call for the creation of a new organisation outside of the United Nations Environment Programme with concentrated environmental responsibilities and the ability to steer United Nations agencies in relation to environmental issues through the integration of several existing environmental and development programs and agencies into one all-encompassing

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55 Najam, Papa and Taiyab, *supra* nt 48; Redgwell, C, "Reforming the United Nations Trusteeship Council" *in* Chambers, WB and Green, JF, eds, *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press 2005), 178–203.

56 Najam, Papa and Taiyab, *supra* nt 48; Elliot, L, "Expanding the Mandate of the United Nations Security Council" *in* Chambers, WB and Green, JF, eds, *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press 2005), 204–226.

57 Le Prestre and Martimort-Asso, *supra* nt 54.

58 Najam, Papa and Taiyab, *supra* nt 48.

59 *Ibid.*

World Environment Organization (WEO),[60] a World Sustainable Development Organization (WSDO)[61] or World Organization for Environment and Development.[62]

A similar proposal concerned the establishment of a Global Environmental Organization which - on the model of the World Trade Organization as the most important institution regulating world trade- having integrated diverse multilateral trade agreements,[63] with broad rulemaking authority to address market failures and facilitate negotiation of international standards to be implemented by all countries - would serve as a forum for formulating and implementing global environmental policy; Global Environment Organization (GEO) would not only include the existing issue-specific international environmental agreements, it would also become the central institution concerned with financial and technological transfers.[64]

Other designs use the Global Environment Facility (GEF) as a role model[65] for global environmental governance and advocate strengthening the role of GEF; strengthening the role of the United Nations Economic and Social Council (ECOSOC) and United Nations Commission on Sustainable Development (CSD) in discussing and overseeing system-wide coordination; propose an organisation for environmental bargaining[66] to trade environmental goods for money, or aim to reinforce G8 with leader-level G20 to serve as a platform for building the new agency.

According to some scholars, such a complete organisation could comprise of the United Nations Environment Programme, the hundreds of Multilateral Environmental Agreements (MEAs), the World Meteorological Organization (WMO), the Global Environment Facility (GEF), Commission on Sustainable Development (CSD), United Nations Development Programme (UNDP), the pollution control programs of the International Maritime Organization (IMO), the International Tropical Timber Organization, the fishery and forestry programs from the United Nations Food and Agriculture Organization (FAO), the Intergovernmental Panel on Climate Change (IPCC), the International Oceanographic Commission (IOC), the UN Inter-agency Committee on Sustainable Development (UNICSD), and many others.[67]

Proponents of this model are of the view that creation of a new agency is an opportunity to put together the best features of existing agencies and guide global environmental policy-making. Such an agency could address the problems of fragmentation and weakness of environmental governance within the United Nations system. However, putting all environmental agreements under one umbrella would be a major challenge, because the current system is strongly decentralised and individual

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60 Charnovitz, S, "A World Environment Organization" 27(2) *Columbia Journal of Environmental Law* (2002), *323,* 323–362.

61 Najam, Papa and Taiyab, *supra* nt 48; Glenn, JC and Gordon, T, *2050 Global Normative Scenarios* (American Council for the United Nations University in cooperation with The Foundation for the Future 1999).

62 Biermann and Simonis, *supra* nt 19.

63 Charnovitz, *supra* nt 60.

64 WZB, Simonis, UE, *Global environmental Problems – Searching for Adequate Solutions*, WZB Discussion Paper, No. FS II 98–405, Berlin, 1998 *at* <bibliothek.wzb.eu/pdf/1998/ii98– 405.pdf> (accessed 18 November 2018) 31.

65 Najam, Papa and Taiyab, *supra* nt 48; Streck, C, "The Global Environment Facility – A Role Model for International Governance?" 1(2) *Global Environmental Politics* (2001), 71.

66 Najam, Papa and Taiyab, *supra* nt 48*;* Whalley, J and Zissimos, B, "What Could a World Environmental Organization Do?" 1(1) *Global Environmental Politics* (2001)*,* 29–34.

67 Charnovitz, *supra* nt 60.

environmental entities strongly resist takeovers.[68] Benefits of the new agency remain uncertain: it can potentially promote cooperation and increase States' environmental concern, but it risks being another big bureaucracy with modest civil society influence and no additional financial and technology transfer to developing countries.[69]

Germany has been the country seen as the main international proponent of a new United Nations specialised agency since Chancellor Kohl, in the mid-1990s, spoke out quite unexpectedly in favour of an 'Environmental Security Council', a proposal that was followed in 1997 by the call for a 'global umbrella organization for environmental issues, with the United Nations Environment Programme as its major pillar' and further pursued by Germany's Red-Green government. In a statement made on January 25, 1999, the environmental policy spokeswoman of the SPD Bundestag faction said:

> "We need ... to focus the tangled and disjointed international organizations and programs. UNEP [UN Environment Programme], CSD [Commission on Sustainable Development], and UNDP [UN Development Programme] should be merged to form an organization for sustainable development. Close links to the World Bank, the International Monetary Fund, the World Trade Organization, and UNCTAD [UN Conference on Trade and Development] should be aimed for as a means of preventing environmental dumping and achieving an environmentally sound, sustainable development in line with Agenda 21".[70]

The German Advisory Council on Global Change in 1996 likewise recommended an 'organization for sustainable development,' but without spelling out any specifics.[71] In December 2000, the German Scientific Advisory Council on Global Change (WBGU) submitted its annual report, entitled 'World in Transition', new structures for global environment policy in which it recommended that the federal government should use the World Summit on Sustainable Development to launch structural reforms for the organisation of environmental policy in the United Nations system. The report proposed the creation of an 'earth alliance' based on three pillars: assessment, organisation and funding. The suggestion was made to strengthen United Nations Environment Programme in preparation for its transformation into a future World Environment Organization that would sit at the heart of this alliance. Having recommended the creation of an international environmental organisation as early as 1997, the German government, through the German Scientific Advisory Council on Global Change report, has since provided solid scientific evidence in support of its proposals and published a reference document on this question.[72]

C. Upgrading United Nations Environment Programme (UNEP) Model

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68 Najam, Papa and Taiyab, *supra* nt 48, 27.

69 Najam, A, "The Case Against a New International Environmental Organization" 9(3) *Global Governance: A Review of Multilateralism and International Organizations* (2003), 367–384.

70 Simonis, *supra* nt 24.

71 German Advisory Council on Global Change (WGBU), *World in Transition: Ways towards Global Environmental Solutions: Annual Report 1995* (Springer 1995).

72 Le Prestre and Martimort-Asso, *supra* nt 54; German Advisory Council on Global Change (WGBU), *World in Transition: New Structures for Global Environment Policy*, 1996.

This model takes United Nations Environment Programme as a departure point for improving environmental governance and suggests upgrading it to a specialised agency to strengthen its status. This model is similar to the previous but distinct in that it seeks the strengthening of United Nations Environment Programme rather than its replacement by a different super-organisation. The United Nations Environment Programme itself has been both an active participant and a focus of the reform debate.[73] It has faced significant challenges since its creation (limited legal mandate, lack of funds, location). The most broadly discussed proposal is upgrading the United Nations Environment Programme to a fully-fledged specialised agency,[74] so that it can adopt treaties, have its own budget and potentially use innovative financial mechanisms. Upgrading the United Nations Environment Programme to a specialised agency would strengthen its role as an 'anchor' institution[75] for the global environment by drawing on its potential capability to function as information and capacity clearing-house and set broad policy guidelines for action within the Global Ministerial Environment Forum (GMEF).

Proponents of this approach have referred to the World Health Organization or the International Labour Organization as suitable models. Other agencies operating in the environmental field would neither be integrated into the new agency nor disbanded.[76] It would leave substantively untouched the current institutional structure of international environmental governance. The established boundaries of the issue-areas governed by international regimes and their existing decision-making procedures would remain unchanged.[77] The new agency in this model is expected to improve the facilitation of norm-building and norm-implementation processes. This strength would, in particular, derive from an enhanced mandate and better capabilities of the agency to build capacities in developing countries. This differs from United Nations Environment Programme's present 'catalytic' mandate that prevents the programme from engaging in project implementation. Furthermore, additional legal and political powers could come with the status of a United Nations special agency. For example, its governing body could approve by qualified majority vote certain regulations that could be binding, under certain conditions, on all members (comparable to the International Maritime Organization), or they could adopt drafts of legally binding treaties negotiated by sub-committees under its auspices (comparable to the International Labour Organization). Such powers would exceed those entrusted to United Nations Environment Programme, which cannot adopt legal instruments.[78]

Similarly, it has been suggested that United Nations Environment Programme could be upgraded into a decentralised United Nations Environment Organization (UNEO).[79] The United Nations Environment Organization would have its own legal

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73 Najam, Papa and Taiyab, *supra* nt 48; UNEP, *supra* nt 26.

74 Biermann, F, "The Rationale for a World Environment Organization" *in* Biermann, F and Bauer, S, eds, *A World Environment Organization: Solution or Threat for Effective Environmental Governance?* (Ashgate 2005), 117–144; UN General Assembly, *Delivering as One: Report of the Secretary-General's High-Level Panel on UN System-Wide Coherence,* (61st Session) A/61/583.

75 Ivanova, *supra* nt 7.

76 Biermann, *supra* nt 11.

77 Oberthür and Gehring, *supra* nt 2.

78 Biermann, *supra* nt 74.

79 Chatham House, Tarasofsky, RG, *Report on Trade, Environment, and the WTO Dispute Settlement* Mechanism, June 2005, *at* <ecologic.eu/sites/files/publication/2015/4_1800_cate_wto_dispute_settlement.pdf> (accessed 18 November 2018); Tarasofsky, RG, "Strengthening International Environmental Governance by Strengthening UNEP" *in* Bradnee Chambers, W and Green, JF, eds,

identity, and would comprise of a general assembly, executive structure and secretariat. It would incorporate United Nations Environment Programme and Global Ministerial Environment Forum, take up United Nations Environment Programme's mandate with respect to its normative function and serve as the authority for environment within the United Nations system. The main justification behind the proposal for a United Nations Environment Organization is the assumption that the United Nations Environment Programme's authority and mandate are inadequate for effective performance in addressing global environmental challenges. The core supposition is that the new status would accord the United Nations Environment Programme with greater visibility, status, independence, authority, finances and strengthen it 'so that it can fulfil its mandate as the principal agency for international environmental governance'.

Upgrading the United Nations Environment Programme to a United Nations Environment Organization requires less financial and diplomatic investment than adding a completely new organisation. While United Nations Environment Programme has a record of institutional success and learning, its potential to perform when given better legal status, more funds and more staff is promising. On the downside, focusing reform debate only on the United Nations Environment Programme distracts us from the broader institutional challenges, and it is not yet clear just how much of a difference specialised agency status will actually give.[80]

D. Organizational Streamlining Model

The Organizational Streamlining Model, also referred to by some authors as the Clustering Model, addresses the need for improved coordination and synergy among various entities within the system of global environmental governance.[81] Clustering defines the grouping of several multilateral environmental agreements so as to make them more efficient and effective.[82] Theoretically, the rationale for clustering is based on the notion that 'the environment' is too complex to be dealt with by one institution. The environmental agenda reflects multiple issues-from hazardous waste, to oceans pollution, to climate change, to biodiversity-that exhibit distinctively different problem structures. In practice, the rationale for clustering rests on the assumption that it would be easier to bring together the functions of several convention secretariats than establish a full-fledged international environmental organisation with similar powers.[83]

Improving coordination is a work in progress and an ongoing challenge within the United Nations system. Integrating environmental institutions into clusters (or clustering)[84] has been discussed as a way to achieve goals of environmental conventions,

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Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms (United Nations University Press 2005) 66–92.

80 Najam, A, "The Case against a New International Environmental Organization" 9(3) *Global Governance* (2003), 367–384.

81 Najam, Papa and Taiyab, *supra* nt 48.

82 Ivanova, *supra* nt 16; Von Moltke, K, REPORT: *On Clustering International Environmental Agreements*, (International Institute for Sustainable Development (IISD), June 2001), *at* <iisd.org/pdf/trade_clustering_meas.pdf> (accessed 18 November 2018), 3.

83 Ivanova, *supra* nt 16.

84 Najam, Papa and Taiyab, *supra* nt 48; Von Moltke, K, "Clustering Multilateral Environment Agreements as an Alternative to a World Environment Organization" *in* Biermann, F and Bauer, S, eds, *A World Environment Organization: Solution or Threat for Effective Environmental Governance?* (Ashgate 2005), 173–202; Najam, A, "A Tale of Three Cities: Developing Countries in Global Environmental Negotiations" *in* Churie, A, Kallhauge, GS and Correll, E, eds, *Global Challenges: Furthering the Multilateral Process for Sustainable Development* (Greanleaf 2005), 124–143; Oberthür, S, "Clustering of

while also pursuing efficiency gains and improving coherence of environmental governance. Clusters can be issue/theme-based, function-based, functional/ organisational, geographically-based or administratively-based (co-location and 'merger' of secretariats).[85] Another way to achieve synergy involves addressing duplication and overlaps by clarifying mandates of different entities, addressing their conflicting agendas and building upon their inter-linkages.[86]

Strategically, calls from the 24th Session of the UNEP GC/GMEF in 2007 called for specific approaches (not the consensus view) for clustering MEAs, including:

- Joint secretariat functions;
- Joint meetings of the bureaus within a cluster;
- Joint meetings of the heads of the scientific and technical committees within a cluster and, where relevant, between clusters;
- Appointment of an overall head of each cluster;
- Introduction of knowledge-management within and between clusters;
- Agreement on a methodological framework of indicators for measuring enforcement and compliance.[87]

While the large number of Multilateral Environmental Agreements is seen by some analysts as 'rooted in the fact that structural differences exist between many environmental problems, thus requiring separate institutional responses',[88] the need for integration of related or overlapping international environmental regimes is undeniable. The current informal consultations on international environmental governance within the United Nations General Assembly have identified clustering of Multilateral Environmental Agreements as a major component of reform. The different proposals that exist identify six major thematic clusters subject areas: 1) conservation, 2) energy, climate change, and global atmosphere, 3) land conventions 4) chemicals and hazardous substances,[89] 5) marine and oceans pollution[90] and 6) extractable resources.

Sample of Proposals for Thematic Clustering[91]

Multilateral Environmental Agreements: Potentials and Limitations in Chambers" *in* Bradnee Chambers, W and Green, JF, *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (United Nations University Press 2005), 40–65.

85 Najam, Papa and Taiyab, *supra* nt 48; Andresen, S, "Global Environmental Governance: UN Fragmentation and Co-ordination" *in* Schram Stokke, O and Thomessen, OB, eds, *Yearbook of International Co-operation on Environment and Development* (Earthscan Publications 2001), 19–26; United Nations University, REPORT: *Inter-Linkages, Synergies and Co-ordination between Multilateral Environmental Agreements*, July 1999, *at* <http://archive.unu.edu/inter-linkages/1999/docs/UNUReport.PDF> (accessed 18 November 2018).

86 *Ibid.*

87 Prasad, DK, Quinn, M and Prasad, S, Sydney IEG Forum Project Team, *Strengthening International Environmental Governance and Civil Society Leadership in Asia and the Pacific* (The United Nations Environmental Programme and the University of New South Wales, December 2008), 24-25, *at* <https://digital.library.unt.edu/ark:/67531/metadc28509/m2/1/high_res_d/IEG-%20Background paperApril2009-final.pdf> (accessed 3 January 2019).

88 Ivanova, *supra* nt 16; Von Moltke, *supra* nt 82.

89 Perry, *supra* nt 26.

90 Ivanova, *supra* nt 16; Berruga and Maurer, *supra* nt 6.

91 Le Prestre and Martimort-Asso, *supra* nt 54, 36.

Theme	Relevant MEAs
Conservation	World heritage convention; Convention on biological diversity; Convention on migratory species; Convention on international trade in species of wild fauna and flora threatened with extinction (CITES); African-Eurasian Migratory Water Bird Agreement (AEWA); Agreement on the conservation of bats in Europe (EUROBATS); Agreement on the conservation of seals in the Wadden sea; Agreement on the conservation of small cetaceans in the North and Baltic Seas (ASCOBANS); International coral reefs initiative (ICRI); Lusaka agreement on concerted operations for coercion targeting the illegal trade of wild fauna and flora; Convention on wetlands of international importance, especially as waterfowl habitat (RAMSAR).
Energy, Climate Change and Atmosphere	United Nations framework convention on climate change; Vienna convention on the ozone layer; Montreal protocol on the ozone layer.
Land	United Nations convention to combat desertification.
Chemicals and Hazardous Substances	Bamako convention; Basel convention; Convention on civil responsibilities for damage caused during the road, rail and internal waterways transport of dangerous goods (CRTD); PIC convention; Convention on the cross-border effects of industrial accidents; Waigani convention; Stockholm convention on persistent organic pollutants (POPS); Guidelines for the dissemination and use of pesticides of the UN food and agriculture organisation (FAO).
Marine and Oceans Pollution	Conventions of the international maritime organisation (IMO); UNEP conventions on regional seas; Convention for the protection of the marine environment in the North- East Atlantic (OSPAR); Helsinki convention.
Extractable Resources	The different agreements on forestry; Public/private initiatives, such as the forest stewardship council or the marine stewardship council; Agreements on fisheries which have a link with environmental impacts linked to agricultural activities.

Another six major clusters that have been identified are: biodiversity, oceans and seas, chemical and hazardous (dangerous) wastes, nuclear energy and weapon testing, climate and atmospheric change, and conventions linked to oceans and land. However, this proposal does not detail which Multilateral Environmental Agreements are linked to these problems. It suggests, also, that each cluster should be located in a country that already has a UN centre.[92] In another document, the United Nations Environment Programme proposes clustering under four headings: sustainable development, biodiversity, chemical and hazardous waste and regional seas.[93]

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92 *Ibid.;* See Dodds, "Felix, Inter-Linkages among Multilateral Environmental Agreements." Paper presented at the International Eminent Persons Meeting on Inter- linkages, United Nations University Centre, 3–4 September 2001, *at* <http://archive.unu.edu/inter-linkages/eminent/papers/WG2/Dodds.pdf> (accessed 10 January 2019).

93 Le Prestre and Martimort-Asso, *supra* nt 54; UNEP, *supra* nt 26.

Functional clustering is based on the idea that existing Multilateral Environmental Agreements use institutions or depend on functions whose bottom-line objectives are similar, although adapted to each Multilateral Environmental Agreement. Four functions which can be clustered have been identified to include: 1) scientific assessment; 2) participation and transparency. The grouping of participation and transparency procedures of Multilateral Environmental Agreements could be based on model of the Aarhus convention; 3) implementation reports. The principle of clustering implementation support involves, for each country, publishing only one implementation report which would cover all the Multilateral Environmental Agreements; 4) conflict settlement.[94]

Regional clustering, on the basis of the principle that most environmental problems are not global in scale, with the exception of climate change, ozone depletion and persistent organic pollutants (POPs), some authors suggest that regional management of environmental issues would be more appropriate. It is indeed important to distinguish between global environmental problems (i.e. those which have impacts in different places around the globe) and those which affect more than one country (e.g. watershed management). Examples of regional clustering like this exist in Europe with the UN Economic Commission for Europe (UNECE). Regional clustering seeks to broaden the European example to apply it to different regions of the world.[95]

The core functions of Multilateral Environmental Agreements clusters will comprise streamlining activities and meetings, coordinating operations and budgeting, close tracking and active coordinating of funding, consolidating the implementation review by country or by issue and improving transparency and participation. Clustering the numerous international environmental agreements will therefore minimise institutional overlap and fragmentation in global environmental governance while avoiding the pitfalls of securing agreement for more radical institutional reform.[96]

This approach, however, cannot advance without leadership. Just like with the more ambitious proposals, it will require at least one of two necessary conditions - 1) individual governments ready to champion the establishment and maintenance of a cluster, and/or 2) coordinators and facilitators, be they existing institutions such as United Nations Environment Programme or newly established ones. Moreover, clustering is likely to be a necessary, but not sufficient, condition for more effective global environmental governance.[97]

Institutional fragmentation also has its benefits:[98] it enhances visibility of environmental protection, advances specialisation and innovation and increases

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94 Le Prestre and Martimort-Asso, *supra* nt 54; Von Moltke, K, "The Organization of the Impossible" 1(1) *Global Environmental Politics* (2001), 23.

95 Le Prestre and Martimort-Asso, *supra* nt 54; Kimball, LA, *Reflections on International Institutions for Environment and Development*, LEAD International Workshop, Bellagio Study and Conference Centre, 2000.

96 Ivanova, *supra* nt 16; Von Moltke, *supra* nt 84; El–Ashry, M, *Mainstreaming the Environment-Coherence among International Governance Systems*, International Environmental Governance Conference, Institute of Sustainable Development and International Relations, Paris 2004; Von Moltke, K, *Whither's MEAs: The Role of International Environmental Management in the Trade and Environment Agenda* (International Institute for International Development, 2001).

97 Ivanova, *supra* nt 16.

98 Knigge, M, Herweg, J and Huberman, D, *Geographical Aspects of International Environmental Governance: Illustrating Decentralization* (Ecologic Institute for International and European Environmental Policy 2005); United Nations University, Dodds, SEH, Chambers, WB and Kanie, N, eds, REPORT:

commitment of States that host international environmental conventions secretariats.[99] However, fragmentation has many disadvantages including institutional overlap, high financial and administrative costs, and increased reporting demands felt especially in developing countries. The effect of these disadvantages is reduction of state participation and decrease in implementation of environmental law. All organisational streamlining proposals need to be well designed in order to contribute to the solution of the problem. Otherwise they may worsen the current situation.[100]

E. Multiple Actors Model

The Multiple Actors Model argues that the system of governance comprises multiple actors whose actions need to be mutually reinforcing and better coordinated. Without better integration of these multiple actors, organisational rearrangement cannot resolve institutional problems. Multiplicity of actors and interactions form a multidimensional 'system' of global environmental governance.[101] It includes States, international environmental organisations, related international organisations, civil society organisations, and public concern and action. Focus on organisations as a single dimension of governance distracts attention from the fact that institutional will is required to affect decision-making procedures and change institutional boundaries.[102]

The first reform proposal is to integrate environment into the larger context of sustainable development and to allow multiple organisations to flourish but create venues for these organisations to interact and 'transact.' According to the supporters of this model, preferring environmental to sustainable development governance may result in further marginalisation of environmental problems on the international agenda, alienation of developing countries, and continuing regime clashes between environment and other relevant international regimes. Supporters of this model are of the view that a General Agreement on Environment and Development should be negotiated to codify universally accepted sustainable development principles and serve as an umbrella for existing Multilateral Environmental Agreements.[103]

The second reform proposal is to create multiple channels of implementation. The quality of global environmental governance will be increasingly determined by the interaction among various entities in implementation and the ability of the system to facilitate their interaction, e.g., through Global Public Policy Networks.[104] Both policy makers and academics argue that too many constraints and mechanisms inhibit performance of the Global Environmental Governance (GEG) system. The

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International Sustainable Development Governance: The Question of Reform: Key Issues and Proposals: Preliminary Findings, United Nations University Institute of Advanced Studies, Tokyo, 2002.

99 Najam, A, Christopoulou, I and Moomaw, B, "The Emergent System of Global Environmental Governance" 4(4) *Global Environmental Politics* (2004), 23, 23–35; Najam, *supra* nt 84; Knigge, Herweg and Huberman *supra* nt 98.

100 Najam, Papa and Taiyab, *supra* nt 48, 20.

101 *Ibid.*; Sanwal, M, "Trends in Global Environmental Governance: The Emergence of a Mutual Supportiveness Approach to Achieve Sustainable Development" 4(4) *Global Environmental Politics,* (2004), 16, 16–22; Najam, Christopoulou and Moomaw, *supra* nt 99.

102 Najam, Papa and Taiyab, *supra* nt 48; Oberthür, S and Gehring, T, "Reforming International Environmental Governance: An Institutional Perspective on Proposals for a World Environment Organization" *in* Biermann, F and Bauer, S, eds, *A World Environment Organization: Solution or Threat for Effective International Environmental Governance?* (Ashgate 2005), 205–234.

103 Najam, Papa and Taiyab, *supra* nt 48; Najam, A, "Financing Sustainable Development: Crises of Legitimacy" 2(2) *Progress in Development Studies* (2002), 153, 153–160.

104 Najam, Christopoulou and Moomaw, *supra* nt 99.

establishment of public policy networks, both bureaucratic and scientific, are proposed as viable tools for decision-making and delivery of results.[105] These networks would incorporate the public, government, and civil society groups in order to find holistic solutions to complex problems.[106] Streck asserts that in order for Global Public Policy Networks (GPPN) to be successful, they must embody a number of qualities. For instance, there is a need for a diversity of cultures and stakeholders. The qualities of openness, flexibility, and efficiency in issues identification, outlining visions and options, creating action plans and launching a concrete plan for their attainment are also central to successful GPPNs. Functions of a new global public policy network might include:

- Agenda setting;
- Standard setting;
- Generating and disseminating knowledge;
- Balancing institutional effectiveness;
- Providing innovative implementation mechanisms.[107]

For example, in 2008 at the Commission on Sustainable Development (CSD), a global public policy networks (GPPN) brought together the UN, governments, and major groups for discussions on water and water management. This particular network was managed by the Stockholm International Water Institute and Stakeholder Forum, and had on its steering committee UN Water, five governments-two of which represent developing countries-from the CSD Bureau and stakeholders. It played a significant role in helping governments prepare for the CSD discussion on water and sanitation.[108]

Another reform proposal under this model is the demand for a Global Environmental Mechanism (GEM). Advocates of this new system state that 'no single bureaucratic structure can build an internal organisation with the requisite knowledge and expertise to address the wide ranging, dynamic, and interconnected problems we now face'.[109] The suggested core capacities of a new GEM would be: 1) The provision of adequate information and analysis to characterise problems, track trends, and identify interests; 2) Creation of a 'policy space' for environmental negotiation and bargaining, sustained build-up of capacity for addressing issues of agreed-upon concern and significance. In relation to the proposed work functions that a GEM would possess, a number have been emphasised including:

- Problem Identification and definition;

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105 Prasad, DK, Quinn, M and Prasad, S, *supra* nt 87; Speth, GJ and Haas, P, *Global Environmental Governance: Foundations of Contemporary Environmental Study* (Island Press 2006); Jan, MW, Thorsten, B and Charlotte, S, "Partnerships and Networks in Global Environmental Governance: Moving to the Next Stage" *in* Ulrich, P, James, R and Ernst, UVW, eds, *Governance and Sustainability: New Challenges for States, Companies and Civil Society* (Greenleaf Publishing Limited 2005), 143.

106 Prasad, DK, Quinn, M and Prasad, S, *supra* nt 87; Streck, C, "Global Public Policy Networks as Coalitions for Change" *in* Esty and Ivanova, M, eds, *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry and Environmental Studies, 2002); Howlett, M, "Managing the 'Hollow State': Procedural Policy Instruments and Modern Governance" 43(4) *Canadian Public Administration* (2000), 412–431; Jan, Thorsten and Charlotte, *supra* nt 101.

107 Streck, *supra* nt 106.

108 Prasad, DK, Quinn, M and Prasad, S, *supra* nt 87.

109 *Ibid.*, 23–24; Esty, D and Ivanova, M, "Environment: The Path of Global Environmental Governance" *in* Ayre, G and Callaway, R, eds, *Governance for Sustainable Development: A Foundation for the Future* (Earthscan 2005), 65.

- Analysis and option evaluation;
- Policy discussion and coordination;
- Financing and support for action;
- Outreach and legitimacy.[110]

Additionally, Esty and Ivanova have pointed out that a Global Environment Mechanism might contain the following elements:

- *A Data Collection Mechanism,* ensuring the availability of reliable data of high quality and comparability, developing indicators and benchmarks, and publishing State of the Global Environment reports;
- *A Compliance Monitoring and Reporting Mechanism,* providing a repository for information on compliance with agreements and established norms, and a continuous and transparent reporting effort;
- *A Scientific Assessment and Knowledge Networking Mechanism,* drawing on basic research on environmental processes and trends, long-term forecasting, and early warnings of environmental risks;
- *A Bargaining and Trade-offs Mechanism,* facilitating the internalisation of externalities through exchanges of commitments on various environmental issues (forest cover, biodiversity protection, species management, etc.) in return for cash or policy change (market access);
- *A Rulemaking Mechanism for the global commons,* establishing policy guidelines and international norms on protection of shared natural resources such the atmosphere and oceans;
- *A Civil Society Participation Mechanism,* providing a business and NGO forum for direct participation in problem identification and policy analysis;
- *A Financing Mechanism,* for global-scale issues mobilising both public and private resources to provide structured financial assistance to developing countries and transition economies;
- *A Technology Transfer Mechanism,* promoting the adoption of best options suited to national conditions and encouraging innovative local solutions;
- *A Dispute Settlement Mechanism,* with agreed procedures and rules to promote conflict resolution between environmental agreements and *vis-à-vis* other global governance regimes in an equitable manner;
- *An Implementation Strategies Mechanism,* ensuring coordination with institutions with primary implementation responsibility (such as national governments, UNDP, World Bank, business, civil society organisations) and providing a database of best practices.[111]

The Multiple Actors Model adopts a broad definition of the problem of global environmental governance. Accordingly, the solutions proposed are broad and offer directions the system should follow, rather than specific organisational improvements. While organisational thinking leaves an illusion of control over governance, systems thinking acknowledge the messiness and uncertainty of the system. The complexity of

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110 Prasad, DK, Quinn, M and Prasad, S, *supra* nt 87; Esty and Ivanova, *supra* nt 7, 4–6.

111 Esty, D and Ivanova, M, "Revitalizing Global Environmental Governance: A Function-Driven Approach" *in* Esty, D and Ivanova, M, eds, *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry & Environmental Studies 2002).

today's environmental threats like climate change and responses to them prove that multiple channels of implementation naturally emerge but can lack direction if one is not provided by the system. Whether the system is mature enough to reverse environmental degradation via strategic directions and normative guidance remains to be seen.[112]For example, while useful and popular, the Global Public Policy Networks are also widely considered complementary, rather than exclusive, solutions. As noted at the July 2007 Chatham House Workshop, 'effective and efficient operation of public policy networks requires the existence of an institutional hub'.[113]

III. Argument against a World Environment Organization

Critics of a new World Environment Organization argues that advocates of a central environmental authority divert attention from more pressing problems and fail to acknowledge that centralising institutional structures is an anachronistic paradigm.[114] They argue in favour of decentralised institutional clusters to deal with diverse sets of environmental issues rather than entrusting all problems to one central organisation.[115] They are of the view that, although a large World Environment Organization would have some compelling logic behind it, such a massive reorganisation is inconceivable. Yet even if it could be done, there are strong arguments against it. One problem is that environmental issues are often diverse from each other and the plenitude of issues might not coexist well.[116] Thus, benefits from an integration of issue-areas as advocated by the New Agency/Centralization Model are limited because international environmental governance is predominantly about the preservation of collective goods rather than club goods. Free international trade for instance, has the properties of a club good that is accessible only to the members of the club.[117]

Thus, States are effectively excluded from reaping the benefits of a liberalised world trade unless they open their own markets.[118] In contrast, environmental protection is frequently a collective good. It will be difficult to prevent a State from taking a free ride if it cannot be excluded from enjoying the collective good of environmental protection. Countries refusing to cooperate to protect the ozone layer cannot be excluded from the benefits of a stabilised ozone layer. Accordingly, States have an incentive to stay out of costly cooperation[119] that will increase with every issue that a country opposes. Thus, a World Environment Organization modelled for instance, after the World Trade Organization being one of the proposed options of the New Agency/Centralization

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112 Najam, Papa and Taiyab, *supra* nt 48; Najam, *supra* nt 103.

113 Hoare, A and Tarasofsky, R, *International Environmental Governance: Report of the Chatham House Workshop*, Chatham House, July 2007.

114 Oberthür and Gehring, *supra* nt 102.

115 Von Moltke, K, "Clustering Multilateral Environment Agreements as an Alternative to a World Environment Organization" *in* Biermann, F and Bauer, S, eds, *A World Environment Organization: Solution or Threat for Effective Environmental Governance?* (Ashgate 2005), 173–202; Najam, A, "Neither Necessary, Nor Sufficient: Why Organizational Tinkering Will Not Improve Environmental Governance" *in* Biermann, F and Bauer, S, eds, *A World Environment Organization: Solution or Threat for Effective Environmental Governance?* (Ashgate 2005), 223–242.

116 Charnovitz, *supra* nt 60.

117 Oberthür and Gehring, *supra* nt 2; Cornes, R and Sandler, T, *The Theory of Externalities, Public Goods and Club Goods* (2nd ed, CUP 1999).

118 Oberthür and Gehring, *supra* nt 2; Hoekman, BM and Kostecki, MM, *The Political Economy of the World Trading System: From GATT to WTO* (OUP 1995), 27–30.

119 Oberthür and Gehring *supra* nt 2; Olson, M, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965).

Model threatens to undermine its own basis and endangers gains so far realised through sector-specific cooperation in international environmental regimes.[120]

Likewise, issue-linkage through integration of issue-areas does not help pressure non-cooperating States and enforce implementation of international environmental commitments. Proponents of environmental protection cannot credibly threaten to make protection of the ozone layer conditional on United States acceptance of controls on greenhouse gases, because realising this threat would harm themselves at least as much as the opponent. The same logic applies to the enforcement of obligations. While for example, disregard of obligations within World Trade Organization may be effectively prosecuted by excluding non-complying countries from benefits in any suitable area of international trade, this threat is usually not available in environmental institutions: a country's non-compliance with obligations to conserve biological diversity cannot usefully be responded to by not complying with commitments to protect the ozone layer.

In several respects, a World Trade Organization-like World Environment Organization does not change the status quo at all. It is unlikely that it is apt to mobilise the additional financial resources needed to reinforce the capacity of developing countries to implement international obligations and develop effective environmental policies. In other words, there is no indication that industrialised countries might be more willing to provide additional financial resources to assist implementation of international environmental commitments in developing countries if issue-areas were integrated.[121]

Another problem is that the resulting organisation would cut a huge swath through domestic policy, and no government would be comfortable giving any World Environment Organization executive that much responsibility. In pointing out why a broad World Environment Organization would be impossible, opponents of a World Environment Organization argued that no major government has an environmental ministry as broad as integrating all its environmental issues and functions as a fully centralised World Environment Organization contemplates. In their view, if governments have not deemed it advisable to amalgamate environmental functions at the national level, but have maintained separate national agencies with environmental functions, why should one assume it would be advantageous at the international level?[122]

The fallacy of full centralisation according to critics of a World Environment Organization can also be seen by recalling that even the non-environmental agencies will need environmental programs, staff, and offices. The World Bank, the World Trade Organization, International Labour Organization, World Health Organization, Food and Agriculture Organization, United Nations Educational, Scientific and Cultural Organization, the United Nations Conference and Trade and Development, the International Atomic Energy Agency and the Organization for Economic Co-operation and Development all have environmental components, and properly so. Thus, critics of a World Environment Organization are of the view that the mainstreaming of environment into all agencies is one of the successes of modern environmental policy, even if these environmental components are inadequate. The existence of such environmental offices is the means that organisations use to interface with related issues. The fact that there

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120 Oberthür and Gehring, *supra* nt 2.

121 *Ibid.*; Oberthür, S and Gehring, T, *Institutional Interaction: Toward a Systematic Analysis,* International Studies Association Annual Convention, Portland, 26 February – 1 March 2003.

122 Charnovitz, *supra* nt 60; Juma, C, "The Perils of Centralizing Global Environmental Governance" *Environment Matters* (2000), 13, 15; Financial Times, Juma, C, *Stunting Green Progress*, 6 July 2000; Financial Times, Esty, DC, *Global Environment Agency Will Take Pressure off WTO*, 13 July 2000.

may be a dozen or more international offices addressing climate change is not symptomatic of disorganisation. Rather these offices exemplify recognition that responding to global warming will require a multifaceted effort.[123]

That a fully centralised World Environment Organization is inconceivable should not come as a surprise because no other regime is fully centralised either. The World Trade Organization may be the core of the trade regime, but many trade agencies and bodies of law lie outside of it, such as United Nations Educational, Scientific and Cultural Organization, the United Nations Conference and Trade and Development (UNCTAD), the International Trade Centre, the trade directorate of the Organization for Economic Co-operation and Development (OECD), the United Nations Convention on Contracts for the International Sale of Goods, the United Nations Commission on International Trade Law, and various agreements on trade in food, endangered species, hazardous waste, military goods, etc. The World Health Organization may be the core of the health regime, but many health agencies and bodies of law lay outside of it, such as the United Nations Population Fund, the Joint UN Program on HIV/AIDS, the United Nations International Drug Control Programme, the International Consultative Group on Food Irradiation, and numerous International Labour Organization conventions.[124]

The main advocates of the World Environment Organization target the centralisation of environmental agencies and functions-the bringing of Multilateral Environmental Agreements and their associated functions under one umbrella organisation. Can we really expect a World Environment Organization to lead to higher value outputs in environmental governance? Reducing the excessive fragmentation in the environmental regime would seem, almost necessarily, to be beneficial. Yet fragmentation also has its good side. According to recent management research, innovation proceeds most rapidly under conditions of some optimal, intermediate degree of fragmentation.[125] Thus, the institutional fragmentation of international environmental governance indicates strength rather than a weakness of environmental cooperation. The multitude of well-functioning environmental institutions indicates that actors have, for the most part, succeeded in defining viable issue-areas in international environmental governance and that an integration of issue-areas is not required in order to ensure mutual benefits of the parties involved.[126] Since a high capacity for innovation may be the most distinguishing feature of the environment regime and a key source of its successes, one needs to be careful about undertaking a reorganisation that would reduce fragmentation, and hence innovation. One reason why some fragmentation is good for innovation is that fragmented entities compete with each other. The environment regime has surely benefited from diversity among the entities that do environmental work.[127]

A World Environment Organization following the Upgrading United Nations Environment Programme/United Nations Model would not significantly affect the governance capacity of institutions making international environmental policy. The currently separate environmental issue-areas would not be integrated, because the sector-specific decision-making processes would remain in place. The participating actors would

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123 Charnovitz, *supra* nt 60; Szasz, PC, "Restructuring the International Organizational Framework" *in* Weiss, EB, ed, *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press 1992), 340, 355, 383.

124 *Ibid.*

125 *Ibid.*; Wall Street Journal, Diamond, J, *The Ideal Form of Organization,* 12 December 2000.

126 Oberthür and Gehring, *supra* nt 2.

127 Charnovitz, *supra* nt 60.

continue to determine their preferences in relation to those issues falling inside the respective issue-areas, while ignoring other issues. Opportunities for cooperation would continue to arise exclusively as a result of these sector-specific preferences. If decision-making proceeds separately for each issue-area, although within the framework of an umbrella organisation, negotiators would not receive additional incentives to coordinate their sector-specific activities and to look for possible issue-linkages or for package deals cutting across the boundaries of established issue-areas.

Those negotiating climate changes would continue to focus on measures to stabilise the global climate, while members of the regime on biological diversity would continue to concentrate on preserving biodiversity. Whereas an exchange of information may be facilitated, resulting tensions between both regimes regarding forestry activities (maximisation of carbon sequestration versus conservation of biological diversity) would persist. Likewise, the mechanisms for supervising and facilitating implementation, such as non-compliance procedures and other functional bodies, would not significantly change, because they would remain organised by sector. A World Environment Organization constructed after the United Nations model could be expected to realise limited efficiency gains at best, but it would not make a significant contribution to the solution of problems of international environmental governance related to decision-making, implementation and coordination. A certain potential for combining certain auxiliary functions of environmental regimes (e.g., reporting, review of implementation) might exist, but gains would be moderate. The bigger problems of international environmental governance could not be solved because this World Environment Organization would not significantly change the delimitation of existing issue-areas or the design of the related decision-making processes. The creation of an umbrella organisation would thus largely be a matter of symbolic politics.[128]

More so, it is argued that the grouping of several multilateral environmental agreements into thematic clusters as suggested by the Organizational Streamlining/Clustering Model is important but only part of the solution. Clustering of some of the hundreds of multilateral environmental agreements has been proposed to address the apparent coordination problems in global environmental governance. Clustering could involve the relocation of treaty secretariats, including the streamlining of administrative services, as well as the co-scheduling of conferences of the parties to related conventions (for instance through back-to-back meetings), the clustering of environmental reporting and information generation and distribution, for example in uniform reports, scientific assessments and clearinghouses or the synchronisation of the meetings of treaty bodies.[129]

Clustering can only be a first step for a larger reform effort. There are so many different levels of clusters for convention-related activities necessary that separate clusters at each of these levels would not solve the existing coordination problems, but could even exacerbate them. For example, convention-related efforts need to be clustered, at one level, according to the environmental medium that is to be protected. Examples would be those agreements that protect the atmosphere or those that protect the marine environment. Such form of clustering is required in particular regarding scientific research and assessment, since the behaviour, transportation and effects of greenhouse

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128 Oberthür and Gehring, *supra* nt 2.
129 Biermann, *supra* nt 32.

gases, ozone-depleting substances and persistent organic pollutants are the subject of similar and related scientific efforts and models.[130]

At another level, however, convention-related efforts need to be clustered according to the human activity at the root of the problem, for example intensive agriculture, transportation, or industrial production. Yet such activity-based clusters would require a different cut. The climate convention, for example, would need to be clustered, for one, with the agreements affecting transportation (together with marine pollution treaties, for example); with agreements regulating industrial production (e.g., jointly with the agreements on ozone-depleting and persistent organic pollutants); with deforestation-related conventions, such as the biodiversity convention and with soil-related conventions, like the desertification convention. Furthermore, clusters are needed to address common problems related to the environmental policy instrument chosen. One example would be a cluster of agreements that require restrictions in trade, for example trade in ozone-depleting substances, in endangered species, in persistent organic pollutants, in hazardous waste, or in genetically modified organisms. The practical implications could be joint programs for the training of custom officials or joint information-sharing mechanisms.[131]

Another area of clustering would be capacity-building in the Global South - the "Developing World," "Developing Countries," "Less Developed Countries," "Less Developed Regions" (i.e., Africa, Latin America, and the developing countries in Asia, including the Middle East).[132] Many environmental agreements have their own provisions on capacity-building, or even their own funding mechanism for these activities (e.g., the Montreal Protocol), without necessarily much coordination. This would, again, call for a different set of clusters. Another kind of clustering would be the regional clusters. To cluster environmental conventions according to all these levels could significantly increase the coordination deficits of the current system, instead of reducing them.[133]

IV. Conclusion and Recommendations

No crisis in world history has so clearly demonstrated the need for closer cooperation and mutual collaboration among States and increasing interdependence of governments and other stakeholders as the contemporary global environmental crisis. The pressures wielded by the dynamic forces of socio-economic development and technological advancement have radically transformed the global environment and the ecological balance of Earth as never before.[134] The complex nature of environmental problems experienced at any given political jurisdiction frequently have their origins at locations other than where their far-reaching consequences are most seriously felt.[135] In terms of jurisdictions, the legal boundaries of sovereign States do not coincide with the limits of

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130 *Ibid.*

131 *Ibid.*

132 Mitlin and Satterthwaite, *supra* nt 28; Braveboy-Wagner, *supra* nt 28.

133 Biermann, *supra* nt 33.

134 Ambalam, K, "Challenges of Compliance with Multilateral Environmental Agreements: The Case of the United Nations Convention to Combat Desertification in Africa" 5(2) *Journal of Sustainable Development Studies* (2014), 145–168, 147–148; UNEP, *supra* nt 2.

135 *Ibid.*; Caldwell, LK, "Management of Resources and the Environment: A Problem in Administrative Coordination" 38(2) *International Review of Administrative Sciences* (1972), 115–127.

the ecological systems which sustain them.[136] The environmental harm caused by a sovereign State is a threat to all nations, irrespective of their background of socio-economic development and the nature and availability of physical and natural resources. Now there is no exit option for the governments since the complex and highly interdependent ecological challenges binds all nations and creates a new level of dependence among nation States.[137]

However, collective action in response to global environmental challenges continues to fall short of needs and expectations. The integrated and interdependent nature of the current set of environmental challenges contrasts sharply with the fragmented and uncoordinated nature of the institutions we rely upon for solutions. We need an approach that acknowledges the diversity and dynamism of the environmental challenge and recognises the need for specialised responses. We need an environmental organisation with the resources and authority to succeed at leading and coordinating international environmental governance; a much stronger global voice and conscience for the global environment.[138]

The systemic problems of international environmental governance have remained outside the political debates because of both ideological and technical difficulties. Ideologically, nation States give priority to national sovereignty over the common planetary interest and developing countries are still fearful that international environmental agreements are a front for an agenda designed to stunt their economic growth. As the G-77 and China's statement in the contemporary reform process contends, 'Promotion of environmental protection alone in developing countries is not a priority as it raises obstacles to the use of limited resources for economic development'. Developing countries thus insist that international environmental governance reform negotiations be firmly grounded in a sustainable development framework.[139]

Specifically, developing countries have clearly identified principles which, according to them, should be present at any discussion of international environmental governance reform. They include:

- the context must be one of sustainable development;
- the principle of common but differentiated responsibilities must remain a central element of international cooperation in the environmental field;
- fairness: any reform must ensure the real participation of the developing countries in the governance system (in the management of funds, for example);
- the reform of governance must promote capacity-building (so as to facilitate the implementation of agreements and the development of national policies).[140]

Technically, developing countries claim that new and additional financial resources are necessary for them to be able to take on the new environmental agenda, that technology transfer is critical to their ability to leapfrog over traditional industrialisation methods, and that greater capacity-institutional, technological, and

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136 Ambalam, *supra* nt 134; Imber, MF "The Environment and the United Nations" *in* Vogler, J and Imber, MF, eds, *The Environment and International Relations* (Routledge 1996), 149–165.

137 Ambalam, supra nt 134; Biermann, F and Dingwerth, K, "Global Environmental Change and the Nation State" 4(1) *Global Environmental Politics* (2004), 1–22.

138 Ivanova, *supra* nt 7, 14.

139 *Ibid.*

140 Le Prestre and Martimort-Asso, *supra* nt 54.

human-would be indispensable to integrating environmental concerns into development priorities. Industrialised countries, on the other hand, demand accountability for any funding as well as monitoring, reporting and verification procedures for environmental actions.[141]

Given the current state of environmental politics, creating any form of a new agency might appear unrealistic to some. Yet two decades ago, the establishment of an international criminal court or a world trade organisation appeared unrealistic, too. It is time again to demand the impossible.[142] In sum, creating a World Environment Organization would pave the way for the elevation of environmental policies on the agenda of governments, international organisations and private organisations; it could assist in developing the capacities for environmental policy in African, Asian and Latin American countries; and it would improve the institutional environment for the negotiation of new conventions and action programmes as well as for the implementation and coordination of existing ones.[143]

The resistance to any streamlining effort by interested actors-including the heads of the various convention secretariats, who are likely to lose influence-is a practical problem rather than a theoretical obstacle to delineating a mandate for a World Environment Organization. A World Environment Organization would not solve all problems, neither of industrialised countries nor of developing countries. But it would be an important institutional step in humankind's efforts to both equitably and effectively manage planet Earth.[144]

This paper, therefore, supports the view that a World Environment Organization should be established with, among other things, the mandate of achieving a comprehensive and systematic global environmental policy. This will help cure the main inadequacies of the current condition of global environmental governance which includes: deficiencies in the coordination of distinct policy arenas (fields), deficiencies in the process of capacity-building in developing countries, and deficiencies in the implementation and further development of international environmental standards. However, as with all international organisations, the establishment of a World Environment Organization would need to be approved and adopted at a diplomatic convention, which would determine the Organization's mandate, financial plan (budget) and other procedural matters.

Further, the proposed World Environment Organization should be: strongly grounded in the context of sustainable development framework by ensuring that nation's industrial and technological development to improve the national economy does not compromise the social and ecological environment. Thus, the proposed World Environment Organization must seek to help nations strike a balance between their economic development and environmental sustainability and protection; the principle of common but differentiated responsibilities with developed countries taking the lead in international environmental protection in view of their immense contributions to global environmental degradation and of the technologies and financial resources they command; fairness- by ensuring the actual participation of the developing countries in the global environmental governance system for example, in the management of global

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141 Ivanova, *supra* nt 7, 18.

142 Biermann, F, "The Emerging Debate on the Need for a World Environment Organization: A Commentary" 1(1) *Global Environmental Politics* (2001), 45, 54.

143 Biermann, *supra* nt 29.

144 Biermann, *supra* nt 32.

environmental funds; promote capacity-building and technology transfer so as to facilitate the implementation of agreements and the development of national policies aimed at environmental protection.

These recommendations, if adopted, will no doubt help to secure the full cooperation, participation and involvement of all especially developing countries in the proposed World Environment Organization, improve global environmental governance and help to tackle the several pressing global environmental problems more efficiently and successfully.

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Legitimacy Issues in Investor-Treaty Arbitration and How a Permanent Court May Be the Best Solution

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Keywords
ISDS; ICSID; UNCITRAL; LEGITIMACY

Abstract

Investor-treaty dispute settlement is used by States and investors to resolve disagreements that investors may have with regard to their investment in the host state. Disputes are usually resolved through arbitration, and the process has all the trappings of general commercial arbitration. However, there have been calls for the system to be replaced by a permanent court structure. If a permanent court is the next step, this must mean that the current system has legitimacy issues which may be resolved by a permanent structure.

This article explores three problems with the current system: inconsistent decisions, lack of appeals, and lack of transparency. These are serious issues which affect the legitimacy of the current system. The discussion focuses primarily on the International Centre for Settlement of Investment Disputes (ICSID) system as this is the most common choice, and some mention is made of the United Nations Commission on International Trade Law (UNCITRAL) system. Throughout the article, I analyse the problems associated with these and how a permanent court may address these legitimacy issues. My argument is that a permanent court can weed out inconsistent decisions, have a fair and real appeals structure, and be sufficiently transparent as to as to allow or facilitate interested groups to act as *amicus curiae*. The discussion makes reference to the draft Transatlantic Trade and Investment Partnership (TTIP) because, through this, the European Union (EU) has proposed a potential permanent court structure.

I. Introduction

In 2008, Gus Van Harten, a professor at Osgoode Hall Law School in Toronto, Canada, submitted a conference paper where he called for the establishment of a permanent court for investment disputes to replace the arbitration-dominated Investor-State Dispute Settlement (ISDS) regime.[1] Fast forward to today, and the idea of a permanent court for investment disputes has become a hot topic of debate amongst academics.[2] In addition,

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1 Osgoode Digital Commons, Van Harten, G, *A Case for an International Investment Court*, 15 July 2008*, at* <digitalcommons.osgoode.yorku.ca/all_papers/259> (accessed 17 November 2018).

2 See García-Bolívar, OE, "Permanent Investment Tribunals: The Momentum is Building Up" *in* Kalicki, JE and Joubin-Bret, A, eds, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill Nijhoff, 2015), 399; Schill SW, "Editorial: US Versus EU Leadership in Global Investment Governance" 17 *The Journal of World Investment and Trade* (2016), *at* <booksandjournals.brillonline.com/docserver/journals/22119000/17/1/22119000_017_01_S001_text.pdf?expires=1542480583&id=id&accname=guest&checksum=5EB485599113868BA0DE57A8FDB99

the European Union (EU) Commission recently proposed an actual permanent court in its Transatlantic Trade and Investment Partnership (TTIP) Draft Proposals to replace the current ISDS regime.[3]

If a permanent court is the logical next step in ISDS, this means that the current system has serious legitimacy issues that need to be addressed. This paper will discuss the issues of inconsistency, lack of appeals and the lack of transparency. Throughout, I will attempt to show that there are serious legitimacy issues and that a permanent court may be the best solution for these problems.

II. Serious Legitimacy Issues in the Current ISDS Regime

I will be dividing this discussion into three parts to show three serious legitimacy issues in the current ISDS regime. The first part deals with issues of inconsistency in ISDS awards. The second part looks into the lack of appeals system, whilst the third part discusses the lack of transparency under the current regime. In each part, I will analyse how these issues have given rise to serious legitimacy concerns and will propose potential solutions to address them.

Through this, I aim to convince you that ISDS currently has serious legitimacy issues that need to be addressed and that the creation of a permanent court may be the best solution to address all three issues simultaneously.

A. Inconsistency

The problem of inconsistency in investment treaty arbitrations is not new and has been raised frequently by scholars.[4] Inconsistencies in investment disputes have been noted in the interpretation of several areas including the most-favoured nation (MFN) clause,[5] umbrella clauses,[6] and even in defining the type of '*investment*' in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs).[7] Whilst these areas are far too numerous to go into all at once given the length of this paper, I will focus on the inconsistencies in the interpretation of the MFN clause for the purposes of this section. This is because decisions related to MFN clauses have generally given rise to very differing decisions, which thus makes an exploration of MFN in ISDS the best example

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ADB> (accessed 17 November 2018); Ketcheson J, "Investment Arbitration: Learning from Experience", in Hindelang, S, and Krajewski, M, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press), 2016), 109.

3 Chapter 2, European Union, *Transatlantic Trade and Investment Partnership Draft Proposals*, September 2015, (TTIP Draft Proposals), *at* <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> (accessed 18 November 2018).

4 Franck S, SD, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" 73(4) *Fordham Law Review* (2005), *at* <ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4062&context=flr> (accessed 18 November 2018); Alvarez, JE, *The Public International Law Regime Governing International Investment*, (Brill Nijhoff 2011) 442.

5 Banifatemi, Y, "The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration,", in Bjorklund, AK, Laird, IA and Ripinsky, S, eds, *Investment Treaty Law: Current Issues III: Remedies in International Investment Law and Emerging Jurisprudence in International Investment Law* (British Institute of International and Comparative Law, 2009) 242.

6 Sinclair, AC, "The Umbrella Clause Debate,", in Bjorklund, AK, Laird, IA and Ripinsky, S, eds, *Investment Treaty Law: Current Issues III: Remedies in International Investment Law and Emerging Jurisprudence in International Investment Law* (British Institute of International and Comparative Law 2009) 311.

7 Alvarez, *supra* nt 4, 446.

to show the problem of inconsistencies. In this regard, I will show examples of certain inconsistencies that have arisen in arbitral decisions and how these inconsistencies affect parties to the dispute. Following this, I will explain how these inconsistencies suggest a potential deficiency in the legitimacy in ISDS.

1. What inconsistencies have arisen when tribunals interpret the Most-Favoured Nation (MFN) clause?

The MFN clause is a very common provision in investment treaties and was originally developed to prevent a host State from discriminating amongst different investors of varying nationalities.[8] In essence, a treaty with such a clause means that the State promises not to grant another State more favourable conditions than the ones offered in the treaty at hand.

However, problems in the interpretation of the MFN clause arose from the case of *Maffezini*[9] where the Tribunal adopted a broad interpretation of the MFN clause which allowed the investor to import elements of a more favourable dispute resolution clause in another BIT. In this case, the dispute resolution clause in the Argentina-Spain BIT required the investor to wait 18 months before submitting the case to international arbitration.[10] However, the investor was able to use the MFN clause to import a six month waiting period from the Chile-Spain BIT and thus avoid the 18 month waiting period.[11] This decision sparked a debate that led to later tribunals either adopting the expansive approach used by the *Maffezini* Tribunal[12] or expressly rejecting the *Maffezini* approach in favour of a narrower approach.[13]

For instance, whilst the Tribunal in *Impregilo*[14] adopted the *Maffezini* approach, one of the arbitrators, Professor Brigitte Stern, in her dissenting opinion, categorically rejected the *Maffezini* approach because, in her view, it modifies the fundamental conditions of access to the rights granted in the BIT.[15] In other words, Professor Stern takes the view that because dispute resolution clauses concern access to ISDS, an MFN clause cannot modify the very conditions of this access. Thus, we start to see that tribunals disagree on the actual legal principles that should be applied.

Other tribunals have tried to widen the principle further. For instance, the Tribunal in *Rosinvest*[16] held that the Respondent consented to arbitrate under the Stockholm Chamber of Commerce by using the widely drafted MFN clause in the

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8 Chalamish, E, "The Future of Bilateral Investment treaties: A De Facto Multilateral Agreement?" 34(2) *Brooklyn Journal of International Law* (2009) 324, *at* <brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1185&context=bjil> (accessed 18 November 2018).

9 ICSID, *Emilio Agustin Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction).

10 *Emilio Agustin Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction), para 19.

11 ICSID, *Emilio Agustin Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction), para 39.

12 ICSID, *Siemens A.G. v. Argentine Republic*, ARB/02/8, 3 August 2004 (Decision on Jurisdiction).

13 ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, 8 February 2005; ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ARB/02/13, 9 November 2004 (Decision on Jurisdiction).

14 ICSID, *Impregilo v Argentina*, ARB/07/17, Award (21 June 2011 (Award).

15 ICSID, *Impregilo v Argentina*, ARB/07/17, 21 June 2011 (Dissenting Opinion of Professor Brigitte Stern), para 49.

16 SCC, RosInvest v Russia, V/079/2005, October 2007, (Award on Jurisdiction).

United Kingdom-Soviet BIT to import a clause from the Denmark-Russia BIT.[17] Through this, the investor was able to arbitrate under a mechanism that was not listed in the original BIT and thus further expanded the approach taken in *Maffezini*. This is especially important because the Tribunal in *Maffezini* attempted to set limits to their approach. These were that an MFN clause could not be used to circumvent exhaustion of local remedies, a fork in the road clause, a choice between domestic and international courts, and nor could it be used to change a forum.[18] Thus, the Tribunal in *Rosinvest* although seemingly following the *Maffezini* approach, gave a decision which is inconsistent with the limits set in *Maffezini*.

However, other tribunals such as the one in *Plama* seem to distance themselves from the *Maffezini* decision and describe the latter as one reached under exceptional circumstances.[19] As such, the tribunal in *Plama* held that an MFN provision 'does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them'.[20] Thus, the Tribunal did not allow the investor to import more favourable dispute resolution terms from another BIT. In essence, the Tribunal in *Plama* attempted to limit the *Maffezini* principle.

Hence, what we effectively have is what has been described as a differing and contrasting two-class approach to MFN interpretation – an expansive class and a narrow class.[21] What is clear is that all of the approaches mentioned are inconsistent. This leads to several questions to which there are no clear answers. Should an investor be allowed to import more favourable terms with certain limits? Or can we ignore these limits and make the claimant consent to an entirely different forum? Or does the importation of different dispute resolution clauses improperly modify fundamental conditions for access to dispute resolution? Or should the basic rule be that no importation can occur unless all parties have explicitly agreed to it? These inconsistencies in investment law have an impact on the investors who rely on ISDS, and ultimately affect the legitimacy of ISDS.

2. How do inconsistencies affect the legitimacy of the ISDS regime?

The rule of law is essential to have a functioning system for those participating in the global economy.[22] One of the primary elements of legitimacy when talking about the rule of law is coherence.[23] This requires consistency in interpreting and applying rules so as to

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17 SCC, RosInvest v Russia, V/079/2005, October 2007, (Award on Jurisdiction), para 73.

18 ICSID, *Emilio Agustin Maffezini v The Kingdom of Spain*, ARB/97/7, 25 January 2000 (Decision of the Tribunal on Objections to Jurisdiction), para 63.

19 Plama, ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, 8 February 2005; ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ARB/02/13, 9 November 2004 (Decision on Jurisdiction), para 226.

20 *Ibid.*, 223; ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, 8 February 2005; ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ARB/02/13, 9 November 2004 (Decision on Jurisdiction), para 223.

21 Egli, G, "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions" 34(4) *Pepperdine Law Review* (2007) 1066, *at* <digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1183&context=plr> (accessed 18 November 2018).

22 Lerner R, RL, "International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade" (2001) 231, *at* <digitalcommons.law.byu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2058&context=lawreview> (accessed 18 November 2018).

23 Egli, *supra* nt 21, 1079.

give the impression of fairness to all parties involved.[24] This does not necessarily mean that inconsistent decisions are immediately unfair and unjust. According to Professor Thomas Franck, as long as inconsistent decisions can be explained by a 'justifiable distinction' from where a clear legal principle emerges and the parties are satisfied, then legitimacy is not undermined.[25] In other words, an inconsistent decision is fine if it is a different application of the same rule that has been clearly explained and distinguished. This is one of the ways in which the law has developed.

However, it has been seen above that the differences in decisions of tribunals in MFN cases have not arisen because of clear distinctions to the rule, but because tribunals are unable to decide the scope, extent and requirement of application of the rule. This marked inconsistency in decisions has led some commentators to give a dim outlook on investment arbitration. For instance, Nigel Blackaby of Freshfields Bruckhaus Deringer said that a 'system where diametrically opposed decisions can legally co-exist cannot last long'.[26] Others have noted that the lack of coherence in ISDS has 'raised the spectre of a legitimacy crisis'.[27] This is correct because parties have no certainty as to whether a particular rule will be accepted or thrown out, and they cannot look to past decisions for clarity given how opposing certain decisions can be. This confusion ultimately defeats one of the primary objectives of BITs, that is to eliminate uncertainty regarding the substantive and procedural aspects of investment protection.[28] Therefore, inconsistent decisions have negatively affected the legitimacy of ISDS.

With this in mind, it is important to find an explanation for these inconsistencies and possible solutions to address the problem. Two explanations have been raised by scholars thus far. These are firstly, the 'growing pains' of the system, and secondly the different outlooks of ISDS arbitrators when it comes to their role. I will approach these in turn.

Firstly, some authors have tried to explain this lack of coherence in ISDS as temporary 'growing pains'.[29] They believe that ISDS is currently in a state of adolescence, and as it grows it shall correct its mistakes and erroneous decisions will be thrown out.[30] In other words, these inconsistencies are natural and the system should just be left to converge over time. With due respect to commentators, I do not agree with this proposition. The problem with the view that ISDS will eventually converge is that it does not address the current legitimacy problem of the regime. If tribunals continue making inconsistent decisions as they grapple with the law, parties may feel that the current system is unfair towards them which may lead to ISDS falling out of favour with parties.[31] Therefore, waiting for the system to converge is not a suitable approach to dealing with the legitimacy problems in ISDS – it simply ignores the current very serious

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[24] Franck, *supra* nt 4, 1585.

[25] Franck, TM, *The Power of Legitimacy Among Nations*, (Oxford University Press 1990), 163.

[26] Goldhaber, M, "Wanted: A World Investment Court" 3 *Transnational Dispute Management* (2004) 1, *at* <transnational-dispute-management.com/article.asp?key=197#citation> (accessed 18 November 2018) (quoting Nigel Blackaby of Freshfields Bruckhaus Deringer).

[27] Franck, *supra* nt 4, 1586.

[28] Egli, *supra* nt 21, 1080.

[29] Alvarez, *supra* nt 4, 447.

[30] Alvarez, *supra* nt 4, 448.

[31] International Institute for Sustainable Development, Ripinsky, S, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, 13 April 2012, *at* <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>. For instance, Bolivia withdrew from the ICSID Convention for reasons including their belief that the system is unfair.

issues in the hopes that the system will 'fix itself'. In my opinion, it would be better to develop a body of rules for investment law rather than wait for convergence – a point I explore later in this section.

The second explanation offered is that ISDS arbitrators have different conceptions of what their role is.[32] One group of arbitrators see their role as that of commercial arbitrators with the sole purpose of resolving the dispute even if that means ignoring 'rules' set by previous tribunals.[33] This is because they are chiefly concerned with giving unanimous decisions as these are less likely to be challenged and more likely to be regarded as legitimate.[34] In other words, this group believes their role is to provide a decision for the parties and nothing more.

However, the second group of arbitrators differ in that they regard ISDS as a form of 'public law' adjudication.[35] Thus, this group sees their role as akin to being a judge on the International Court of Justice (ICJ).[36] They are more concerned with setting out the law in a way that State parties would accept, and which is more in line with the general expectations of the international body of public international lawyers.[37] This dichotomy between the perceived roles of arbitrators is one of the explanations offered to explain the inconsistency in decisions.[38]

What is needed is a suitable solution that can address the different perceived roles of ISDS arbitrators, and that can aid – or intensify – the convergence of investment law into a body of rules. A potential solution is a sitting panel of judges that could stem from a permanent court structure. These judges would have a defined role and can build a body of investment law rules rather than simply wait for convergence, thus increasing both certainty and coherence.

The TTIP Draft Proposals (TTIP)[39] show how this could work in practice. They list the criteria for potential judges sitting in the court of first instance. Article 9 of TTIP states that judges are appointed for a term of six years, and shall have 'qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence … and … have demonstrated expertise in public international law'.[40] By limiting the scope of the judges to public international lawyers, a permanent court would have a body of judges who all have a similar outlook on what their role entails, and as previously explained, are more willing to set out the law rather than merely solve a dispute. This is similar to the structure of the International Tribunal for the Law of the Sea (ITLOS) which specifies certain criteria for judges and which, according to scholars, generally has no serious problems of inconsistency.[41] This also

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32 Alvarez, *supra* nt 4, 449.
33 Alvarez, *supra* nt 4, 451.
34 Paulsson J, "Awards – and Awards", *in* Bjorklund, AK, Laird, IA and Ripinsky, S, eds, *Investment Treaty Law: Current Issues III: Remedies in International Investment Law and Emerging Jurisprudence in International Investment Law* (British Institute of International and Comparative Law 2009), 100.
35 Alvarez, *supra* nt 4, 450.
36 Walde, T, "Remedies and Compensation in International Investment Law" 5 *Transnational Dispute Management* (2005), *at* <transnational-dispute-management.com/article.asp?key=557> (accessed 18 November 2018).
37 Alvarez, *supra* nt 4, 451.
38 Alvarez, *supra* nt 4, 451.
39 TTIP Draft Proposals; This is chosen because these are the most current and real proposals for an actual permanent court system.
40 Article 9, TTIP Draft Proposals.
41 Karaman IIV, *Dispute Resolution in the Law of the Sea,* (*Publications on Ocean Development*, (Vol. 72, Leiden/Boston: Martinus Nijhoff Publishers 2012), 288.

immediately solves the problem of different perceived roles of ISDS arbitrators and contributes towards greater coherence of ISDS decisions. Additionally, a relatively small panel of judges could potentially develop a coherent body of investment law rules, thus increase certainty for parties, and therefore convergence.

The development of a body of investment law jurisprudence is not one which ISDS stakeholders would resist because literature shows that, over time, investment tribunals have increasingly started to cite previous awards.[42] Therefore, having a coherent set of rules developed by sitting judges would be a better way to fix the problem of inconsistency rather than waiting for the system to automatically correct itself by 'throwing out the bad decisions' as has been previously suggested.[43] This solution would decrease inconsistency and, in turn, increase the level of certainty for parties involved in ISDS and therefore restore legitimacy.

B. Appeals

The creation of an appeals facility for ISDS is not a new suggestion. The International Centre for the Settlement of Investment Disputes (ICSID) has previously considered introducing one, and various scholars have written about it.[44] Currently, parties arbitrating under ICSID can request an annulment of the award under very narrow grounds through an annulment committee.[45] Parties using other institutions such as the United Nations Commission on International Trade Law (UNCITRAL) do not have recourse to a similar mechanism and thus can only challenge its enforcement under the New York Convention or at the place of arbitration.[46]

This section will focus solely on the ICSID annulment committee given its uniqueness to ISDS. I will show the problems that have come about under the current system, how these problems are serious enough to affect the legitimacy of ISDS, and why the creation of an appeals tribunal is desirable and can restore legitimacy to ISDS.

1. What are the problems associated with the current system?

Under Article 52 of the ICSID Convention, parties can attempt to get an award annulled under very limited grounds. These are:

a. that the tribunal was not properly constituted;
b. that the tribunal has manifestly exceeded its powers;
c. that there was corruption on the part of a member of the tribunal;

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[42] Weidemaier W, WMC, "Towards a Theory of Precedent in International Arbitration" 51 *William and Mary Law Review* (2010) 1908, *at* <scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.co.in/&httpsredir=1&article=1325&context=faculty_publications> (accessed 18 November 2018).

[43] Commission, JP, "Precedent in Investment Treaty Arbitration: —A Citation Analysis of a Developing Jurisprudence," 24(2) *Journal of International Arbitration* (2007) 24 J.154.

[44] ICSID Secretariat, DISCUSSION PAPER: *Possible Improvements of the Framework for ICSID Arbitration,* 22 October 2004, *at* <icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf> (accessed 18 November 2018); Qureshi, AH, "An Appellate System in International Investment Arbitration?", *in* Muchlinski, P, Ortino, F and Schreuer, C, eds, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), 1160.

[45] Article 52, International Centre for Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* 14 October 1966 (ICSID Convention).

[46] Article V, United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 10 June 1958 (New York Convention); Franck, *supra* nt 4, 1551.

d. that there has been a serious departure from a fundamental rule of procedure; or
e. that the award has failed to state the reasons on which it is based.[47]

It should be noted from the outset that a tribunal being mistaken in either the law or facts of the case are not grounds for annulment. I will now use two decisions from annulment committees to demonstrate the problems associated with this system. The first decision will show how the constrained rules of the annulment committee affect the legitimacy of ISDS, whilst the second will show how some committees give an expansive interpretation to Article 52 of the ICSID Convention which, in turn, affects the legitimacy of the current ICSID annulment committee system.

If we look at the case of *CMS*,[48] the Argentinian government had lost an arbitration against an American company for various regulatory measures it had undertaken during the Argentine financial crisis.[49] The Tribunal did not accept the Argentinian government's defence of necessity, which fell under Article XI of the BIT.[50] Argentina thus decided to apply for annulment of the award on the grounds that the tribunal had manifestly exceeded its powers and failed to state reasons.[51]

On analysing the award, the Annulment Committee noted that the Tribunal had made 'manifest errors of the law' in its interpretation of Article XI, and that there were significant lacunae in the award such that it was 'impossible for the reader to follow the reasoning' for certain issues.[52] Despite these serious criticisms of the award, the Committee recognised the narrow limits to its jurisdiction and concluded that the award could not be annulled under the grounds argued by Argentina.[53] In the words of the Committee, it 'cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal'.[54] The Committee recognised that although there were errors and lacunas in the application of Article XI, the Tribunal nonetheless applied it which is what it was tasked with doing.[55]

This situation is one where the Committee has followed the ICSID annulment rules to the letter. It recognised that it had narrow jurisdiction and used its limited powers to come to a decision.[56] The problem is that when the rules are followed to the letter, an annulment committee does not have enough powers to address situations where it believes that a tribunal has made serious errors in the interpretation of the law. This, in my view, directly affects the legitimacy of ISDS. In the previous section, I touched on how the concept of coherence and predictability relate to the legitimacy of the rule of law. Here, it is important to note that the concepts of justice, fairness, and the opportunity for review also link to the legitimacy of the rule of law.[57] In other words, if a

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47 Article 52(1), ICSID Convention.
48 ICSID, *CMS Gas Transmission Company v Argentine Republic*, ARB/01/8, 25 September 2007 (Annulment Proceeding - Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic).
49 ICSID, Decision on the Application for Annulment of the Argentine Republic, para 30.
50 ICSID, Decision on the Application for Annulment of the Argentine Republic, para 38.
51 ICSID, Decision on the Application for Annulment of the Argentine Republic, para 2.
52 ICSID, Decision on the Application for Annulment of the Argentine Republic, paras 97 and 130.
53 ICSID, Decision on the Application for Annulment of the Argentine Republic, para 158.
54 ICSID, Decision on the Application for Annulment of the Argentine Republic, para 136.
55 *Ibid.*
56 Maslo, PB, "Are the ICSID Rules Losing Their Appeal? Annulment Committee Decisions Make ICSID Rules a Less Attractive Choice for Resolving Treaty-Based Investor-State Disputes" 54(1) *Virginia Journal of International Law* (2014) 2.
57 Franck, *supra* nt 4, 1584.

party that has participated in ISDS is later told by an annulment committee that the tribunal made manifest errors in its interpretation of the law but that there is nothing that can be done to remedy the situation, would this not affect the legitimacy of ISDS?

The reason this occurs is that the current system promotes finality of awards over accuracy.[58] However, this is not always beneficial for the parties involved. Practitioners have noted that an 'adverse final award is obviously adversely final' and can thus have an impact on confidence in the system,[59] and scholars have noted that accuracy of the law is generally of greater benefit to parties to investment arbitration than finality.[60] Therefore, this suggests that the current annulment committee system which has narrow grounds of review in order to promote finality is deficient when it comes to providing legitimacy in the ISDS system.

In contrast to this, there are cases where the annulment committee has not been able to restrain itself as in the *CMS* case and has instead assumed a wide perception of its functions. An example of this is the *Enron* case which also concerned measures taken by the Argentinian government during its economic crisis.[61] When interpreting a particular rule, the Committee found that the Tribunal had correctly identified the governing law, the relevant rules, and had applied it. However, it disagreed with the way and reasoning which the Tribunal used to interpret the rule in question and found this to be in excess of its powers.[62] In essence, the Committee allowed an annulment for what they believed was an error of law by interpreting it as a 'manifest' excess of powers.[63] Therefore, in contrast to the *CMS* Committee, the *Enron* Committee seems to be almost assuming the role of an appellate body.

What is most surprising is that the ground which the *Enron* Committee used to annul the case was not one argued by Argentina – it was entirely created and developed by the Annulment Committee.[64] This decision was also heavily criticised by scholars who believe that the committee overstepped its powers and tried to assume the role of an appellate body by allowing an annulment for an error of law.[65] In addition, later annulment committees also recognised that the *Enron* Committee went too far in its decision.[66]

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58 Walsh, TW, "Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?" 24(2) *Berkeley Journal of International Law* (2006) 444, 459.

59 Veeder, VV, "The Necessary Safeguards of an Appellate System" 2 *Transnational Dispute Management* (2005) 6, *at* <transnational-dispute-management.com/article.asp?key=401> (accessed 18 November 2018); Veeder also notes that parties to investment arbitration differ from parties to commercial arbitration in that they may not always want finality.

60 Walsh TW, *supra* nt 58, 461; However, Walsh notes that whilst it should be of greater theoretical benefit but that because generally the United States and investors tend to win investment arbitrations, there is currently little financial incentive for them to currently want an appeal system to promote more accurate awards.

61 ICSID, Decision on the Application for Annulment of the Argentine Republic.

62 ICSID, Decision on the Application for Annulment of the Argentine Republic, para 393.

63 *Ibid.*

64 Schreuer, C, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope" 10 *The Law and Practice of International Courts and Tribunals* (2011) 220, *at* <univie.ac.at/intlaw/wordpress/pdf/lape_010_02_211_225.pdf> (accessed 18 November 2018).

65 Friedland, P and Brumpton, P, "Rabid Redux: The Second Wave of Abusive ICSID Annulments" 27(4) *American University International Law Review* (2012) 727, 745.

66 ICSID, *Togo Electricité and GDF-Suez Energie Services v Republic of Togo*, ARB/06/7, 6 September 2011, (Decision on Annulment); ICSID, *Continental Casualty Company v The Argentine Republic*, ARB/03/9, 16 September 2011 (Decision on Annulment 2011).

The issue of committees going beyond their powers and assuming the role of an appellate body has occurred before in the annulment decisions in *Fraport*, *Amco*, and *Sempra*.[67] These instances further demonstrate the deficiencies of the current annulment system. This is because these decisions may affect the trust that parties have in the ICSID system because the committees in question contravene and go beyond the language of the ICSID Convention by assuming the role of an appellate body.[68] In addition, when annulment committees such as *Enron* develop arguments in favour of a party, the other party may feel that the system lacks fairness. This perception may lead a party to question the legitimacy of the annulment committee mechanism.

Therefore, the situation we have is one where if the annulment grounds are followed to the letter, the result can lead to unfairness which may, in turn, affect the legitimacy of ISDS. Moreover, certain committees harm the legitimacy of the current annulment committee system by going beyond the powers assigned to them in order to annul awards. Clearly, some reform of the system is needed. However, merely finding ways to ensure expansive tribunal decisions do not occur would still leave a *CMS*-like situation which still harms the legitimacy of ISDS. In my opinion, the best solution is introducing an actual appeals system for ISDS.

2. How would the creation of an appeals system protect the legitimacy of ISDS?

At the outset, I believe it is important to mention that parties should be able to challenge awards on the basis of an error of law. This is important because it will help uphold the legitimacy of ISDS in terms of the rule of law as explained in the previous section. In addition, as I explained in the previous section, the finality of awards should not be the sole focus of an ISDS system if finality compromises accuracy. Whilst this view may seem shocking to a commercial arbitrator, it is important to remember that investment arbitration involves issues of substantial public interest which thus makes accepting erroneous decisions less justifiable in the name of finality than in commercial arbitration.[69] The idea of promoting fairness over finality by introducing an appellate mechanism to investment arbitration has also been proposed by scholars such as Platt.[70] Therefore, allowing awards to be reviewed, whilst perhaps sacrificing the concept of finality, is not necessarily a negative outcome because of the public interest of ISDS and because it would increase fairness and thus legitimacy in the system.

However, merely amending the ICSID Convention to add extra grounds of review to Article 52 is not a good approach to creating such an appellate mechanism. This is because under Article 66 of the ICSID Convention, all proposed amendments can only be effective once all Contracting States have approved and ratified the amendment.[71] Understandably, the prospect of achieving this is unlikely. Additionally, it would only be

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[67] ICSID, *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Philippines*, ARB/03/25, 23 December 2010 (Decision on Annulment); ICSID, *Amco Asia Corp. v. The Republic of Indonesia*, ARB/81/1, 16 May 1986 (Decision on Annulment); ICSID, *Sempra Energy International v The Argentine Republic*, ARB/02/16, 29 June 2010 (Decision on Annulment).

[68] Friedland and Brumpton, *supra* nt 65, 756.

[69] Yannaca-Small, K, "Improving the System of Investor-State Dispute Settlement" 1 *Organisation for Economic Co-operation and Development Working Papers on International Investment*, *(OECD Working Papers on International Investment)* (2006) 48, *at* <oecd.org/china/WP-2006_1.pdf> (accessed 18 November 2018).

[70] Platt R, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" 30(5) *Journal of International Arbitration* (2013) 531.

[71] Friedland and Brumpton, *supra* nt 65, 758.

a solution for ICSID and not have an impact on other bodies such as UNCITRAL. A better approach would be to create an appeals mechanism from the ground up which interested States can sign up to.

The grounds of appeal could be modelled on TTIP which includes the proposal for an appellate body. These grounds are 1. that that the Tribunal has erred in the interpretation or application of the applicable law; 2. that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; and, 3. those grounds provided for in Article 52 of the ICSID Convention.[72] These grounds are wide enough such that the legitimacy concerns in terms of fairness and the rule of law would be addressed, and narrow enough such that losing parties cannot launch an appeal for anything they want and thus increase costs as a result.[73]

A good comparator for the potential success of such an appeals mechanism would be the World Trade Organization (WTO) Appellate Body as it is the only international third-party adjudicative system with an appeals mechanism for trade law.[74] The WTO Appellate Body has been praised as a system in which parties have confidence, and with a high degree of predictability given dissents are so rare.[75] In addition, it is made up of a standing body of members who are appointed for a four-year term which allows the system to benefit from collective expertise and thus helps encourage consistency and reduces unpredictability.[76] The fact that the WTO has such a successful appellate body – which commentators note has not had the same legitimacy crisis that ICSID has faced – demonstrates that it can serve as a model for an ICSID appeals mechanism.[77] Therefore, having an appellate mechanism can potentially increase fairness and contribute to the legitimacy of ISDS as it has done in the WTO system.

Whilst this may sacrifice the concept of finality, it will promote fairness and thus increase the legitimacy in the system. TTIP shows the potential form this appellate mechanism could take, whilst the successes of the WTO Appellate Body demonstrate the potential benefits such a system could have.

C. Transparency

The issue of transparency in international investment arbitration is one which has increasingly become the focus of attention amongst parties to ISDS, scholars, and the general public.[78] The tensions which bring about legitimacy concerns is because of the hybrid nature of ISDS which, on the one hand, is a public international law process involving States, and on the other hand is rooted in arbitration which is a private form of

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[72] Article 29, TTIP Draft Proposals.

[73] In addition, having a small number of judges with set qualifications for the appeals mechanism – the TTIP proposals allows for six judges with expertise in public international law – would overcome any potential problems in terms of inconsistency as identified in the first part of this discussion.

[74] Ngangjoh-Hodu, Y and Ajibo, C, "ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration" 6(1) *Journal of International Dispute Settlement* (2015), 308.

[75] *Id.*, 313.

[76] *Id.*, 322.

[77] *Id.*, 328.

[78] Euler, D, Gehrig, M and Scherer, M, eds, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press 2015), 1.

dispute resolution.[79] Therefore, it is important that the right balance is struck between these two notions whilst also protecting the legitimacy of ISDS.

In this section, I will start by describing how transparent current proceedings are under the current regime and associated problems. Following this, I will explain what improvements could be made to improve transparency. My discussion will touch on the transparency proposals in the TTIP as well as the new UNCITRAL directive on transparency in investment arbitration. Hence, I will show that ISDS currently has serious transparency issues that need reform.

1. How transparent are proceedings under the current regime?

If transparency is merely the publication of awards, then investment arbitration is very transparent. Whilst BITs and the ICSID Convention say little about transparency, in practice, there is not as much confidentiality as compared to traditional commercial arbitration.[80] For instance, according to Article 48(5) of the ICSID Convention, ICSID is required to seek parties' consent that the award be published. However, in the absence of such consent, the centre publishes excerpts of the legal reasoning.[81] The situation is similar for investment arbitrations occurring under the London Court of International Arbitration (LCIA) or other national arbitral institutions.[82] Therefore in terms of publication of awards, investment arbitration is much more transparent than commercial arbitration.

However, when it comes to the issues of public access and the involvement of *amicus curiae*, investment arbitration is rather closed. With regards to public access, investment arbitration is held *in camera* and the public does not have access to neither the pleadings nor the oral hearings.[83] When it comes to the involvement of *amicus curiae*, this has only been allowed in limited circumstances.[84] For instance, before the new transparency rules came into effect, UNCITRAL Tribunals were only mandated to conduct arbitrations in a manner it considered appropriate and therefore could use their discretion when deciding to permit *amicus curiae*.[85]

By contrast, ICSID has more detailed rules regarding *amicus curiae,* albeit still limited. Under ICSID *amicus curiae* are allowed to file written submissions regarding matters that are within the scope of the dispute.[86] In doing so the tribunal must consider whether 1. the submission would assist it in determining a factual or legal issue related to the proceedings by bringing a perspective or particular knowledge or insight different from that of the parties; 2. the submission would address a matter within the scope of the dispute; and 3. the non-disputing party has a significant interest in the proceeding.[87] Tribunals are also required to ensure that the submission does not disrupt the proceedings

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79 *Id.*, 20.

80 Böckstiegel KH, "Commercial and Investment Arbitration: How Different are they Today?" 28(4) *The Journal of the London Court of International Arbitration* (2012) 586.

81 *Ibid.*

82 *Ibid.*

83 Choudhury, B, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" 41 *Vanderbilt Journal of Transnational Law* (2008) 786.

84 *Ibid.*, 778.

85 Article 17(1), United Nations Commission on International Trade Law, *Arbitration Rules as revised in 2010*, 2010, UNGA Res 65/22.

86 Bastin, L, "The Amicus Curiae in Investor-State Arbitration" 1 *Cambridge Journal of International and Comparative Law* (2012) 208, 216.

87 Rule 37(2), ICSID, *Rules of Procedure for Arbitration Proceedings*, 10 April 2006 (ICSID Arbitration Rules).

or prejudice one of the parties, and must give both parties the opportunity to comment on the submission.[88] However, parties are still able to veto the attendance of *amicus curiae* and they have generally been denied access to the evidentiary record presented in the hearing.[89] For instance, in the *Berhnard von Pezold* case, the Claimants vetoed the European Centre for Constitutional and Human Rights' (ECCHR)attendance of the hearings and denied them access to the evidentiary record.[90] This contributes to one of the criticisms of ISDS which is that, given that *amicus curiae* do not generally have access to the proceedings and the evidentiary record, they may not be able to provide briefs of substantive value that could pass the threshold laid out above.[91] Thus, whilst there is some degree of openness when it comes to accepting *amicus curiae*, it is still rather closed.

Whilst this may seem unsurprising to a traditional commercial arbitrator, it should be stressed that investment arbitration is one of public interest. Commentators generally agree that the public has a substantial interest in arbitrations involving States.[92] This is because investment arbitration generally involves challenges by private parties to government measures which are usually implemented to achieve public policy goals, and can result in arbitrators striking down these government measures.[93] As a result, there may be an impact on a State's national budget and on the welfare of the people.[94] This substantial public interest is a reason why Non-Governmental organisations (Organizations (NGOs) frequently attempt to submit briefs in investment arbitrations in order to provide expertise on issues ranging from the environment to public health which may be at stake in the arbitration.[95] This substantial public interest is one of the arguments as to why ISDS should be significantly more open to both the public and *amicus curiae* as compared to traditional commercial arbitration.

In addition to the public interest arguments, a more open ISDS mechanism would help increase public trust in the system. This is because ISDS is generally very negatively perceived by the public as a sort of '*secret court*' which places the interests of corporations above that of the public.[96] Commentators suggest that the perception of a secret court

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88 *Id.*, 217.

89 Kluwer Arbitration Blog, Triantafilou E, *A More Expansive Role For Amici Curiae In Investment Arbitration?*, 11 May 2009, *at* <kluwerarbitrationblog.com/2009/05/11/a-more-expansive-role-for-amici-curiae-in-investment-arbitration> (accessed 18 November).

90 ICSID, *Bernhard von Pezold and others v Zimbabwe*, 28 July 2015, ARB/10/15 (Award), 36.

91 Jagusch S and Sullivan J, "A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern", in Waibel, M, Kaushal, A, Chung, KH, Balchin, C, eds, *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010), 96.

92 Delaney, JF and Magraw, D, "Transparency and Public Interest", *in* Muchlinski, P, Ortino, F and Schreuer, C, eds, *The Oxford Handbook of International Investment Law* (Oxford Univesity Press 2008), 724.

93 Levine, E, "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation" 29(1) *Berkeley Journal of International Law* (2011) 200; Choudhury, *supra* nt 83, 778.

94 OECD, "Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures", *OECD Working Papers on International Investment*, 2005/01, 40, *at* <oecd.org/daf/inv/investment-policy/WP-2005_1.pdf> (accessed 18 November 2018).

95 Levine, *supra* nt 93, 209.

96 Bastin, *supra* nt 86, 212; The Guardian, Provost, C and Kennard, M, *The obscure legal system that lets corporations sue countries*, 10 June 2015, *at* <theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid> (accessed 18 November 2018); The Independent, Sheffield, H, *TTIP: UK Government found secret courts in trade deal have 'lots of risk and no benefit' in its only assessment*, 25 April 2016, *at* <independent.co.uk/news/business/news/ttip-uk-government-only-did-

system in which the public has no input can lead to a democratic deficit in ISDS.[97] Some have gone so far as to suggest that this could generate popular backlash against ISDS.[98] This is something which tribunals have recognised and have tried their best to address. For instance, when deciding whether or not to allow *amicus curiae* briefs, the Tribunal in *Methanex* noted that the,

> arbitral process could benefit from being perceived as more open or transparent or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive amicus submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.[99]

This clearly demonstrates that tribunals are acutely aware of the criticisms and negative perceptions that surround ISDS.

Therefore, it is clear that increasing levels of transparency in investment arbitration by allowing more participation by *amicus curiae* will aid in enhancing the legitimacy of ISDS. This is important given the public interest involved in investment arbitration and because of concerns of public perception of ISDS. In addition, commentators note that increasing transparency in ISDS could lead to higher quality decision making given that the arbitrators and parties know their activities would be subject to public scrutiny, and aid in the protection of certain related public interests that may not be the subject matter of the dispute.[100] Whilst it has been noted that the consequences of increased transparency are potentially greater costs and delays to the process, it is generally accepted that the benefits that increased transparency would bring far outweigh the disadvantages.[101] Therefore, the current regime is deficient and steps should be taken in order to provide greater levels of transparency in ISDS.

2. What can be done to increase transparency in ISDS?

First, it is clear that in order to be more transparent, ISDS must be open to greater involvement of *amicus curiae* that goes beyond merely providing briefs at the tribunal's discretion. This is important because trends in investment arbitration suggest that it is not only NGOs but also groups representing workers as well as other civil society groups that petition to submit briefs.[102] This shows that *amicus curiae* can be a route for greater public involvement in the ISDS process. Therefore, ISDS should continue to be open to *amicus curiae* briefs from a wider group of actors to increase transparency.

However, merely accepting a wider range of *amicus curiae* is not enough. In my opinion, if ISDS is to maintain its legitimacy, it needs to go a step further. A good model for what this change could look like is the TTIP. This is because these proposals were

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one-assessment-of-trade-deal-and-found-it-had-lots-of-risks-and-no-a6999646.html> (accessed 18 November 2018).

97 Choudhury, *supra* nt 83, 786.

98 Maupin, JA, "Transparency in International Investment Law: The Good, the Bad, and the Murky", *in* Bianchi, A and Peters, A, eds, *Transparency in International Law*, (Cambridge University Press 2013), 14, *at* <ssrn.com/abstract=2058195> (accessed 18 November 2018).

99 UNCITRAL, *Methanex Corporation v United States of America*, 15 January 2001 (Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae') 49.

100 Delaney, *supra* nt 92, 779.

101 *Id.*, 785.

102 Levine, *supra* nt 93, at 213.

based on the results of a public consultation on ISDS in TTIP and hence should adequately address most of the concerns that the public would have.[103]

Article 23(1) of the TTIP permits a tribunal to allow 'any natural or legal person which can establish a direct and present interest in the result of the dispute to intervene as a third party'.[104] The role of the intervener is limited to supporting the award sought by one of the parties to the dispute.[105] Furthermore, if the application to intervene is granted, the intervener is allowed to receive a copy of every procedural document served on the disputing parties, has permission to attend the hearings, and may make an oral statement in addition to a written statement.[106] Furthermore, the intervening party is allowed to intervene all the way up to the Appeals Tribunal.[107]

These proposals go well beyond the limits set on *amicus curiae* in the current regime. Firstly, they allow the intervening party to take a side and support one of the disputants. In my opinion, this recognises the substantial public interest in ISDS by allowing a biased party to intervene in the dispute. This would allow public interest organisations to directly and actively support government policy that is at risk of being struck down. Secondly, for the first time, these parties are granted access to all the documents in the hearings and are allowed to attend the hearings in order to make a statement. In my opinion, this would allow organisations to make more substantive submissions to the tribunal and recognises the potential stake that the public may have in the result of the arbitration.

However, the TTIP has gone a step further by incorporating the whole of the new UNCITRAL rules on transparency.[108] These new rules from UNCITRAL go even further to promote transparency by making many documents available to the public through an online database.[109] In addition, the new rules provide that all hearings will be made open to the public with the exception of such portions that need to be private in order to protect confidential information.[110] These measures are radical when compared to the current regime which is modelled on commercial arbitration. This level of openness and increased public access will have the effect of increasing public awareness of disputes and the legitimacy in ISDS because the public would be allowed to scrutinise the whole process.[111] Therefore, this would directly address the criticisms of secrecy in ISDS that was discussed earlier. It should be noted that the Mauritius Convention on Transparency also attempts to incorporate the whole of the UNCITRAL rules on transparency into BITs, regardless of the arbitration institution proceedings are commenced in.[112] Assuming

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[103] European Commission, "Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),)", *Commission Staff Working Document,* 13 January 2015, *at* <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> (accessed 18 November 2018).

[104] Article 23(1), TTIP Draft Proposals.

[105] *Ibid.*

[106] Article 23(3), TTIP Draft Proposals.

[107] Article 23(4), TTIP Draft Proposals.

[108] Article 18(1), TTIP Draft Proposals.

[109] UNCITRAL, *FAQ - UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2016, *at* <uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_FAQ.html> (accessed 18 November 2018).

[110] Article 6, UNCITRAL, *Rules on Transparency in Treaty-based Investor-State Arbitration*, 10 December 2014.

[111] Choudhury, *supra* nt 83, 814.

[112] United Nations, *The Convention on Transparency in Treaty-based Investor-State Arbitration*, 1 April 2014, UNGA 69/116.

widespread ratification of the Mauritius Convention, it will only serve to correct transparency issues in ISDS whilst ignoring other legitimacy issues discussed above.

In essence, the current ISDS regime has serious issues when it comes to transparency. These issues contribute to increasing the negative public perception of ISDS and thus harm the legitimacy of ISDS. TTIP would go a long way in addressing these issues by combining the UNCITRAL proposals with its own standards. Being more open to *amicus curiae* briefs and allowing public access to the hearings ensures that issues of substantial public interest would have a voice in the proceedings and improves the overall public image of ISDS. This, in turn, helps in increasing the legitimacy of ISDS.

III. Conclusion

The current ISDS regime has serious issues in terms of the inconsistency of awards, lack of appeals mechanism, and in the transparency of ISDS. I have shown that each of these issues give rise to serious concerns regarding the legitimacy of the process. Potential solutions were also presented to address each of these issues, and these were discussed in the context of the current TTIP Draft Proposals given that the proposals include a permanent court.

In my view, the best solution to cumulatively address all the above issues is the creation of a permanent investment court. Creating a permanent investment court from the ground up would be the most efficient way to incorporate all the potential solutions simultaneously. The court would have a system which includes a small roster of judges to ensure consistency, an appeals mechanism to ensure fairness, and incorporates the transparency suggestions discussed to maintain public confidence in the system. Thus, all the legitimacy issues raised in this discussion could be addressed by the creation of a permanent court.

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Migrant Rights in International Law: Exploring the Gendered Experiences of Migrant Women and Girls

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Keywords
MIGRANT WOMEN AND GIRLS; CEDAW; GENDER GUIDELINES; VULNERABILITY; SUSTAINABLE DEVELOPMENT GOALS

Abstract

Migrants are people who choose to move from one place to another to seek a better life. However, when these people move across international borders as a result of fleeing from a 'well-founded fear of persecution' and not based on choice, they are forced migrants. This article examines the situations when women and girls move across international borders in order to flee from persecution or massive violations of human rights linked to gender violence. The article argues that women and girls experience vulnerabilities at all stages of the migration cycle not only because they are forced migrants fleeing from life-threatening situations, but also as a result of violations of their human rights based on gendered experience. An examination of the *Convention on the Elimination of All Forms of Discrimination Against Women* and the Immigration and Refugee Board of Canada's Chairperson's Guideline No 4 shows that, when these instruments are misapplied or not considered, the vulnerabilities of migrant women and girls may be exacerbated by such misapplication or non-consideration. This article ends by concluding that a focus should not be upon a woman or girl's vulnerability, but on her agency to be self-reliant and resilient towards her own destiny.

I. Introduction

Migrants are defined as those who 'choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons'.[1] According to the United Nations (UN), displacement is the 'forced movement of people from their locality or environment and occupational activities. It is a form of social change caused by a number of factors, the most

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1 United Nations High Commissioner for Refugees (UNHCR), Edwards, A, *UNHCR Viewpoint: 'Refugee' or 'migrant' – Which is right?,* 11 July 2016, *at* <unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> (accessed on 18 November 2018).

common being armed conflict'.[2] For the purpose of this article, the focus will be upon migrants who are displaced, especially forced migrants or refugees.

More people are displaced around the world than ever before. In fact, according to an estimate by the UN High Commissioner for Refugees (UNHCR), 65.3 million people were forcibly displaced around the world in 2015 as a result of persecution, conflict, generalised violence or human rights violations.[3] Of those displaced around the world in 2015, 47% of them are women, while 51% are under the age of 18.[4] The significance and relevance of ensuring international protection for migrant women and girls should therefore not be undermined. In fact, the UN Assistant Secretary-General has stated that 'displaced and migrant women and girls are commonly subject to multiple and intersecting forms of discrimination. On top of gender-based discrimination, they may be targeted on additional grounds such as race, disability or belonging to a minority group'.[5] Now more than ever, States' compliance with international law affecting forced migrants should be closely monitored and scrutinised.

This article therefore aims to raise awareness of the situation of migrant women and girls and to encourage more stringent monitoring and scrutiny over how and whether the international human rights regime is in fact effective in encouraging migrant women and girls to achieve self-reliance and resilience. This article seeks to draw the attention towards better monitoring and scrutiny of the international treaty regime, as well as certain 'soft law' guidance instruments, in hopes that improvements can be made to assist migrant women and girls to resist being passive victims of their plight but be powerful actors in their own right.

To this end, this article will focus specifically on the situation of migrant women and girls and how their experiences are multifaceted due not only to the vulnerabilities they experience based on sex, but also the reinforcement of such vulnerabilities by international treaty law and 'soft law' guidance instruments, such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the Immigration and Refugee Board of Canada Chairperson Guideline No. 4 (Gender Guideline), when these instruments are misapplied, disregarded or lack punitive measures. The vulnerabilities of migrant women and girls may be exacerbated in three ways. First, this article argues that the lack of punitive measures for, and the non-binding nature of, CEDAW Committee communications to States parties are problematic. Secondly, the inconsistent application and the non-consideration of 'soft law' guidance instruments such as the Gender Guideline create additional barriers for migrant women and girls. Third, the lack of coordination among States for implementing the Sustainable Development Goals adds to the difficulties faced by migrant women and girls. This article does not claim that the international law regime concerning the human rights of

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2 United Nations Educational, Scientific and Cultural Organization (UNESCO), *Displaced Person/Displacement*, *at* <unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/displaced-person-displacement> (accessed 18 November 2018).

3 UNHCR, REPORT: *Global Trends Forced Displacement in 2015*, 20 June 2016, *at* <unhcr.org/576408cd7.pdf%20[Global%20Trends%20Report> (accessed 18 November 2018), 2 (UNHCR Global Trends Report 2015).

4 *Ibid.*

5 UN Women, Puri, L, *Op-ed: Empowering Women and Girl Migrants and Refugees*, 15 September 2016, *at* <unwomen.org/en/news/stories/2016/9/op-ed-empowering-women-and-girl-migrants-and-refugees> (accessed 18 November 2018) (UN Women and Puri).

migrant women and girls is not effective, but that the misapplication or misinterpretation of these norms may lead to the exacerbation of vulnerabilities of these individuals while perpetuating the cycle of harm suffered. This article suggests that one reason that may contribute towards the problems of misapplication and misinterpretation of norms is a broader issue inherent within the structure of international law, as set up by the top-down implementation approach of the Westphalian State-centric model. This article concludes by recommending that with the right tools, migrant women and girls can be agents of change themselves – empowered to achieve self-reliance and resilience in the midst of their strife.

A. Context and Overview

The UN 61st Session of the Commission on the Status of Women (CSW61) was held at the UN Headquarters in New York City on March 13–24, 2017. CSW61 brought together activists, students, academics, civil society, UN entities, and government representatives to examine ways to empower women and girls and to achieve gender equality. The meeting could not have been timelier due to the number of forcibly displaced persons currently around the world. In fact, according to a Global Trends Report by the UNHCR in 2015, 'wars and persecution have driven more people from their homes than at any time since UNHCR records began'. [6] These statistics not only show the significance and relevance of international protection needed for these vulnerable migrants, but also highlight the urgent need for States to apply international law properly in their domestic order. The issue of migration is of particular interest. Migrant women and girls are a group of individuals who experience additional barriers as a result of the multifaceted vulnerabilities they face as migrants and women and girls, some of whom are forcibly displaced, as well as a 'well-founded fear of persecution'.

This article will argue that, contrary to mainstream academic commentaries, when international treaty law and 'soft law' guidance instruments are applied inconsistently, disregarded, or misapplied, this misapplication of the law may reinforce the vulnerabilities of migrant women and girls, instead of permitting States to equip them with the tools necessary to achieve self-reliance and resilience. Rather than a critique on the law as it is, this article suggests that the application or interpretation of the law, when incorrect or not considered, may undermine the original purpose of that law. This article will demonstrate how the vulnerabilities of migrant women and girls may be reinforced in the misapplication of international treaty law by using CEDAW as an example and by examining the term 'discrimination against women' as set out by CEDAW. Next, Canadian jurisprudence where the Gender Guideline should have been considered will be used as an example to illustrate how, contrary to the purpose of the Gender Guideline to encourage more gender-sensitive tribunal decisions, the opposite generally occurs due to the misapplication of the Gender Guideline or the failure to consider the Gender Guideline at all.

Due to the limited scope of this article, the focus will be upon CEDAW and the Gender Guideline instead of other gender guidelines issued by countries, such as the United Kingdom, or international organisations such as the UNHCR. The methodology employed by this article

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[6] UNHCR, Edwards, E, *Global Forced Displacement Hits Record High*, 20 June 2016, *at* <unhcr.org/afr/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html> (accessed 18 November 2018).

will involve an examination of the *travaux préparatoires*, or preparatory works, of the primary international instrument protecting the rights of women, CEDAW, as well as the text of the 'soft law' guidance instrument which is the Gender Guideline. CEDAW was chosen as a starting point of analysis because it is the primary international instrument for the protection of women and girls from discrimination.[7] The Gender Guideline is a focus also due to it being the pioneer gender guideline of its kind focused on gender-related persecution by a refugee status adjudicative body.[8]

B. The Significance and Relevance of Migrant Women and Girls

The significance of examining the topic of migrant women and girls could not be more relevant now than ever before. Many migrant women and girls face discrimination, violence, and exploitation at various stages of the migration cycle as a result of their uniquely gendered experiences. For instance, migrant women and girls are more susceptible to being trafficked for sexual exploitation and constitute 98% of victims being trafficked.[9] Also, the UN Sustainable Development Goal Target 10.7 is aiming to 'facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.[10] This Sustainable Development Goal is of particular relevance because it seeks to reduce the multiple vulnerabilities faced by migrant women and girls.

According to the UNHCR Global Trends Report of 2015, the global demographic characteristics of refugees shows that, between the years 2003-2015, almost 50% of refugees worldwide were made up of women.[11] Migrant women not only experience vulnerabilities as migrants, but are often subjected to additional barriers in certain cultures, such as in Yemen, where the large majority of women displaced by conflict are also single females heading households.[12]

C. Key Definitions

The definition of 'migrant' used by this article is taken from the UNHCR Emergency Handbook, which details the distinction between a 'migrant' and a 'refugee'.[13] According to

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7 Article 1, United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) 1249 UNTS 13 (CEDAW).

8 Sadoway, G, "The Gender Factor in Refugee Determination and the Effect of 'Gender Guidelines'" *in* Hajdukowski-Ahmed, M, Khanlou, N, and Moussa, H, eds, *Not Born a Refugee Woman: Contesting Identities, Rethinking Practices* (Berghahn Books 2009), 244.

9 Global Migration Group, *Policies Empowering Migrant Women and Girls in the Context of 2030 Agenda for Sustainable Development: CSW Side Event*, 24 March 2016, *at* <globalmigrationgroup.org/system/files/FINAL%20GMG%20STATEMENT%2024%20March%20CSW_1.pdf> (accessed 18 November 2018).

10 *Ibid.*

11 UNHCR Global Trends Report *supra* nt 3, 53 (Table 5).

12 *Ibid.,* 31.

13 UNHCR Emergency Handbook, *Migrant Definition, at* <emergency.unhcr.org/entry/44938/migrant-definition> (accessed 18 November 2018).

the UNHCR, a migrant is 'any person who moves, usually across an international border, to join family members already abroad, to search for a livelihood, to escape a natural disaster, or for a range of other purposes'.[14] Distinguished from a 'migrant', a 'refugee' is someone who is experiencing a 'well-founded fear of persecution' due to his or her race, religion, nationality, membership in a particular social group or political opinion, outside of his or her country of origin, is unwilling or unable to avail him or herself to State protection, and is unable or unwilling to return.[15] Another definition which is used in this analysis is 'sex discrimination'. 'Sex discrimination' or 'discrimination based on sex' is defined under Article 1 of CEDAW, as detailed below. For the purpose of this article, migrant women and girls will also include women asylum claimants and refugees, who are forced migrants.

For the purpose of this analysis, the distinction between 'sex' and 'gender' must also be ascertained. Pursuant to the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, 'gender' refers to 'the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another'.[16] Further, 'gender' is 'not static or innate but acquires socially and culturally constructed meaning over time'.[17] 'Sex', on the other hand, is defined as 'a biological determination [i.e. maleness and femaleness]'.[18] Henceforth, this analysis examines migrant women and girls as including both female asylum claimants and refugees who experience discrimination based on sex (discrimination based on the femaleness of claimant or refugee) rather than gender (discrimination based on the socially-constructed norm or characteristic of the claimant or refugee). 'Gender violence' is assumed, for the purpose of this article, to be violence experienced as a result of one's gender or violence experienced as a result of discrimination based on sex. For this analysis, the focus will be upon gender violence that occurs to migrant women and girls at stages during their migration cycle.

D. Migration and Gender

Gender is not an independent, enumerated ground for a 'well-founded fear of persecution' as defined under Article 1A of the *Convention Relating to the Status of Refugees* (Refugee Convention).[19] In other words, women asylum claimants cannot claim gender as a ground for experiencing a 'well-founded fear of persecution'. Rather, gender-related persecution has been widely recognised as a form of persecution and not a ground upon which persecution may be based.[20] As a developing area of the law, the Gender Guideline pioneered by the Immigration

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14 *Ibid.*

15 Article 1A, United Nations, *Convention Relating to the Status of Refugees* (1951) 189 UNTS 137 (Refugee Convention).

16 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, December 2011, *at* <unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> (accessed 18 November 2018) 87.

17 *Ibid.*

18 *Ibid.*

19 Immigration and Refugee Board of Canada, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, 13 November 1996, *at* <irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> (Gender Guideline) (accessed 18 November 2018); See also, Article 1A, Refugee Convention.

20 *Ibid.*

and Refugee Board of Canada aims to address the unique experience of women refugees requiring special care and attention and is the first of its kind to do so.[21] However, this article posits that the Gender Guideline, although well-intentioned, is often disregarded even where gender elements are present in the case possibly due to its non-binding nature, which may ultimately prevent its purpose from being achieved.

Before diving into a discussion of the critiques of the misapplication and non-consideration of international and 'soft law' guidance instruments relevant to migrant women and girls, it is also important to highlight the positive aspects of migration. For instance, migration can provide opportunities for migrant women and girls who struggle with patriarchal notions of gender norms, such as traditional gender roles. For some migrant women and girls, migration is a method of venturing into the brave new world, leaving behind culturally-established gender roles. Some scholars have also argued that, unlike inequalities in the workplace, migration create opportunities for women, such as allowing them to gain greater personal autonomy, getting jobs and confronting obstacles which may sometimes be easier for women.[22] The out-migration of women also gives them an advantage over men because of the increase in opportunities for work and marriage as is the case in Kerala and South Vietnam.[23] Further, migrant women, who leave their villages to marry elsewhere, have enhanced status, so that their families have increased bargaining power in marriage transactions, resulting in greater preference for villagers to have girls rather than boys.[24]

Despite the positive sides of migration, there are, unfortunately, also negative aspects. For instance, although migration may improve women's lives by giving them opportunities outside of traditional gender roles, the women may have unrealistic expectations regarding the decision to migrate, lack the know-how and ability to cover expenses relating to migration, or are discriminated against, exploited or abused as migrants.[25] This article therefore argues that migrant women and girls face additional barriers as both migrants and as women and girls in accessing international protection. It is often the result of these barriers and lack of access to protection that the international law regime and migrant rights under international law should be closely monitored and scrutinised to reduce vulnerabilities for these individuals.

II. International Law Concerning Migrant Women and Girls

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[21] Since its inception in 1993, the Gender Guideline has served as a model for other countries considering similar initiatives, including the United States and Australia; See also, Ramirez, J, "The Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution", 14(7) *Refuge: Canada's Journal on Refugees* (1994) 3, *at* <refuge.journals.yorku.ca/index.php/refuge/article/view/21841> (accessed 18 November 2018).

[22] Morokvašić, M, "Gendering Migration" 3 *Institut za migracije i narodnosti* (2014) 355-378, 368.

[23] *Ibid.*

[24] *Ibid.*

[25] Kawar, M "Gender and Migration: Why are Women more Vulnerable?" *in* Reysoo, F and Verschuur, C, *Femmes en Mouvement*, (Graduate Institute Publications 2016) 73-75, *at* <graduateinstitute.ch/files/live/sites/iheid/files/sites/genre/shared/Genre_docs/2865_Actes2004/10-m.kawar.pdf> (accessed 18 November 2018).

A central piece of the analysis in this article is focused upon the relationship between the misapplication of instruments of the international law regime and the vulnerabilities of migrant women and girls. The term 'international law regime' refers to the body of international treaty law, international custom, general principles of international law, as well as the scholarly outputs of highly-qualified publicists and judicial decisions of courts and tribunals.[26] As reiterated earlier, the focus will be upon two particular instruments, the former being CEDAW, as an international treaty, and the latter being the Gender Guideline, as a 'soft law' instrument.

The section below will examine the international law regime that concerns migrant women and girls. First, international treaty law will be examined, followed by the 'soft law' guidance instruments applicable.

A. The Legal Framework Relevant to Migrant Women and Girls

1. International Treaty Law

The most prominent international instrument protecting women and girls from discrimination is CEDAW. There are more than 185 ratifications to CEDAW, and together with its optional protocol, both instruments are regarded as the 'cornerstone' of all UN Women programmes, including for the CSW61.[27] The aim of UN Women is to work towards the elimination of discrimination against women and girls, to empower women, and to achieve gender equality between women and men.[28] CEDAW is therefore used as an example to illustrate how the lack of punitive measures and the non-binding nature of CEDAW Committee communications may reinforce the vulnerabilities of migrant women and girls instead of focusing on equipping these individuals with the right tools to achieve self-reliance and resilience.

Pursuant to the *Vienna Convention on the Law of Treaties*, which governs treaty interpretation, Article 31(1) provides that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning given it based on the context and the object and purpose.[29] Pursuant to Article 32, the *travaux préparatoires* of a treaty may be used as supplementary means of interpretation only where the ordinary meaning of a provision of the treaty will leave the meaning ambiguous or otherwise bring the meaning into absurdity.[30] Therefore, the analysis of CEDAW should begin with an examination of its object and purpose, found in its preamble, which provides that:

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[26] Article 38, United Nations, *Statute of the International Court of Justice,* 18 April 1946, *at* <refworld.org/docid/3deb4b9c0.html> (accessed 18 November 2018).

[27] UN Women, *Guiding Documents*, *at* <unwomen.org/en/about-us/guiding-documents> (accessed 18 November 2018); United Nations General Assembly, *Resolution Adopted by the General Assembly: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 October 1999, A/RES/54/4, *at* <undocs.org/en/A/RES/54/4> (accessed 18 November 2018).

[28] UN Women, *About UN Women*, *at* <unwomen.org/en/about-us/about-un-women> (accessed 18 November 2018).

[29] Article 31(1), United Nations, *Vienna Convention on the Law of Treaties* (1969) 331 UNTS 1155 (VCLT).

[30] Article 32, VCLT.

> [D]iscrimination against women violates the principles of equality of rights and respect for human dignity, [and] is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries.[31]

As shown in the preamble, the object and purpose of CEDAW is to ensure respect for human dignity and to encourage the full participation of women on equal terms with men in the political, social, economic and cultural spheres of their countries. According to the object and purpose of CEDAW, therefore, and in order to enhance international protection for migrant women and girls and to address their vulnerabilities, it is important to recognise the self-reliance and resiliency of these individuals – the end goal of which is to enable and empower them to fully participate in their communities in various capacities, including participation at all levels of decision-making in the migration process.

CEDAW addresses discrimination against women by first ascertaining the meaning of the term 'discrimination against women', which is found under Article 1. Article 1 of CEDAW will be the main focus for the purpose of this article. Article 1 of CEDAW states that:

> For the purpose of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made *on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (emphasis added).[32]

In contrast to Article 1, which lays down what constitutes 'discrimination against women', Article 2 specifies how States parties must address their legal obligations under CEDAW in order to respect, protect and fulfill women's rights to non-discrimination and to enjoy equality.[33] Article 2 is too long to reproduce in this article, but the provision obliges States parties to protect women against discrimination by private parties and to take *positive steps* to eliminate or reduce all practices which prejudice and perpetuate inferiority of or superiority of either of the sexes and of stereotyped roles for men and women.[34] It is argued, therefore, stronger compliance with CEDAW provisions by private parties such as individual rights holders (who, it is argued, have a right to be protected from discrimination and also a corresponding duty to safeguard those rights) entails:

1. The incorporation of punitive measures to deter violation of those provisions; and

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[31] Preamble, CEDAW.

[32] Article 1, CEDAW.

[33] Para 9, CEDAW Committee, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, *at* <www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf> (accessed 18 November 2018) (General Recommendation 28).

[34] *Ibid.*

2. The strengthening of the binding nature of CEDAW Committee communications on States parties.

2. 'Soft Law' Guidance Instruments

The 'soft law' guidance instruments which this article will examine include both the Gender Guideline and UN Sustainable Development Goal No 10. The main provision which concerns this analysis is found under section AI of the Gender Guideline, which states that women refugees may be placed into four broad categories, one of which is 'women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender'.[35] In order to be recognised as refugees, women asylum claimants must demonstrate that the State is unwilling or unable to protect them.[36] Sustainable Development Goal No 10 aims to reduce inequality within and among countries.[37] Target 10.7 of the Sustainable Development Goal No 10 aims to 'facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.[38]

Other 'soft law' guidance instruments concerning the treatment or experience of migrant women and girls, which not be the focus of this analysis, include: the UNHCR Executive Committee Conclusions on women and girls at risk and United Nations General Assembly Resolutions on violence against migrant workers.[39]

B. The International Law Regime: Potentially Reinforcing the Vulnerabilities of Migrant Women and Girls?

As reiterated above, the aim of CEDAW is to respect, protect and fulfil women's rights to non-discrimination and to enjoy equality.[40] However, CEDAW provisions, as with other international human rights treaties, do not have enforcement mechanisms. While it is true that the CEDAW Committee does have a supervisory and monitoring role, it is insufficient because its communications are non-binding in nature. In other words, when specific provisions are violated by States parties, little can be done to bring justice to the victims of human rights violations, especially when there is a general lack of punitive measures against the States parties committing these violations other than 'naming and shaming'.[41] Although

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35 Section A.I.3, Gender Guideline.

36 *Ibid.*

37 United Nations Division for Sustainable Development Goals, *Sustainable Development Goal 10*, *at* <sustainabledevelopment.un.org/sdg10> (accessed 18 November 2018) (SDGs).

38 *Ibid.*

39 See, UNHCR Executive Committee of the High Commissioner's Programme, *Conclusion on Women and Girls at Risk No. 105 (LVII) – 2006*, 6 October 2006, *at* <unhcr.org/excom/exconc/45339d922/conclusion-women-girls-risk.html> (accessed 18 November 2018); United Nations Inter-Agency Network on Women and Gender Equality, *Women Migrant Workers*, *at* <un.org/womenwatch/ianwge/resolutions/ga_res_by_topic.htm#14> (accessed 18 November 2018).

40 General Recommendation 28.

41 Interestingly, a statistical analysis conducted by Emilie M Hafner-Burton has shown that, although limited, human rights naming and shaming has certain positive effects on governments that are subjected to global publicity efforts, including a reduction in some violations of political rights afterward in Hafner-Burton, EM, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem" 62(4) *International*

the problem of enforcement is prevalent among the international human rights regime, this lack of enforcement powers and thus punitive measures against States parties is especially detrimental for migrant women and girls. The following section discusses how the lack of punitive measures, the non-binding nature of CEDAW communications, the misapplication or non-consideration of the Gender Guideline, and the lack of coordination for implementing the Sustainable Development Goals as structural deficiencies of the international law regime may potentially contribute to the vulnerabilities of migrant women and girls.

1. Lack of Punitive Measures and Non-Binding Communications of the Committee

While mainstream scholarly literature may argue that the CEDAW framework and the international human rights law regime generally contribute to the safeguarding of individual rights for migrant women and girls, it is argued that the lack of punitive measures for CEDAW and the misapplication or non-consideration of the Gender Guideline may potentially reinforce the vulnerabilities of these individuals.

When CEDAW violators generally 'go free' without effective punitive measures, the vulnerabilities of migrant women and girls may be exacerbated. One example concerns the lack of punitive measures for violators of CEDAW provisions. For instance, in *Jallow v. Bulgaria*, the CEDAW Committee held that State authorities violated Articles 2(b), 2(c), 2(d), 2(e), and 2(f) of CEDAW as a result of failing to protect the applicant from domestic violence and failing to consider the allegation of violence when denying the applicant custody of her daughter.[42] The applicant is a Gambian citizen submitting the communication for herself and on behalf of her daughter M.A.P., a Gambian and Bulgarian national.[43] The applicant alleges that she was forced to take part in pornographic films and photographs by her husband in Bulgaria and was subjected to psychological and physical violence, including sexual abuse.[44] The applicant claimed that Bulgaria, as a State party to CEDAW, violated Articles 1, 2, 3, 5 and 16 of CEDAW as a result of the discriminatory treatment that she and her daughter, as women, received from its authorities, and Bulgaria's failure to protect them from domestic gender-based violence and to sanction the perpetrator.[45] Despite the fact that Bulgaria was found to be in violation of Articles 2, 5, and 16 of CEDAW, and the applicant and her daughter have suffered serious moral and pecuniary damage and prejudice, the remedy applied by the CEDAW Committee was compensation to the victims of the human rights

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Organization (2008) 689-716, *at* <cambridge.org/core/services/aop-cambridge-core/content/view/39C386310B323A85E58F4E687CA5F7D9/S0020818308080247a.pdf/sticks_and_stones_naming_and_shaming_the_human_rights_enforcement_problem.pdf> (accessed 18 November 2018).

42 CEDAW Committee, *Isatou Jallow v Bulgaria,* Communication No 32/2011, 28 August 2012, CEDAW/C/52/D/32/2011, *at* <www2.ohchr.org/english/law/docs/CEDAW-C-52-D-32-2011_en.pdf> (accessed 18 November 2018) (Jallow); See also, Open Society Justice Initiative, *Case Digests: UN Committee on the Elimination of All Forms of Discrimination against Women*, June 2013, 4, *at* <opensocietyfoundations.org/sites/default/files/case-digests-cedaw-june-2012-20130619.pdf> (accessed 18 November 2018) (Case Digest).

43 *Jallow*, paras 1 and 2.

44 *Jallow,* para 2.2.

45 *Jallow,* para 3.1.

violation 'commensurate with the gravity of the violations of their rights'.[46] This case demonstrates that, while violations of CEDAW provisions take place and such violations are denounced by the CEDAW Committee (known in human rights as 'naming and shaming'), little is in fact done to punish the human rights violator or bring justice to the victims of violation other than requiring the violator to compensate the victim.

Although authoritative, the non-legally binding nature of the communications issued by the CEDAW Committee is compounded with the problem of applying the CEDAW communications by States parties.[47] The non-legally binding nature of CEDAW Committee's decisions create barriers for victims of human rights violations, such as migrant women and girls, to achieve justice. For example, States parties that are found to have violated specific provisions of CEDAW may reduce their violations as a result of being named and shamed; however, in reality, since CEDAW Committee decisions are non-legally binding, States parties are not under a legal obligation to comply. While the CEDAW Committee has mechanisms to monitor States parties' compliance with its decisions (termed 'follow-up procedures') and States parties to CEDAW have accepted to respect the Committee's findings, States parties are nonetheless free to deviate from the recommendations without significant penalty.[48] Compared to individual migrant women and girls whose rights have been violated, the scale is tipped in favour of the resourceful States party found to have violated those rights.

2. Inconsistent Application or Non-Consideration of the Gender Guideline

Another issue that must be addressed is the inconsistent application or the non-consideration of the Gender Guideline by Canadian tribunals. For the purpose of this analysis, the focus will be upon the Refugee Protection Division of the Immigration and Refugee Board of Canada's adjudication of refugee status claims affecting women and girls in the context of forced migration. Given the limited scope of this article, the analysis will focus upon a specific and limited number of cases, rather than a holistic overview of cases over a broad spectrum.

The case of *MDE* demonstrates how the Gender Guideline was not taken into consideration in the refugee tribunal's decision-making on granting refugee status to a claimant, even where the claimant alleges that there are gender-related elements to her claim.[49] In this case , the claimant is from India and, following the death of her husband, her tenant stopped paying rent and started to act hostilely towards her.[50] The claimant then fled to Canada due to the police's failure to respond to the threats.[51] However, the gendered-element of her claim, which is the fact that she was targeted as a result of being an older, widowed woman in India, was not considered by the Immigration and Refugee Board before rejecting her asylum application, nor was it considered by the Federal Court on appeal.[52] In the case of

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46 *Jallow*, paras 8.7 and 8.8(1); See also, Case Digest, *supra* nt 42, 17.

47 United Nations Office of the High Commissioner for Human Rights, *Human Rights Treaty Bodies – Individual Communications*, *at* <ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> (accessed 18 November 2018).

48 *Ibid.*

49 Federal Court (Citizenship and Immigration), *Devi v Canada* [2008] FC 1110.

50 Federal Court (Citizenship and Immigration), *Devi v Canada* [2008] FC 1110, para 2.

51 Federal Court (Citizenship and Immigration), *Devi v Canada* [2008] FC 1110, para 2.

52 Federal Court (Citizenship and Immigration), *Devi v Canada* [2008] FC 1110, para 10.

JWN the claimant was granted refugee status although the Gender Guideline was not considered by the Immigration and Refugee Board or the Federal Court.[53] The claimant applied for refugee status on the basis of a 'well-founded fear of persecution' from her parents and prospective husband that she would be subjected to forced marriage and female genital mutilation.[54] These two cases show that despite the relevance and significance of the Gender Guideline and the presence of gender elements in the claim, in certain cases, the Immigration and Refugee Board of Canada or the Federal Court may not take the Gender Guideline into consideration in their decision-making. Where the Gender Guideline is not considered, it becomes problematic because it may contribute towards inconsistency in decision-making, and may undermine the protection regime enhanced by the Gender Guideline for migrant women and girls, especially those fleeing from a 'well-founded fear of persecution'. Another example is seen in the case of *MSM,* where the Immigration and Refugee Board of Canada rejected the applicant's claim for refugee status without considering the Gender Guideline despite the claimant's allegation of sexual assault in the context of employment.[55] At the Federal Court level, it was held that not considering the Gender Guideline was problematic, but the court did not rule on whether the Immigration and Refugee Board should have considered the Gender Guideline.[56]

Yet another problem is inherent in the non-binding nature of the Gender Guideline. Although Immigration and Refugee Board of Canada adjudicators must apply the guidelines unless compelling reasons require departing from them, the Gender Guideline itself is non-binding and therefore need not be followed in every case.[57] This fact makes it possible for adjudicators to not follow the Gender Guideline which may become regular practice. Instead, the Refugee Protection Division of the Immigration and Refugee Board of Canada's determination on whether to consider and apply the Gender Guideline should be performed uniformly over a wide spectrum of cases, rather than solely on a case-by-case basis. Similar to the lack of punitive measures for CEDAW violations, the non-binding nature of the Gender Guideline, it is argued, contributes to instances where the Gender Guideline may not be considered. The non-consideration of the Gender Guideline where gender elements are often present in the claim may result in its inconsistent application, potentially increasing the chances of impunity for human rights violators including contributing towards the vulnerabilities of migrant women and girls.

While some may argue that compensation is a type of 'punishment' for the human rights violator, it is suggested instead that compensation cannot possibly repair the damage done to migrant women and girls who have suffered from the hands of these violators. In some cases, the harm suffered from human rights violators may be so severe, that the migrant women and girls affected are scarred for life. For example, the case of a Roma claimant who

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53 Federal Court (Citizenship and Immigration), *JWN v Canada* [2004] FC 432.

54 Federal Court (Citizenship and Immigration), *JWN v Canada* [2004] FC 432, para 3.

55 Federal Court (Citizenship and Immigration), *MSM v Canada* [2005] FC 147, para 3.

56 Federal Court (Citizenship and Immigration), *MSM v Canada* [2005] FC 147, para 19.

57 LaViolette, N, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" 19 *International Journal of Refugee Law* (2007) 169, 169–214.

was raped by four men, one of whom was the son of a high-ranking police officer.[58] As a result of a violation of her rights, the Roma claimant had to live with repercussions of being a rape survivor for the rest of her life. In this case, any amount of compensation would not have repaired the damage suffered. In another case, a claimant from India was suffering domestic abuse from her husband and was subjected to regular beatings from him.[59] The harm suffered as a result of recurrent domestic abuse at the hands of her husband may result in Post-Traumatic Stress Disorder or other severe aftereffects which may be detrimental to the claimant for the rest of her life. In this case, as with other cases mentioned, compensation cannot possibly repair the damage done.

Some scholars may also argue that the lack of enforcement mechanisms in international law is a general problem indicative of the way international law is structured; rather than a specific problem similar to CEDAW or the Gender Guideline, it is argued that the broader issue of the lack of punitive measures for human rights violators and the inconsistent application or non-consideration of 'soft law' guidance instruments, such as the Gender Guideline, can contribute to exacerbating the situation for migrant women and girls. For instance, where human rights violators are not punished for their violations, it may incentivise additional violations of those human rights.[60] Further, migrant women and girls are, arguably, more vulnerable than women and girls who are not migrants, as a result of the multifaceted layers of vulnerabilities migrant women and girls experience at all stages of the migration cycle. For example, as asserted by the UN Assistant Secretary-General, migrant women and girls 'face a series of challenges, which include psycho-social stress and trauma, health complications, [and] physical harm and risk of exploitation'.[61]

In addition, inconsistent application or the non-consideration of 'soft law' guidance instruments, which are by nature persuasive though non-binding, may nullify or undermine the effects of having these instruments in the first place. In other words, these 'soft law' guidance instruments may be undermined to the extent that, in the end, it may result in discretionary decision-making . Moreover, the procedural safeguards put into place by these 'soft law' guidance instruments, such as the Gender Guideline, are important guarantees that should not be ignored by adjudicators during decision-making. The current prevailing trend seems to suggest that on the one hand, the Gender Guideline is being considered and followed in some cases where gender elements are present, while on the other hand, it is neither followed nor considered regardless of the presence of gender elements in the application. This inconsistency in asylum decision-making, it is argued, may potentially contribute towards the vulnerabilities of migrant women and girls in that the misapplication or non-consideration of the Gender Guideline may ultimately influence whether migrant women and girls are granted refugee status.

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58 Immigration and Refugee Board of Canada, Refugee Protection Division, *Case No CRDD T98-04880,* 20 October 1999.

59 Immigration and Refugee Board of Canada, Refugee Protection Division, *Case No CRDD MA 1-02285 et al.,* 8 March 2002.

60 CEDAW Committee, *General Recommendation No 19 (11th Session, 1992) Violence Against Women*, *at* <un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> (accessed 18 November 2018) para 24(g): For instance, it has been recommended by the CEDAW Committee that 'specific preventive and punitive measure are necessary to overcome trafficking and sexual exploitation'.

61 UN Women and Puri, *supra* nt 5.

3. Lack of Coordination for Implementing the Sustainable Development Goals

The lack of coordination among States in the implementation of the Sustainable Development Goals is also an area of concern which may contribute towards the vulnerabilities of migrant women and girls. For instance, it has been suggested by Bond, a British organisation that focuses on international development through research and training, that States may prioritise some Sustainable Development Goals over others.[62] For instance, since migration is a highly-politicised issue, States may choose to avoid sensitive issues such as implementing Sustainable Development Goal No 10 on '[reducing] inequality within and among countries' by '[facilitating orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.[63] Further, academic commentators have argued that wealthier and more developed States should be required to make more effort when implementing and prioritising the Sustainable Development Goals, which is not the case for the way the Sustainable Development Goals are currently structured.[64] While States may prioritise some Sustainable Development Goals over others, some developing States may have fewer resources than other States to implement these goals, thus contributing to a lack of coordination among States for implementing the Sustainable Development Goals. This in turn may increase the chances of the Sustainable Development Goals not being properly implemented, thus widening the protection gap for migrant women and girls.

As aforementioned, therefore, the harmful cycle which increases the vulnerabilities of migrant women and girls may begin with CEDAW provisions that lack punitive measures and 'soft law' guidance instruments that are applied inconsistently or disregarded. This may then lead to the impunity of human rights violators, increasing the likelihood of repeated violations, individual justice for migrant women and girls is thus not achieved, and finally, the potential for exacerbating the vulnerabilities of migrant women and girls. A summary of these key points is represented in the diagram below:

Cycle of Harm often experienced by Migrant Women and Girls in the Migration Process *

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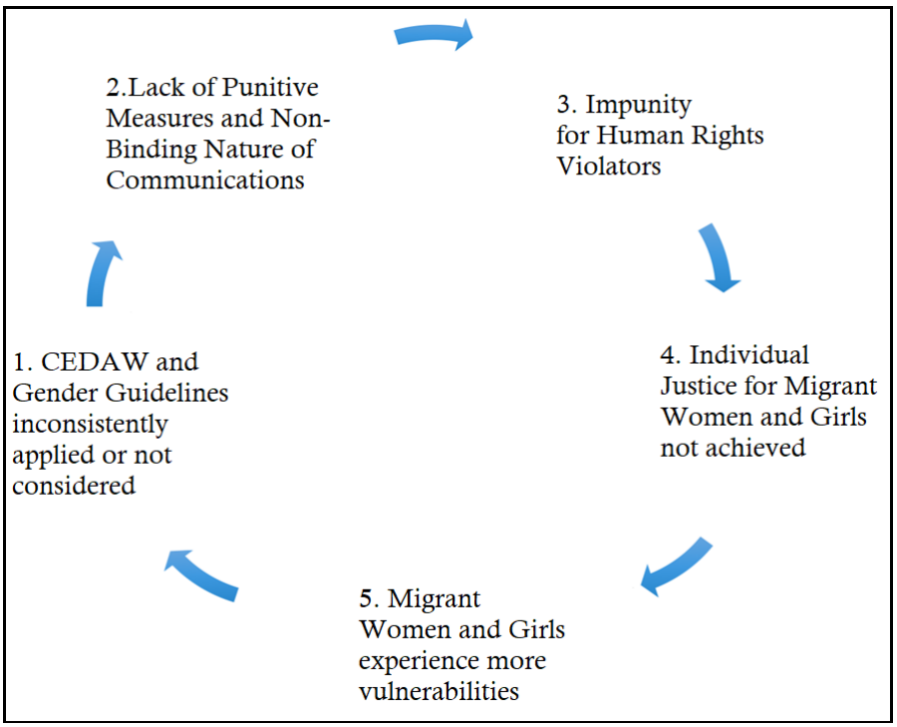
[62] Bond UK, *Implementing the Sustainable Development Goals: Where to Start?, at* <bond.org.uk/sites/default/files/bond_sdgs_prioritisation_paper_october_2016.pdf> (accessed 18 November 2018) (Bond).

[63] SDGs, *supra* nt 37.

[64] Bond, *supra* nt 62, 2.



* For illustrative purposes only.

This cycle of harm illustrates that often , inconsistently applying or not considering the Gender Guideline or CEDAW communications may either result in or encourage the lack of punitive measures and reinforces the non-binding nature of the CEDAW Committee's communications. For instance, States parties to CEDAW may have incentives not to follow the CEDAW Committee's communications since they are non-binding. The lack of punitive measures of the international human rights regime for human rights violators, combined with the non-binding nature of CEDAW Committee communications, may result in impunity for violators, thus reducing instances where individual justice may be achieved for migrant women and girls. When individual justice is not achieved for migrant women and girls, their vulnerabilities as both migrants and women and girls may be exacerbated, and they are, in turn, made more vulnerable.

III. Concluding Remarks

Migrant women and girls are not passive victims, but with the right tools, they too can be agents of change in spite of their circumstances. The barriers experienced by migrant women and girls are multifaceted, and may include: economic barriers, such as poverty and lack of education; social barriers, such as xenophobia and language difficulties; legal barriers, such as discriminatory laws; and institutional barriers, such as lack of voice in decision-making at all levels in society. Although the Agreed Conclusions of CSW61 stressed the 'positive contribution of migrant women and girls', the 'need to address the special situation and vulnerability of migrant women and girls' and 'the obligation of States to protect the human rights of migrants so as to prevent and address abuse and exploitation', it has been argued that the vulnerabilities of migrant women and girls may be exacerbated by:

1. The lack of punitive measures for, and the non-binding nature of, CEDAW Committee communications to States parties;
2. The inconsistent application of, and non-consideration of, 'soft law' guidance instruments such as the Gender Guideline; and
3. The lack of coordinated effort among States in the implementation of the Sustainable Development Goals including Target 10.7.[65]

By examining how these three reasons may make migrant women and girls more vulnerable, this article seeks to raise awareness of the situation of these individuals not by highlighting their plight, but by encouraging a more rigorous monitoring of the human rights violations committed towards this group.

The section below will examine the lessons learned from CSW61 and recommendations in light of these areas needing improvement. The best practices relating to enhancing international protection for migrant women and girls will also be discussed.

A. Lessons Learned

Migrant women and girls are often portrayed as passive victims of their circumstances. Migration itself is highly-gendered, in that the production of migration itself results from the exclusion of women and girls from decision-making at all levels, the prevalence of social barriers, including poverty and limited skills, and the existence of discriminatory laws against women and girls. Furthermore, as reiterated by the UN Assistant Secretary-General, in order for the international law regime to be effective, it must be enabled domestically through national-enabling environments such as through affirmative laws, policies, and measures, the enhancement of financing and investments, gender responsive institutions, as well as data, knowledge, monitoring and accountability.[66] In order to strengthen the international law framework for the protection of migrant women and girls, it is suggested that all stages of migration which concern migrant women and girls should be the target of monitoring and close scrutinising. For example, it has been recommended by the outcome document from the expert meeting in Geneva in November 2016 on the Global Compact for Safe, Orderly and Regular Migration that 'a broad application is adopted so that the rights of women [and girls] at all stages of migration are addressed, promoted and protected in the context of global structural drivers of migration and inequality'.[67]

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[65] For Agreed Conclusions of CSW61, See, United Nations Economic and Social Council, *Women's Economic Empowerment in the Changing World of Work: Agreed Conclusions*, E/CN.6/2017/L.5, 27 March 2017, paras 36 and 37, *at* <undocs.org/en/E/CN.6/2017/L.5> (accessed 18 November 2018) (Agreed Conclusions).

[66] UN Women Commission on the Status of Women, *Report on CSW61 and Analysis of the Agreed Conclusions: Ms. Lakshmi Puri, UN Assistant Secretary-General and Deputy Executive Director of UN Women*, 14-16, *at* < <lawsdocbox.com/Politics/72122872-Report-on-csw61-and-analysis-of-the-agreed-conclusions-ms-lakshmi-puri-un-assistant-secretary-general-and-deputy-executive-director-of-un-women.html> (accessed 18 November 2018).

[67] UN Women, *Recommendations for Addressing Women's Human Rights in the Global Compact for Safe, Orderly and Regular Migration*, November 2016, 4, *at* <unwomen.org/-/media/headquarters/attachments/sections/library/publications/2017/addressing-womens-human-rights-migration-en.pdf?la=en&vs=4301> (accessed 18 November 2018).

B. Recommendations and Best Practices

Drawing on the lessons learned at CSW61, some recommendations may be made to improve the situation of migrant women and girls. First, the agency, self-reliance, and resiliency of migrant women and girls should be placed at the forefront and not be undermined in both law-making and policy decisions. This allows migrant women and girls to become empowered and not to be portrayed as victims. Secondly, with the right tools, migrant women and girls may be empowered to be agents of change themselves. Thirdly, a comprehensive approach to law and policy-making is required, namely: legal reform to address the harmonisation between international and domestic standards; national economic programs with special focus on migrant women and girls to enable and to empower their resilience; and gender mainstreaming in the business sector and the full participation of women and girls at all levels of decision-making.

Further, migrant women and girls are not a homogenous group. There are migrant women and girls who also experience disabilities, and/or are discriminated based on their sexual orientation (LGBTI) or their ethnic identities as minorities in a community. The response to address the multifaceted vulnerabilities faced by migrant women and girls needs to be tailored to the diversity and economic situation of all migrant women and girls regardless of their race, nationality, religion, gender, sexual orientation or political opinion. In order to enhance the self-reliance of migrant women and girls, there needs to be an implementation of economic interventions to contribute towards the integration and resettlement process of these individuals.

A critique of the lack of enforceability of CEDAW provisions, the inconsistent application or non-consideration of 'soft law' instruments such as the Gender Guideline, and the international human rights regime at large cannot be made without discussing the problems of a State-centric approach to international law. The Westphalian State-centric model encourages top-down implementation of international law obligations.[68] This model is problematic because it fails to recognise other actors within the international law sphere – which includes the rights holders. Arguably, the most neglected and consequently vulnerable group of individuals are the rights holders themselves. It is paradoxical that the international law regime is set up to favour powerful and resourceful States when, at the same time, the primary stakeholders are those with the least bargaining chips at the negotiation table. Often, , the lack of legal status or access to international protection make migrant women and girls vulnerable.

One way this State-centric approach to international law regime may be resisted is by advocating for the bottom-up approach. It is only when the full, equal, and meaningful participation of migrant women and girls at all levels of decision-making, particularly those from developing States, is incorporated that these individuals may achieve self-reliance and resilience. As stated in the Agreed Conclusions of CSW61, addressing the vulnerabilities of migrant women and girls requires a strong alliance among States parties, nongovernmental organisations, and civil society to take part by '[taking] appropriate steps to ensure their full, equal and meaningful participation in the development of local solutions and opportunities'.[69]

While there is no overnight solution to the ongoing problems faced by migrant women and girls, the work that needs to be done must start now and must involve incorporating the

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[68] See generally: Grote, R. "Westphalian System" *Max Planck Encyclopedia of Public International Law* (2006).

[69] Agreed Conclusions, *supra nt* 65.

voices of these individuals in decision-making at all levels. This includes cooperation between international organisations such as the United Nations, governments and civil society.

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Specific Direction: An Unspecific Threshold

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Keywords
SPECIFIC DIRECTION; AIDING AND ABETTING; ICTY; PERISIC; INTERNATIONAL CRIMINAL COURT; ROME STATUTE; ARTICLE 25(3)(C); INDIVIDUAL CRIMINAL RESPONSIBILITY

Abstract

Aiding and abetting has been recognised as a form of individual criminal responsibility since the 1940's when the first international tribunals were created. The form of responsibility had a relatively simplistic history of application until it faced an unprecedented upheaval through the introduction of the threshold of specific direction in the *Perišić* appeals judgment. The judgment has since been rejected by the Special Court of Sierra Leone (SCSL) in the *Charles Taylor* judgment and by the International Criminal Tribunal for Former Yugoslavia (ICTY) in *Sainovic, Popović* and *Stanišić and Simatović* judgment.

The present paper focuses on the relevance of the standard of specific direction before the International Criminal Court (ICC). It argues that the standard is unjustifiable under international criminal law as, *firstly*, no convictions or acquittals have been affected on the standard and, *secondly* and more importantly, the text of the Rome Statute has rejected the standard. The standard of specific direction has not legal pedigree under customary law, is contrary to the text of the Rome Statute and counter-intuitive to the objectives of the ICC as it unreasonably increases evidentiary requirements at the Court and consequently makes the fight against impunity, an already challenging task, even more difficult.

I. Introduction

The International Criminal Court (ICC) was established with a multiplicity of objectives, foremost amongst which was and is to bring an end to impunity.[1] Over the course of its short existence, the Court has faced a host of challenges to this objective, ranging from suspects evading arrest to non-cooperation by member States. Amongst these challenges facing the Court lies another potential challenge of threshold[2] a challenge that raises the question: when does criminal responsibility ending impunity attach in the case of aiding and abetting?

The answer to this question remained relatively straightforward until February 2013. Any person who knowingly supported the principle perpetrator in the commission or attempted commission of international crimes where such support had a substantial effect

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1 Rome Statute of the International Criminal Court (ICC), preamble.

2 The terms standard and threshold have been used synonymously.

upon the commission was held to have committed aiding or abetting.[3] However, the Appeals Chamber (AC) of the International Criminal Tribunal for Former Yugoslavia (ICTY), in *Prosecutor v. Perišić*,[4] significantly affected the seemingly settled law on aiding and abetting by curiously introducing (or re-introducing) another element, namely 'specific directions', for establishing the particular form of individual criminal responsibility. The element required the accused to not only substantially assist but also to specifically direct such assistance towards the aiding or abetting a crime. The judgment faced widespread criticism[5] for the fear that it could cripple the fight against impunity.[6]

The precedent was subsequently weakened – first by the Special Court of Sierra Leone (SCSL)[7] and then by the ICTY itself.[8] Today, while the standard remains constricted, the possibility of its application cannot be completely ruled out by merely relying on a body of persuasive precedents.[9] Further, with the existence of alternate interpretations of aiding and abetting being laid down in *Perišić* and *Charles Taylor* and *Sainovic* and *Stanišić and Simatović,* the possibility of divergence in the jurisprudence on aiding and abetting under international criminal law cannot be ruled out. This divergence can fracture the consistency in jurisprudence and create fragmentation within a field that does not consist of binding precedents.[10]

This article intends to discuss the requirement of specific direction with a particular focus on the ICC which is yet to lay down its own understanding of aiding and abetting. The present paper proceeds in the following manner. The first part traces the evolution and content of the specific direction threshold. The paper then turns to its core arguments that, *firstly* and more generally, the element of specific direction is not necessary for proving aiding and abetting under customary international criminal law. For this purpose, the author relies on the jurisprudence of the ICTY arguing that the Tribunal previously relied upon

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3 International Criminal Tribunal for the Former Yugoslavia (ICTY), IT-95-17/1-T, *Prosecutor v Furundzija*, 10 December 1998, para 249.

4 ICTY, ICTY-IT-04--81-A, *Prosecutor v Perisic*, 28 February 2013.

5 Ventura, MJ, "Farewell 'Specific Direction': Aiding and Abetting War Crimes and Crimes Against Humanity in Perišić, Taylor, Sainović et al, and US Alien Tort Statute Jurisprudence", in Stuart, CM (ed.), The War Report: Armed Conflict in 2013, Geneva Academy of International Humanitarian Law and Human Rights, 511, 512-13 (May 1, 2014); Stewart, J, *"Specific Direction" is Unprecedented: Results from Two Empirical Studies*, EJIL:Talk! European Journal of International Law blog, 4 September 2013, *at* <http://www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies/> (accessed 20 November 2018).

6 NY Times, Roth, K, *A Tribunal's Legal Stumble*, *at* <http://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html?_r=0>, (accessed 20 November 2018).

7 Special Court for Sierra Leone (SCSL), SCSL-03-01-A, *Prosecutor v Charles Ghankay Taylor*, 26 September 2013 http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf.

8 ICTY, *Prosecutor v Nikola Sainovic*, IT-05-87-A, 23 January 2014, *at* <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf> (accessed 20 November 2018); ICTY, *Prosecutor v Popović et al*, IT-05-88-A, 30 January 2015, Para 1758; ICTY, *Prosecutor v Stanišić and Simatović*, IT-03-69-A, 9 December 2015, *at* <http://www.icty.org/x/cases/stanisic_simatovic/acjug/en/151209-judgement.pdf> (accessed 20 November 2018).

9 The International Criminal Court is not bound by its previous case law. Article 21 of the ICC Statute specifically allows for previous case law to be relied upon only as a subsidiary means for interpretation.

10 Carcano, A, "Of Fragmentation and Precedents in International Criminal Law: Possible Lessons from Recent Jurisprudence on Aiding and Abetting Liability", 14(4) *Journal of International Criminal Justice*, 771.

certain elements to prove aiding and abetting, and that while the terminology 'specific direction' was not abandoned, it was not relied upon as well. *Secondly,* the paper would argue more specifically that the framework of the Rome Statute removed the requirement (if any) of the establishment of specific direction when it departed from the Statutes of the ICTY and SCSL. To carve out such deviation made by Assembly of State Parties, the author will delve into the interpretation of the provisions of the Rome Statute, as well as the standard of mental element set under the Statute. Finally, the paper shall conclude that any addition of the element of specific direction would be not only be contrary to the literal interpretation of the Statute but also counter-intuitive to the objective of the ICC as such a standard would excessively increase the evidentiary requirements at the ICC, consequently making the fight against impunity, an already challenging task, even more difficult.

II. The Specific Direction Test

The AC in *Perišić*, relying upon paragraph 229 of the *Tadic* Appeals judgment,[11] reversed the decision of the Trial Chamber (TC), holding that in cases of remoteness of the accused from the scene of the crime, the prosecution had to additionally prove that the accused had specifically directed his assistance towards the commission of the crime.[12] At the outset, it must be noted that the AC did not clarify the kind or type of directions requisite to aiding or abetting, merely observing that such analysis could only be case specific.

Before commenting on the interpretation relied upon by the AC, it would be prudent to analyze the alleged source of the test, that is, the *Tadic* Appeals Judgment itself. The *Tadic* AC had then held that:

> *[t]he aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.*[13]

The AC in *Tadic* provided the aforementioned understanding of aiding and abetting to differentiate this form of individual criminal responsibility from joint criminal enterprise.[14] The main objective of the formulation was thus to illustrate that while in the case of joint criminal enterprise a common concerted plan was necessary, aiding and abetting required practical assistance by the accused to the principle perpetrator.[15]

The loose terminology used by the AC was subsequently reproduced in several cases, such as *Blaškić*,[16] *Vasiljević*,[17] *Krnojelac*,[18] and *Kupreškić*,[19] which led to its further literal entrenchment into the ICTY case law.

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[11] ICTY, *The Prosecutor v Tadic*, IT-94-1-A, 15 July 1999, para 229 (emphasis added).

[12] ICTY, *Prosecutor v Perisic*, 28 February 2013, ICTY-IT-04--81-A, para 38.

[13] ICTY, *The Prosecutor v Tadic*, IT-94-1-A, 15 July 1999, para 229 (emphasis added).

[14] Trahan, J, Lovall, EK, "The ICTY Appellate Chamber's Acquittal of Momcilo Perisic: The Specific Direction Element of Aiding and Abetting Should Be Rejected or Modified to Explicitly Include a 'Reasonable Person' Due Diligence Standard", *Brook. Journal of International Law* (2014) 172, p. 203.

[15] Shaw, D, "Prosecutor v Taylor: Is the SCSL's Rejection of the Specific Direction Enigma Enough to End Debate Between the Ad Hoc Tribunals?", 22 *Tul. J. Int'l & Comp. L.* (2013-2014) 425, p. 431; ICTY, *The Prosecutor v Tadic*, IT-94-1-A, 15 July 1999, paras 228-229.

[16] ICTY, *Prosecutor v Blaškić*, IT-95-14-A, 29 July 2004, para 45, *at* <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf> (accessed 20 November 2018).

In 2011, the TC, while convicting Perisic for aiding and abetting the crimes perpetrated by the *Vojska Republike Srpske* (VRS), concluded that Perisic had presided over a system that provided comprehensive military assistance to the VRS. The TC was consequently of the opinion that in the absence of an assistance by *Perisic*, the VRS would not have been able to implement its war strategy which included systematic commission of crimes.[20] The TC then specifically went on to hold that the absence of any express instructions to commit crimes did not absolve Perisic, as a causal relationship between the assistance and the crimes or a specific direction towards the commission of the crimes was not a *sine qua non* under aiding and abetting.[21] The TC therefore went on to find that the assistance provided by Perisic substantially contributed towards the crimes ultimately committed by the VRS during the Siege of Sarajevo and in Srebrenica.[22]

The AC in its part did not rebut the findings of the TC that Perisic knew, at the time of assisting the VRS, of the crimes being perpetrated by the organisation. However, it held that in addition to the knowledge of the crimes being perpetrated by VRS, Perisic should have specifically directed his assistance towards those crimes. The AC, therefore, not only relied on an element whose inception itself was misleading but also conflated knowledge – an indicator of *mens rea* – with specific directions, understood by the Court itself as an element of *actus reus*,[23] when it held that knowledge could serve as circumstantial evidence of specific direction but could not conclusively manifest the same.[24] The Court then overruled the findings of the TC and held that in the absence of any cogent reasons to depart from established law, the TC had erred in sidestepping the requirement of specific direction. Thus, the AC, sourcing the legal pedigree of specific direction under customary international law through the constant reiteration of the *Tadic* formulation in subsequent ICTY case law, firmly established the requirement of specific direction under the head of aiding and abetting. The AC consequently acquitted Perisic on all counts.[25]

The acquittal of Perisic was received by the international criminal law community with shock and an apprehension that the decision would be a blow to the gradual but unprecedented move against impunity.[26] Allegations of larger political implications

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17 ICTY, *Prosecutor v Vasiljević*, IT-98-32-A, 25 February 2004, para 102, *at* <http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf> (accessed 20 November 2018).

18 ICTY, *Prosecutor v Krnojelac*, IT-97-25-A, 17 September 2003, para 33, *at* <http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf> (accessed 20 November 2018).

19 ICTY, *Prosecutor v Kupreškić et al*, IT-95-16-A, 23 October 2001, para 254, *at* <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf> (accessed 20 November 2018).

20 ICTY, *Prosecutor v Perisic,* IT-04-81-T, 6 September 2011, paras 1621-1627.

21 *Ibid.*, para 1624.

22 *Ibid.*, paras 1621-1627; ICTY, IT-04-81-A*, Prosecutor v Momcilo Perisic*, Partially Dissenting Opinion of Judge Liu, 28 February 2013, paras 4-7.

23 ICTY, ICTY-IT-04--81-A, *Prosecutor v Perisic*, 28 February 2013, paras 25 and 33, *at* <http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf> (accessed 20 November 2018).

24 *Ibid.*, paras 68.

25 *Ibid.*, paras 74 and 122.

26 Aksenove, M, "The Specific Direction Requirement for Aiding and Abetting: A Call for Revisiting Comparative Criminal Law", 4 *Cambridge J. Int'l & Comp. L.* 88 (2015), 107; Coco, A and Gal, T, "Losing Direction: The ICTY Appeals Chamber's Controversial Approach to Aiding and Abetting in *Perišić"*, *12 Journal of International Criminal Justice* (2014) 345, pp. 365-366; NY Times, Roth, K, *A Tribunal's Legal*

influencing the ICTY flew around.[27] Authors argued that State concerns regarding provisioning of assistance to other countries being affected by a lower standard under aiding and abetting led to the abrupt increase in the threshold.[28]

III. Evaluation of the Specific Direction Doctrine

Despite stringent criticism of the doctrine by several scholars,[29] the judgment did find some support.[30] It would therefore be prudent to analyze the arguments put forth in defense of specific direction before embarking upon an evaluation of the same.

A. Justification for Specific Direction

The strongest and perhaps the only argument put forth in favour of specific direction is the practicality of aiding and abetting in the absence of such a requirement.[31] The argument brought forth by the affirming scholars is best explained through an illustration:

> Country A provides arms and ammunitions to the armed forces of Country B which are engaged in an armed conflict with a belligerent group within their border. These munitions are utilized for lawful as well as unlawful purposes. Country A has knowledge that certain part of their support is being utilized to commit international crimes. Should the chief of army of Country A be responsible under aiding and abetting for provisioning munitions to the armed forces of B despite such knowledge?[32]

Judge Meron, President of the ICTY, was of the view that such support cannot attract criminal responsibility under aiding and abetting as the organisation to which arms are being

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Stumble, *at* <https://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html> (accessed 20 November 2018).

27 Opinio Juris, Heller, KJ, *The Real Judge Meron Scandal at the ICTY*, *at* <http://opiniojuris.org/2013/06/17/the-real-judge-meron-scandal-at-the-icty/> (accessed 20 November 2018); Wikileaks, ICTY: President Meron Urges USG To Oppose Del Ponte Renewal, *at* <https://www.wikileaks.org/plusd/cables/03THE HAGUE1827_a.html> (accessed 09 January 2019).

28 The New York Times, Marlise Simons, M, *Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders*, 14 June 2013, *at* <http://www.nytimes.com/2013/06/15/world/europe/judge-at-war-crimes-tribunal-faults-acquittals-of-serb-and-croat-commanders.html?_r=0Marko Milanovic> (accessed 20 November 2018); EJIL:Talk!, Milanovic, M, *Danish Judge Blasts ICTY President [UPDATED]*, 13 June 2013, *at* <http://www.ejiltalk.org/danish-judge-blasts-icty-president/> (accessed 20 November 2018).

29 Trahan, Lovall, *supra* nt 14, 184.

30 Opinio Juris, Heller, KJ, *The SCSL's Incoherent — and Selective — Analysis of Custom*, 27 September 2013, *at* <http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom/> (accessed 20 November 2018).

31 ICTY, *Prosecutor v Perisic*, IT-04-81-T, 6 September 2011, Dissenting Opinion Of Judge Moloto on Counts 1 To 4 And 9 To 12, paras 32-33, *at* <http://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf> (accessed 20 November 2018); ICTY, *Prosecutor v Perisic*, IT-04-81-A, Transcript of Appeals Chamber Hearing: 30 October 2012, p. 62; Opinio Juris, Heller, KJ, *Why the ICTY's 'Specifically Directed' Requirement Is Justified*, 2 June 2013, *at* <http://opiniojuris.org/2013/06/02/why-the-ictys-specifically-directed-requirement-is-justified/> (accessed 20 November 2018).

32 *Ibid*.

provided is engaged in both lawful and unlawful activities.[33] This opinion is also echoed by Professor Kevin Heller who has previously articulated his support for specific directions as an element under aiding and abetting until the *mens rea* standard for the form of criminal responsibility is increased from mere knowledge.[34]

While the very legal basis of specific direction remains questionable, it is imperative to ask a more fundamental question: why not? Why shouldn't a military leader who continues to support an armed group, despite knowledge of the committal of international crimes and violations of international humanitarian law (IHL), be held responsible for aiding and abetting such crimes? The rules under the Hague Regulations, the Geneva Conventions and its additional Protocols, and under the customary international criminal law do not consider a combination of lawful and unlawful activities as a valid justification to deviate from such Regulations. Therefore, the exposition by the ICTY, which had to apply such rules while arriving at its decisions, cannot unilaterally create such an exception to responsibility.

As a principle, the laws of armed conflict developed, amongst other reasons, due to the unfortunate inevitability of war.[35] The laws aimed at maintaining the basic minimum level of humanity even during an otherwise inhumane activity, such as a war. To now argue that an individual should overlook (and thereby condone) the violations of this minimum standard set by the laws of war merely because they go alongside lawful combat activities is betraying the very foundations of IHL.[36] While the degree of *mens rea* required to evidence an individual's complicity may be argued upon, the *actus reus*, so long as the support considerably contributes towards the crimes, cannot be heightened to such an extent as to make the laws of war otiose. The principles of criminal law must be developed on a morally defensible basis,[37] and the fact that the attachment of responsibility may have certain geopolitical implications cannot be a factor.

B. The Fallibility of Specific Directions

Specific direction, despite being introduced as far back as in 1998 and having been reiterated in subsequent case laws, was never identified as a separate element of aiding and abetting.[38] Two reasons may be identified for such a situation. *Firstly*, the observations of the AC in *Tadic* qualified merely as obiter dictum.[39] As was mentioned in Section II, *Tadic* merely used

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[33] ICTY, *Prosecutor v Perisic*, IT-04-81-A, Transcript of Appeals Chamber Hearing: 30 October 2012, p.62.

[34] Heller, *supra* nt 31; Opinio Juris, Heller, KJ, *My Talk in London Defending the Specific-Direction Requirement*, 26 October 2013, *at* <http://opiniojuris.org/2013/10/26/talk-london-defending-specific-direction-requirement/> (accessed 20 November 2018). The author provides a link summarising his views on the issue in the aforementioned link.

[35] Kalshoven, F, and Zegveld, L, "Constraints On The Waging Of War An Introduction To International Humanitarian Law", (ICRC Geneva), p. 12 -15, *at* <https://www.loc.gov/rr/frd/Military_Law/pdf/Constraints-waging-war.pdf> (accessed 20 November 2018).

[36] *Ibid*.

[37] Stuart, CM, *"Specific Direction" is Indefensible: A Response to Heller on Complicity,* 12 June 2013, *at* <http://opiniojuris.org/2013/06/12/specific-direction-is-indefensible-a-response-to-heller-on-complicity/> (accessed 20 November 2018).

[38] ICTY*, Prosecutor v Momcilo Perisic*, IT-04-81-A, Partially Dissenting Opinion of Judge Liu, 28 February 2013, paras 3; Shaw, *supra* nt 15, p. 431.

[39] Coco and Gal, *supra* nt 26, pp. 354-55.

the term *'…specifically directed'* to differentiate joint criminal enterprise from aiding and abetting. The Court was adjudicating upon aiding and abetting as a form of criminal responsibility. Therefore, the observations did not establish any precedent to which subsequent chambers must give deference in the absence of any cogent reasons for deviation.[40] Moreover, the customary nature of specific direction as introduced by the *Tadic* Appeals is itself questionable.[41] The AC, in developing this terminology, did not rely on any precedent or international instrument evident from the absence of reliance on any authority to establish the customary status of specific direction.[42] *Secondly,* the incorporation of the terminology by subsequent judgments was rather mechanical in nature, with none of the cases explaining the meaning, the scope or in the very least its application to the case.[43] Specific direction was not identified as an element of aiding and abetting prior to *Tadic*, and even afterwards, while several judgments mention it, it is doubtful whether any acquittal was effected (except *Perisic*) in its absence.[44] The AC unfortunately traced down specific direction to have a customary nature while nothing in case law, or academic writings manifests the same, and the repeated iteration of an assertion does not convert it into law.[45]

In contrast with the observation of the AC in *Tadic*, a comprehensive study into the law of aiding and abetting had already been done by the ICTY in *Anto Furundžija*, wherein it examined several post World War II judgments to identify the elements encompassing aiding and abetting.[46] The TC therein held that, under customary international criminal law, the *actus reus* of aiding and abetting required practical assistance on part of the aider or abettor of the principle perpetrator which had a substantial effect on the commission of the crime.[47] Practical assistance could be in the form of moral support or encouragement of the principal perpetrator, even if the same did not have any causal relationship with the final act.[48] The TC also explicitly discounted the possibility of the *actus reus* requiring any *direct* assistance stating that that such a terminology was misleading as it implied the requirement of a tangible form of assistance, while the same was not a requisite as understood by erstwhile Tribunals, as well as Member States during the negotiations on the Rome Statute.[49]

The findings of the TC in *Furundžija* were subsequently upheld by the AC[50] a year after the *Tadic* Appeals judgment, indicating that the dual elements forming an essential part of the *actus reus* of aiding and abetting liability are: a) assistance, moral support or

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40 Ventura, *supra* nt 5; Stuart, *supra* nt 5, 511, 522.

41 ICTY, *Prosecutor v Nikola Sainovic*, IT-05-87-A, 23 January 2014, para 1650, *at* <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf> (accessed 20 November 2018); Aksenove, *supra* nt 26, 92-94.

42 Ventura, *supra* nt 5, p. 11; ICTY, *The Prosecutor v Tadic,* IT-94-1-A, 15 July 1999, para 229. Note the conspicuous absence of any footnotes to the proposition laid down by the AC.

43 Shaw, *supra* nt 15, 431; Trahan, Lovall, *supra* nt 14, 184.

44 Stewart, *supra* nt 5.

45 Ventura, *supra* nt 5, 11.

46 ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, 10 December 1998, *at* <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (accessed 20 November 2018).

47 *Ibid.*, para 235.

48 *Ibid.*, para 233.

49 *Ibid.*, paras 231-232.

50 ICTY, *Prosecutor v Furundzija*, IT-95-17/1-A, 21 July 2000, *at* <http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf> (accessed 20 November 2018).

encouragement, b) which had a substantial effect on the commission of the crime.[51] Unlike the terminology employed in *Tadic*, the two elements recognised by TC and later affirmed by AC in *Furundžija* have been actively cited and used to effect convictions or acquittals at the Court. For instance, in *Aleksovski*, the AC cited paragraph 229 of *Tadic* AC judgment[52] but based the conviction of the accused on the twin criteria laid down in *Furundžija*, i.e. for his encouragement that had a substantial effect on the mistreatment of the HVO soldiers by the perpetrators.[53] Similarly in *Brđanin,* the AC acquitted the accused on the count of committing torture by holding that the Prosecution had failed to prove that the acts of *Brđanin* amounted to an encouragement that could have a substantial effect on the commission of the crime.[54] The AC therefore quite conspicuously circumvented the requirement of specific directions. Finally, in *Kupreskic*, a case cited by the AC in *Perisic*, the acquittal of the accused was in effect not done because of the absence of specific directions but due to circumstantial evidence failing to prove that his acts had a substantial effect on the commission of the crime.[55]

In fact, several cases at the ICTY explicitly rejected the requirement of specific direction on the ground that it was not an element of aiding and abetting liability. In *Mrkšić et al.*, the AC, relying upon *Blagojević* and *Jokić*, held that specific direction was not an essential element of aiding and abetting.[56] In *Perisic*, the AC held that the Court in *Mrkšić* had failed to give cogent reasons for their deviation from an already settled law on aiding and abetting and therefore had erred in diluting specific directions.[57] However, as has been stated earlier, the legal pedigree of specific direction is dubious in the very least and the findings of the Court in *Mrkšić* in fact make explicit the futility of the specific direction test. Further, considering that the inception of specific direction was itself in the form of an *obiter dictum* and not *ratio decidendi,* it was not incumbent upon AC in *Mrkšić* to cite reasons for their departure. It is for the same reason that the ICTY, in *Sainovic* – a more recent judgment on aiding and abetting –went on to explicitly hold that the terminology coined by AC in *Tadic* did not form a precedent for subsequent Courts to follow.[58] Even the SCSL, upon receiving the argument on specific direction from Charles Taylor, held that the same did not form a part of customary law on aiding and abetting, and that the ICTY had in fact erred in so far as it had sought to understand specific direction as a prerequisite for proving aiding and

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[51] *Ibid.*, paras 124-127.

[52] ICTY, *Prosecutor v Zlatko Aleksovski*, IT-95-14/1-A, 24 March 2000, para 163, *at* <http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf> (accessed 20 November 2018).

[53] *Ibid.*, para 172.

[54] ICTY, *Prosecutor v Radoslav Brđanin*, IT-99-36-A, 3 April 2007, paras 276-277, 288-89, *at* <http://www.refworld.org/docid/48aae70a2.html> (accessed 20 November 2018).

[55] ICTY, *Prosecutor v Zoran Kupreškić Mirjan Kupreškić Vlatko Kupreškić Drago Josipoviić Vladimir Šantic*, IT-95-16-A, 23 October 2001, 292-296, 303-304, *at* <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf> (accessed 20 November 2018).

[56] ICTY, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, IT-95-13/1-A, 5 May 2009, para 159; IT-02-60-A, *Prosecutor v Vidoje Blagojević and Dragan Jokić*, 9 May 2007, para 189.

[57] ICTY, *Prosecutor v Perisic*, ICTY-IT-04--81-A, 28 February 2013, paras 32-35.

[58] ICTY, *Prosectuor v Nikola Sainovic*, IT-05-87-A, 23 January 2014, para 1623, 1626-1650.

abetting.[59] Finally, the ICTY has gone on to observe that the doctrine of specific direction was recognised neither in the jurisprudence of the Tribunal nor under customary international law.[60]

Additionally, the dual requirement of specific directions and substantial effect is highly problematic. Principally, if substantial effect is established (along with knowledge of the commission), then it must necessarily imbibe acknowledgment of the crime and directives to commit the crime in the sense that the encouragement would be assisting the commission of the crime. The inclusion of specific direction adds a level of impracticality to the theory of aiding and abetting as the necessary implications flowing from the theory would then be that if directives include lawful and unlawful activities, then the crime would never be committed. The AC, in fact, made a similar observation when it proposed that general assistance, which could be useful for both lawful and unlawful purposes, is not sufficient for aiding and abetting.[61] Quite obviously, if the assistance provided was for lawful purposes and the perpetrator singularly carried out crimes without the knowledge of the accused or without the accused substantially assisting the crime, the accused may not be guilty for aiding and abetting. However, in situations where in spite of the knowledge of the crimes the accused still directs his assistance even for legitimate purposes, the knowledge combined with the effect of the assistance on the crime should suffice conviction.

The idea that an accused, who is proved to have substantially aided organisations responsible for international crimes, should walk free on an extremely thin rope under positive international criminal law lacks any legal or even moral conviction.

IV. Aiding and Abetting at the International Criminal Court

The flight of specific direction from *Tadic* to *Sainovic* to *Popović*, and thereafter *Stanisic and Simatovic*, attains greater importance due to the potential effect it can have on the ICC, which in its nascent years has relied heavily on the jurisprudence of the ICTY.[62] This reliance, especially on interpretation of substantive law such as that of aiding and abetting, despite the differential structuring of the ICC and other ad-hoc international tribunals, is essential to avoid fragmentation and strive towards the ideal of universality of international criminal law.[63]

The ICC has not yet dealt concretely with the law on aiding and abetting, with only the Pre-Trial Chamber (PTC) making observations regarding the same.[64] In the few cases concerning aiding and abetting that have come before the Court, the approach of the PTC

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[59] SCSL, *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, 26 September 2013, paras 481-486, *at* <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf> (accessed 20 November 2018).

[60] ICTY, *Prosecutor v Stanišić and Simatović*, IT-03-69-A, 9 December 2015, para 104-106, *at* <http://www.icty.org/x/cases/stanisic_simatovic/acjug/en/151209-judgement.pdf> (accessed 20 November 2018); IT-05-88-A, *Prosecutor v Popović et al*, 30 January 2015, Para 1758.

[61] ICTY, *Prosecutor v Perisic*, ICTY-IT-04--81-A, 28 February 2013, para 44.

[62] Viebig, P, *Illicitly Obtained Evidence at the International Criminal Court*, (International Criminal Justice Series 4, Asser Press), 27-28; International Criminal Court (ICC), *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, paras 533-536 and 603.

[63] Viebig, *supra* nt 62, 24.

[64] ICC, *The Prosecutor v Callixte Mbarushimana,* ICC-01/04-01/10; ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11.

has been diametrically opposite with the Chamber favouring the substantial effect doctrine of the ICTY in two cases[65] and explicitly rejecting the same (without providing any alternative) in another.[66] The latter approach may owe its origin to the fact that Article 25(3)(c) of the Rome Statute provides for any sort of assistance to be culpable for aiding and abetting, in contrast with the settled stand of the ad-hoc tribunals that the assistance should be substantial.[67] The non-inclusion of the *'directly and substantially'* requirement for aiding and abetting from Article 2(3)(d) of the Draft Code of Crimes adds further to the belief that substantial assistance may not have been decided upon as a standard at the ICC. However, the absence of such terminology, in fact, reflects an adherence to the Statutes of the ICTY, ICTR or the SCSL, which also did not include an explicit requirement of substantial assistance,[68] and such a requirement was sourced through customary international law which identified assistance to subsume and imply substantial assistance for attachment of culpability.[69] Therefore, it is unlikely that the ICC would go forward with merely any form of assistance to establish responsibility under aiding and abetting.

An arguably more important issue concerns the level of *mens rea* required to attract culpability under aiding and abetting. The Ad Hoc Tribunals, as well as scholars, have previously been of the unanimous opinion that the *mens rea* for aiding and abetting is *knowledge*. However, the language of Article 25(3)(c) states:

> … For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

The Statute thus requires that the assistance be provided *for the purpose* of facilitating the commission or attempted commission of the crime. This purpose requirement, despite not having yet been adjudicated upon by the ICC, has already made scholars anxious as to its scope and consequential effect.[70]

The purpose requirement under Article 25(3)(c) is a novelty brought into the Rome Statute from the Model Penal Code of the American Law Institute.[71] Relying upon the

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[65] ICC, *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, para 279; ICC, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, para 354.

[66] ICC, *The Prosecutor v. Blé Goudé*, Confirmation of Charges Decision, ICC-02/11-02/11-186, para 167.

[67] ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, 10 December 1998; SCSL, *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, 26 September 2013, para 391, *at* <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf> (accessed 20 November 2018).

[68] Article 7(1) ICTY Statute; Article 6(1) ICTR Statute; Article 6(1) SCSL Statute; William Schabas, *An Introduction to International Criminal Court* (4th ed. Cambridge University Press 2011), 228.

[69] ICTY, *Prosecutor v Furundzija*, IT-95-17/1-T, 10 December 1998; SCSL, *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, 26 September 2013, para 391.

[70] *Ibid.*; Scheffer, DJ, "Brief of David J. Scheffer, Director of the Centre of International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari", in *Presbyterian Church of Sudan v Talisman Energy Inc. before the Supreme Court of United States*, 19 May 2010; James G. Stewart Blog, Van Sliedregt, E and Popova, A, *Interpreting "For the Purpose of Facilitating" in Article 25(3)(C)?*, 22 December 2014, *at* <http://jamesgstewart.com/interpreting-for-the-purpose-of-facilitating-in-article-253c/> (accessed 20 November 2018).

[71] Ambos, K, "General principles of criminal law in the Rome Statute", 10 *Criminal Law Forum* (1999) 1, 10.

model code itself, interpretation of the requirement has ranged from arguments in favour of an intent requirement[72] to arguments equating purpose to knowledge itself.[73]

The author is of the view that the purpose requirement in fact compliments the *mens rea* standard provided for under Article 30. Article 30 of the Statute provides for the mental element for crimes unless otherwise provided for in the Statute. Barring crimes such as genocide, persecution, or torture[74] that require an increased form of mental element, crimes under the Statute base their *mens rea* requirement on Article 30. Article 30 separately defines intent for conduct and consequences.[75]

The TC of the ICC in *Bemba et al.* while dealing with Article 25(3)(c) held that the *mens rea* under aiding and abetting may be divided into two parts; one relating to the conduct of the aider and abettor i.e. the accused and the other relating to the conduct of the principal perpetrator.[76] The Bemba TC then clarified that the purpose requirement only relates to the former, i.e. the facilitation of the crime and not the principal offence, for which Article 30 continued to remain applicable.[77] It is pertinent to note that the Appeals Chamber despite overturning TC judgment did not in fact overrule the findings of the TC on this point.

The purpose requirement consequently attaches itself to the facilitation of assistance provided by the aider or abettor. Therefore, the accused should be aware that the offence by the principal perpetrator shall occur in the ordinary course of events[78] akin to the erstwhile position of law before other international tribunals;[79] however he/she must also purposefully facilitate the crime, that is to say, that the accused must facilitate the crime through a willful assistance[80] and not assistance through negligence or recklessness.[81] This characterisation of the purpose requirement relating to the conduct of the aider/abettor rather than to the crime committed by the principal perpetrator finds support in the Taylor Judgment as well. The AC, while considering the Ministries Trial,[82] observed that the knowledge of the accused was

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72 Reggio, A, "Aiding and Abetting In International Criminal Law: The Responsibility of Corporate Agents And Businessmen For 'Trading With The Enemy' of Mankind", 5 *International Criminal Law Rev*iew (2005) 623, p. 645.

73 Scheffer, DJ, "Brief of David J. Scheffer, Director of the Centre of International Human Rights, as Amicus Curiae in Support of the Issuance of a Writ of Certiorari", in *Presbyterian Church of Sudan v Talisman Energy Inc. before the Supreme Court of United States*, 19 May 2010.

74 Article 6 ICC Statute; Article 7(1)(h) read with Article 7(2)(g) ICC Statute; Article 7(1)(f) read with Article 7 (2)(e) ICC Statute.

75 Article 30(2)(a) and Article 30(2)(b) ICC Statute.

76 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, para 97.

77 Ibid.

78 Article 30(2) ICC Statute.

79 Ventura, MJ, "Aiding and Abetting" in Jérôme de Hemptinne et al. (eds), Modes of Liability in International Criminal Law (Cambridge, Cambridge University Press 2019) (forthcoming), 55.

80 Eser, A "Individual Criminal Responsibility" in Cassese, A, et al (eds), *The Rome Statute of The International Criminal Court: A Commentary* (Oxford University Press 2002) p. 801; Schabas, *supra* nt 68.

81 James G. Stewart Blog, Stewart, J, *An Important New Orthodoxy on Complicity in the ICC Statute?*, 21 January 2015, *at* <http://jamesgstewart.com/the-important-new-orthodoxy-on-complicity-in-the-icc-statute/> (accessed 20 November 2018).

82 USA v Weizsäcker et al ('The Ministries Trial').

sufficient to fulfill the indicia of *mens rea* for aiding and abetting.[83] The Appeals Chamber then went on to discuss that Karl Rasche, who had advanced the loans to the Nazi Schutzstaffel (SS), was not acquitted for the lack of *mens rea* in relation to the awareness of the crime which was clearly fulfilled through his knowledge but rather because he did not advance the loans with purpose that the borrower would use the funds to commit the crimes.[84]

In sum, the author acknowledges an increase in the threshold of aiding and abetting at the ICC in comparison to the ad hoc Tribunals; however, such increase is not through the inclusion of specific direction within the *actus reus* of the crime but through the inclusion of purpose requirement for the facilitation of assistance.

V. Conclusion

International criminal law has been entrusted with a responsibility to balance the rights of the accused with the fight against impunity. This balance has been maintained (more or less) by Ad-Hoc Tribunals quite remarkably. However, a few cracks have been noticed recently through the inclusion of unrealistic thresholds in proving culpability. One such challenge the requirement of specific directions within the *actus reus* of aiding and abetting. The inclusion of specific direction meant that the prosecution needed to not only show that an accused facilitated the commission of a crime by providing substantial assistance to the perpetrator but also that such assistance was specifically directed towards the crime. In this era, with decentralised and distant command structures and increasingly common geographically detached drone warfare, the requirement of specific direction, in fact, transports us back to a time where impunity could thrive due to the ineffectiveness of the law. It provides various important actors with the opportunity of avoiding culpability by arguing their absence from the scene of the crime or, worse yet, due to the absence of specific instructions to commit the crime. The reversal of the *Perisic* judgment by the SCSL and then the ICTY was the hopefully the final word on the issue. However, the requirement may be revisited by a future Court and thus it is prudent to highlight the logical and legal fallacies in the doctrine, so that future tribunals, as well as drafters, can make an informed decision with respect to the inclusion of such standards.

It is important to note that under customary international law *actus reus* of aiding and abetting requires only two factors: (i) practical assistance by the accused (ii) which had a substantial effect on the commission of the crime. This requirement remains true even for the ICC, which has, in terms of its language for *actus reus*, borrowed from the Ad Hoc Tribunals. However, with regards to the *mens rea*, while the customary requirement remains that of knowledge, the ICC incorporates a purpose requirement, in addition to the existing knowledge requirement, that necessitates that the assistance be provided with the purpose of facilitating the perpetrator.

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[83] SCSL, *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, 26 September 2013, para 424, *at* <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf> (accessed 20 November 2018).

[84] SCSL, *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A, 26 September 2013, n 1325, *at* <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf> (accessed 20 November 2018).

The ICC augurs in a new era of international criminal justice. It is imperative for the Court to stay true to its mandate and continue its fight against institutionalised impunity.

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Solidarity as a Principle of International Law: Its Application in Consensual Intervention

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SOLIDARITY; CONSENSUAL INTERVENTION; ARMED CONFLICTS

Abstract

The article analyses solidarity as a principle of international law, in relation to consensual intervention. The main point of the article is that solidarity constitutes a fundamental principle of international law which lies at the center of the collective security system. This is why solidarity, in the framework of international law must comply with the ultimate goal of the preservation of international peace and security. In such a framework, consensual intervention is assessed from the perspective both of the inviting as well as of the intervening part, on the basis of several criteria, including the level of actual control on the ground, the compliance with international and domestic law, the scope of the consent and the means of implementation of this scope. In cases of contested domestic authority, a larger variety of criteria need to be taken into account. It is proposed that solidarity can offer a balanced approach, between State-centered and human security or in other words between solidarity among States and solidarity towards the people.

I. Introduction

Recent years have 'witnessed' a rise both in the invoking of consent in relation to assistance or intervention in the course of internal conflicts, as well as in the latter form of conflicts. From the war in Eastern Ukraine to the 'forgotten war' of Yemen and the unprecedented human catastrophe[1] - among other cases - consent has become a point of reference in the political and legal debate. Even more heated is the debate about the provision of consent in States of contested authority. In the current article, the issue of consensual intervention is approached from the perspective of the principle of solidarity within international law.

The article distinguishes between solidarity in moral terms and solidarity at the legal level, where it is engulfed into the wider goals of the legal system. This is why solidarity, in the framework of international law must comply with the ultimate goal of the preservation of international peace and security.

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1 Amnesty International, *Yemen The Forgotten War*, September 2015, *at* <www.amnesty.org/en/latest/news/2015/09/yemen-the-forgotten-war/> (accessed 28 November 2018); World Health Organization, *Number of suspected cholera cases reaches 100.000 in Yemen*, 8 June 2017, *at* <www.who.int/mediacentre/news/releases/2017/suspected-cholera-yemen/en/> (accessed 28 November 2018); BBC News, *UN: World facing greatest humanitarian crisis since 1945*, 11 March 2017, *at* <https://www.bbc.com/news/world-africa-39238808> (accessed 7 January 2019); EJIL: Talk!, Vermeer, T, *The Jus ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?*, 30 April 2015, *at <https://www.ejiltalk.org/the-jus-ad-bellum-and-the-airstrikes-in-yemen-double-standards-for-decamping-presidents/>* (accessed 28 November 2018).

Therefore, acts supposedly of solidarity, among States must be carefully assessed under the collective security system imperatives. Such is the case of consensual intervention. Regarding States of limited sovereignty,[2] the invitation of a government for intervention and the subsequent positive response by another State must be put under the scrutiny of the examination of government lawfulness, of the rights even of a lawful government, in the course of an internal conflict and of the obligation to meet the standards of solidarity towards both States and people.

II. The concept of solidarity in – international – law

A. Solidarity as an ethical-political context and its presence in legal systems

Solidarity has been approached through some numerous perspectives, with many of them originating from interpretations of the human condition and subsequent ethic-political imperatives. It prerequisites bonds on the basis of common characteristics which identify a community as such, tending subsequently towards 'a commitment to some kind of mutual aid or support',[3] which might escalate from the most minimalistic and archaic unit of the family, to that of nation, class or even to a universalistic version of solidarity, encompassing all of mankind.[4]

While the Christian, ecumenic idea of brotherhood - with its strong, even subconscious, influence even until today - as well as the Aristotelian understanding of the human nature advocate a more or less spontaneous human tendency towards solidarity, in the sense either of caring and love for each other,[5] or of the need for social coexistence, solidarity is also endorsed as a principle in specific political and legal frameworks.[6]

The former depicts a moral and in such a sense a mainly horizontal conception of solidarity, on the grounds, more or less of an intuitive and spontaneous human tendency; the latter displays a hierarchical, vertical structure, which in the framework of a legal

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2 Risse, T, "Governance Under Limited Sovereignty", *in* Finnemore, M and Goldstein, J, eds, *Back to Basics: Rethinking Power in the Contemporary World. Essays in Honor of Stephen D. Krasner*, (2010), 5, as Thomas Risse comments 'while areas of limited statehood belong to internationally recognized states (even Somalia still commands international sovereignty), it is their domestic sovereignty which is severely circumscribed. In other words, areas of limited statehood concern those parts of a country in which central authorities (governments) lack the ability to implement and enforce rules and decisions and/or in which the legitimate monopoly over the means of violence is lacking, at least temporarily. Areas of limited statehood can be parts of the territory (e.g. provinces far away from the national capital), but they can also be policy areas (e.g. the inability to implement and enforce environmental laws). In this understanding, areas of limited statehood are not confined to fragile, failing, or failed states the latter having completely lost their domestic sovereignty.'; Borzel, T and Risse, T, "Dysfunctional Institutions, Social Trust, and Governance in Areas of Limited Statehood", (2015), 67, SFB Governance, Working Paper, *at* <http://www.sfb-governance.de/publikationen/sfb-700-working_papers/wp67/SFB-Governance-Working-Paper-67.pdf> (accessed 22 June 2016). In this sense, ALS's constitute part of a wider category of 'failures' or 'ellipsis' of governance on behalf of state authorities in parts of the territory or fields of authority, which schematically can be classified as 'dysfunctional state institutions.

3 Llewelyn-Davies, M, "Two Contexts of Solidarity among Pastoral Maasai Women", *in* Caplan, P and Bujra, JM, eds, *Women United, Women Divided: Cross-Cultural Perspectives on Female Solidarity* (Tavistock 1978), 206.

4 Bayretz, K, "Four uses of 'Solidarity'", in Bayertz, K, ed, *Solidarity* (Springer 1999), 5; Brunkhorst, H, *Solidarity: From Civic Friendship to a Global Legal Community*, (MIT Press 2005), *at* IX, 64.

5 Brunkhorst, H, *Solidarity: From Civic Friendship to a Global Legal Community*, (MIT Press 2005); Dobrzański, D, "The Principle of Solidarity", in Dobrzański, D ed, *The Idea of Solidarity: Philosophical and Social Contexts*, (The Council for Research in Values and Philosophy 2011), 10.

6 This latter concept is also closer to the Ancient Greek approach which identified specific virtues in the framework of '*polis*' - i.e. of the city - making them essentially political virtues or virtues of the righteous citizen.

system necessitates or rewards specific acts as acts of solidarity. In other words, solidarity is welcomed as a means for an end and not as a self-evidently, 'righteous' human tendency.[7]

In such a context, solidarity is depicted as not a solely or mainly spontaneous but also as a sophisticated and rationally orchestrated praxis, which is eventually shaped as a legal principle.[8]

B. Solidarity as a principle of international law

As the previous horizontal/vertical distinction indicates, solidarity constitutes a legal principle as well, imposing the abstention or fulfilment of certain acts. A precise, 'official' definition of solidarity as a legal concept is absent and not always necessary. Elements from the moral as well as the normative level must be combined in order to have an accurate description.[9]

A working description would refer to the help among actors in furtherance of common goal, values or avoidance of common danger. In the international community and therefore in international law, the provision of such 'help' under the aforementioned circumstances constitutes fundamental, constitutional principle, given that although it is not mentioned per se, it transcends and signifies some of the fundamental pillars of the international legal order, as the latter is drawn in the UN Charter.[10]

The most profound among them is the collective security system, concerning both the (inter) State, as well as the human security pillar.

Regarding the inter-State level, the exceptional and for limited time lawfulness of State use of force - until the UN Security Council deals with the situation-as well as the

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7 It has been also described as the distinction between solidarity from below and solidarity from above; Cook, K, "Solidarity as a basis for human rights: Part 1: legal principle or mere aspiration?", 5 *European Human Rights Law Review* (2012), 504, 505; Regarding its impact as an interpretative tool of international law, see: Wolfrum, R and Kojima, C, eds, *Solidarity: A Structural Principle of International Law* (Max-Planck Institut fur auslandisches offentliches Recht and Volkerrecht, Springer 2009), 45; The horizontal/vertical distinction can be found within the international legal framework too, albeit with a different meaning, as a distinction between solidarity among States and solidarity among States and populations. Boisson de Chazournes, L, "Responsibility to Protect: Reflecting Solidarity?", *in* Wolfrum, R., Kojima C., eds, *Solidarity: a structural principle of international law*, (Springer 2010), 102.

8 Dobrzański, *supra* nt 5, 12.

9 Hayward, JE, "Solidarity: The Social History of an Idea in Nineteenth Century France", 4 *International Review of Social History* (1956), 261-284; Hayward, JE, "Leon Bourgeois and Solidarism", 6 *International Review of Social History* (1961), 19-48; Durkheim, E, *Moral Education*, (Free Press 1986); In such a sense for example, Hayward describes a three- stage process starting from the French revolution with mystification of the concept of solidarity, mainly signifying a legal obligation, then becoming more of a political idea during the period between 1849 and 1895 and in the third phase, from 1896 onwards, when it emerged as a 'dogmatic credo', promoting social reforms and entering the diplomatic language as well; Dworkin, R, *Taking Rights Seriously,* (Harvard University Press,1978), 22, 24-25; Such a description seems to fit – up to some extent – with Dworkin's description of principles as 'a requirement of justice or fairness or some other dimension of morality.' In addition, again according to the Dworkinian perspective, principles are different from rules in that they serve as more general guidelines; Alexy, R, *A Theory of Constitutional Rights*, (Oxford University Press 2002), 47; As Alexy frames it 'principles are norms which require that something be realised to the greatest extent possible given the legal and factual possibilities. Principles are optimisation requirements, characterised by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible.'

10 For analysis of the UN Charter as a constitutional text, indicatively, see: Franck, T, "Is the U.N. Charter a Constitution?", in Frowein, JA, ed, *Negotiating For Peace: Liber Amicorum Tono Eitel*, (Springer-Verlag 2003), 95; Schwindt, CJ, "Interpreting the United Nations Charter: From Treaty to World Constitution", 6 *U. C. Davis Journal of International Law & Policy* (2000) 194, 206.

obligation of all States to confront aggression, illegal use of force and not to recognise as lawful the results of violations of *jus cogens* norms, regardless of whether they are victims of such acts or not, prerequisites the central place of solidarity in international law.

The innovation of the collective security system is the fact that it imposes a centrally organised and regulated system of response to threats against international peace and security, which is entrusted not only on the affected States but on the whole of the international community and its member-States.[11]

In other words, because solidarity is so crucial for international law and for the international community in order for them to retain their consistency and viability, on the basis of aspirations which unite mankind and in the face of dangers which threaten it, a collective, ecumenical response is necessary, in furtherance of which inter-State solidarity is considered as a fundamental principle.[12] Even further, States' perceptions of their security are supposed to be incorporated into the wider, collective, security system.[13]

In addition, the collective security system is in principle designed and certainly during last decades has come to endorse the principle of solidarity towards non-State actors too. In a number of cases, events of domestic nature of States were perceived by the UNSC as threats against international peace and security, exactly in the name of collective security and of solidarity towards peoples or groups of people.[14]

Mass violations of human rights, colonial and racist regimes, terrorism, failed States, the commitment of internationally prohibited crimes such as genocide, war crimes, crimes against humanity and ethnic cleansing have all been considered at times as such threats, requiring and necessitating the solidarity of States or of international organisations towards the peoples as well, even at the expense of State interests or contrary to them.[15]

The collective security system emerges thus, as a combination of two pillars - of State - centred and of human security. The inspiration behind both of them,[16] lies with the principle of solidarity and of collective sharing of responsibility as well as of burden.[17] It is

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11 White, ND, "On The Brink Of Lawlessness: The State Of Collective Security Law" 13 *Indiana International & Comparative Law Review* (2002) 237, 237; Claude Jr, IL, *American Approaches To World Affairs*, (University Press of America 1986), 51; Morgenthau, H, *Politics Among Nations*, (Peter Labella and John M Morriss 1949), 232.

12 Anderson, K, "United Nations Collective Security and The United States Security Guarantee In An Age Of Rising Multipolarity: The Security Council As The Talking Shop Of The Nations", 10 *Chicago Journal of International Law* (200), 55, 59; Wolfers, A, *Discord And Collaboration*, (The John Hopkins Press 1962), 168.

13 Wolfers*, supra* nt 12, 170.

14 Iraq, Somalia, Haiti, Rwanda, DR Congo are some of the equivalent cases; Le Mon, J and Taylor, RS, "Security Council Action in the Name of Human Rights: From Rhodesia to the Congo" 10(2) *UC Davis Journal of International Law* (2004) 197, 199; Arnison, ND, "International Law and Non- Intervention, When Do Humanitarian Concerns Supersede Sovereignty?" 17 *Sum Fletcher F. World AFF* (2003) 199, 203.

15 Reisman, TWM, "Acting Before Victims Become Victims: Preventing and Arresting Mass Murder" 40 *Case W. Res. J. Int'l L.* (2008) 57, 78; Duffy, H, *The 'War On Terror' And The Framework Of International Law*, (Cambridge University Press 2005), 178 and 184; Shestack, JJ, "Globalization of Human Rights Law", 21 *Fordham International Law Journal* (1997-1998), 558, 566; Stern, B, "What Exactly Is the Job of International Institutions?" 90 *American Society of International Law Proceedings* (1996), 585, at 587.

16 Claude, IL Jr, *American Approaches To World Affairs* (University Press of America 1986), 51; White, ND, "On The Brink Of Lawlessness: The State Of Collective Security Law", 13 *Indiana International & Comparative Law Review* (2002), 237, 237; Fowler, MR, "Collective Security And The Fighting In The Balkans", 30 *Northern Kentucky Law Review* (2003), 299; Morgenthau, H, *Politics Among Nations*, (Peter Labella and John m. Morriss 1949), 232.

17 Wolfers, A, *Discord And Collaboration* (The John Hopkins Press 1962), 168; Article 43, United Nations, *Charter of the United Nations* (1945) 1 UNTS XVI (UN Charter): 'All Members of the United Nations, in

the acknowledgment of the importance of the principle of solidarity, combined with the history and the realities of the international community, that led to the foundation of the UN and of the collective security system.[18]

In this framework, article 54 of the ILC final articles on State Responsibility explicitly suggests that 'injured' States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached.'[19] It is a provision whose implementation lies with the initiative of individual States too,[20] provided that they are 'lawful measures', meaning within the framework of international law.

The centrality of solidarity in and through the collective security system, as well as the reference of it to all actors and legal subjects - States and non-State alike -[21] determines the emergence of a variety of other manifestations of solidarity in international law, which re- ascertain that the latter constitutes a principle of the international legal order, expanding the field of threats in the face of which solidarity can be invoked,[22] as well as the depth of it, regarding the actors towards whom solidarity is directed, exceeding inter-State solidarity in favour of solidarity towards the people too.

Responsibility to Protect - R2P - as a 'concept-in-the-making' both in political and in legal terms indicate a rather '*lato sensu*' sense of responsibility, which is indicative of a tendency of the international community to enhance the fortification of already existing legal norms.[23]

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order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rites of passage, necessary for the purpose of maintaining international peace and security'; Article 51, UN Charter, is characteristic and definite in its wording by recognising on the one hand, in extremis the potential for collective self-defense, and through that for a type of horizontal act of solidarity, while on the other hand placing a limit on the first type of acts which are the SC actions on the matter.

18 Reyes, CL, "International Governance Of Domestic National Security Measures: The Forgotten Role Of The World Trade Organization"14 *UCLA Journal of International Law and Foreign Affairs* (2009), 531, 535-536.

19 Article 54, International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, A/56/10 (ILC) 137, para 1.

20 *Ibid.*, para 2.

21 Boisson de Chazournes*, supra* nt 7*,* 94–95.

22 UN General Assembly, *A more secure world: our shared responsibility,* Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, (55th session), A/59/565, 11, *at* <www.un.org/secureworld/report.pdf> (accessed 27 June 2017), (*A more secure world*); Slaughter, AM, "Security, Solidarity, And Sovereignty: The Grand Themes of UN Reform", 99 *American Journal of International Law* (2005)*,* 619, 623.

23 Magnuson, W, "The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law" 43 *Vanderbilt Journal of Transnational Law* (2010) 255, 292- 293; UNGA, *A more secure* world, *supra* nt 22; Indicative reference regarding the flow of significant texts in the context of R2P can be made to the report of the United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change entitled "A More Secure World: Our Shared Responsibility", as well as the UN Secretary-General report entitled 'In Larger Freedom'; In Larger Freedom: UN Security Council, *Towards Development, Security and Human Rights for All, Report of the Secretary-General* (2005) A/59/2005, *at* www.un.org/largerfreedom/contents.htm (accessed 27 June 2017); Kokott, J, *States, Sovereign Equality*,

A variety of areas which are critical for the sustainability of the international community endorses fundamentally solidarity: human rights law which is based at large at the universalistic notion of solidarity;[24] environmental law which shares a clear imprint of the principle of solidarity, from the 1972 Stockholm Declaration, to 1992 Rio Declaration[25] and to Paris Agreement.[26] In addition, aspects of international economic law too, such as the New International Economic Order – NIEO - and the Charter of Economic Rights and Duties of States are influenced - directly and indirectly - to solidarity as a legal principle.[27]

In such a framework, MacDonald comments that 'Solidarity is first and foremost a principle of cooperation which identifies as the goal of joint and separate State action an outcome that benefits all States or at least does not gravely interfere with the interests of other States... creates a context for meaningful cooperation that goes beyond the concept of a global welfare State; on the legal plane, it reflects and reinforces the broader idea of a world community of interdependent states'.[28] The description is helpful, albeit incomplete

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in Max Planck Encyclopedia of Public International Law, paras. 28–29, *at* www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1113&recno=26& (accessed 24 April 2012).

24 Cook, K, "Solidarity as a basis for human rights: Part 2: 'practical solidarity'" 6 *European Human Rights Law Review* (2012), 654, 658; Also see: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.
UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3, para 1 (ICESCR).
Other documents in relation to human rights also contain references to solidarity, such as for example: Article 1, Preamble, Universal Declaration of Human Rights, 38; African Commission on Human and People's Rights; African (Banjul) Charter of Human and Peoples' Rights; UN General Assembly Resolution 3201 (S-VI), *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, (6th special session) A/RES/S-6/3201.

25 Chapter I, Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, 1 January 1973, UN Doc A/CONF.48/14/Rev.1; Volume I, Annex I, Principle 27, Rio Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development,* 12 August 1992, UN Doc A/CONF.151/26/Rev.1.

26 Solidarity in international environmental law is demonstrated in three ways: 'in relation to the principle of 'common but differentiated responsibilities' ('CBDR'), which is based on the need for states to cooperate 'in a spirit of global partnership' in order to conserve and protect the Earth's ecosystem...', second '...by way of the flexibility mechanisms, and in particular, the Clean Development Mechanism ('CDM')...' and third '...by the creation of funding initiatives.' Williams, A, "Symposium--Climate Justice and International Environmental Law: Rethinking the North-South Divide', 10 *Melbourne Journal of International Law* (2009), 493, 505-507.

27 UN General Assembly, *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/S-6/3201; UNGAOR, 6th Specialized Session, Support No 1 (1974) A/9559; Charter of Economic Rights and Duties of States, *GA Res 3281 (XXIX)*, (1974) A/3281; International Law Association, *Report of The Sixty-Second Conference held at Seoul, from 24 August to 30 August 1986*, 5; The Seoul declaration of the International Law Association, which further elaborated the issue by stating that 'The principle of solidarity reflects the growing interdependence of economic development, the growing recognition that States have to be made responsible for the external effects of their economic policies and the growing awareness that underdevelopment or wrong development of national economies is also harmful to other nations and endangers the maintenance of peace. Without prejudice to more specific duties of cooperation, all States whose economic, monetary and financial policies have a substantial impact on other States should conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation. In the legitimate exercise of their economic sovereignty, they should seek to avoid any measure which causes substantial injury to other states, in particular to the interests of developing States and their peoples'.

28 R. St J. Macdonald, Solidarity in the Practice and Discourse of Public International Law, (1996) 8, *Pace*

in the sense that it does not encompass the whole of the actors which participate in the international community and on whose, solidarity applies as a principle.

Different conceptual approaches, argue in favour of the distinction between solidarity and cooperation, as well as of solidarity and collective security identifying in the former a principle which is autonomous and not secondary to another concept.[29] While this view has the merit of addressing solidarity as an autonomous principle it fails to capture the fact that a principle can transcend other principles and norms while still being autonomous and not of a subordinate nature.

In such a sense the argument of this paper is that solidarity, because it is a fundamental and primary principle of international law is also omnipresent in the collective security system and in a vast area of international law. It has been 'formulated with the intention of changing or confirming, as the case may be, elements of the existing legal order, or if its implementation would have that effect'.[30]

Characteristically, the independent expert for human rights on behalf of the human rights commission, Rudi Muhammad Rizki, in his report of 2010, concluded that 'International solidarity is perceived by virtually all respondents as a principle, and by several as a right in international law...International solidarity is seen as a means essential to the international community's pursuit of peace, sustainable development and the eradication of poverty.'[31]

As UN, General Assembly - GA - resolution 57/213 provided in one of the few documents where solidarity is explicitly mentioned, it is 'a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most;'[32] Similarly, the Human Rights Council report on 'Human Rights and International Solidarity' and the 2000 UN Millennium Declaration, referred to solidarity as a principle or value of international law.[33]

In this framework, a more specific manifestation of solidarity is analysed in this article, namely, consensual intervention or intervention by invitation. The following debate encompasses both 'directions' of solidarity: between governments but also towards

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International Law Review, 259, 259–260; Keohane, RO, "Sovereignty, Interdependence, and International Institutions", in Miller, LB and Smith, MJ, eds, *Ideas & Ideals: Essays On Politics In Honor of Stanley Hoffmann* (Westview 1993), 91 and 92.

29 Boisson de Chazournes, *supra* nt 7, 97.

30 Cook, *supra* nt 7, 509; Cheng, B, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press 2006), 7-25.

31 Rizki, RM, *Report of the Independent Expert on Human Rights and International Solidarity,* 5 July 2010, A/HRC/15/32 para 6.8; Not all state or academic opinions on the matter are unanimous though. There are opinions which denounce the existence of a legal principle of solidarity, arguing that it exists solely as a political and moral principle. Dann, P "Solidarity and the Law of Development cooperation" in Wolfrum and Kojima, eds, *Solidarity: A Structural Principle of International Law* (Max-Planck-Institut fur auslandisches offentliches Recht and Volkerrecht, Springer 2009); Other approaches have been proposed as well, suggesting that solidarity is indeed a legal principle but without adding new obligations, while other approaches insist on a re-distributive consequence of solidarity as a legal principle in favour of less-developed states; Williams, A, "Symposium--Climate Justice and International Environmental Law: Rethinking the North-South Divide", 10 *Melbourne Journal of International Law* (2009), 493, 503.

32 UN General Assembly, Promotion of a democratic and equitable international order, 25 February 2003, (57th plenary meeting) A/RES/57/213.

33 Human Rights Commission, *Human rights and international solidarity* (2009) A/HRC/12/L.20, paras 14-16; UNGA, *Resolution 55/2. United Nations Millennium Declaration*, 18 September 2000, (55th plenary meeting) A/RES/55/2, para 6.

the people.

III. Intervention by Invitation and Its Limits

A. The Limits of the Right of a Legitimate Government to Consensual Intervention

The concept of intervention by invitation or with consent, has been proven, in practice, to be one of the most complicated, implicating issues of government legitimacy (from different perspectives) as well as collective security.[34]

Traditionally, it is widely accepted that an invitation by the recognised government of a State,[35] which effectively controls the territory and the population, constitutes a legitimate basis for intervention,[36] provided the consent to intervention is genuine.[37]

The origins of this approach can be identified in a combination of mainstream concepts about sovereignty, approaches to international law as a legal system built on State consent and the provisions of the UN Charter regarding the equal sovereignty of all States. On the basis of such an understanding of sovereignty, the foundation of which is that the sovereign is the ultimate and sole superior over the territory and the population in legal and political terms[38], it is widely accepted that the government of a State possesses the authority to opt out of the general prohibition on the use of force, which is foreseen in the Charter, when providing its consent for an intervention in its territory.

The invitation of intervention is perceived as a bilateral agreement between the inviting, or consenting, part and the intervening part, which suspends the normal code of conduct and rules regulating their relationship regarding the use of force.[39] After all, force is not used against the territorial integrity or the political independence of the State, but in furtherance of them, despite literally taking place in the territory of the State.

Because of that, the 'Use of Force Committee of the International Law Association' characterised consent as an 'additional lawful basis for a state's armed forces to enter and/or be stationed on the territory of another state…' It also suggested that consent is not 'an exception to the prohibition of the use of force. The exceptions of Security Council authorisation and self-defence (as discussed above) remain a violation of State sovereignty,

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34 Falk, RA, "Introduction", in Falk, RA, ed, *The International Law of Civil Wars* (John Hopkins Press 1971), 18; The area under examination is that of internal armed conflicts, in the sense of 'sustained, large-scale violence between two or more factions seeking to challenge, in whole or in part, the maintenance of governmental authority in a particular state.'; Millerson, R, "Intervention by Invitation", in Damrosch, L and Scheffer, D, eds, *Law and Force in the New International Order* (Westview Press 1991), 127,128-29; Henkin, L, "The Invasion of Panama Under International Law: A Gross Violation", 29 *Columbia Journal of Transnational Law* (1991), 293; Reisman, WM, "Humanitarian Intervention and Fledgling Democracies", 18 *Fordham International Law Journal* 794, (1995), 800.

35 Abass, A, "Consent Precluding State Responsibility: A Critical Analysis", 53 *International and Comparative Law Quarterly* (2004), 211, 223-224; The government is supposed to bear and exercise the sovereignty of the state and therefore express its will.

36 Whippman, D, "Military Intervention, Regional Organizations and Host-State Consent", 7 *Duke Journal of International & Comparative Law*, (1996), 209, 209.

37 International Law Commission, Ago, R, *Eighth Report on State Responsibility*, (1979) A/CN.4/318, para 3, 35-36.

38 Worth, JR, "Globalization and The Myth of Absolute National Sovereignty: Reconsidering The 'UN-SIGNING' Of The Rome Statute And The Legacy Of Senator Bricker", 79 *Indiana Law Journal* (2004) 245, 258; Kwiecie, R, "Does the State Still Matter? Sovereignty, Legitimacy and International Law", 32 *Polish Yearbook of International Law* (2012), 45, 57, 60; Frohnen, BP, "A Problem of Power: The Impact of Modern Sovereignty on The Rule of Law in Comparative and Historical Perspective", 20 *Transnational Law & Contemporary Problems* (2012), 599, 600; Permanent Court of International Justice (PCIJ), *The case of the S.S. "Lotus" (France v Turkey)*, PCIJ Series A no 10, ICGJ 248, 18, 7 September 1927.

39 Ago, R, *supra* nt 37, paras 31–32.

but are excused violations. On the other hand, a State's use of force on the territory of another State upon its consent involves no violation of State sovereignty *ab initio*.'[40]

The same view was adopted by the International Court of Justice in the famous Nicaragua Case,[41] as well as in the DRC v Uganda case, provided the consent was valid.[42] The Draft Articles on State Responsibility also provide in article 20, that: 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'[43]

Implicit, albeit strong evidence for the prevalence of this approach can be found in two UN Resolutions; 3314 and 387 respectively. Article 3, para. e, of resolution 3314 defines aggression as - among other things: 'The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;'[44] Indirectly but profoundly it can be concluded that within the framework of the agreement of the hosting State, the military activities are legitimate. The Security Council, in its 387 resolution, also reiterated the 'inherent' right of every State to '…request assistance from any other State or Group of States.'[45] Combining the aforementioned positions, the lawfulness of consensual intervention has come to be considered by several analysts as axiomatic.[46]

Consensual intervention is implicitly presented as a manifestation of inter-State solidarity, which therefore complies with the inherent admissions of the collective security system and thus retains its lawfulness.

This is not an uncontested approach, of course. The core of the theoretical argument about non-interventionism, in spite of consent, is that since a government needs to invite a foreign intervention in order to consolidate its authority, its position as sovereign is already compromised and therefore a foreign intervention will determine what is, and what should be, essentially a domestic rivalry for the determination of the polity and the socio-economic model of a country; therefore, a violation of self-determination and sovereignty.[47]

In addition, it is argued that intervention even by consent could internationalise the

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40 International Law Association, *Washington Conference, Use of Force, Report on Aggression and the Use of Force,* (2014), 13.

41 International Court of Justice (ICJ), *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14, para 126.

42 McGuinness, M, *Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations*, (2006), 10(1), ASIL Insights.

43 Article 20, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53rd Session, April 23 - June 1, July 2 - August 10, 2001; A criticism to this argumentation though is that it lacks precision given that the term prohibited intervention is not a clarified enough term. Therefore, the preclusion of the wrongfulness of a loosely defined act becomes problematic in the first place.

44 UN General Assembly Resolution, Definition of Aggression, 14 December 1974, (29th plenary meeting), A/RES/29/3314, Article 3(e).

45 UN Security Council, Angola- South Africa, 31 March 1976, (1900th meeting) S/RES/387.

46 Gray, C, *The Use of Force in International Law*, (Oxford University Press 2008), 85.
Schmitt, M, Drone Attacks under the Jus as Bellum and Jus in Bello: Clearing the "Fog of Law", (2010) 13, *Yearbook of International Humanitarian Law*, 311, 315.

47 Lauterpacht, H, *Recognition in International Law,* (Cambridge University Press 1947), 93-94, 233-234; Byrne, M, "Consent and the Use of Force: an examination of "intervention by invitation" as a basis of US drone strikes in Pakistan, Somalia and Yemen" 3(1) *Journal on the Use of Force and International Law* (2016) 97, 100.

conflict therefore it could endanger international peace and security.[48]

Non-interventionism, when projected onto the debate about solidarity implies that inter-State solidarity can be antagonistic with solidarity towards the people of that same State, since or when it suppresses their aforementioned self-determination right.[49] In the comparison or potential antithesis between the two aspects of solidarity, the latter is perceived as morally prevalent in the sense that the State and its government are supposed to be means for the welfare of the people and not vice-versa. Therefore, inter-State solidarity becomes subordinate to solidarity towards the people.

A number of important scholars endorsed non-interventionism, in the framework of de-colonisation, advocating non-interventionism in furtherance of a right to revolution and internal self-determination.[50] Intervention under consent is in this sense approached as a violation of article 2(4) of the UN Charter.[51]

From such a perspective, in 1975 the Institut De Droit International – IDI - adopted the Principle of Non-Intervention in Civil Wars, according to which, in any case of internal conflict, no intervention should take place.[52] Although that was not a complete prohibition of intervention, it extended at the vast area of internal conflicts.

It must be mentioned however, that there is not a unanimous understanding on whether the IDI resolution constituted '*lex lata*' or at least a 'persuasive interpretation of the general rule against nonintervention' or '*de lege ferenda*'.[53] However, the attitude which was adopted in the 2009 report seems closer to the latter position, given that it recognises that there are conflicting and opposing views in relation to the issue of nonintervention.[54]

This position was partially amended in 2011[55] by foreseeing some exemptions to non-interventionism: de-colonisation wars, wars in the course of which genocidal acts or gross violations of human rights take place, civil riots or conflicts below the threshold of

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48 Wedgwood, R, "Commentary on Intervention", *in* Damrosch, LF and Scheffer, DJ, eds, *Law and Force in the New International Order* (Westview Press 1991), 135.

49 Here can be identified the other interpretation of the vertical/horizontal dimension of solidarity, considering the vertical dimension as inter-State and the horizontal, as directed towards the people. A more accurate description, without making much difference regarding the actual meaning of the terms would be the one differentiating between solidarity among state governments- in this sense horizontal - and solidarity between States or international organisations and people - a diagonal aspect of solidarity.

50 Wright, Q, *The Role of International Law in the Elimination of War*, (Manchester University Press, Manchester, 1961), 61; Brownlie, I, *International Law and the Use of Force by States*, (Clarendon Press, 1963), 327; Norton Moore, J, "Legal Standards for Intervention in Internal Conflicts", 13 *Georgia Journal of International and Comparative Law* (1983) 191, 196; Schachter, O, "International Law: The Right of States to Use Armed Force", 82 *Michigan Law Review* (1984) 1620, 1641; Gray, CFC, *International Law and the Use of Force*, (Oxford University Press 2008), 81; Max Planck Institute, REPORT: *Independent International Fact-Finding Mission on the Conflict in Georgia, Report Vo. II*, September 2009, *at* <http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf> (accessed 28 November 2018), 278.

51 Schachter, O, "The Right of States to Use Armed Force" 82(5/6) *Michigan Law Review* (1984) 1620, 1641.

52 Schindler, D, Institut De Droit International, *The Principle of Non- Intervention in Civil Wars, Eighth Commission, Article 2(1)*, 14 August 1975, *at* <http://www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf> (accessed 28 November 2018); Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.

53 Schachter, O, "International Law: The Right of States to Use Armed Forces" 82, *Michigan Law Review* (1984) 1620, 1620-1646; Hafner, G, Present Problems of the Use of Force in International Law, (2009), 73, *Annuaire de l'Institut de droit international- Session de Naples*, 10th Commission, 303, *at* <http://www.idi-iil.org/app/uploads/2017/06/Hafner.pdf> (accessed 21 January 2019).

54 Hafner, *supra* nt 53, 304.

55 Lieblich, E, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013), 135.

non-international armed conflicts and terrorism.[56]

However, it is difficult both from an historical and empirical, as well as from a normative perspective to embrace an absolute prohibition of consensual intervention or even a reversal of the right - in principle - of a State government to consent to intervention. From the Spanish Civil War experience and the failure of the democratic States to provide valuable help to the legitimate government, to the genocide in Rwanda and the current concerns about non-State actors, a solid and general commitment to a 'negative equality' principle and to non-interventionism could seriously undermine international legal norms and collective security.

The complete nonintervention thesis, despite its significance is also influenced by the political realities of each era – such as by the Vietnam war[57] - and although it might fit in with them, its potential generalisation could and would have undesirable effects in terms of the international legal order.

In addition, a general prohibition of the right of the lawful government to consent would undermine the foundations of international legal order, diminishing State sovereignty, which lies out of the UN Charter context and of the *opinio juris* of most international actors, States and non-State actors alike. Eventually, it would lead to a situation if imbalance between solidarity towards the people and solidarity among States.

This is why views which attempt to reach a balance between the lawfulness of consensual intervention and the complete noninterventionism emerge. Some of them distinguish between '*de lege lata*' and '*de lege ferenda*', while others accept the lawfulness of consensual intervention but pay more attention to the legitimacy of the government providing the consent.[58]

In general, however, it is reasonable to accept the right of a recognised government State to consent to an intervention in principle but also to question whether it may exercise this right unconditionally or not. The answer to this question prerequisites the answer to a preliminary question: whether sovereignty is legally unlimited or not.

Traditionally, sovereignty is perceived as legally unlimited and unbounded by any other State or authority. This perception has passed into the icon of international law and of the international community as founded on the (inter-) State will and sovereignty.[59]

As Professor Greenwood explains, contrary to domestic legal systems: 'There is no 'Code of International Law'. International law has no Parliament and nothing that can really be described as legislation... The result is that international law is made largely on a decentralised basis by the actions of the 192 States which make up the international

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56 Hafner, *supra* nt 53, 319–338.

57 Nolte, G, *Intervention upon Invitation: Use of Force by Foreign Troops in Internal Conflicts at the Invitation of a Government under International Law*, (Springer 1999), 116.

58 Lieblich, *supra* nt 55, 137;

59 PCIJ, *The case of the S.S. "Lotus" (France v Turkey)*, 7 September 1927, PCIJ Series A no 10, ICGJ 248, 18; As the Permanent Court of International Justice in the famous "S. S. Lotus" case held: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed'; Worth, JR, "Globalization and The Myth of Absolute National Sovereignty: Reconsidering The "UN-SIGNING" of The Rome Statute and The Legacy Of Senator Bricker" 79 *Indiana Law Journal* (2004) 245, 258; Kwiecie, R, "Does the State Still Matter? Sovereignty, Legitimacy and International Law" 32 *Polish Yearbook of International Law* (2012) 45, 57, 60; Frohnen, BP, "A Problem of Power: The Impact of Modern Sovereignty on The Rule of Law in Comparative and Historical Perspective" 20 *Transnational Law & Contemporary Problems* (2012) 599, 603.

community.'[60] Therefore, once the bearer of sovereignty is identified, no, or little, interference in its free will can be acceptable.

However, sovereignty has also been defined as responsibility '...to protect the welfare of its own peoples' and to 'meet its obligations to the wider international community.'[61] Or, as it has been suggested, the international system or community is nowadays a 'tightly woven fabric of international agreements, organisations, and institutions that shape [States'] relations with each other and penetrate deeply into their internal economics and politics', which necessitates a new type of sovereignty based on achieving common goals through working together.[62]

Since the adoption of the UN Charter, State sovereignty is comprehended not as 'limitless' - not even within the domestic sphere - but as limited or restrained because of the participation of the State in the constitutionally formulated international community and therefore by international law.[63]

It is the State's free will that determines its participation in the wider international community. In such a sense, State sovereignty is not restrained in favour of another sovereign - which would deprive it essentially of its sovereignty - but within a legal system which the State itself has accepted and 'internalised'.[64] State sovereignty emerges as a concept not distinct from that of the international community, but as a concept existing and evolving within the international community,[65] under the 'international law

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60 United Nations Office of Legal Affairs, Greenwood, C, *Sources of International Law: An Introduction*, 2008, *at* <http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf> (accessed 28 November 2018).

61 UNGA, *A More Secure World*, *supra* nt 23, 22.

62 Chayes, A and Handler Chayes, A, *The New Sovereignty: Compliance with International Regulatory Agreements,* (Harvard University Press 1995), 26.

63 Fassbender, B, "Sovereignty and Constitutionalism in International Law", *in* Walker, N, ed, *Sovereignty In Transition* (Hart Publishing 2003), 131.

64 Rozakis, L, *The Concept of Jus Cogens in the Law of Treaties* (Amsterdam North-Holland Publications Co 1976) 1; Characteristically, the violation of *jus cogens* norms is to be confronted by the international community regardless of sovereignty and potential domestic legitimacy.

65 As an idea it is not that different from Aristotelian or Freudian ideas about why the individual needs to (co-) exist in organised societies, in order to enhance its potentials and achieve a more complete form of humanity, despite the restrictions imposed upon him/her because of his/her social life; The change of paradigm regarding sovereignty is, to some extent, a result of the internationalisation of human rights and a 'humanisation' of international law, of the designation of individuals or communities of people not only as objects but also as partially autonomous subjects of international law, who, under specific circumstances, might not be represented by their governments at the international level, as well as of the institutionalisation of the international community through international legal norms of a fundamental and binding nature regardless of States' adherence to such norms or even contrary to domestic legitimacy; I, Cotler, Minister of Justice and Attorney General of Canada, *Building a New International Law: What Have We Learned, What Must We Do?*, Address to the Magna Carta Foundation (January 12, 2005). Such are the cases of national liberation and self-determination movements. Under some opinions this is also the case of systematic and gross violations of human rights, although such arguments are far from unanimously accepted; Mullerson, R and Scheffer, DJ, "Legal Regulation of the Use of Force", *in* Damrosch, L, Danilenko, G and R. Mullerson, R, eds, *Beyond Confrontation: International Law For The Post-Cold War Era*, (University of Michigan Press, 1995), 125-126; Byers, M, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999), 194; Spagnoli, F, "The Globalization of Human Rights Law: Why do Human Rights Need International Law?" 14 *Texas Wesleyan Law Review* (2008) 317, 325- 326; Conklin, WE, "The Peremptory Norms of The International Community" 23 *European Journal of International Law* (2012) 837, 838; Crawford, J, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge University Press 2002), 148-150, 158-160.

supremacy principle'.[66]

International law, therefore, because of the supremacy principle, is not merely seated upon the domestic legal order, but also rearranges partially the latter, under the imperatives of the collective security system and its goals, which are articulated in the two aspects of inter- State solidarity and of solidarity towards the people.

In addition, the transformation or reinterpretation of sovereignty in accordance with international law means that while State sovereignty has a singular bearer - namely the government of the State - it is not only a privilege, but also a responsibility towards the people of the State, who participate in the international legal order not only indirectly through their States, but also directly, as subjects and objects of international law.[67]

In such a framework, the traditional concept of State sovereignty is transformed[68] in favour of its approach in the wider framework of international law. The argument then, in relation to consensual intervention, is that even if the government of the State is recognised as the legitimate one, its right to consensual intervention is not absolute. Since the government in general needs to comply with international law - or at least with its most fundamental rules - the government privilege and right to invite an intervention follows the limitations that are imposed upon sovereignty by international law, as well.[69]

In the light of this, the scope of intervention, as well as its methods, must be placed under scrutiny.[70] An intervention that endangers the collective security system, in furtherance of the commission of internationally prohibited crimes - such as genocide, war crimes, crimes against humanity, ethnic cleansing - implicating the commission of mass and grave violations of human rights, aiming at the suppression of self-determination movements[71] or which is supportive of apartheid and racist regimes would profoundly contradict international legitimacy; such a contradiction cannot be 'healed' by government invitation. Consent in general can be no excuse for neglecting the rights of individuals within the consenting State, who after all are subjects of international law too, or for violating at least fundamental norms of international law.[72]

An invitation on behalf of the government cannot legitimise an intervention in

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66 Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'; Teson, F, "Le Peuple, C'est Moi!: The World Court and Human Rights" (1987) 81 *American Journal of International Law* (1987) 173, 175-178.

67 Le Mon, J and Taylor, RS, "Security Council Action in the Name of Human Rights: From Rhodesia to the Congo" 10(2) *UC Davis Journal of International Law* (2004) 197, 199; Arnison, ND, "International Law and Non- Intervention, When Do Humanitarian Concerns Supersede Sovereignty?" 17 *Sum Fletcher F. World AFF* (2003) 199, 203.

68 Boyle, FA, *Destroying World Order: U.S. Imperialism in the Middle East before and after September 11th* (Clarity Press, 2004), 107.

69 Orford, A, *Reading Humanitarian Intervention, Human Rights and the Use of Force in International Law* (Cambridge University Press 2003), 4; Scheffer, DJ, "Toward a Modern Doctrine of Humanitarian Intervention" 23 *University of Toledo Law Review* (1992) 253, 262- 263; Berlin, AH, "Recognition As Sanction: Using International Recognition Of New States To Deter, Punish, And Contain Bad Actors" 31 *University of Pennsylvania Journal of International Law* (2009) 531, 568-570.

70 Bannelier, K and Christakis, T, "Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict" 26 *Leiden Journal of International Law* (2013) 855, 855-874; Bannelier-Christakis, K, "Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent" 29 *Leiden Journal of International Law* (2016) 743, 745.

71 Wilson, HA, *International Law And The Use Of Force By National Liberation Movements* (Clarendon Press, 1988), 91-136.

72 Deeks, AS, "Consent To The Use Of Force And International Law Supremacy" 54 *Harvard International Law Journal* (2013) 1, 21-22.

furtherance of scope and acts, which, if conducted by the government of the State itself, would be illegal under international law.[73]

Article 16 of the International Law Commission report of 2005, on 'Responsibility of States for Internationally Wrongful Acts' - which the International Court of Justice, in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) determined that endorses a principle of customary international law[74] - is crystal clear on that.[75] It prerequisites knowledge on behalf of the assisting State of the unlawfulness of its act and for the act to constitute breach of the State's own obligations,[76] as well as a 'nexus' between the assistance and the internationally wrongful act.[77]

The level of intent constitutes the one critical issue. As Dapo Akande commented 'Art. 16 …requires knowledge …[whereas] the ILC's own commentary … seems to require that assistance be given 'with a view' to, or with the intent of, facilitating the commission of wrongful act.' The commentary of the ILC refers to awareness of the circumstances determining the wrongfulness.[78]

The ICJ in the Bosnian Genocide Case, as well as several analysts advocated the need of being aware of specific illegality,[79] as well as that ignorance of law is no excuse.[80] The issue is far from clear, varying from 'almost certainty'[81] to the much lower level or 'recklessness'.[82]

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73 Whippman, D, "Military Intervention, Regional Organizations and Host-State Consent*"* 7 *Duke Journal of Comparative & International Law* (1996) 209, 215.

74 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007, 420; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007 (Dissenting Opinion of Judge ad hoc Mahiou), para 124.

75 Article 16, International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001); 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State'.

76 EJIL: Talk!, Akande, D, *Chatham House Paper on Aiding and Assisting by States*, November 28, 2016, *at* <www.ejiltalk.org/chatham-house-paper-on-aiding-and-assisting-by-states/> (accessed 28 November 2018).

77 International Law Commission, *supra* nt 19.

78 *Ibid.,* Article 16, para 4.

79 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007 (Dissenting Opinion of Judge ad hoc Mahiou), para 421; Chatham House, International Law Program, Moynihan, H, REPORT: *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, Research Paper, 14 November 2016, *at* <https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism> (accessed 28 November 2018), para 36; Crawford, J, *State Responsibility: The General Part* (Cambridge University Press 2013), 407; Nolte, G and Aust, HP, "Equivocal Helpers Complicit States, Mixed Messages and International Law" 58 *International & Comparative Law Quarterly* (2009) 1, 14.

80 International Law Commission, Crawford, J, "Statement of Special Rapporteur" I *Yearbook of the International Law Commission* (1999) 69, para 14.

81 Crawford, J*, supra* nt 79, 408; International Law Commission, Ago, R, 2(II) *Yearbook of the International Law Commission* (1978) UN Doc A/CN.4/SER.A/1978/Add.1 (Part 2), para 10; Between actual knowledge, and 'constructive' awareness, an intermediary level which has been proposed is that of 'wilful blindness'; Moynihan, *supra* nt 79, paras 46-49; ICJ, *Corfu Channel case (UK v Albania) (Merits)* (1949) ICJ Rep 4; The ICJ, in the 'Corfu Channel Case' interpreted and implemented this criterion as 'must have known'.

82 Just Security, Goodman, R, *Foreign Gov't Assistance to Trump Administration Policies: What Int'l Law*

Taking into account the magnitude of State force and impact on international relations, the need to balance between State-centered security and interests on the one hand and human security on the other hand - or in other words taking into account the need to balance between solidarity towards States and towards the people - as well as the practical difficulty in identifying the actual intent of a State, the threshold must not be raised too high to be ever met. In this sense, considerable 'recklessness' in the use of State's own force should be considered as enough in order for State's behavior to fall within the Article 16 provisions.

As for the nexus element, it is not absolutely clear if the threshold is placed at the 'significant contribution' level or even to 'minor degree',[83] although the former seems more suitable as a criterion.[84] The actual determination of the fulfillment or not of this criterion rests of course on the factual analysis on the ground. Again though, the aforementioned criterion of acknowledgment of State's responsibility and of the need to balance between the State-centered and the human-centered aspects of security and solidarity necessitates an intermediary.[85] Such cases of consensual intervention would endanger international peace and security and distort the collective security system.[86]

Therefore, while governments do possess in principle the right to invite an intervention, this right is not unlimited and cannot contravene their obligations under international law such as those mentioned above. In addition, while governments can legitimately intervene in the framework of inter-State solidarity they cannot bypass their obligation to take into account their responsibility to manifest their solidarity towards the people of other States too, directly.

This latter remark is not simply 'old wine into new bottle'. The reference to solidarity as a criterion for the assessment of the compliance of States with international law, in the framework of consensual intervention, offers a more thorough examination of the limits of State consent, which are placed in relation to the wellbeing of specific objects of interest - States and people - which need to be taken into account when an intervention is sought.

Solidarity constitutes the internal and fundamental, normative criterion - albeit with a strong ethical component within its normativity - which determines if and how consensual intervention will be implemented, in line with the collective security system imperatives. The limit of horizontal, inter-State agreements is international law, as a legal system with solidarity at its foundation, in its very own, vertical, hierarchical framework

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Prohibits, 23 November 2016, *at* <www.justsecurity.org/34835/foreign-govt-assistance-trump-administration-policies-intl-law-prohibits/> (accessed 28 November 2018).

83 UN, *Draft articles on Responsibility of States for Internationally Wrongful Acts* (2001), Article 16, paras 5 and10.

84 Moynihan, *supra* nt 79, para 24; In any case, the level of the Saudi- led coalition involvement in the Yemeni war is more than significant; it is catalyst.

85 A certain approach would be to distinguish in the face of such situations between the actual act of consent provision and the content, the substance of this act; or in other words between the lawfulness of the intervention as such but not of the actions committed in the course of it, when wrongful acts are committed. While such a clear distinction seems and is logical it fails to capture the organic consistency of the provision of consent: an act of consent must not be assessed only procedurally but also teleologically.

86 White, ND, "On The Brink Of Lawlessness: The State Of Collective Security Law" 13 *Indiana International & Comparative Law Review* (2002) 237, 237; Fowler, MR, "Collective Security And The Fighting In The Balkans" 30 *Northern Kentucky Law Review* (2003) 299, 299; Morgenthau, H, *Politics Among Nations: The Struggle for Power and Peace* (AA Knopf 1948), 232; Wolfers, A *Discord And Collaboration* (The John Hopkins Press 1962), 168.

and of course the collective security system, in its holistic interpretation.[87]

B. The Question of the Right to Consensual Intervention in the Face of Contested Authority and Government Legitimacy

Things become further complicated in cases of contested sovereignty and government legitimacy. The examination of this last issue requires an analysis of government legitimacy in the course of internal conflict in order to identify criteria according to which one can determine when a government, or any other entity, possesses the authority to consent to an intervention.

The question of government legitimacy has been proven highly divisive partially because of the relative ambiguity of international law,[88] but mainly because of the double - if not multiple - standards by States, as well as by UN organs, in the face of different cases.[89]

A standard and traditional approach considers as legitimate the government that controls the territory and the population of a State,[90] for a sufficient period of time,[91] regardless of other issues of internal or international legitimacy.[92]

The UN through its organs appears to have favoured such an approach as the case of the seat of China in the UNSC indicated. Then - Secretary General – SG - of the UN, Trygve Lie, had argued that the legitimate representative of China in the UN should be appointed from the communist instead of the nationalist government,[93] since the primary was the one controlling the territory and the population and was capable of fulfilling China's obligations towards the UN.[94]

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87 Schachter, O, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991), 81.

88 Arend, A and Beck, R, *International Law and the Use of Force: Beyond the Charter Paradigm* (Routledge 1993), 193.

89 Smith, S, "The Plight Of The Secular Paradigm" 88 *Notre Dame Law Review* (2013) 1409, 1412-1413.

90 Farer, TJ, "Panama: Beyond the Charter Paradigm" 84 *American Journal of International Law* (1990) 503, 510-11; Nowrot, K, "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone" 14(2) *American University International Law Review* (1998) 321, 388- 389; Takashi, M, "Recognition of States and Governments in International Law: Theory and Practice" 28 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2010) 64, 64-65; Lloyd, DO, "Succession, Secession, And State Membership In The United Nations" 26 *New York University Journal of International Law & Politics* (1994) 761, 761.

91 Beck, D, The Legal Validity of Military Intervention by Invitation of the Government 56 *British Yearbook of International Law* (1985) 189, 251.

92 Roth, BR, "Governmental Illegitimacy Revisited: 'Pro-Democratic' Armed Intervention in the Post-Bipolar World" 3 *Transnational Law & Contemporary Problems* (1993) 481, 482; Wimmer, H, The State's Monopoly on Legitimate Violence. - Violence in Historyand in Contemporary World Society as Challenges to the State. Paper presented at the Conference "Transformations of Statehood from a European Perspective", January 23-25 2003, Vienna, organized by the Austrian Academy of Sciences. Vidmar, J, "Territorial Integrity and The Law Of Statehood" 44 *George Washington International Law Review* (2012) 697, 700; Kelsen, H *General Theory Of Law And State* (Cambridge University Press 1961), 220-221; Similar is Krasner's suggestion. He went on saying that 'Domestic sovereignty does not involve a norm or a rule, but is rather a description of the nature of domestic authority structures and the extent to which they are able to control activities within a State's boundaries. Ideally, authority structures would ensure a society that is peaceful, protects human rights, has a consultative mechanism, and honours a rule of law based on a shared understanding of justice'; Krasner, S, "Sharing Sovereignty. New Institutions for Collapsed and Failed States" 29(2) *International Security* (2004) 85, 88; Krasner, S, *Sovereignty. Organized Hypocrisy* (1999, Princeton University Press), 3.

93 Brownlie, I, *Principles of Public International Law* (Oxford University Press 1998), 91.

94 Downer, J, "Towards A Declaratory School Of Government Recognition" 46 *Vanderbilt Journal of Transnational Law* 581 (2013) 589–591; However, this approach does not imply that the communist China did not meet the criteria as they are set by the Charter, concerning international law*;* US Senate, *Committee on Foreign Relations, Libya and War Powers*, *Hearing*, S. Hrg. 112 – 189, 28 June 2011, *at*

However, the internal, constitutional legitimacy and the compliance with international law have also been proposed as legitimising factors.[95] It is in this framework, that in cases of contested authority between the government exercising effective control and the legitimate one according to domestic law, when consensual foreign intervention is at stake, Talmon argues in favour of attributing authority for lawful consent to the latter.[96]

D'Aspremont presented a somewhat different distinction '… between the legitimacy pertaining to the source of power and the legitimacy related to the exercise of power', with the primary referring to the origin of power, while the latter to its actual implementation; the qualification of a government originates from the legitimacy according to the origin of power, while disqualification refers to its exercise.[97]

In a number of cases, dealing with military coups or with specific types of regimes, which violate the fundamentals of international law the effective control criterion receded in front of internal legitimacy.[98]

<https://www.foreign.senate.gov/download/hearing-transcript-062811> (accessed 21 January 2019); It has been also proposed that States should not officially recognise or deny recognition to other governments and regimes, but simply deal with them. The official US approach is not that different. The legal adviser of the US Department of State suggested that: '[I]nternational law focuses on the question of recognition, and recognition tends to follow facts on the ground, particularly control over territory. As a general rule, we are reluctant to recognise entities that do not control entire countries because then they are responsible for parts of the country that they don't control, and we're reluctant to derecognise leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control'.

95 Reisman, WM, "Humanitarian Intervention and Fledgling Democracies" 18 *Fordham International Law Journal* (1995) 794, 796; This was not a totally novel approach. In 1964, for example, President Julius Nyere of Tanganyika turned to the UK army when he was overthrown by a coup, asking and legitimising an intervention although he was not in control of his country. Similar consensual interventions have taken place by France in its former colonies. In all these cases, the international community did not seem to question the legitimacy of the interventions; Whippman, *supra* nt 73*,* 216.

96 Talmon, S, *Recognition of Governments in International Law* (Clarendon, 1998), 113; Marks, S, "What Has Become of the Emerging Right to Democratic Governance" 22 *European Journal of International Law* (2011) 507, 511; In the aftermath of the events in Haiti and of the coup against Gorbachev, the school of Manhattan, and in particular, the work of Thomas Franck advocated the recognition of a right to democratic governance, as an ecumenical criterion for government legitimacy; Roth, B, "Popular Sovereignty: The Elusive Norm" 91 *American Society International Law Proceedings* (1997) 363, 368; Despite its influence in the academic environment and public debate, the general acceptance of such a criterion of legitimacy has been denounced both on political and legal grounds. After all, neither *opinio juris* leading to a customary rule- nor a universal definition of democracy can be traced; Steiner, H and Alston, P, *International Human Rights in Context: Law, Politics*, Morals (2nd ed, Oxford University Press 2000), 888; Foreign Affairs, Nathan, A, *The Tiananmen Papers*, 1 January 2003, *at* <www.foreignaffairs.com/articles/56670/andrew-j-nathan/the-tiananmen-papers> (accessed 28 November 2018) 80; Haltern, U, "Book Review" 7 *European Journal of International Law* (1996) 135, 136; Max Planck Encyclopedia of Public International Law, Fox, G, *Democracy, Right to, International Protection*, March 2018, *at* <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e773?prd=EPIL> (accessed 28 November 2018); Fox, G and Roth, B, "Democracy and International Law" 27 *Review of International Studies* (2001) 327, 338; Murphy, D, "Democratic Legitimacy and the Recognition of States and Governments" *in* Fox, G, and Roth, B, eds, *Democratic Governance and International Law* (Oxford University Press 2000), 123, 153.

97 d'Aspremont, J, "Legitimacy Of Governments In The Age Of Democracy" 38 *New York University Journal of International Law and Politics (JILP)* (2006) 881-882; d'Aspremont, J and De Brabandere, E, "The Complementary Faces Of Legitimacy In International Law: The Legitimacy Of Origin And The Legitimacy Of Exercise" 34 *Fordham International Law Journal* (2011) 190, 193.

98 Two such cases are the ones of the S. African and Rhodesia racist regimes and of the so- called Turkish Republic of Northern Cyprus. In both cases, jus cogens were violated. The apartheid governments and subsequently South Africa as a State passed from the level of 'normal' admission in the international community, to a gradual de-legitimisation in the UNGA from which they were eventually excluded from

In relation to the issue of credentials and representation of Ethiopia in the League of Nations, as well as of Congo in 1960 and of Yemen in 1962 in the UN, a synthesis of criteria was adopted, including the compliance with international law and the dedication to world public order too.[99]

During the 90s in Liberia and in Sierra Leone, the ousting of incumbent presidents, despite the fact that they either controlled small parts of the territory - in the first case - or had fled the country - in the second case - did not prevent them from requesting foreign intervention. These requests were considered by the international community as valid and legitimate.[100]

In the case of the coup in Haiti, Chapter VII was invoked in relation to the situation of internal legitimacy and constitutional order. In this context, the overthrow of President Aristide by a military coup was followed by widespread condemnation and the demand for Aristide's return to power. Both the GA and the SC adopted resolutions concerning the condition of democracy and human rights in Haiti.[101] The denial of the military junta to comply led to the adoption of UN SC resolution 940, under Chapter VII, which, apart from authorising the use of force, referred to the ruling regime as the 'the illegal de facto regime'.[102]

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it, as well as by all UN bodies, in favour of antagonistic entities, namely the ANC and the Pan Africanist Congress of Azania, which were attributed the status of authentic representatives of the majority of the South African people. In the case of the so- called Turkish Republic of Northern Cyprus, the international community again has denied the recognition of the de facto created conditions on the ground due to the fact that it emerged out of a violation of *jus cogens* norms.
Stultz, N, "Evolution of the United Nations Anti-Apartheid Regime" 13(1) *Human Rights Quarterly* (1991) 1, 13-14; United Nations and the African National Congress, Reddy E. *Partners in the Struggle against Apartheid*, South African History Online *at* <https://www.sahistory.org.za/archive/united-nations-and-african-national-congress-partners-struggle-against-apartheid-e-s-reddy> (accessed 9 January 2019), 3-4; Lloyd, DO, "Succession, Secession, And State Membership In The United Nations" 26 *New York University Journal of International Law & Politics* (1994) 761, 767-768; Talmon, S, "Who is a legitimate government in exile? Towards normative criteria for governmental legitimacy in international law" *in* Goodwin, G and Talmon, S, eds, *The Reality of International Law. Essays in Honour of Ian Brownlie* (Oxford University Press 1999), 499; Somewhat similar was the denial by the Allies of the legitimacy of newly established governments of collaborators of the Axis during World War II.

99 McDougal, M and Goodman, R, "Chinese participation in the United Nations: the legal imperatives of a negotiated solution" *Yale Law School Legal Scholarship Repository* (1966) 694-695.

100 EJIL: Talk!, Vermeer, Z, *Intervention with the Consent of a Deposed (but Legitimate) Government? Playing the Sierra Leone card*, March 6, 2014, *at* <https://www.ejiltalk.org/intervention-with-the-consent-of-a-deposed-but-legitimate-government-playing-the-sierra-leone-card/> (accessed 28 November 2018); However, in the same article it is mentioned that in both cases, ECOWAS and ECOMOG attempted to find complementary sources of legitimacy for their intervention in furtherance of the ousted presidents. Although that is true, it is also true that the international community did not take a hostile position toward the interventions.

101 Teson, F, "A Symposium on Reenvisioning The Security Council, Collective Humanitarian Intervention" 17 *Michigan Journal of International Law* (1996) 323, 355- 356;
UN Security Council, Haiti (16 June), 16 June 1993, (3238th meeting) S/RES/841.

102 Whilst this was obviously a reference to the domestic constitutional order, it was mainly on the basis of violations of international law endangering international peace and security that the potential of the use of force was invoked- although the connection between the two seemed to imply that the illegitimacy of the government should be and was assessed from an international law perspective, despite its de facto control of population and territory; UN Security Council, Authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti, 31 July 1994, (3413th meeting) S/RES/940;
Tyagi, K, "The Concept of Humanitarian Intervention Revisited" 16 *Michigan Journal of International Law* (2005) 883, 898- 901.

In Côte d'Ivoire, a similar position was adopted when, following the 2010 presidential elections, Laurent Gbagbo, who contested the official results, managed to get proclaimed as President of the country by the President of the Constitutional Council at the expense of the President-Elect Alassane Ouattara. The UN insisted on the recognition of Ouattara, imposing sanctions on Gbagbo's government, despite the fact that the government of the latter exercised effective control.[103]

In the coup d'état in Honduras and the overthrow of President Zelaya, the UN General Assembly – GA - in resolution 63/301, apart from the condemnation of the coup, called '...firmly and unequivocally upon States to recognise no Government other than that of the Constitutional President, Mr. José Manuel Zelaya Rosales',[104] just as the Organization of American States - OAS.[105] In a similar context, in Sierra Leone[106] and in Cambodia in 1997[107] the internal legitimacy criteria were considered as the dominant ones.

It seems that to some extent, in the immediate aftermath of coups against democratically elected governments, States, and the international community, are keen to deny legitimacy to governments that have emerged out of breaches of the constitutional order of States.

The most logical explanation for this approach is that military coups are profoundly distinct from whatever any popular uprising or rebellion could be, given that coups originate from within the State apparatus and certainly are in no position to claim that they implement internal self-determination better than a democratically elected government. This stance of the international community also implies the recognition of solidarity towards the people of a State and their rights, as an obligation of other States in the framework of international law.

However, this is not a solid approach. On the contrary, it is still 'vulnerable' to ad hoc and politically biased assessments. The international community, for example, was ready to legitimise and recognise the overthrow of Egyptian President Morsi by a military coup as well as the new government that was formed by the military junta.[108]

A few decades before that, in Cambodia, during the controversy between Sihanouk's and Lon Nol's government, the UNGA recognised as legitimate the latter, which had been established by a coup, on the basis of the effectiveness criterion.[109] It is

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103 EJIL: Talk!, d'Aspremont, J, *Duality of government in Côte d'Ivoire*, January 4, 2011, *at* <http://www.ejiltalk.org/duality-of-government-in-cote-divoire/> (accessed 28 November 2018).

104 UN General Assembly, Situation in Honduras: democracy breakdown, 1 July 2009, (63rd session) A/RES/63/301.

105 The New York Times, Thompson, G and Lacey, M, *O.A.S. Votes to Suspend Honduras over Coup*, July 4, 2009, *at* <https://www.nytimes.com/2009/07/05/world/americas/05honduras.html> (accessed 28 November 2018).

106 Similar is the case of Liberia in 1990. In both cases, a request to ECOWAS for action was sent, by the overthrown but otherwise legitimate presidents.
EJIL: Talk!, Vermeer, Z, *Intervention with the Consent of a Deposed (but Legitimate) Government? Playing the Sierra Leone card*, March 6, 2014, *at* <http://www.ejiltalk.org/intervention-with-the-consent-of-a-deposed-but-legitimate-government-playing-the-sierra-leone-card/#more-10479> (accessed 28 November 2018).

107 Downer, J, "Towards A Declaratory School Of Government Recognition" 46 *Vanderbilt Journal of Transnational Law* (2013) 581, 604-605.

108 See: US Department of State, *Diplomacy in Action, Jen Psaki Spokesperson Daily Press Briefing Washington, DC*, (26 July 2013).
B. Fernandez, The State Department and a tale of two coup-type things, (Al Jazeera), 9 August 2013, *at* <https://www.aljazeera.com/indepth/opinion/2013/08/201388143913249526.html> (accessed 9 January 2019).

109 UN General Assembly, Restoration Of The Lawful Rights Of The Royal Government Of National Union Of Cambodia In The United Nations, 29 November 1974 (30th session) A/RES/3238; d'Aspremont, J,

true that the UN organs as well as States' practice has failed to produce a uniform opinion or trend within the international community.[110]

The events of the Arab Spring, concerning government legitimacy and consensual intervention, blurred the lines even further both in legal and political terms. The cases of the Arab Spring do not mainly refer to military coups versus elected governments - apart from Egypt - but to the debate about what constitutes popular uprising and what rights such movements may claim in terms of representation of the State at the expense of the recognised government. Therefore, they also raised the issue of solidarity towards peoples in other States.

Libya and Syria pose two such paradigms. Although in the first, consensual intervention was not invoked, the attempted de-legitimisation of the then-recognised Qaddafi government and the partial-recognition of another entity instead, created a great deal of legal uncertainty.

During the internal war in Libya, the Libya Contact Group[111] recognised as legitimate authority of Libya the National Transitional Council – NTC - instead of the Libyan government, on humanitarian grounds and despite the fact that NTC did no exercise effective control over Libyan territory.[112]

Dapo Akande in an accurate critique noted that 'Recognition of the Libyan NTC as the government of Libya when it did not have effective control of most of Libya was premature and therefore of dubious legality...Moreover premature recognition of governments coupled with assistance to that 'government' would set a very bad precedent indeed.'[113]

And Professor Talmon asked: 'Through his actions, Colonel Qadhafi may 'have lost the legitimacy to govern' but has he also lost the competence to do so under international law? […] International law does not distinguish between illegitimate regimes and lawful governments. 'Legitimacy' is a political concept and not a legal term of art. In fact, international law does not provide any criteria for defining and determining legitimacy.'[114]

"Responsibility for Coups d' État in International Law" 18 *Tulane Journal of International & Comparative Law* (2010) 451, 455- 456.

110 In such a framework, the US position during the proceedings of UNGA resolution 396/1950 referred to a synthesis of criteria incorporating the effectiveness of control over territory and population, the acceptance of responsibility for carrying out the obligations under UN Charter and the internal processes in the State; Annexes, Agenda Item 61, 9, United Nations General Assembly, *Official Records* (1950) A/AC.38/L.45.

111 Republic of Turkey, Ministry of Foreign Affairs, *Libya Fourth Meeting of the Libya Contact Group Chair's Statement,* (11 July 2015), *at* <http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa> (accessed 9 January 2019).

112 EJIL: Talk!, Akande, D, *Recognition of Libyan National Transitional Council as Government of Libya*, 23 July 2011, *at* <http://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/#more-3607> (accessed 28 November 2018); EJIL: Talk!, Talmon, S, *The Difference between Rhetoric and Reality: Why An Illegitimate Regime May Still Be A Government in the Eyes of International Law*, 3 March 2011, *at* <http://www.ejiltalk.org/the-difference-between-rhetoric-and-reality-why-an-illegitimate-regime-may-still-be-a-government-in-the-eyes-of-international-law/#more-3101> (accessed 28 November 2018).

113 EJIL: Talk!, Akande, D, *Would It Be Lawful For European (or other) States to Provide Arms to the Syrian Opposition?*, 17 January 2013, *at* <http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/#more-7410> (accessed 28 November 2018).

114 Talmon, *supra* nt 112; To some extent that was the position, which was shared by the US administration itself, which distinguished between legality and legitimacy of the Libyan government; EJIL: Talk!, Akande, D, *Which Entity is the Government of Libya and Why does it Matter?*, 16 June 2011, *at* <http://www.ejiltalk.org/which-entity-is-the-government-of-libya-and-why-does-it-matter/#more-

The events in Libya, for those advocating government legitimisation mainly on humanitarian grounds, were supposed to indicate a shift towards a criterion based on the respect of human rights and international law at the expense of the effective control of territory and population. Again, the idea was that a responsibility on behalf of the international community to manifest solidarity towards the people directly was prevalent - at least rhetorically.

However, what followed, with the total collapse of Libya as a State, rather proved such an attitude to be opportunistic; an arbitrary manipulation of legal norms, which bears grave dangers for the regional and international stability as well as for the welfare and the protection of human rights of the people concerned.[115]

Syria has also been a hard test of all legal theories.[116] A bloc of States, mainly built around the US and its allies, attempted to de-legitimise the Syrian government and recognise the National Coalition for Syrian Revolutionary and Opposition Forces - National Coalition - as the legitimate representative of the Syrian people in an attempt. This attempt fell short of a full recognition as government in exile not only because of legal reasons, but also following the developments on the battlefield, which gave the advantage to the Syrian government.[117]

However, the US intervened in Syria partially on the basis of UNSC Res. 2249(2015), referring to the fight against IS and other terrorist organisations, but also - during 2017 - in defense of the so-called Syrian Democratic Forces – SDF - a US-affiliated group - at least currently - of Kurds and Arabs as well as directly against the Syrian government following allegations of the use on its behalf of chemical weapons. While in initial stages of the US strikes against IS there could be some allegations of 'passive' or 'implied' consent on behalf of the Syrian Government it is by now obvious that the latter considers the actions taken by the US and its allies on Syrian territory as hostile acts of aggression, in violation of its sovereignty.[118] Still though, the US without any solid legal justification maintains and expands its presence in Syria.

Russia and Syria's regional allies on the other hand invoked the invitation by the Syrian Government for their own intervention[119] and denounced the US intervention as

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3460> (accessed 28 November 2018).

115 Akande, *supra* nt 114; 'One further point to consider in all of this is whether the recognition of the NTC as the legitimate representative of the Libyan people points towards the creation of some sort of new status in international law... Something which is not quite a government (or perhaps even a kind of government), not quite a national liberation movement, not quite an insurgent. None of the States that has described the NTC as legitimate representative have stated explicitly that they regard this as a legal status...'

116 It will not be analysed here extensively, apart from some remarks that show the division of the international community over the issue of government legitimacy, mainly on the grounds of political speculations.

117 S. Talmon, Recognition of Opposition Groups as the Legitimate Representative of a People, (2013), 12, *Chinese Journal of International Law*, 219, at p. 220, BBC News, *Russia anger at Syrian Arab League opposition seat*, 27 March 2013, *at* <www.bbc.co.uk/news/world-middle-east-21953423> (accessed 28 November 2018); Official Journal of the European Union, *Council Decision 2013/186/CFSP of 22 April 2013*, 22 April 2013, *at* <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:111:0101:0102:EN:PDF> (accessed 28 November 2018); Official Journal of the European Union, *Council Decision 2013/103/CFSP of 28 February 2013*, 28 February 2013, *at* <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:058:0008:0008:EN:PDF> (accessed 28 November 2018); Deutsche Welle, *EU Boosts Status of Syria's National Coalition*, 11 December 2012, *at* <www.dw.de/eu-boosts-status-of-syrias-national-coalition/a-16443081> (accessed 28 November 2018).

118 EJIL: Talk!, Van Steenberghe, R, *From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition,* October 23, 2015, *at* <https://www.ejiltalk.org/13758-2/> (accessed 28 November 2018).

119 Lucas, S, *The effects of Russian intervention in the Syria Crisis* (GSDRC, University of Birmingham, 2015), 1.

illegitimate. While the US and its allies have criticised the Russian intervention up to the extent that it has been critical for the survival of the Syrian Government, they have not directly denied its legitimacy. Their position towards the Syrian Government has not reached the level of its complete de-legitimisation. Again, solidarity among States as well as towards parts of the Syrian people were invoked by the different intervening parts.

In Ukraine, following the overthrow of President Yanukovych, the majority of the international community recognised as legitimate the de facto government of Ukraine,[120] although the vote for his removal by the Ukrainian Parliament fell short of the constitutional provisions.[121]

Ousted President Yanukovych asked for Russian intervention, a request which in principle should amount to a sound and valid justification for foreign intervention.[122] Both the Russian ambassador in the UNSC as well as the Russian President invoked this letter of consent from the President of Ukraine as a legitimate provision of consent for intervention.[123]

Yanukovych's consent was rejected as potential basis for Russian intervention by many members of the international community, because he was not exercising effective control over Ukrainian territory and population.[124] Russia maintained that it considered it as a legitimate request from the legitimate - at that point - president,[125] although it never accepted that it intervened in E. Ukraine and therefore it did not invoke it.[126]

Behind these inconsistent practices lie obviously geopolitical and national security interests, which prevail over legal clarity. One could also trace - in indirectly legal and moral terms - a differentiation on the basis of whether the entity challenging government authority resembles to a popular uprising or rebellion turning against an authoritarian government and therefore bears the potential for genuine expression of popular will or not. In the primary case, a part of the international community is keen to recognise and legitimise the domestic transformations within the State as legitimate and seems to be finding it reasonable and legitimate to show its solidarity towards the people directly.

Things supposedly are simpler in cases where a government has to deal with non-State, terrorist actors, such as the Islamic State – IS - or Al Qaeda and affiliated groups. The French intervention in Mali under UNSC Resolution 2085 following the invitation of

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120 The Guardian, Agreement on the Settlement of Crisis in Ukraine (Kyiv, 21 February 2014), *at* <www.theguardian.com/world/2014/feb/21/agreement-on-the-settlement-of-crisis-in-ukraine-full-text> (accessed 9 January 2019).

121 Vermeer, *supra* nt 100.

122 BBC News, *Ukraine's Yanukovych asked for troops, Russia tells UN*, 4 March 2014, *at* <http://www.bbc.com/news/world-europe-26427848> (accessed 28 November 2018).

123 Putin, V, *Vladimir Putin answered journalists' questions on the situation in Ukraine, President of Russia*,14 March 2014, *at* <en.kremlin.ru/events/president/news/20366> (accessed 28 November 2018).

124 EJIL: Talk!, Wisehart, D, *The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?*, 4 March 4 2014, *at* <http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/#more-10459> (accessed 28 November 2018); Allison, R, "Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules" 90(6) *International Affairs* (2014) 1255, 1264.

125 Churkin, V, at Security Council 7125th Meeting (3 March 2014), Assistant Secretary-General for Political Affairs Updates Security Council as It Holds Second Meeting on Ukraine in Three Days Security Council 7125th Meeting (PM), *at* <https://www.un.org/press/en/2014/sc11305.doc.htm> (accessed 9 January 2019).
It is interesting to note here that the US declined Yanukovych's consent -at least partially- on the basis of the unconstitutionality of his act*;* Allison, *supra* nt 124, 1264-1265.

126 Interview with Radio Europe 1 and TF1 TV channel, 4 June 2014, Russian Presidential Website and BBC Monitoring Online (4 June 2014), *at* <https://www.youtube.com/watch?v=MrFqCF0dbgM> (accessed 9 January 2019).

the government of Mali,[127] as well as the participation of coalition forces on the side of the Iraqi Government in the course of the fight against IS in Iraq pose two such examples.

In addition, there are cases where consent is an additional basis of the legitimacy of the intervention, together with the invocation of self-defense, such as that of Kenyan intervention in Somalia in 2011 against Al-Shabaab. The most 'convenient' justification was the consent of the Somali Government although Kenya invoked implicitly its right to self-defense against Al-Shabaab. The Somali position was somewhat ambiguous, but still its most reasonable interpretation is that the government of Somalia consented to the intervention.[128]

A similar case is the prolonged US intervention in Afghanistan. Whilst initially the US invoked the right to self-defense in order to invade Afghanistan and overthrow the de facto Taliban regime following the 9/11 attacks on the basis of the ties between the Taliban and Al Qaeda[129] and although the UNSC resolutions 1368 and 1373 are widely considered as authorising US use of force at the time,[130] the continuous presence of US forces - apart from those of the international security force, ISAF - is based at large on the consent of the Afghani Government.[131]

Although the Afghani Government was imposed and is kept in power mainly because of the US intervention and despite the fact that it does not exercise full control over the territory and the population, its endorsement by the international community as the legitimate one and the nature of the organisation fighting against are two main reasons for attributing to it the right to consent to intervention.[132]

In practice though, even under such conditions quite often it becomes complicated enough to reach a uniform solution.[133] The lack of unanimous definition of terrorist organisations, the complicated conditions on the ground and the contradictory State interests prove that even seemingly obvious legal trends and norms are quite often too

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127 EJIL: Talk!, Christakis, T and Bannelier, K, *French Military Intervention in Mali: It's Legal but… Why? Part II: Consent and UNSC Authorisation*, 25 January 2013, *at* <https://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unsc-authorisation/> (accessed 28 November 2018).

128 Lieblich, *supra* nt 55, 16.

129 Bush, GW, *Address to the Nation Announcing Strikes against Al Qaida Training Camps and Taliban Military Installations in Afghanistan*, 7 October 2001, 2 PUB Papers, 1201-1202; Bush, GW, *President's Radio Address*, 13 October 2001, 2 PUB Papers, 1235- 1236;
Bush, GW, *Remarks on Signing the Afghan Women and Children Relief Act of 2001*, 12 December 2001, 2 PUB Papers, 1506- 1507; On 7 October 2001, the US informed the UN Security Council that it was exercising '…its inherent right of individual and collective self-defense…', by actions '…against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan…'; UN Security Council, *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, 7 October 2011, UN DOC S/2001/946.

130 UN Security Council, Condemnation of 11 September attacks against United States, 12 September 2001, (4370th meeting) S/RES/1368: '…the inherent right of individual or collective self-defense in accordance with the Charter…' In the first paragraph, the resolution 'Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security.' The Resolution also reaffirmed '…that such acts, like any act of international terrorism, constitute a threat to international peace and security…', '…the inherent right of individual or collective self-defence as recognised by the Charter of the United Nations as reiterated in resolution 1368 (2001) …' and the '…the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts…'.

131 Lieblich, *supra* nt 55, 17-18.

132 *Ibid.*, 18-19.

133 Even more, the endless Afghani war, if we take into account the US support back in the 80s, towards what came to be the Taliban.

complicated to implement.

Parenthetically, the case of Afghanistan, as well as the case of Iraq in relation to the fight against IS, could give rise to the question of the genuineness of the consent, since both governments are the outcome of US actions and need - or at least needed - US help in order to survive. Therefore, the origins and the dependency of the two governments raise the issue of whether they were in fact coerced to consent.

It is true that in such situations of inequality and dependency, the actual limits between coercion and genuine consent are blurred. While such an argument is interesting, it bears the danger that almost all cases of consent provided by weaker States to significantly more powerful States would be considered as null and void. Normatively speaking, such a consent can be considered as valid since the international community has recognised the government as lawful, meaning, therefore, that in terms of international law it falls under the equal sovereignty provision of the UN Charter.

Here, the reference to the principle of solidarity can become a test, which provides insightful understanding. More specifically, the intervening State must take into account that it needs to combine solidarity towards the government of the State with solidarity towards the people - or at least not to deteriorate the position of the latter. A balanced approach therefore, between the two sides of solidarity provides us with a normative, interpretative tool on the issue.

A similar case, in terms of the genuineness of the consent, is that of the Syrian intervention and presence in Lebanon for almost 3 decades, from 1976 to 2005. In this case, whilst the consent of the Lebanese government had been offered and was re-affirmed, the international community eventually demanded the withdrawal of all foreign troops, treating the Lebanese consent as more or less the outcome of coercion or at least as non-satisfactory under international law to provide legitimacy.[134]

The genuineness of the consent coincides emphatically in this case, with the solidarity criterion. It is not only the typical or even substantial will of the government that matters but also the impact of the intervention on the people and the life of the State in general. Therefore, again, inter-State solidarity must be assessed continuously with solidarity to the people.

Apart from its significance regarding the genuineness of the consent in principle, the case of Syrian presence in Lebanon is important because it shows that the act of consent might be singular, but its assessment is continuous. In addition, it showed that the fact that consensual intervention is a form of bilateral agreement does not exclude the UNSC as an organ to which international peace and security is entrusted.

Therefore, a once valid act of consent might be de-legitimised in the future for a variety of reasons. As such can be considered the case of the Saudi-led intervention in Yemen. Even if the consent of the ousted by the Houthis' uprising, president Hadi is to be considered as in principle lawful, on the basis of the internal constitutional formation of Yemen and of UN SC resolution 2216(2015)[135] - which is not without contrary arguments - the scope of the consent and the specific means of the intervention have de-legitimised

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134 Lieblich, *supra* nt 55, 18-19; UN Security Council, Security Council Declares Support For Free, Fair Presidential Election In Lebanon; Calls For Withdrawal Of Foreign Forces There, 2 September 2004, (5028th Meeting) SC81/81, *at* <https://www.un.org/press/en/2004/sc8181.doc.htm> (accessed 9 January 2019).

135 UN Security Council, Security Council Demands End to Yemen Violence, Adopting Resolution 2216 (2015), with Russian Federation Abstaining, 14 April 2015, (7426th meeting) S/RES/2216, *at* <https://www.un.org/press/en/2015/sc11859.doc.htm> (accessed 9 January 2019).

it,[136] exactly on the basis that the right of a government to invite an intervention, as well as of the third State to respond positively are not unconditional. The scope of the consent as well as the means of the intervention co-determine their legitimacy, in the basis of the need to balance between the two aspects of solidarity.

The variety of cases and State approaches indicate that the interpretation of law in relation to government legitimacy in situations of contested authority necessitate answers, which must include a combination of criteria, keeping in mind that an ad hoc assessment is inevitable and critical.[137]

The existence of the government as a matter of the control of territory and population for a sufficient period of time constitutes undoubtedly the primary criterion of legitimacy. When, due to the emergence of antagonistic entities, which control extended part of the territory and of the population,[138] the governmental capacity and its primary source of legitimacy are contested,[139] an assessment including several criteria must be adopted: what is the extent of government loss of control over the State;[140] why government

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136 Lawfare, Deeks, A, *International Legal Justification for the Yemen Intervention: Blink and Miss It, Lawfare*, 30 March 2015, *at* <www.lawfareblog.com/international-legal-justification-yemen-intervention-blink-and-miss-it> (accessed 28 November 2018); IRIN News, Dyke, J, *Is the Saudi war on Yemen legal?*, 3 April 2015, *at* <www.irinnews.org/analysis/2015/04/03/saudi-war-yemen-legal> (accessed 28 November 2018).

137 Roth, B, "Governmental Illegitimacy Revisited: 'PRO-DEMOCRATIC' Armed Intervention In The Post-Bipolar World" 3 *Transnational Law & Contemporary Problems* (1994) 481, 495; It must be mentioned here that the history of the UN itself indicates not an absolute persistence on the objective criteria. According to Brad Roth: 'The history of the United Nations has known eight significant credentials contests involving China, Hungary, Congo (Leopoldville), Yemen, Cambodia (1973-74 and post-1978), South Africa, and Israel. The de facto regime was denied credentials in the cases of China (1950-71), Hungary (1957-63), Cambodia (post-1978) and South Africa (1974), and narrowly prevailed in the case of Cambodia in 1973-74.'

138 The most suitable legal term would be that it must be questioned 'beyond reasonable doubt'.

139 Obviously, the terms 'legitimate representative' and 'legitimate government' are not identical. The analysis here focuses on the issue of government. The reference to the attribution of the status of 'legitimate representative' is made here only parenthetically, in the sense of a first step leading to the second and most important one; Dinstein, Y, *War, Aggression and Self-Defence* (4 ed, Cambridge University Press 2005) 116; While it is less intervening compared to regime change intervention, still it bears significant legal consequences. For example, it raises the question of which entity possesses the authority to provide consent for an outside intervention; Lieblich, E, "Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements" 29 *Boston University International Law Journal* (2011) 337,357-359; Auron, D, "The Derecognition Approach: Government Illegality, Recognition, And Non-Violent Regime Change" 45 *George Washington International Law Review* (2013) 443, 484-485.

140 Farer, TJ, "Panama: Beyond The Charter Paradigm" 84 *American Journal of International Law* (1990) 503, 510-511; Governments that control the capital of the State and extended parts of the territory, without facing imminent danger of collapse, at least in some instances, are comprehended as possessing internal legitimacy. A contrary, and not totally unjustified position, though, is that a contested government, even in partial control, should share its power with the opposition, given that it fails to control the whole of territory and population; Wippman, D, "Treaty- Based Intervention: Who Can Say No?" 62 *University of Chicago Law Review* (1995) 605, 627- 628; Wippman, D, "Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict" 27 *Columbia Human Rights Law Review* (1996) 435, 435- 444; Walzer, M, "The Moral Standing of States: A Response to Four Critics" 9 *Philosophy & Public Affairs* (1980) 209, 216-218; Delahunty, RJ and Yoo, J, "Statehood and the Third Geneva Convention" 46 *Virginia Journal of International Law* (2005) 131, 138; Fox, G, "Self-Determination In the Post-Cold War Era: A New Internal Focus?" 16 *Michigan Journal of International Law* (1995) 733, 738; Buchheit, L, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978), 9-11; Thornberry, P, "The Democratic or Internal Aspect of Self-Determination"*, in* Tomuschat, C, ed, *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 102, 124-125; Grant, T, "Between Diversity And Disorder: A

control has been lost;[141] compliance or not with the constitutional formation and democratic standards;[142] fulfillment of internal self-determination standards;[143] stable presence of this form of government within the domestic constitutional history of the State.[144]

It would be convenient enough to be able to draw an equation determining the exact relationship among these three types of criteria; regrettably that is impossible. It is logical, though, to suggest a combined assessment of legitimacy including all types of criteria. The entity which meets most of the standards in all categories should bear legitimacy. Obviously, these guidelines come down to an ad hoc examination. The most that anyone can expect from an international lawyer or the international community is sincerity in the implementation of these criteria, since no pre-determined solutions can be provided.

Eventually, the principle of solidarity can offer guidance: in the end, the question must be whether the invited intervention, under the light of the aforementioned criteria, establishes a balanced approach between solidarity among States and solidarity towards the people, keeping in mind that on the one hand, State sovereignty constitutes a means for the end, which is the welfare of the people and on other hand that solidarity to the people must not come to constitute a pretext for regime change interventions, which eventually deteriorate the position of the people at State, even more.

IV. Conclusion

The article attempted to incorporate into the debate about consensual intervention the principle of solidarity. From such a perspective it examined the nature of solidarity exactly as a fundamental principle of international law which can be identified as the driving force behind the collective security system.

The lawfulness of consensual intervention is assessed through a combination of paragons from both sides - i.e. both the inviting part and the intervening. These paragons include the situation on the ground as well as the compliance with internal and international law. Behind these limitations lies the solidarity principle which obliges both the consenting government and the intervening State, to take into account solidarity among States, as well as solidarity towards the people.

This approach becomes even more critical in cases of States of contested government authority, not only for the inviting but also from the intervening forces as well, since it is their responsibility too, to assess the legitimacy of the consent they are being given. They need to revisit these criteria, through the perspective of the two aspects solidarity, towards States and the people. In this sense, the principle of solidarity eventually determines the legitimacy of the intervention. The intervening State in the framework both of jus ad bellum and jus in bello needs to assess the responsibility to manifest solidarity towards both the State and the people.

Review Of Jorri C. Duursma, Fragmentation And The International Relations Of Micro-States: Self-Determination And Statehood" 12 *American University Journal of International Law and Policy* (1997) 629, 637.

141 There are obvious political differences, which may have legal implications, on the basis of whether the cause for the loss of control is a military coup or a popular uprising.

142 Crawford, J, *The Creation of States in International Law* (2nd ed, Oxford University Press 2007), 57

143 Hamid, R, "What is the PLO?" 4(4) *Journal of Palestine Studies* (1975) 90, 90-109; Such a case of implementation of self-determination without State authority, although in the course of a national-liberation and self- determination struggle, is the one of the PLO.

144 Lee, TW, "Point-Counterpoint: The International Legal Status of Taiwan: The International Legal Status of the Republic of China on Taiwan" 1 *UCLA Journal of International Law & Foreign Affairs* (1997) 351, 385.

The international community has found it hard to reach unanimous ground on how to deal with such situations, mainly because of their profound political impact, as well as because of contradictory interpretations of international law. The principle of solidarity is omnipresent in this debate through the variety of international law provisions. A direct reference to solidarity as a criterion is necessary so that an elaborate assessment of the conditions on the ground can be achieved.

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