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PRESIDENT'S NOTE

Dear reader,

Hereby I would like to proudly introduce 1st Issue of the 7th volume of the Groningen Journal of International Law. As all previous issues, this issue is readily available for free on our website at <https://grojil.org> and <https:// ugp.rug.nl/grojil>.

Being an open issue, GroJil 7(1) presents you with several articles on the various topics of International Law. The editorial team worked very hard on them and thus our Publishing Director Jochelle Greaves has created an overview of the articles and the basic concepts they are discussing.

In the opening contribution, Juliana Borenstein addresses government misuse of the 'State secrets privilege', which serves to protect national security interests, particularly during 'extraordinary renditions' in light of the fight against terrorism. She puts forth the argument that States utilize this privilege to prevent their violation of human rights from being investigated, thereby promoting impunity, and thus it is vital that mechanisms are implemented to have the use of this privilege closely scrutinized by an impartial judicial organ.

In the second article, Osatohanmwen Eruaga examines the legality of Italian push-back measures as a measure of tightening border controls in light of the migration crisis against the standards of international law. He argues that States should adopt measures which are sensitive to migrant rights in order to prevent State action from conflicting with the principles of international law.

Laurence Juma discusses the role of Kenyan domestic legal institutions in supporting the principles and institutions of international criminal justice by looking at their interaction with and application of the principles of international criminal justice. Within the article, he considers whether calls for the withdrawal from the Rome Statute should be heeded, while contending that there must be a joint effort between domestic and international institutions, as well as reforms to the entire international criminal justice system, to end impunity.

In the fourth contribution, King James Nkum and Beida Onivehu Julius focus on international air and space law, particularly discussing the legal issues and implications emerging out of contemporary space exploration activities, including space tourism, and examine them against the overarching framework of UN Space Treaties.

Naimeh Masumy critically analyses whether the Energy Charter Treaty can be considered a viable instrument to foster and safeguard the concept of sustainable

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development, whilst simultaneously promoting foreign investment. She also proposes some reforms that could be made to the treaty in order to ensure that key issues are observed as relates to energy efficiency and sustainable development.

Allan Mukuki examines the impacts of climate change in light of forced migration, revealing the effects and challenges posed to the current definition of refugees and the existing international regime of refugee protection. He contends that there is the need to include climate change as a Convention ground for people to seek refugee status, while acknowledging the challenges in the re-imagination of the concept of forced migration in the face of climate change, such as lack of State will and consensus.

In the next contribution, Regina Menachery Paulose explores the ongoing crisis of statelessness in Assam in which an estimated 4 million persons have become stateless and face deportation to Bangladesh. She reviews the history of the situation and how statelessness may lead to genocide, underscoring the importance of action and highlighting potential actions that India can take in order to resolve future cases of statelessness by specifically examining the Global Compact on Refugees and other international instruments.

In the winning article of the 2019 Student Writing Competition, Erez Roman examines the role played by motive and intent in the legal qualification and prosecution of cultural heritage destruction by comparing various instruments and assessing different cases. He advances that a better understanding of the reasons behind such conflict-related destruction, which continues to take place in countries such as Syria, will allow for effective prosecution.

Lastly, Sai Venkatesh offers a legal analysis of the issues surrounding the use and regulation of Autonomous Weapons Systems and their implications on the existing principles of International Humanitarian Law. This is done with use of models of the New Haven School of International Legal Thought, delving into the need for Autonomous Weapons Systems and how regulation, rather than prohibition, is the ideal solution to address their legality.

GroJil editorial Board would like like to recognise all the efforts made by the editors in order to prepare the articles for publication and express gratitude for their splendid work. Moreover, I personally would like to thank each Board Member for their great dedication and work on this issue.

On the organisational matters, this year GroJil had changes in the Editorial Board and we also invited a new member to out Advisory Board - Professor of Migration Law Dr. Viola Bex-Reimert. Moreover, GroJil is planing to focus more on promotional activities this year and to increase its visibility within the University of Groningen doors and worldwide.

Therefore a large focus will be given to branding and promotional activities of the journal, same as its cooperation with the University of Groningen and other study

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associations. Importantly, starting from this issue GroJil will follow the OSCOLA referencing style and is abolishing its old referencing guide.

Happy reading!

Kyrill Ryabtsev

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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Extraordinary Renditions and State Secrets: A Human Rights Approach

Juliana Gil Borenstein*

DOI: 10.21827/5d5141b011de5

Keywords
STATE SECRETS PRIVILEGE; NATIONAL SECURITY; HUMAN RIGHTS; COUNTER-TERRORISM; EXTRAORDINARY RENDITION

Abstract

One of the world's main concerns over the past decades has been the phenomenon of terrorism. It is evident that terrorism must be eradicated, especially considering the huge threat it poses to the basic values of democratic societies. However, it must be kept in mind that arbitrary governments also represent a huge threat to these same values and, therefore, safeguards must exist to guarantee that state authorities act within the framework of law. Unfortunately, some governments misuse the 'state secrets privilege' argument, created to protect their right to confidentiality in national security affairs, to prevent their gross violations of human rights from being assessed by the judiciary, violating victims' rights and promoting impunity. This is particularly true in cases involving so-called 'extraordinary renditions' used to fight terrorism. This article defends the premise that as much as the existence of secrecy is essential for the protection of every nation, no secrecy can serve as an excuse for governments to violate human rights and disregard the rule of law. In order to ensure that state secrets privilege is not used as a way to promote impunity for serious human rights violations, it is very important that mechanisms are implemented in order to have the claim of secrecy in national security related issues closely scrutinised by an impartial judicial organ. It is in the interest of democracy and justice that a fair balance is struck between the interests of national security and the protection of human rights.

Introduction

The terrorist attacks of September 11, 2001 made terrorism one of the greatest fears of governments and people all over the globe. Although terrorism is far from being the most prevalent cause of death in any given society, it has had a huge impact in the collective mind nonetheless. This can be explained not only because of mass media, but also due to terrorism's unpredictability, large scale organisation and to the extent of terrorism's impact on global economics and politics. Moreover, terrorism has an immeasurable impact on human rights, as it aims at the destruction of the values that are the very core of the Charter of the United Nations and human rights law in general, undermining the foundations of democracy and the rule of law. As such, fighting terrorism has become a priority for many governments and all sorts of measures and intergovernmental cooperation were/are being developed in order to do so. It is self-evident that states have the duty to protect their nationals against all threats, terrorism included, taking positive measures to protect them from terrorism threat and to hold

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terrorists accountable for their actions. Efforts to eradicate terrorism are praised and they must be taken.

However, it is now widely known that in their restless effort to fight terrorism governments have often used disproportionate force and acted arbitrarily, continuously breaching their obligations under international human rights law.[1] One of their most controversial measures adopted so far is the extraordinary rendition by which states transfer, without any legal process, a person to the custody of another state in order for them to be detained and interrogated. During this procedure, it is alleged that individuals detained are more often than not subject to all kinds of cruel and inhumane treatment, and that the rule of law is completely disregarded in the process.[2] Presumption of innocence is a principle which seems to be unknown to those who carry out this kind of procedure, and charges are very often not brought before the courts against the so called 'suspects of terrorism' who are subject to the measure.

While terrorists' activities 'negate everything that human rights represent',[3] extraordinary renditions and secret detentions are not less harmful to human rights. There are cases in which individuals remain under government custody for months or years, without any access to a lawyer or being able to contact their families. Under these conditions, some individuals are known to have died in detention[4] and others are simply released after some time without any or little explanation, as the cases below will demonstrate.

Victims sometimes try to obtain some kind of redress for the violation of their basic rights before a court, a right which is well established under customary international law.[5]

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1 As examples of such disproportionate and arbitrary acts disclosed to the public, the Special Rapporteur mentioned in his report that the site Wikileaks published numerous diplomatic reports confirming the existence of secret detentions and illegal transfers of detainees. In addition, the American soldier Bradley Manning is facing charges for refusing to continue to take part in illegal activities of the government during counter-terrorism operations and to cover them up, handling classified documents to the referred site confirming the said abuses. See Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights) 'Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations' (16 September 2011) Doc. 12714 3, 20. Moreover, the German Chancellor Angela Merkel told a press conference that the United States had admitted that it had made a mistake of identity in relation to the case of Mr. El-Masri, where he was subject to the extraordinary rendition programme of the CIA for being suspect of terrorism and then tortured by the United States. See Amrit Singh, 'European court of human rights finds against CIA abuse of Khaled el-Masri' (*The Guardian* 13 December 2012) <www.theguardian.com/commentisfree/2012/dec/13/european-court-human-rights-cia-abuse-khaled-elmasri>accessed 12 May 2019.

2 The Committee on International Human Rights of the Association of the Bar of the City of New York and The Centre for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"'* (ABCNY & NYU School of Law 2004); Robert Verkaik, 'The Big Question: What is extraordinary rendition, and what is Britain's role in it?' (*Independent* 8 June 2006) <www.independent.co.uk/news/uk/crime/the-big-question-what-is-extraordinary-rendition-and-what-is-britains-role-in-it-481452.html> accessed 12 May 2019; Jonathan Horowitz and Stacy Cammarano, '20 Extraordinary Facts about CIA Extraordinary Rendition and Secret Detention' (*Open Society Foundations*, 5 February 2013) <www.opensocietyfoundations.org/voices/20-extraordinary-facts-about-cia-extraordinary-rendition-and-secret-detention>accessed 12 May 2019.

3 Isaac Terwase Sampson, 'Between Boko Haram and the Joint Task Force: Assessing the Dilemma of Counter-Terrorism and Human Rights in Northern Nigeria' (2015) 59(1) Journal of African Law 25, 27.

4 Andrei Scheinkman and others, 'The Guantanamo Docket: A History of the Detainee Population' *New York Times* (2 May 2018) <www.nytimes.com/interactive/projects/guantanamo> accessed 12 May 2019.

5 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 art 3; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 8; Convention for the Protection of Human Rights and Fundamental Freedoms

Instead of obtaining such redress, they have their fundamental rights violated even further by the refusal of the courts to fully analyse their cases. Such refusal is justified under the 'state secrets privilege' claim used by governments in order to have the judiciary stop ruling on the issues which, according to them, must remain secret in order to protect national security. To preserve secrecy, legal doctrines such as this were created and developed in several countries. The doctrine is an evidentiary rule and is usually not provided by law. It is rather a jurisprudential construction which considers that the executive power has the prerogative to withhold information from the court, victims and/or the public if its disclosure would be able to put national security at risk.[67] If the argument is accepted by the court, the state-held evidences at issue may not be admissible in the case, preventing the court from properly addressing the alleged human rights violations brought to it by the victims of those wrongful measures.

This article will focus on the judicial practice of the state secrets privilege and how it may establish impunity for human rights violations, corruption and criminal behaviour against the backdrop of the extraordinary rendition and secret detention programme carried out by the US and assisted by several other countries. The analysis herein carried out will mainly be based on an international human rights law perspective. The main question to be answered in this work is: to what extent may the state secrets privilege violate international human rights law when used in the context of extraordinary rendition and secret detention? To answer this question, extraordinary rendition and secret detention will be explained, and, subsequently, assessed as to how these measures may violate human rights. Explaining how these procedures violate human rights is important in order to show the importance of having an impartial organ scrutinising the lawfulness of government measures. The following chapter will focus in particular on the state secrets privilege and it will explain the notion and its impact on human rights. The study will be done through an analysis of the relevant case law. While this work recognises the importance of secrecy to the very existence of the national state, it will show the importance of striking a balance between national security and individual rights, since the former is the very core of the existence of any democratic nation.

(adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005 (European Convention on Human Rights, as amended) (ECHR) art 13; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 6; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 25; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 91; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (African Charter) art 7; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT) art 14; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 39; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 68, 75; See also Dinah Shelton, *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Martinus Nijhoff 2000) 238; Mahmoud Cherif Bassiouni, *Post-Conflict Justice* (Brill 2002) 217; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc. A/RES/60/147 (2006).

6 'Background on the State Secrets Privilege' *ACLU* <www.aclu.org/other/background-state-secrets-privilege> accessed 12 May 2019; 'FAQs: What Are State Secrets' (*Center for Constitutional Rights*, 17 October 2007) <www.ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-are-state-secrets>accessed 12 May 2019.

The role of the courts in scrutinising the legality of the executive's actions is the main weapon people have against government's arbitrariness.

I. Extraordinary Renditions

Only weeks after the 9/11 terrorist events the extraordinary rendition and secret detention programme was approved by the President George W Bush.[7] This programme would involve the secret killing, capturing and detention of specific persons eligible for the programme.[8] It is believed that the CIA was authorised to independently carry on the programme by a presidential directive signed on 17 September 2001.[9] The programme is still surrounded by a high level of secrecy, thus little is known on the number or identities of people subject to it. The little information that came to public was obtained through the individuals who have emerged from it,[10] through leaking of information from insiders,[11] through investigations conducted by inter-governmental organisations,[12] and through projects developed to uncover the facts on the extraordinary rendition programme.[13] Moreover, although not in many details, there have been some official acknowledgements on the existence of the programme and on the transfers of detainees to foreign governments. The Egyptian government alone has affirmed that around sixty to seventy detainees were transferred to Egypt between September 2001 and May 2005.[14][15] It is most likely that most detainees are transferred to the custody of foreign countries rather than being held directly by the CIA.[15]

In 2006, the Military Commissions Act (MCA)[16] was passed by the Congress and approved by the US President, although the secret detention or extraordinary rendition programme is not authorised by any law.[17] President George W Bush sought to have terrorist suspects held in Guantánamo brought before a military commission to be tried. However, in *Hamadan v Rumsfeld*, the Supreme Court held that such commission 'lack[ed] power to

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7 Margaret L Satterthwaite, 'The U.S. Program of Extraordinary Rendition and Secret Detention: Past and Future' in European Centre for Constitutional and Human Rights (ed), *CIA- 'Extraordinary Rendition' Flights, Torture and Accountability – A European Approach* (ECCHR 2009) 27, 27.

8 Ibid. See also Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report' (11 June 2007) Doc. 11302 rev. 64.

9 Satterthwaite (n 7) 34.

10 Satterthwaite (n 7) 33. See also *Mohamed v Jeppesen Dataplan Inc* (ND Cal 2008) 539 F.Supp.2d 1128, 1130; *Adler Monica Courtney et al* n 12428/09 (4 November 2009) Milan Tribunal; *El-Masri v Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012).

11 One of the most cited comments made by a US official on the extraordinary rendition programme: 'We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.' Dana Priest and Barton Gellman, 'U.S. Decries Abuse but Defends Interrogations' *Washington Post* (26 December 2002).

12 See Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), 'Alleged Secret Detentions in Council of Europe Member States' (22 January 2006) Doc. AS/Jur (2006) 03 rev.

13 Ian Cobain and James Ball, 'New light shed on US government's extraordinary rendition programme', *The Guardian* (22 May 2013) <www.theguardian.com/world/2013/may/22/usextraordinary-rendition-programme>accessed 12 May 2019.

14 'A Conversation with Michael Hayden' (*Council on Foreign Relations* 7 September 2007) <www.cfr.org/event/conversation-michael-v-hayden>accessed 12 May 2019; Satterthwaite (n 7) 34.

15 Satterthwaite (n 7) 34, 98.

16 Military Commissions Act of 2006 (17 October 2006) Public Law 109–366, 120 Stat 2600.

17 Satterthwaite (n 7) 36-37.

proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions.'[18] In 2007, the US President issued an executive order stating that the CIA carries out 'a program of detention and interrogation.'[19] Finally in 2008, the Supreme Court ruled that the Military Commissions Act of 2006 was unconstitutional.[20]

The extraordinary rendition and secret detention programme consists of the apprehension and transfer of the suspects, followed by their detention in secret CIA 'black sites' overseas - such as Guantanamo Bay and Bagram - or in foreign detentions, and subsequent interrogation. The detainee is allegedly stripped, subject to a body cavity search, photographed naked, dressed up in diapers, and purportedly beaten during the process. Following that, they would be restrained with handcuffs, ankle shackles and chains, blindfolded and ears covered in order to lose their sensory perception, and finally placed aboard an aircraft.[21] In the detention sites, the detainee would be subject to other various types of torture (or, as defined by President George W Bush, 'alternative set of procedures'),[22] such as beatings, sexual abuse and electric shocks, while often not being formally charged with any crime or granted access to lawyers, to their governments or to anything in the outside world.[23] Thousands of individuals are believed to have been detained worldwide under the suspicion of terrorism since the 9/11 attacks.[24] Many of them were never brought before any court, languishing in a 'legal limbo.'[25] The US government had been refusing to recognise them as prisoners of war or to grant them the protections of the Geneva Conventions[2627] until the judgement of the Supreme Court mentioned above rejecting its policies. After the referred judgement, US government shifted its policies to recognise the application of the protection granted by the international humanitarian law to those detainees.[27]

I.I Extraordinary Renditions and Human Rights

First, it is important to understand the role that human rights play in the protection of democracy and of the civilian population as a whole. In totalitarian governments, such as the

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18 *Hamdan v Rumsfeld* (29 June 2006) 548 US 557.

19 Executive Order 13440 (20 July 2007) 72 Fed Reg 141 40707.

20 *Boumediene v Bush* (12 June 2008) 553 US 723, 57–64.

21 Satterthwaite, (n 7) 38.

22 Satterthwaite, (n 7) 39. See also Parliament Assembly of the Council of Europe, (n 9).

23 Satterthwaite, (n 7) 39.

24 Steven MacPherson Watt, 'Torture, "Stress and Duress" and Rendition as Counterterrorism Tools' in Rachel Meeropol et al (ed), *America's Disappeared: Secret Imprisonment, Detainees, and the 'War on Terror'* (Seven Stories Press 2005).

25 ibid.

26 The Geneva Conventions are the main applicable law in case of armed conflict. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

27 Charles Babington and Michael Abramowitz, 'US Shifts Policy on Geneva Conventions' *Washington Post* (12 July 2006) <www.washingtonpost.com/wpdyn/content/article/2006/07/11/AR2006071100094.html??noredirect=on>accessed 13 May 2019.

fascists regimes in Italy, Germany, Spain or Portugal, the power of the state stemmed from the fear of people of a 'common enemy' that would endanger their fundamental freedoms.[28] In those regimes, citizens agreed to grant an increasing power to the executive branch, believing that this would protect the population against the alleged enemy. As a result, people's individual rights and freedoms were gradually curtailed. Those measures taken by the government against the enemies, often referred to as 'terrorists', were actually more harmful to their own civilians.

The fear of terrorism triggered by the terrorist attacks that have been occurring since 2001 has in many countries had an effect of broadening the powers given to the executive branch under the premise that a centralised power can fight terrorism more effectively. As mentioned above, such an extensive power is a matter for preoccupation, since this is the main feature of totalitarian governments as well. The principle of separation of powers and the mutual oversighting among the state branches are fundamental to the existence of a democratic society. Protecting the state should mean not only protecting it from terrorist threats, but also against measures that contravenes the democratic state's core values, such as the rule of law and democracy itself.

In democratic countries politicians must seek to legitimise their policies before their people.[29] The normative consensus – that is, when 'the political discourse on counter-terrorism supports the same general normative position'[30]— will be analysed below in relation to extraordinary renditions and the democratic values of the countries involved in the cases analysed. There is incoherence when policies contradict the ethical norms of a state, therefore, undermining them.[31]

When governments violate individual rights and disregard the rule of law under the justification of protecting individuals against the violations of their rights and protecting democracy, there is normative incoherence. As it will be demonstrated below, the extraordinary rendition and secret detention programme profoundly violates international human rights law and even the domestic laws of the states carrying it out. Protecting individual rights through the violation of individual rights, mainly through the commission of serious human rights violations, is incoherent when facing the values that such measures are supposed to protect: the rule of law, democracy and fundamental rights.

Most counter-terrorist measures were adopted in the context of the aftermath of a terrorist act in response to the public outcry, and in such situation legislators and official authorities tend to react quickly by issuing laws and measures which limit significantly fundamental human rights. It is in those situations in which 'states are drawn to diminish human rights protection in the face of challenges such as terrorism, that supervision and monitoring are most needed to check domestic measures against abuses of power.'[32] In many instances, it is highly debatable whether the measures adopted are proportionate to the actual attack or the threat.

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28 Anna Oehmichen, 'Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France' (Doctoral thesis, Leiden University 2009) 133.

29 Peter O'Brien, 'Counter-terrorism in Europe: the elusive search for order' (2016) 25(3) European Security 366.

30 ibid 368.

31 ibid.

32 Julian Lehmann, 'Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' (2011) 8(1) Essex Human Rights Review 103, 104.

When it comes to extraordinary renditions and secret detentions, a number of international human rights law violations are implicated, such as the right to personal liberty and security, the prohibition to torture, the right to due legal process and to fair trial, and, at times, the right to life.

Except for situations of state of emergency, when some derogations are allowed, states must entirely fulfil their obligations under international human rights law,[33] which includes *inter alia*: the right not to be deprived of liberty unless for reasons prescribed by law and under a proceeding governed by it; the right to be informed, in a language he or she understands, of the grounds for detention and to be promptly notified of the charges against him or her; right to have access to his or her family and medical assistance; right to be brought before a competent court; the right to be tried within a reasonable time; right to be informed of his or her right to consular assistance; right to access to a lawyer.[34] However, even in situations of most serious concerns threatening the life of the nation, some rights are absolute and cannot be derogated.[35] For instance, the right to not be detained for reasons that are not prescribed by law,[36] the right to be informed of the reasons for the detention,[37] to the access to a lawyer, and, if applicable, to family, medical and consular assistance,[38] to time limits to detention pending trial,[39] to judicial review of the detention,[40] as well as to be treated with humanity and respect for human dignity,[41] which includes the right not to be ill-treated or tortured.[42]

It is important to notice that both international human rights law and international humanitarian law absolutely prohibit inhumane treatment and torture.[43] As such, during peace or armed conflict, detainees must be kept in a facility which respects their physical and mental attributes.[44] As the prohibition of torture or other inhumane, cruel or ill-treatment is

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33 Inter-American Commission on Human Rights, 'Report on Terrorism and Human Rights' OEA/Ser.L/V/II.116 Doc.5 Rev.1 corr (22 October 2002) para 18; ICCPR (n 5) art 4.

34 UNGA Res 43/173 UN Doc (9 December 1988) A/Res/43/173.

35 Office of the High Commissioner for Human Rights, 'Core Human Rights in the Two Covenants' (September 2013) <nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf> (accessed 15 May 2019); European Court of Human Rights, 'Guide on Article 15 of the European Convention on Human Rights: Derogation in Times of Emergency' (31 August 2018) <www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf>accessed 15 May 2019,10–11.

36 ICCPR (n 5) art 9(1).

37 ICCPR (n 5) art 9(2).

38 UNCHR 'General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (1992) in in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' UN Doc HRI/GEN/1/Rev.9 (Vol I) para 11.

39 ICCPR (n 5) art 9(3), 14(3)(c).

40 ICCPR (n 5) art 9(4).

41 ICCPR (n 5) art 10.

42 ICCPR (n 5) art 7.

43 First Geneva Convention (n 26) art 12; Second Geneva Convention (n 26) art 12; Third Geneva Convention (n 12) art 17, 87; Fourth Geneva Convention (n 26) art 32; Geneva Conventions (n 26) common art 3; Additional Protocol I (n 5) art 75(2)(a), 75(2)(e); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) art 4(2)(a), 4(2)(h); UDHR (n 5) art 5; ICCPR (n 5) art 7; UNCAT (n 5) art 2(2); ECHR (n 5) art 3; American Convention on Human Rights (n 5) art 5(2); African Charter (n 5) art 5; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Intl Hum Rts Rep 893 (2005) art 8.

44 Inter-American Commission on Human Rights (n 33) para 138.

absolute and non-derogable, any information obtained under torture or ill-treatment should not be used in court.[45] Nonetheless, as pointed out by the UN Special Rapporteur Philip Alston, not only were terrorist suspects held in Guantánamo subject to degrading and inhumane treatment, including torture, but also the information obtained through this method was used as evidence by the Military Commission Act.[46]

Furthermore, international human rights law imposes that people may be detained only in places officially recognised as a detention place,[47] which renders secret detention places, such as 'black sites' used by the U.S. unlawful. In addition, even if the forced transfer of individuals is not prohibited under international law, customary international law imposes several limits to it, for instance, the prohibition to transfer persons when it would expose them to a real risk of being ill-treated or worse in the receiving state (obligation of *nonrefoulement*).[48] For that reason, countries that cooperate with the US programme of extraordinary renditions and secret detention risk contravening their obligation of *nonrefoulement*.[49]

Enforced disappearances, i.e. a deprivation of liberty in which the individual's whereabouts is unknown and he or she is, put those individuals outside the protection of law, and, therefore, is absolutely prohibited, according to the UN Human Rights Committee.[50] The Committee also states that the right to challenge the lawfulness of the detention is non-derogable,[51] and that even in times of armed conflict, the principles of necessity, proportionality, humanity and non-discrimination must be applied.[52]

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45 UNCAT (n 5) art 15; *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996) 68; *Serves v France* App no 20225/92 (ECtHR, 20 October 1997) 46; Inter-American Convention to Prevent and Punish Torture (entered into force 28 February 1987) OAS Treaty Series No 67 (1985) art 10; *GK. v Switzerland* (2003) CAT/C/30/D/219/2002; UNGA (Human Rights Council), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 April 2014) UN Doc A/HRC/25/60.

46 UNGA (Human Rights Council), 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Addendum – Mission to the United States of America. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (27 May 2009) UN Doc A/HRC/11/2/Add.5 para 40. See also 'The Guantanamo Trials' (*Human Rights Watch*, 9 August 2018) <www.hrw.org/guantanamo-trials> accessed 15 May 2019.

47 UNCHR (n 33) para 11.

48 UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (31 January 1994) para 6; *Zaoui v Attorney General (No 2)* (30 September 2004) 1 NZLR 690 34, 136; UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) <www.unhcr.org/4d9486929.pdf> accessed 15 May 2019; Matthew Pollard, 'Terrorism, Counterterrorism, and Human Rights' in Saul Takahashi (ed) *Human Rights, Human Security and State Security: The Intersection (Vol 1)*' (ABC-CLIO LLC 2014) 108.

49 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33; UNCAT (n 5) art 3; *El-Masri v Macedonia* (n 10) 220; *Alzery v Sweden* (2006) UN Doc CCPR/C/88/D/1416/2005.

50 Communication No. 1327/2004, *Grioua v Algeria*, UN Doc CCPR/C/90/D/1327/2004 (2007), para 7.2. See also Declaration on the Protection of All Persons from Enforced Disappearance, UNGA Res 47/133 (18 December 1992) A/RES/47/133; Inter-American Convention on Forced Disappearance of Persons (adopted 6 June 1994, entered into force 28 March 1996) art 3; UNGA International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UN Doc A/RES/61/177.

51 UNCHR 'General Comment 29: Article 4 (Derogations during a State of Emergency)' (2001) UN Doc CCPR/C/21/Rev.1/Add.11 para 11, 15, 16.

52 Ibid.

Moreover, the right to fair trial is also considered a non-derogable one.[53] In accordance with the principles of legality and the rule of law, '[d]eviating from fundamental principles of fair trial, including the presumption of innocence' is prohibited in all circumstances.[54] Moreover, even if Article 4 of the International Covenant on Civil and Political Rights (ICCPR) permits derogation from some aspects of Article 14 (right to fair trial) in times of state of emergency, those derogations may never exceed what is 'strictly required by the exigencies of the actual situation' and must respect other non-derogable rights.[55] Both international human rights law and international humanitarian law prescribe the obligation to respect this right.[56] In fact, fair trial guarantees provided for by the international human rights law still apply during armed conflicts, subject to the very strict situations where derogation is allowed.[57] Under international humanitarian law, depriving someone of this right even constitutes a war crime.[58] Article 17 of the International Convention for the Suppression of the Financing of Terrorism, for instance, requires the fair treatment of any person detained, including respect for the rights and guarantees provided for by international human rights law. Article 21 of this Convention confirms that by stating that 'it shall [not] affect other rights, obligations and responsibilities of States and individuals under international law.'

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53 UNCHR (n 51) para 7, 15; UNHCR, 'General Comment 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial)' (2007) UN Doc CCPR/C/GC/32 para 6, 59; The Arab Charter of Human Rights expressly treats the right to fair trial under Article 16 of the Charter as non-derogable in times of emergency. See Arab Charter on Human Rights (n 43) art 4(2).

54 International Covenant on Civil and Political Rights 'General Comment 29' in 'Derogations during a State of Emergency' (2011) UN Doc CCPR/C/21/Rev.1/Add.11, para 11, art 24; ICCPR 'General Comment 32, art 14' in 'Right to equality before courts and tribunals and to a fair trial (2007) UN Doc CCPR/C/GC/32, para 6.

55 ibid.

56 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) [UDHR] art 10; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [ECHR] arts 5-7;African Charter on Human and Peoples' Rights [African Charter] (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58, art 7; Organisation of American States [OAS], 'American Convention on Human Rights, "Pact of San Jose"' (22 November 1969) <https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf> accessed 15 May 2019, art 8; ICRC, 'Customary IHL: Rule 100, Free Trial Guarantees'<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100>accessed 16 May 2019; Common Article 3 of the Geneva Conventions; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)(adopted 12 August 1949) 75 UNTS 135 art 84(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 6(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 75(4).

57 ICRC, 'Customary IHL Database, Rule 100 on Fair Trial Guarantees'<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule100> accessed 15 May 2019. See also, Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' (1993) International Review of the Red Cross <https://www.icrc.org/eng/resources/documents/article/other/57jmrt.htm> accessed 15 May 2019; Louise Doswald-Beck, 'Fair Trial, Right to International Protection', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e798> accessed 15 May 2009.

58 Additional protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (protocol I) (entered into force 7 December 1978) 1125 UN Treaty Series 3, art 85.

It should be also noted that the use of military courts to try persons accused of terrorism offences is not prohibited by international law, but the use must comply with the obligation to guarantee the individual's right to be judged by an impartial and independent court, as well with all the other obligations enshrined in international human rights treaties and customary international law.[59]

Another point which is relevant to this discussion is the use of secret evidence by courts in national security-related cases. The UN Special Rapporteur Philip Alston pointed out the Military Commission Act enacted by US provided that the government can withhold from the defence the sources and methods by which evidences were acquired, and allows that detainees are convicted based on evidence that was never shown to them.[60] However, the use of secret evidence constitutes a violation of the right to fair trial and the principle of equality of arms, since the persons accused have no access to the evidence against them, and, therefore, cannot properly defend themselves.

Finally, Article 6 of the ICCPR states that 'no one shall be arbitrarily deprived of his life.' It goes on to state that even in 'countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime' and that '[t]his penalty can only be carried out pursuant to a final judgment rendered by a competent court.' Thus, the use of death penalties to those suspects subject to the extraordinary rendition programme raises concerns,[61] mainly when considering that the imposition of death penalty follows a trial which most certainly did not comply with the international fair trial standards. Therefore, the imposition of such penalty under these conditions would be a violation to Article 6 of the ICCPR.[62]

In sum, extraordinary renditions involve the commission of numerous violations to international human rights law. As any violation to human rights, individuals are entitled to seek redress under national and/or international courts.[63] What we will see, however, is that

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59 UN Office of Counter-Terrorism, 'Right to fair trial'<https://www.un.org/counterterrorism/ctitf/en/right-fair-trial>accessed 16 May 2019; UN; Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations, A/HRC/28/32 (2015). See note 63.

60 Philip Alston, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development - Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston-Addendum – Mission to the United States of America, A/HRC/11/2/Add.5 (2009), para 40. Although the Military Commission Act of 2006 was amended in order to ensure more fair trial guarantees to the prisoners, it is believed that the U.S. authorities still conceal the investigative methods in criminal cases, eroding the fair trial rights. See 'US: Secret Evidence Erodes Fair Trial Rights' (*Human Rights Watch,* January 2018) <https://www.hrw.org/news/2018/01/09/us-secret-evidence-erodes-fair-trial-rights>accessed 15 May 2019; Owen Bowcott, 'Secret evidence leads to downgrade of convictions over Stoke shooting' (*Guardian*, 22 May 2018).

61 Cassandra Stubbs, 'At Guantánamo, a Death Penalty Case Without a Death Penalty Lawyer'(ACLU 14 November 2017) <https://www.aclu.org/blog/national-security/detention/guantanamo-death-penalty-case-without-death-penalty-lawyer>accessed 15 May 2019; Alka Pradhan, 'Outside the United States, Extraordinary Rendition on Trial'(2011) 15 ASIL <https://www.asil.org/insights/volume/15/issue/29/outside-united-states-extraordinary-rendition-trial> accessed 12 May 2019.

62 International Commission of Jurists, 'Pakistan: end military trials of civilians': 'Such use of military courts to try civilians is inconsistent with international fair trial standards, and the imposition of the death penalty after such trials violates the right to life.' (2018) <https://www.icj.org/pakistan-end-military-trials-of-civilians/> accessed 12 May 2019.

63 ACLU (n 6).

the right to access to justice and all the rights derived from it, including the right to reparations, are also violated on the grounds of national security and secrecy.

II. The Significance of State Secrets Privilege for Extraordinary Rendition

What is going to be shown in this chapter is that not only states violate international human rights through the use of extraordinary renditions and secret detentions itself, but they also violate their international human rights obligations by failing to properly address these former violations. Such failure happens where the state-held evidences are not allowed to be revealed to the courts and victims on the ground that disclosure would risk national security. This ground is called 'state secrets privilege' and can be applied to criminal and civil lawsuits.

Many states developed such doctrine, which is a common law evidentiary privilege that enables governments to withhold secret information in legal proceedings.[64] The claim of privilege may result in the rejection of a discovery request or even in the total dismissal of the case without appreciation by the court.[65] It is often used as a way to shield the responsible authorities from being held accountable for their violations of human rights. This work intends to argue that the privilege may contravene the states' obligation to provide for effective investigation of all violations, prosecute the responsible persons and ensure they are punished according to the rule of law. The impact of the state secrets privilege on human rights can be seen in several legal cases of extraordinary rendition, as shown below.

III. I Relevant Cases

III.I.I *Nasr and Ghali v. Italy*

Also known as *Abu Omar* case, this case was judged on 23 February 2016 by the European Court of Human Rights. Nasr Osama Mustafa Hassan, or Abu Omar, an Egyptian refugee in Italy, was subject to the US extraordinary rendition programme in cooperation with the Italian Intelligence and Security Service (*Servizio Informazioni e Sicurezza Militare*). The applicant sustained that he had been stopped by the Italian authorities, put into a lorry, handed over to CIA authorities, transferred to a secret detention in Egypt, tortured and interrogated. Later, these facts were brought before the Tribunal of Milan, which convicted twenty-three American authorities, but was forced to dismiss the charges against five Italian agents because the state secrets privilege was invoked and confirmed by the Italian Prime Minister.[66] Under the Italian law, when the state secrets privilege is invoked in a criminal case, and confirmed by the Prime Minister, the only authority vested with this prerogative power, the information cannot be used by the prosecutor or the judge in any way.[67] The invocation of state secrets privilege for crucial evidence made it impossible for the court to convict the Italian authorities.[68]

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64 Sudha Setty, 'Litigating Secrets. Comparative perspectives on the state secrets privilege' (2009) 75:1 Brooklyn Law Review 201<https://brooklynworks.brooklaw.edu/blr/vol75/iss1/4/>accessed 15 May 2019.

65 ibid.

66 *Adler Monica Courtney et al*, Milan Tribunal, Judgement of 4 November 2009 (application n 12428).

67 Law 124 (on Intelligence System for the Security of the Republic) of 3 of August 2007 and Law 187 (New Provisions Governing State Secrets Privilege) of 13 August 2007.

68 Arianna Vedaschi, 'State Secret Privilege versus Human Rights. Lessons from the European Court of Human Rights Ruling on the Abu Omar Case' (2017) European Constitutional Law Review 166, 169.

However, considering that the information at issue was already well known by the prosecutor and was already in public domain, the admission by the court of the secrecy argument is understood to have extended the privilege beyond the terms of the law.[69] As a result, the application of state secrets privilege in this case is seen not as a mean to protect national security, but merely to shield public authorities from prosecution.[70]

The Italian Constitutional Court is the only institution with powers to perform judicial review on the legitimacy of the state secrets privilege, by analysing the classified documents.[71] However, in this case, the court refrained from doing so by merely analysing the formal and procedural aspects governing the privilege.[72] It did not even verify whether a link between the state secrets privilege and the reasons prescribed by law existed.[73] The very law governing the secrecy says that it cannot be used for hiding acts against the constitutional order, which includes the fundamental human rights.[74] By refusing to review the state secrets privilege, the Italian Constitutional Court left it entirely to the discretion of the Prime Minister, which presents a risk of arbitrary use of the privilege.[75]

When brought before the Strasbourg Court, it ruled that the cooperation of the Member States of the Council of Europe with the CIA's extraordinary renditions programme violated Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the ECHR. The Court settled not only the ruling on extraordinary renditions, but also on the accountability of the Member States for failing to provide an effective remedy to victims of gross violations to human rights, even when the wrongful acts are carried out outside their territories.[76] In this judgement, the Court stated that the claim of state secrets privilege is unlawful when in relation to evidence which is already in the public domain and when it is used as way to avoid the accountability of the responsible authorities.[77] The Court also pronounced on the unlawfulness of the government's behaviour of not in fact implementing the punishments set by the domestic court to the foreign authorities subject to it.[78]

As such, the Court demonstrated that extraordinary rendition and enforced disappearances undermine the most basic human rights and the fundamental values of a democratic society. It reinforced that democratic states are bound to the rule of law, even when facing the horrible threat of terrorism. It also demonstrated that to protect these principles, it is of paramount importance to hold those who violate them accountable by granting an effective remedy to the victims, and thus, the use of state secrets privilege must remain an exception and be balanced with proper guarantees.

III.I.II *El-Masri*

Khalid El-Masri, a German citizen, alleged that during a trip to Macedonia, he was detained by Macedonian agents, kept in incommunicado detention in a hotel for several weeks for interrogation, blindfolded and handcuffed, handed over to the CIA agents, who beat him,

69 ibid 171.

70 ibid.

71 Law n 124//2007, art 40; 2011 Italian Criminal Procedure Code, art 202(8).

72 Vedaschi (n 69) 172-173.

73 Judgement n. 106 of 11 March 2009, Italian Constitutional Court, paras 8.1-8.4, 12.5.

74 Law n 124/2007, art 39(11).

75 Vedaschi, (n 69) 174.

76 ibid 167.

77 *Nasr and Ghali v Italy*, Jugement du 23 Février de 2016, ECHR, at 268-74.

78 ibid.

removed his clothes, forced a suppository in his anus, covered his head with a bag, forcibly sedated him several times and transferred him to a black site in Afghanistan. In Afghanistan, he claims that he was again tortured and interrogated, and that he began a hunger strike to protest against his detention without charge. He says that his health deteriorated, but no medical care was given and after a while, he was allegedly force-fed through his nose. Five months from his first arrest, he claims that he was taken to Albania, his belongings were returned, and that he was instructed to walk down the way without turning back. He says that he met the Albanian authorities on the way, who asked for his passport and once they saw he had no visa, they returned him to Germany. No charges were ever filed against him.

El-Masri filed a civil claim in the U.S. District Court for the Eastern District of Virginia against the former Director of the CIA and the aviation companies that made his transport during the extraordinary rendition procedure. The case was dismissed on the ground of state secrets privilege,[79] after the U.S. government argued that the suit could not proceed without exposing confidential information related to national security and foreign affairs.[80] The decision of the Court upheld the government argument by stating that the lawsuit could not proceed because the government would not be able to reply without revealing 'considerable detail about the CIA's highly classified overseas programs and operations'.[81] It also stated that 'while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well established and controlling legal principles require that in the present circumstances, El- Masri's private interests must give way to the national interest in preserving state secrets.'[82]

The case was finally brought before the European Court of Justice against Macedonia (the only country involved that was under the jurisdiction of the Court). The decision of the Court on this case was a landmark judgement on the cooperation of EU states with the programme of extraordinary rendition and enforced disappearances of the U.S. The Court stated that such cooperation violated the prohibition of torture and other cruel, inhumane and degrading treatment, as well as the prohibition on unlawful detention.[83] The Court also ruled that there was a violation to the right to respect for one's privacy and family life, and to the right to an effective remedy.[84]

Moreover, in their concurring opinion, the Judges Tulkens, Spielmann, Sicilianos and Keller, stated that within the framework of the right to an effective remedy, the state violated the right to truth, which requires an effective investigation and plays an important role in 'strengthening confidence in public institutions and hence the rule of law'.[85] Here the Court had no jurisdiction to rule upon the use of the state secrets privilege by the US, but it stated, nonetheless, that the privilege has 'often been invoked to obstruct the search for the truth'.[86] It went on to declare that while there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may

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79 *El-Masri v Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2005) 537.

80 Statement of Interest, Assertion of a Formal Claim of State Secrets Privilege by United States of America, *El-Masri v Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2005) 437.

81 *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) 539.

82 ibid.

83 *El Masri v Macedonia*, (2012) (Judgement) 2067ECHR 211, 240.

84 ibid 248 – 60.

85 *El-Masri v Macedonia*, Separate Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller (2012) 2067 ECHR 1, 6.

86 *El-Masri v Macedonia* (2012) (Judgement) 2067 ECHR 191.

generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory[87]

The Court asserted that the inadequate investigation deprived the victim of being informed about the truth of the facts that victimised him and the role of those responsible for it.[88] Therefore, the privilege violated the right of Mr. El-Masri to an effective remedy against the horrific violations that were committed against him, to the truth about what happened (a right that is owned by the victim, his relatives and encompasses the right to know of society in general), and it also hampered the state to comply with its obligation to carry out an effective investigation and to punish the ones responsible for these wrongful acts.

It should be noted that later it was officially acknowledged that El-Masri's extraordinary rendition was a case of mistaken identity,[89] which reinforces the need for a court's scrutiny towards such measures.

III.I.III *Binyam Mohamed*

In 2002, Binyam Mohamed was allegedly detained in Pakistan while he tried to return to the United Kingdom, his place of legal residence. The Pakistani authorities supposedly handed him over to U.S. agents, who submitted him to interrogations without any access to a lawyer for four months.[90] Subsequently, he claims that he was forced into a plane, blindfolded and taken to a black site in Morocco.[91] There he alleges that he was detained, interrogated and tortured by Moroccan agents for a year and a half. According to him, his bones were routinely broken by them, he was beaten, cut with a scalpel all over his body, including his penis, and 'hot stinging liquid' was poured into his open wounds.[92] In 2004, he is believed to have been taken by CIA agents and transferred to Afghanistan in a private aircraft.[93] After months being interrogated and tortured there, he claims that he was taken to Guantánamo Bay. In the hands of American agents, he was tortured by *inter alia* being kept in constant darkness, barely fed and subjected to loud noises such as women and children screaming. At last, in 2005, he was charged with conspiracy by a U.S. military commission. He had supposedly confessed, but he says that he was forced to confess during torture. During his stay in Afghanistan, he was also questioned by British officials.

Later on, he tried to obtain with the British government proof that he has been tortured by U.S. officials to prove that his confession was obtained under torture. However, the British government refused to disclose the documents under the 'public interest immunity doctrine', the British equivalent to state secrets privilege.[94]

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87 ibid 192.

88 ibid.

89 Glenn Kessler, 'Price to Admit German's Abduction Was an Error: On European Trip, Rice Faces Scrutiny on Prisoner Policy' (*Washington Post*, 7 December 2005) <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/06/AR2005120600083.html>accessed 30 June 2019; Dana Priest, 'Wrongful Imprisonment: Anatomy of a CIA Mistake' (*Washington Post*, 4 December 2005).

90 Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' (2016) 38(1) Human Rights Quarterly 58.

91 *Mohamed v Jeppesen Dataplan*, *Inc*, 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008)

92 *Mohamed v Jeppesen Dataplan*, *Inc*, 614 F.3d 1070, 1074 (9th Cir. 2010)

93 Davis, (n 90) 60.

94 ibid.

He then brought the issue before the British courts.[95] It was only when the case went to the High Court that the British government acknowledged they had documents that 'might be relevant in the context of proceedings before the Military Commissions.'[96] However, according to the government, disclosing those documents would cause 'significant damage to [the] national security of the United Kingdom'.[97] Under this new evidence, the High Court found that there was an 'arguable case', but it stayed its order to produce documents until the Foreign Secretary decided whether to invoke the public interest immunity.[98]

Later the Court made a redacted version of its decision to protect confidential information. [99] However, the Foreign Secretary opposed to the release of the documents and the publication of the redacted paragraphs on the ground that US had threatened to reconsider its intelligence sharing cooperation with the United Kingdom if such documents were released.[100] During the proceedings before the High Court, Mr Mohamed's *habeas corpus* petition was heard by the US Federal Judge Emmet Sullivan, who requested the US government to produce evidence to support the charges against him. At the end, the US government produced forty-two heavily redacted documents,[101] which were considered by the British High Court as enough evidence to provide Mr Mohamed with an effective remedy before the British Court.[102] However, the Court still needed to deal with the issue of the publication of the redacted decision. According to it, 'requirements of open justice, the rule of law and democratic accountability demonstrate the very considerable public interest in making the redacted paragraphs public, particularly given the constitutional importance of the prohibition against torture.'[103] As such, the High Court dismissed the appeal of the Foreign Secretary, and held that the 'publication of the redacted paragraphs would not reveal information which would be of interest to a terrorist or criminal or provide any potential material of value to a terrorist or a criminal.'[104] This case shows that not only are counter-terrorism operations transnational, but that so are the efforts to keep information secret.[105] However, the more transnational the efforts to fight terrorism, the more compelling it is to ensure that human rights are respected and that accountability for their violations is seriously taken.

The cases mentioned above illustrate the tension that exists between national security interests and international human rights law. The governments want to keep the clandestine aspects of their counter-terrorism operations secret, and most of the national courts recognise the right to keep this secrecy on national security grounds, making accountability for human rights violations very difficult. There is a huge risk – and indeed the cases mentioned herein demonstrate that the risk has been materialised - that governments make use of these secrecy

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95 *Mohamed, R v Secretary of State for foreign & Commonwealth Affairs* (Rev 31-07-2009) [2008] EWHC 2048 (Admin) (21 August 2008) 2.

96 ibid 47.

97 ibid.

98 ibid 147, 149.

99 ibid 4.

100 *Mohamed, R v Secretary of State for foreign & Commonwealth Affairs* [2008] EWHC 2100 (Admin) (29 August 2008) 5,2.

101 Mohamed, R v Secretary of State for foreign & Commonwealth Affairs [2009] EWHC 152 (Admin) (04 February 2009) 5, 7.

102 Davis, (n 90) art 61-2.

103 *Mohamed, R v Secretary of State for foreign & Commonwealth Affairs* [2009] EWHC 152 (Admin) (04 February 2009), para 54.

104 *Mohamed, R v Secretary of State for foreign & Commonwealth Affairs* [2010] EWHC Civ 65 (Admin) (10 February 2010), para 52.

105 Davis, (n 90) art 63.

doctrines to simply guarantee impunity to the human rights violations committed by their authorities.

IV. State Secrets Privilege and Human Rights

As this work has shown in the previous chapters, the use of the state secrets privilege in cases concerning national security may serve as means to prevent public authorities from being held accountable for their violation to human rights. This shield itself is another violation to human rights, because states are not only bound to respect fundamental rights such as, *inter alia*, the right to life, the right not to be tortured or ill-treated, the right not to be arbitrarily detained, but also the right to be heard before a competent and impartial court, to receive a proper redress, to have those responsible for their injustices investigated and punished, to be ruled by a transparent government, to search the truth about the facts related to them and involving their government and to have a government that fights impunity in the name of democracy.

The right to fair trial, enshrined in Article 6 of the European Convention on Human Rights (ECHR), Article 14(1) of the ICCPR, Article 8 of the American Convention on Human Rights and, Article 7 of the African Charter on Human and Peoples' Rights, Article 13 of the Revised Arab Charter on Human Rights and Article 20 of the ASEAN Human Rights Declaration, is one of the fundamental guarantees of human rights and the rule of law.[106] This right is essential for the enjoyment of the other fundamental rights. For this reason, it is paramount that every person has access to judicial protection, which is implemented by the access to court, to remedies and reparations.

In *Myrna Mack Chang v. Guatemala*, the Inter-American Court of Human Rights stated that allowing officials in the branch of the government under investigation to deny access to information on the grounds of secrecy constituted a violation to the right of judicial protection and to an investigation.[107] For this Court, states are entitled to make some information secret, but this 'must be subject to control by other branches of State or by a body that ensures respect for the principle of the division of powers.'[108] It should be noted that while the US is not subject to the jurisdiction of this Court, the Inter-American Commission of Human Rights may decide on the lawfulness of its state secrets privilege jurisprudence.[109]

In *El-Masri*, the European Court of Human Rights stated that the right to an effective remedy 'requires independent and rigorous scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [prohibition of torture]'[110] and that '[t]his scrutiny must be carried out without regard to any perceived threat to the national security of the expelling State.'[111] The Court also acknowledged that '[t]he concept of 'State secrets' has often been invoked to obstruct the search for the truth.'[112]

The Inter-American Court of Human Rights recognised the right to truth, explaining that the right to an effective investigation and to truth derives from the obligation to protect

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106 Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism, (October 2014) <https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf> accessed 12 May 2019.

107 *Myrna Mack Chang v. Guatemala*, n. 101, Judgement of 25 November 2003, IACHR, 181.

108 ibid 180, 181.

109 Davis, (n 90) 71.

110 *El Masri v Macedonia*, (2012) (Judgement) 2067 ECHR, 257.

111 ibid.

112 ibid 191.

people from violations to their rights and to grant them judicial protection.[113] The state secrets doctrine prevents the victims, their relatives and the society from knowing the facts and wrongful acts committed by the governments in violation to fundamental human rights.

Moreover, the European Court of Human Rights also ruled that 'the confines of a democratic society governed by the rule of law cannot allow this system to operate in conditions of guaranteed impunity for the abuses committed by its agents.' [114] Furthermore, the Court also stated that 'it should be possible to ensure accountability of the anti-terrorist and security services without compromising the legitimate need to combat terrorism and to maintain the necessary level of confidentiality.'[115]

In addition, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment also imposes the obligation of the states to investigate and to punish allegations of torture.[116]

Even if the European Court of Human Rights' and the Inter-American Court of Human Rights' rulings are only binding to those countries that accepted their jurisdiction, because many of the rights and obligations stated by these courts are reflected in numerous sources of international law, these rights may be considered as reflecting customary international law, and therefore, binding on all the states of the planet.[117] Those instruments of international human rights law and rulings demonstrate that the state secrets privilege cannot eliminate the right of the victims, their relatives or society to know the truth about these violations and that states cannot, on behalf of national security, breach their obligations under customary international law and human rights law toward the right to truth, to an effective investigation, to an effective remedy, and to judicial protection. Victims have the right to justice, and this means that their claims must be heard, that they have the right to know about the facts and people who victimised them, to see them punished, to receive proper redress, and those rights cannot be arbitrarily taken from them.

IV.I National Security *Versus* Human Rights Dilemma

In order to avoid the misuse of the state secrets privilege, the assessment of what must be kept secret or not must not be confined to the organ involved in the litigation at issue. Mainly when there is a claim of the existence of torture or ill-treatment or other gross violations to human rights, this claim deserves a close and independent scrutiny regardless of whether there is a matter of national security involved or not.

In this regard, Israeli practice should be noticed. In *Public Committee Against Torture in Israel v. Israel*, the committee challenged the use of preventive airstrikes by the Israeli forces against alleged terrorists. The executive branch of the government, however, claimed that the issue was not justiciable on the grounds of national security.[118] Here the court established four criteria to assess if a case is justiciable before a court or not: (i) where there is human rights involved, the case is always justiciable; (ii) where the case involves mainly political or military policies and not a legal dispute, it is not justiciable; (iii) issues that have already been dealt with by international courts to which Israel is signatory, must be justiciable domestically as

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113 *Velásquez Rodrigues v. Honduras*, N. 4, 29 July 1988, IACHR, 166; *Blake v. Guatemala, Reparations*, N. 48, 22 January 1999, IACHR, 63.

114 *Aslakhanova v. Russia*, (2012) (Judgement)2075 ECHR, 231.

115 ibid.

116 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Resolution 39/46, U.N. GAOR (1984), arts 12-14.

117 Davis, (n 90) 81. See also, (n 6), (n 49) and (n 60).

118 *Public Committee Against Torture v. Israel*, 2005 Isr HCJ 769/02.

well; and (iv) a judicial review should be allowed when analysing the *ex post* objective application of a policy, rather than the policy itself.[119] In this case, the court considered that the suit challenged not the policy on use of strikes in general, but their specific use against civilians, a subject which has already been considered by other international courts and that the analysis was over an ex post situation, despite of the classified military information involved.[120] As such, the court ruled that the matter was justiciable, and the Israeli Supreme Court has consistently considered that matters related to national security are justiciable.[121]

In *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior*, considering the balancing test applied, the court explained that, even though the court is cautious when examining the security claims of the executive branch, it should examine the reasonableness of their claims and proportionality of the measure concerned when it involves a security policy in violation of human rights.[122] Furthermore, in an attempt to preserve security, the Israeli courts often use *in camera* review without the presence of the parties or lawyers to assess the risk to national security.[123]

In Scotland, the courts have consistently struck a balance between national security interests and the interest in democratic accountability and individual rights.[124] In *Leven v. Young*, the court held that the judiciary have the right to make an independent determination on the claim of the privilege over certain evidence.[125] Nonetheless, the courts also stated that the party seeking the classified information should demonstrate a significant level of need for the disclosure to be granted.[126]

In *Conway v. Rimmer*, the court established the Scottish standard by saying that "[i]f, on balance, considering the likely importance of the document in the case before it, the court considers that it should probably be produced, it should generally examine the document before ordering the production".[127] On the other hand, the court also established guidelines to define when greater deference should be given to the government in cases related to documents concerning national security, saying, however that in cases, such as litigations related to accidents involving state employees and on government premises, the crown privilege ought not to be invoked.[128] The court further stated that "[i]mmunity from unauthorised disclosure and from accountability are two sides of the same coin".[129] This balancing test set forth in *Conway* is still applied today in cases concerning state secret privilege in Scotland.

These approaches demonstrate the importance of striking a fair balance between human rights and the interests of national security. An independent and impartial organ must be always responsible for scrutinising the implications of the executive branch's measures on the human rights of the affected persons. Cases involving grave violations to human rights

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119 ibid 50-54.

120 ibid 8, 51, 19-46, 56, 54.

121 See for instance, *Schnitzer v Chief Military Censor,* 1989 Isr. HCJ 680/88.

122 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior,* 2006 Isr. HCJ 7052/03 443, 692-693.

123 See for instance, *Vanunu v. Head of the Home Front Command*, 2004 Isr. HCJ 5211/04.

124 ibid.

125 *Leven v. Young* (1818) 1 Murray (Scot. 1st Div) 350, 370.

126 William Weaver and Danielle Escontrias, 'Origins of the State Secrets Privilege'(2010) *Social Science Research Network*, SSRN 37.

127 *Conway v. Rimmer*, A.C. (1968), 911.

128 ibid 923.

129 ibid 924.

should be always justiciable, and courts should implement measures, such as *in camera* reviews if necessary, to guarantee that human rights will always be protected, even when the need to preserve national security demands secrecy. In addition, having the victims prove the violations of their rights in cases in which all the evidence is in the custody of the state is unfair and inhuman.[130] In such cases, the burden of proof must be shifted to the state responsible for the alleged violations.

Democracy requires that impunity within the state institutions be fought and this can only be achieved through the mechanism of checks and balances – in this case, through the scrutiny of the judiciary over the executive branch.

V. Final Conclusion

Whereas it is of paramount importance that governments fight terrorism, a phenomenon that threatens our society as it is and the very essence of fundamental human rights, it is also critical that they do not relinquish human rights while doing so. Unfortunately, what we have seen during the past years is an increasing abuse by states of their prerogatives on behalf of combating the impunity of terrorism. Individuals are detained, kidnapped, tortured and even killed in a manner which completely falls short of complying with human rights obligations, both at national and international levels.

Any democratic state based on the rule of law is bound to have judicial mechanisms to ensure that human rights are protected against the possible arbitrariness of government agents in any circumstance. The only way to guarantee that the executive branch of the government does not abuse its prerogatives and becomes arbitrary is through a system of checks and balances, inherent to the principle of separation of powers. Where the courts cannot exercise their prerogatives to scrutinise the activities of the government in order to guarantee compliance with the rule of law and human rights, democracy is no longer existent. It is part of the functions of the judiciary branch of the government to scrutinise the measures taken by the executive branch that may contravene the law, mainly when the law is that of human rights. Courts must make sure that governmental activities fall within the framework of legality, and to do so it is essential that impunity does not take place.

In many instances, however, the state secrets privilege has been used as a way to shield state officials from prosecution and punishment. While this work acknowledges the need of secrecy to protect the interests of national security, it considers that the information about the responsibility of those involved in gross violations against human rights, such as torture, enforced disappearance and murder should not be kept a secret.

Furthermore, the use of state secrets privilege over information that is already known by the plaintiff or that is already in public domain cannot be regarded as anything but an attempt by the government to shield its wrongful acts from public or judicial scrutiny, and, therefore, courts should not accept this claim. A distinction must be made between legitimate secrets and those which do not deserve protection.

Allowing the executive to decide upon their own mistakes and to make them secret would deprive not only the courts of their role, but also the plaintiffs of their right to a fair trial, to the truth and to an effective remedy and reparations. Moreover, it is clear from all the information that came to public knowledge that the use of the secrecy privilege cannot be simply left to the assumption of good faith of the executive.

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130 OHCHR, 'Human rights must always be protected, even when countering terrorism – UN experts' (16 April 2015) <https://www.ohchr.org/EN/newsEvents/Pages/DisplayNews.aspx?NewsID=15846&LangID=E> accessed 12 May 2019.

For this reason, it is fundamental that the judiciary exercises its prerogatives to at least check if the claim of secrecy has a legitimate ground, and, even in cases where it does, to develop a way to ensure as much as possible that the victims are protected by the courts and the perpetrators are punished. As such, procedural safeguards must be put in place to guarantee that a fair balance is struck between the interests of national security and the interests of preserving transparency and protecting human rights. For instance, in cases involving torture, forced disappearances or other gross violations of human rights, the burden of proof should be shifted to the government instead of having the victims or their relatives to prove what happened to them. Without judicial oversight, the prohibitions to torture, to arbitrary detention and killings are meaningless. Finally, it is only by embracing human rights that society and its values can be preserved.

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Seeking the Golden Fleece through Lampedusa: Situating Municipal Action in International Law

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Keywords
ILLEGAL MIGRATION BY SEA; HUMAN RIGHTS; INTERNATIONAL LAW; BORDER CONTROL

Abstract

The crises of illegal migration by sea, currently plaguing the coastal States around the Mediterranean Sea, have created a situation of tightening border controls. Italy, as a choice destination State for many migrants, has continued to employ measures to ensure that the number of vessels carrying irregular migrants arriving onshore is reduced to the barest minimum. Push-back measures, which are conducted based on bilateral agreements with Libya, are one such method of seaward border management. This article questions the legality of the Italian push-back measures, as a representation of State interest, when placed next to international law. The paper argues that, since such measures of externalisation of border security may conflict with principles of international law, destination States should consciously adopt measures that are sensitive to migrant rights.

Introduction

Across the world, since the emergence of modern nation States, States have asserted control over their borders as a matter of jurisdictional right.[1] Part of this control seeks to manage illegal migration, which is said to threaten security and labour markets, as well as the cultural and national identity of the State.[2] Even with these controls, the international community has, of recent, continued to face problems associated with illegal migration. The International Organisation for Migration (IOM) statistics reveal that in 2015, over one million illegal migrants and refugees arrived at various countries across the Mediterranean, with the coastal States of Italy, Greece and Spain serving as access points into Europe.[3] The figures of about 363,401 persons in 2016 and 25,589 persons at the end of March 2017 respectively exclude

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1 Secretariat General, Council of European Union, 'Feasibility Study on the Control of the European Union's Maritime Borders' (11490/1/03) Brussels 19 September 2003, 8; Pia Oberoi and Eleanor Taylor-Nicholson, 'The Enemy at the Gates: International Borders, Migration and Human Rights (2013) 2 Laws 169, 178.

2 Michael Pugh, 'Drowning not Waving at Sea: Boat People and Humanitarianism at Sea' (2004) 17 Journal of Refugee Studies 51, 52; Oberoi and Taylor-Nicholson (n 1) 170.

3 International Organisation for Migration (IOM), 'Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015: IOM' (*IOM UN Migration,* 22 December 2015) <www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom> accessed 25 May 2019.

the lives lost or declared missing at sea.[4] The growing numbers of migrants cause States disadvantaged by their inflow to adopt a protectionist position with regards to migration management and security control of their maritime borders.[5] From a protectionist perspective, the State places its national interest as paramount, such that border controls take the shape of services that fulfil this goal.

This paper seeks to interrogate the complexities of international principles and national interest as it relates to illegal migration by sea by economic migrants. The paper focuses on Italy as the choice destination of this class of migrants, and argues that States, for the purpose of their security interests, are entitled to take actions which will minimise the risks created by illegal migration. However, the paper argues that the initiative of externalising control adopted in the securitisation of border control may be at odds with certain obligations under existing international law. Thus, the paper advocates for, among other measures, the adoption of border control procedures that are sensitive to the human rights of migrants, especially those who attempt to undertake the journey for purely economic reasons. The paper also calls for increased global investment that translates to socio-economic enhancements in States identified statistically as migrant-producing States, as a means to strike an appropriate balance between international law and State interest and, at the same time, contribute significantly to curtailing the problem of illegal migration.

This paper consists of six sections, including the introduction and conclusion. Section II identifies and examines the threat of illegal migration as a security issue for destination States. This section of the paper lays the foundations for an assessment of the how State interest exists side-by-side with international law in the discourse of illegal migration by sea. Italy's externalisation of migrant control is examined in Section III before it is considered side-by-side with international law in Section IV. Section V proffers solutions to balancing the protectionist actions of the State with the requirements of international law.

I. The Threat of Illegal Migration

Globalisation creates a scenario where contemporary society expects the movement of capital, physical goods, ideas and even people.[6] In line with this expectation, migration covers any kind of movement of an individual or a group of persons, transnationally or within a State, for various reasons and irrespective of legal status.[7] A wide spectrum of persons engage in migration, include those engaging in the process for solely economic reasons. However, the existence of necessary requirements to enter a destination country presents a means of classifying migrants broadly into two classes – illegal and legal migrants.

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4 IOM, 'Mediterranean Update' <migration.iom.int/docs/MMP/170328_Mediterranean_Update.pdf> accessed 25 May 2019.

5 Pelin Sönmez, 'The EU's Black Sea Initiatives and their Effects on Migration Control and Security Cooperation' (2016) 49 Journal of Black Sea Studies 1, 4.

6 Raimo Vayrynen, 'Illegal Immigration, Human Trafficking, and Organised Crime' in George J Borjas and Jeff Crisp (eds) *Poverty, International Migration and Asylum* (Studies in Development Economics and Policy, Palgrave Macmillan London 2005) 143.

7 IOM, 'Definition of Migrant' in IOM, United Nations High Commission for Refugees (UNHCR) and Save the Children *Addressing Irregular Migration Flows in Southern Africa: Protection and Assistance in Mixed Migration* (Training Manual Facilitator's Guide, March 2016) 9 <www.refworld.org/pdfid/5804d4204.pdf> accessed 25 May 2019.

Migration may be broadly classified as unlawful, irregular or illegal in the absence of compliance with relevant requirements of domestic immigration legislation and rules of a receiving or destination country.[8] The IOM defines irregular or illegal migration as one which occurs 'outside the regulatory norms of the sending, transit and receiving countries'.[9] In other words, an individual's recognised freedom to exit a country is not matched with a corresponding right to enter another country.[10]

I.I The Concept of Illegal Migration by Sea

Although usage of the phrase 'illegal migration by sea' has gained frequency in recent years, it remains an unclear term due to the paucity of its precise definition by its users, who nevertheless engage the term copiously. It may be the case that scholars opt to avoid a precise definition due to assertions, such as that made by Malia, that 'within the broad classification of illegal migrants is a mixed population comprising *de facto* asylum seekers, economic migrants and victims of trafficking.'[11] This mixed population shares the feature of having entered into a country in contravention of laid-down rules and procedures.[12] However, the illegal economic migrant has no genuine reason to engage asylum procedures. Vayrynen limits illegal migration in the strictest sense to voluntary movements by immigrants.[13] This is because other illegal migrants engage in movement due to circumstances beyond their immediate control. From this dimension, the intention behind illegal migration is economic in nature, hinged on the hope improving one's financial status through better payment for work in the destination country, albeit by means defined as illicit by governments. Illegal economic migrants, more often than not, require the help of persons to bring them to their destination clandestinely. Hence the connection between illegal migration and human smuggling.[14] Voluntary migrants may also be in the company of vulnerable persons who have been preyed upon, have lost their freedom and are to be bonded in servitude in the destination

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8 Vayrynen (n 6) 143; Patricia Mallia, 'The Challenge of Irregular Maritime Migration' (2013) Jean Monnet Occasion Paper No 4/2013 <citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.662.4953&rep=rep1&type=pdf> accessed 28 June 2019 5.

9 IOM, *International Migration Law: Glossary of Migration* (IOM 2004) 34.

10 Eric Tardif, 'Migration Crisis in the Mediterranean: Reconciling Conflicting Agendas' (2017) Human Rights Brief 1, 2 <hrbrief.org/hearings/migration-crisis-mediterranean-reconciling-conflicting-agendas-2/> accessed 11 May 2019.

11 Mallia (n 8) 5. Some writers also employ the term 'mixed migrants' to capture the mixed population that undertake the journey of illegal migration.

12 Ervin Ciorobai 'Smuggling of Migrants: Threats to National Security' (2017) 13 Research and Science Today 54, 57 (where the author states that undoubtedly, smuggling and trafficking of persons are forms of illegal migration and the operations share common features).

13 Raimo Vayrynen, 'Illegal Immigration, Human Trafficking, and Organised Crime' (UNU/WIDER Poverty, International Migration and Asylum conference, Helsinki, 27-28 September 2002) 4.

14 See Protocol on Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 40 ILM 384 (Smuggling Protocol) art 3 on the definition of smuggling. See also Vayrynen (n 13), 4; Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 Journal of Maritime Law and Commerce 219, 210.

country. These are trafficked persons.[15] This paper identifies that adopting the umbrella of illegal migration shields the nested, yet distinct, concepts of smuggling and trafficking that carry significant legal and political consequences.[16] However, in reality, the legal distinction between the concepts of illegal migration, human smuggling and human trafficking may not be so clear cut.[17] This is because, frequently, economic migrants become victims of trafficking; traffickers may act as smugglers and use the same routes for both trafficking and smuggling; and the conditions of these illegal migrants may be so bad that it is difficult to believe they agreed to it.[18] Tardif affirms that migrants arriving in Europe seldom belong to just one group, blurring the distinction between the various categories of migrants that attempt to access the continent illegally.[19] Similarly, the IOM links illegal migration to smuggling and trafficking-processes by which individuals are assisted to enter a State's territory in a manner which violates State laws, in exchange for compensation (payment or benefits). Following this association, one can understand why illegal migration in its broad sense is defined as movement of persons, with assistance, into a State's territory in a manner that violates the law of the destination State.

With specific reference to entry through maritime routes, Tervo and others define illegal migration by sea as the unauthorised entry of a third country national to the territory of a State through its maritime borders.[20] This paper utilises the phrase 'illegal migrant by sea' to describe persons who, for economic reasons, voluntarily engage in the process of entering a State's territory through its maritime borders in a process that contravenes generally accepted migration standards.[21]

A. Illegal Migration by Sea as a Threat to Coastal States

In recent years, illegal migration at sea has attained priority status on the security agendas of several States, especially in Europe.[22] Statistics reveal that a large number of migrants wish to

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15 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 40 ILM 335 (Trafficking Protocol) art 3 on the definition of trafficking.

16 Vayrynen (n 13) 6.

17 MJ Miller, 'The Sanctioning of Unauthorized Migration and Alien Employment' in David Kyle and Rey Koslowski (eds), *Global Human Smuggling: Comparative Perspectives* (John Hopkins University Press 2001) 326.

18 United Nations Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings* (United Nations 2008) 3.

19 Tardif (n 10) 2. See also Ciorobai (n 12) 57 (where the author states that undoubtedly, smuggling and trafficking of persons are forms of illegal migration and the operations share common features).

20 Kamruk Hossain, Adam Stepien and Henna Tervo, 'Illegal Immigration by Sea as a Challenge to the Maritime Border Security of the European Union with a Special Focus on Maritime Surveillance Systems' in Timo Koivurova et al (eds), *Understanding and Strengthening European Union-Canada Relations in Law of the Sea and Ocean Governance* (University of Lapland Artic Centre 2009) 387.

21 It will, however, draw a distinction in discussing persons smuggled (PS) and victims of trafficking (VOT) when the need arises.

22 Vayrynen (n 13) 9; Hossain, Stepien and Tervo (n 20) 387; Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee

either take advantage of the socio-economic discrepancies between developed and less developed countries or are forced to flee due to wars.[23] This creates a herculean challenge to the control of territorial borders as a fundamental attribute of the sovereignty of the destination States, which is translatable to a security threat from the maritime domain.[24] Generally, security (including maritime security) as a 'post-cold war era' concept jettisons the traditional idea that security revolves around the fear of, and the exercise of, domination or warfare between nations.[25] This is because the emergence and exposure to new risks and dangers (such as environmental degradation, climate change and transnational crimes) which challenged the well-being of individuals and communities necessitated a normative shift.[26] The broadened conceptualisation of security creates a field of integrated and multi-sectoral linkages with the possibility of an infinite pool of threats and vulnerabilities.[27] For destination States, appearing to crack down on these unwanted patterns of migration is increasingly regarded as essential for safeguarding social peace.[28] Notably, securitisation arising from threat perception differs among States, although they may coincide with globally defined threats.[29]

The movement of migrants across the Mediterranean is considered to constitute the largest movement of people through European borders since World War II.[30] Ever since October 2013, when 366 migrants died in a shipwreck off the Italian island of Lampedusa, captured the world's attention, the international community continues to express grave concern about the trends of illegal migration by sea. Migrants embark on crossing the Mediterranean sea -a major commercial shipping route- in inhuman transport conditions that violate international maritime safety standards, often leading to human tragedies.[31] Heightened control measures on land borders contribute to refugees and migrants increasingly resorting to death-defying crossings, including along the central Mediterranean

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Law' (2009) 21 International Journal of Refugee Law 256, 257; European Commission, 'EU Action Plan Against Migrant Smuggling (2015-2020)' (27 May 2015) COM(2015)285 final, 1.

23 Vayrynen (n 13) 20; Amnesty International '*Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*' (Amnesty International 2014) 8.

24 Martin Heisler and Zig Layton-Henry, 'Migration and the Links Between Social and Societal Security' in Ole Weaver et al, *Identity, Migration and the New Security Agenda in Europe* (New York 1993) 149; Mallia (n 8).

25 Osatohnamwen O Eruaga, 'Towards a Normative Shift in Maritime Security Governance: Appraising Private Maritime Security Companies in Nigeria's Anti-Piracy and Armed Robbery at Sea Institutional Framework' (2016) 4 Akungba Law Journal 1, 316.

26 ibid.

27 Wang Yizhou, 'Defining Non-Traditional Security and Its Implication for China' (2004) 12 China and World Economy 59, 62; Christian Burger, 'What is Maritime Security?' (2015) 53 Marine Policy 159, 160.

28 Oberoi and Taylor-Nicholson (n 1) 170.

29 Yizhou (n 27) 62; Burger (n 27) 160.

30 Gervais Appave, 'Migrations: Some Observations about Contemporary Trends' (WMU Symposium on Migration by Sea, 26-27 April 2016, Malmo) (on file with the author).

31 Marcello Di Filippo, 'Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life' (2013) 1 Paix et Sécurité Internationales 53, 56. The three main problems relating to the boat voyages in illegal migration by sea are overcrowding, the poor condition of the boat resulting in technical failures, and the lack of a 'professional driver'. Crimes against navigational safety jeopardises safety and property at sea and, at the same time, undermines the operation of maritime services. See also Attard (n 14) 210.

route.[32] Accordingly, the Feasibility Study on the Control of EU Maritime Borders identifies that vessels engaged for the purposes of illegal migration are 'chartered for their last trip under the flag of convenience of a country located far from the Mediterranean basin. The ships… are unseaworthy and highly dangerous for both their passengers and for regular navigation.'[33] In most cases, migrants are placed in fishing boats and dinghies which are ordinarily unsuitable for use on the high sea.[34] The Migration Policy Research reveals that the number of persons who die at sea, compared to those who survive, is steadily increasing and has constantly been above 3% since 2006.[35] This translates to at least three deaths for every 100 crossings.[36] According to the IOM's Missing Migrant project, over 3,770 refugees and migrants are known to have died at sea while trying to reach Europe in 2015, representing a 15% increase compared to the previous year.[37]

II. Italian Pushbacks as a Migration Control Measure

In spite of several reports of migrants perishing at sea, large numbers seeking a better living still embark on the deadly journey by sea to Europe. Italy is one of the closest European coastal States to the African continent, separated only by the Mediterranean which makes it faster and cheaper for travellers to access.[38] Furthermore, Italy matches the description of a country where migrants could attain political and socio-economic liberation. The Italian Human Development Index (HDI) value increased from 0.768 to 0.887 between 1990 and 2015, positioning it at 26 out of 188 ranked countries and territories.[39]

Statistics shows that migrants are not primarily of Mediterranean origin.[40] Nigeria was the second most common country of origin in 2015 and topped the list of the main

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32 Amnesty International (n 23) 13.

33 Council of the European Union, Secretariat General, 'Feasibility Study on the Control of the European Union's Maritime Borders - Final report' (19 September 2017) 11490/1/03, 10.

34 Sara Hammond, 'African Transit Migration Through Libya to Europe: The Human Cost' (*The American University Forced Migration and Refugee Studies*, 2006) 51 <www.migreurop.org/IMG/pdf/hamood-libya.pdf> accessed 25 May 2019.

35 Anna Di Bartolomeo, Philippe De Bruycker and Philippe Fargues, 'Migrants Smuggled by Sea to the EU: Facts, Law and Policy Options' Migration Policy Centre Research Report 2013/09 (European University Institute 2013) 4.

36 ibid.

37 IOM, 'Over 3,770 Migrants Have Died Trying to Cross the Mediterranean in Europe in 2015' <missingmigrants.iom.int/over-3770-migrants-have-died-trying-cross-mediterranean-europe-2015> accessed 11 May 2019.

38 Job Osazuwa, 'Illegal Desert Journey to Europe: How Nigerian drowned in Mediterranean Sea' *The Sun* (Lagos, 24 March 2016) <sunnewsonline.com/illegal-desert-journey-to-europe-how-nigerian-drowned-in-mediterranean-sea/> accessed 25 May 2019.

39 United Nations Development Programme (UNDP), *Human Development for Everyone* (UNDP 2016) 202. HDI is a summary measure adopted by the UNDP for assessing progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. Italy's HDI for 2015 was at par with the average of Organisation for Economic Cooperation and Development (OECD) countries while it was below the average of very high performing HDI countries such as the United Kingdom.

40 Hossain, Stepien and Tervo (n 20) 388. Apart from the short periods of unrest in countries such as Syria, Algeria, Lybia and Tunisia, which caused a surge of citizen migrants from these countries, the eastern countries majorly serve as transit countries.

nationalities arriving to Italy from West and Central Africa in 2016.[41] The Nigerian Immigrations Services asserts that not less than 10,000 Nigerians have died between January and May 2017 trying to cross the Mediterranean Sea and the deserts.[42] The death of thousands at sea and the pressure which those who survive the journey put on the Italian State spurs the State to continually explore and establish migration control methods which Obiero and Taylor-Nicholson argue are often dangerous.[43] Migrants are increasingly confronted by border control measures detached from the landward territorial borders of destination States, commonly known as externalisation or push-backs. Lomba identifies that externalisation of control occurs through the deflection of migrants and transfer of responsibilities to safe third countries, first country of asylum, safe country of origin and readmission agreements with third countries.[44] The objective is to prevent the physical arrival of illegal migrants at their desired final destination.[45]

The use of push-back measures in the control of illegal migrants by sea is not a new phenomenon.[46] The United States of America, and Australia, as well as several European States, including Italy, have engaged in migrant deflections since the nineties, as a means of migration control.[47] Giuffre notes that the expectation of such externalisation is the dilution and reallocation of State responsibility.[48] Such transfers of responsibility have gained strength in Europe through incorporation into various European Union (EU) measures.[49] Indeed, several European governments consider the push-backs as necessary to counter 'the emergency' represented by the influx of people and to deter 'a million' waiting in Libya from reaching Italian shores.[50]

A significant proportion of Italy's externalisation measures controlling migration flows across the Mediterranean are expressed in several bilateral partnership agreements and practical cooperation arrangements with Libya, reflecting the contemporary international

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41 IOM's Global Migration Data Analysis Centre (GMDAC), 'Global Migration Trends Fact Sheet' (2015) 12 <gmdac.iom.int/global-migration-trends-factsheet> accessed 11 May 2019.

42 Gbenro Adeoye, Adelani Adepegba, Jesusegun Alagbe and Success Nwogu, 'Illegal Migration: 10,000 Nigerians Die in Mediterranean Sea, Deserts – NIS' *The Punch Newspaper* (27 May 2017).

43 Oberoi and Taylor-Nicholson (n 1) 173; Mariagiulia Giuffre, 'State Responsibility Beyond Borders. What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 International Journal of Refugee Law 692, 693.

44 Sylvie Da Lomba, *The Right to Seek Refugee Status in the European Union* (Intersentia 2004) 106.

45 Oberoi and Taylor-Nicholson (n 1) 172.

46 Frank Brennan, 'Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection' (2016) 39 Boston College International and Comparative Law Review 47, 59; Natalie Klein, 'Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants' (2014) 15 Melbourne Journal of International Law 2, 414.

47 Stephen H Legomsky, 'The USA and the Caribbean Interdiction Program' (2006) 18 International Journal of Refugee Law 677, 684. For a recount of Italy's use of pushbacks, see generally, Rutvica Andrijasevic, 'Lampedusa in Focus: Migrants Caught between the Libyan Desert and the Deep Sea' (2006) 82 Feminist Review 120, 121

48 Giuffre (n 43) 693.

49 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 arts 77 and 79; Council Regulation (EC) 2007/2004/EC (26 October 2004). See also, Fischer-Lescano, Löhr and Tohidipur (n 22) 256–296.

50 Andrijasevic (n 47) 122.

relationship between the two States.[51] These arrangements became necessary for Italy because Libya serves as one of the most prominent departure countries for migrants aiming to reach Italy and its islands of Lampedusa and Sicily.[52] The arrangements and partnerships to combat illegal migration were first initiated in 2000 with the *Agreement on the War Against Terrorism, Organised Crime, Drug Trafficking and Illegal Migration* and subsequently reiterated in the several other Protocols entered into in 2004 and 2007.[53] Under these agreements, the States agreed to establish joint missions with Libya patrolling both her coastline and international waters on vessels provided by Italy. The agreements provided a layered approach to ensuring that migrants are deterred from reaching their preferred destination. In the first instance, potential migrants by sea are stopped on land by Libyan coastguards before they commence the seaward journey from Libya to Italy. In the event that they embark on the journey, there is still room for timely interception by Libyan authorities within Libyan territorial waters. The agreements also provide for the deflection of migrants intercepted by the Italian authorities in international waters closer to Italian territory. On the strength of the aforementioned agreements, thousands of illegal migrants have been deflected to Libya.[54]

The *Treaty of Benghazi* of 2008[55] formalised Italy's cooperation with Libya against illegal migration, by providing the legal framework for unifying, and providing treaty backing for, previous bilateral agreements.[56] Article 19 of the Treaty provides for the implementation of previous agreements and protocols on immigration, particularly the *Tripoli Protocol* of 2007, which provides for the patrol of Libya's approximately 2,000km coast by a mixed crew from both countries.[57] The Treaty also provides for the establishment of a control system on the Libyan land border to be run Italian companies possessing the necessary technical skills to

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51 Hammond (n 34); Mustafa Abdalla Kashiem, 'The Treaty of Friendship, Partnership and Cooperation Between Libya and Italy: From an Awkward Past to a Promising Equal Partnership' (2010) 1 California Italian Studies 1, 4.

52 Hossain, Stepien and Tervo (n 20) 388.

53 Tullio Scovazzi, 'Human Rights and Immigration at Sea' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press 2014) 224.The entire contents of the bilateral agreements remained undisclosed despite the request from the European Parliament, UN Human Rights Committee, and NGOs to make it public. Nevertheless, they formed the basis of cooperation between the two States, aimed at tackling the movement of migrants from Libya to Italy. See Andrijasevic (n 47) 121; Silja Klepp, 'Italy and its Libyan Cooperation Program: Pioneer of the European Union Refugee Policy?' in Jean-Pierre Cassarino (ed), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean* (Middle East Institute 2010) 78–85.

54 Klepp (n 53) 78–85.

55 Trattato di amicizia, partenariato e cooperazione tra la Repubblica italiana e la grande Giamahiria araba libica popolare socialista (Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya) (Italy-Libya) (2008) [Benghazi Treaty] <www.istitutospiov.it/sites/default/files/articolo/Trattato%20di%20Amicizia,%20Partenariato%20e%20Cooperazione%20tra%20la%20Repubblica%20Italiana%20e%20la%20Grande%20Giamahiria%20Araba%20%20Libica%20Popolare%20Socialista/testo_trattato_it_lib.pdf> accessed 25 May 2019.

56 Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation Between Italy and Libya: New Prospects for Cooperation In The Mediterranean?' (Mediterranean Strategy Group Conference, Genoa, 11–12 May 2009) 3 <www.iai.it/sites/default/files/iai0909.pdf> accessed 25 May 2019.

57 Benghazi Treaty (n 55) art 19(1).

promote migration control. This project is to be financed equally between Italy and the European Union.[58]

Notably, the agreements on illegal migration do not draw a distinction between nationals of Libya and third country nationals, nor do they differentiate the individuals at sea into the various classes of irregular migrants. Thus, all illegal migrants at sea are subjected to push-back measures, irrespective of the fact that they may actually be entitled to enjoy protection under principles of international law.

III. The Tension between Italy's Migration Control and International Principles

The Libya-Italy agreement, as a reflection of Italy's externalisation of migration control, provides the necessary framework for exploring the compatibility of border control policies with international law. Ordinarily, destination States can rightfully undertake border control measures which may include pushbacks. This assertion hinges on the principle of (land and seaward) territorial control, which recognises that States have sovereign rights that are not subject to external interference.[59] However, as part of and in commitment to the global order, States are expected to conduct their sovereign affairs with due regard to international legal principles which reflect a universal legal system. As such, any State conducting push-back measures has to do so within the confines of their rights and obligations at sea, including respect for international human rights principles.[60]

International law, through several international instruments, provides the backdrop within which States operate at sea. The *United Nations Convention on the Law of the Sea* (UNCLOS), as one such instrument, provides the broad framework for the determination and further development of rights and duties associated with activities occurring within global maritime jurisdiction.[61] UNCLOS bestows on coastal States legislative and enforcement jurisdiction to prevent the infringement of immigration laws within the territorial sea and contiguous zones.[62] Outside the aforementioned zones, the principle of freedom of the high sea is exercised and a vessel is subject only to the exclusive jurisdiction of the flag State.[63] Accordingly, where a vessel is within its territorial sea or continuous zone, Italy, as a State,

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58 Benghazi Treaty (n 55) art 19(2).

59 Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders' (2006) XXVI SAIS Review 1, 11.

60 Klein (n 46) 441.

61 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3/ 21 ILM 1261 (UNCLOS). UNCLOS is regarded as international customary law so its provisions are applicable to all States. See United Nations Security Council (UNSC) Resolution 1950 (20 November 2010) UN Doc S/RES/1950, preamble; James Kraska, *Contemporary Maritime Piracy* (Praeger 2011) 129.

62 UNCLOS (n 61) art 33. See also Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2010) 80.

63 UNCLOS (n 61) art 92(1). On the principle of exclusive State jurisdiction, see also Tamo Zwinge, 'Duties of Flag States to Implement and Enforce International Standards and Regulations and Measures to Counter Their Failure to Do So' (2011) 10 Journal of International Business and Law 2 297, 299; Klein (n 46) 421.

can carry out measures against a vessel carrying illegal migrants at sea.[64] The right of Italy to carry out measures against a vessel on the high sea that is stateless is also recognised under international law.[65] Specifically, research has shown that vessels out at sea for the purpose of illegal migration are either stateless or registered under flags of convenience, meaning that they are not under the effective control of any State.[66]

Article 98 of UNCLOS imposes a duty on States to rescue persons in distress, including migrants at sea, and disembark them in a place of safety.[67] According to the aforementioned provision, a State shall require any vessel flying its flag to render assistance to anyone found at sea in danger of being lost and proceed with all possible speed to rescue persons in distress.[68] While UNCLOS provides the framework for the duty to assist, the details of the obligation are contained in the International Maritime Organisation (IMO) multilateral treaties – the *Conventions on Safety of Life at Sea* (SOLAS)[69] and the *Search and Rescue (SAR) Convention*,[70] as well as the IMO Guidelines on the Treatment of Persons Rescued at Sea.[71] These subsequent instruments require that rescued persons be disembarked in a place of safety.[72] Notably, these treaties fall short of explicitly setting out and imposing on the State the ultimate responsibility to receive rescued persons.[73] Arguably, a State will be well within its duties to rescue people at sea and send them to the State closest to the rescue site or even

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64 UNCLOS (n 61) 27.

65 UNCLOS (n 61) 110; Smuggling Protocol (n 14) art 8; Klein (n 46) 420.

66 Efthymios Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 Syracuse Journal of International Law and Commerce 145, 159; Mallia (n 8) 7; Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmented Reading of EU Member States' Obligation Accruing at Sea' (2011) International Journal of Refugee Law 1, 13; Klein, (n 46) 421.

67 Search and Rescue operations stem from the moral-turned-legal obligations to render assistance to those who are stranded at sea. For an in-depth discussion of the duty, see Bernard Oxam, 'Human Rights and the United Nations Convention on the Law of the Sea' (1998) 36 Columbia Journal of Transnational Law 399, 414; Jessica E Tauman, 'Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters Of The Tampa Crisis' (2002) 12 Pacific Rim Law and Policy Journal 11 461, 473; Frederick Kenney and Vasilios Tasikas, 'The Tampa Incident: The IMO Perspectives and Responses to the Treatment of Persons Rescued at Sea' (2003) 12 Pacific Rim Law and Policy Journal 143; Martin Ratcovich, 'The Concept of "Place of Safety": Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?' (2016) 33 Australian Yearbook of International Law 81; Osatohanmwen Eruaga 'Illegal Migration in the Mediterranean and the Challenges of Observing the Duty to Render Assistance at Sea: Appraising the Legal Order from a Commercial Shipping Perspective' (accepted for publication in Loyola Maritime Journal).

68 UNCLOS (n 61) art 98(1)(a).

69 International Convention for the Safety of Life at Sea (opened for signature 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS Convention) annex.

70 International Convention on Maritime Search and Rescue (opened for signature 27 April 1979, entered into force 22 June 1985) 1405 UNTS 119 (SAR Convention) annex.

71 IMO, 'Guidelines On The Treatment Of Persons Rescued At Sea' (20 May 2004) Res MSC.167(78) (IMO Guidelines) annex, 5.1 <http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/MSC.167(78).pdf> accessed 29 June 2019.

72 SOLAS Convention (n 69) Ch. V Reg 33, para 1(1); SAR Convention (n 70) Annex Ch. 3, para 3(1)(9).

73 Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011) 143; Klein (n 46) 427.

to a State that is further away, so long as such a State is willing to allow them to disembark.[74] However, the concept of the place of safety remains a relevant consideration in the determination of the place of disembarkation. The IMO Guidelines define a place of safety as a place where rescue operations terminate, and 'where the survivors' safety or life is no longer threatened, basic human needs can be met and transportation arrangements can be made for the survivors' next or final destination.'[75] Rather than this simplistic interpretation of the notion of the place of safety, current international practice, arising from a convergence of human rights and humanitarian approaches, constructs a wider definition which puts into consideration the quality of the rescued persons as well as the possible need for international protection.[76] As a result, the notion of 'a place of safety' is interpreted to coincide with the idea of safety under humanitarian and human rights principles which is synonymous with freedom from threat.[77] The requirement of the disembarkation of migrants to a third country willing to accept them thus requires the original destination country to ensure that the third country is actually safe in the true sense of the word.[78] Jurisprudence from the Court of Justice of the European Union affirms this obligation in the cases of *NS v United Kingdom* and *ME v Ireland* (joined cases)[79] and *Hirsi Jamaa and Others v Italy.*[80] Accordingly, Godwin-Gill asserts that a State which disembarks migrants in a country which it knows or reasonably expects will violate their fundamental human rights becomes party to that violation of rights.[81]

Migrants, regardless of their nationality or legal status, are protected by a considerable number of international and regional instruments that recognise their human rights as they do for other human beings.[82] The *Universal Declaration of Human Rights* (UDHR),[83] the *International Covenant on Civil and Political Rights* (ICCPR)[84] and the *Convention on the Rights of*

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74 Jasmine Coppens and Eduard Somers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?' (2010) 25 International Journal of Marine and Coastal Law 377, 388. This is especially so since some State parties to the original Conventions are not parties to the amendments that attempt to provide further clarity. For example, for Malta who is not a party to the amendments, rescued people must be disembarked at the closest safe port, usually at Lampedusa or in Sicily, even though the rescue happened in the Malta SAR region. Italy, on the other hand, considers that unless a different arrangement is reached on a case by-case basis, the State competent for the relevant SAR zone must allow the disembarkation, in which case the State conducting the search and rescue becomes irrelevant. See Amnesty International (n 23).

75 IMO Guidelines (n 71) para 6.12.

76 Ratcovich (n 67) 92–94, 120; Klein (n 46) 427.

77 *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECHR 23 February 2012); Klein, (n 45) 428.

78 *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012).

79 Joined cases C-411-10 *N.S. v United Kingdom* and C-493-10 *M.E. v Ireland* ECLI:EU:C:2011:865.

80 *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012).

81 Guy Goodwin-Gill, 'The International Protection of Refugees and Asylum Seekers: Between Principle and Pragmatism?' (3 November 2014) <hperma.cc/A3N4-WYTN> accessed 11 May 2019.

82 Brennan (n 46) 59.

83 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3 (right to life), art 5 (prohibition of torture or cruel, inhuman or degrading treatment), art 13 (movement rights) and art 14 (right to seek and to enjoy in other countries asylum from persecution).

84 UN General Assembly, International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 6, 7 and 12.

the Child, as well as several regional agreements,[85] recognise several rights that are relevant in the context of irregular migration. These rights include the right to life and the prohibition of torture or cruel, inhuman or degrading treatment, as well as movement rights. Tardif notes that the movement rights, which are the legal basis of migration, are subject to certain limits which are reflective of rights accorded to States to control movement in and out of their territory.[86] This means that international law expects individuals engaging in migration to respect the sovereignty of State territories by abiding by their respective immigration rules. However, a breach of these rules by migrants does not deprive them of the protection afforded by provisions on human rights.[87] Clearly, a conflict of interest between national and international law, arising from human rights violations, is likely to occur in the course of handling irregular migration through Italy's push-back measures.[88] There is a tendency for officials of destination States, in conducting push-backs, to treat migrants in a cruel and degrading manner, and even to cause physical damage to the vessel carrying the migrants, in an attempt to ensure that they do not reach their preferred destination. The Commissioner for Human Rights of the Council of Europe observed that the 'excessive use of force by law enforcement officials charged with border control' contributes to the risk migrants face of losing their lives or facing serious injury during their journey.[89]

The recognition of the right to flee one's country and seek asylum in another country gives rise to the principle of *non-refoulement*. *Non-refoulement* prohibits the return of an individual to a country in which he or she has a well-founded fear of being persecuted.[90] Although considered principally as the cornerstone of refugee protection in humanitarian law, *non-refoulement* also receives recognition under general international human rights law as an independent but related principle.[91] Flowing from this recognition, *non-refoulement* obligations to migrants have been extended to cover migrants who do *not* fall under the protection of the

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85 African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (4 November 1950) (ECHR).

86 Tardif (n 10) 4.

87 Klein (n 46) 432–33.

88 Commissioner for Human Rights, 'The Human Rights of Irregular Migrants' CommDH/Issue Paper (Strasbourg, 17 December 2007) 1, 14 <rm.coe.int/16806da797> accessed 25 May 2019; Mark R von Sternberg, 'Reconfiguring the Law of Non-Refoulement: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection' (2014) 2 Journal of Human Movement Science 4, 329–360; Klein (n 46) 420.

89 Commissioner for Human Rights (n 88) 1, 3.

90 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Protocol Relating to the Status of Refugees of the Convention Relating to the Status of Refugees (opened for signature 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 art 3; Alice Framer, 'Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures That Threaten Refugee Protection' (2008) 23 Georgetown Immigration Law Journal 1, 2.

91 Tardif (n 10) 4; *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECHR 23 February 2012), Concurring opinion of Judge Pinto De Albuquerque ('Although the concept of refugee contained in art 33 of the UN Refugee Convention is less extensive than the one under international human rights law, international refugee law has evolved by assimilating the broader human rights standard and thus enlarging the convention concept of refugee (incorrectly called "de jure refugees") to other individuals who are in need of complementary international protection (incorrectly called "de facto refugees")).

Refugee Convention.[92] For instance, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)[93] contains an unambiguous *non-refoulement* provision as a general principle of human rights.[94] Skyes states that the principle of *non-refoulement* in human rights is implicit in other contexts and serves as a corollary of other recognised rights.[95] Accordingly, the UN Human Rights Committee explains that the Article 6 obligation of the ICCPR is extendable to the principle of *non-refoulement* and, as a result, 'State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*'[96]

A necessary corollary of the prohibition against *refoulement* is ensuring that each migrant is afforded an opportunity to seek asylum and that migrants are not expelled collectively.[97] Under several regional human rights instruments, collective expulsion is unequivocally prohibited, in order to ensure the protections that the principle of *non-refoulement* explicitly guarantees.[98] The UNHCR Note on the Principle o*f Non-Refoulement* explains that the right not to be collectively expelled is imperative in irregular migration because 'every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined.'[99] Accordingly, Italy, through its push-back measures, is obligated not to peremptorily expel persons arriving on its shores, regardless of whether they arrive legally or illegally.[100] Giuffre argues that the denial of entry of a vessel into territorial waters

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92 Katharina Röhl, 'Fleeing Violence and Poverty: Non-Refoulement Obligations Under the European Convention of Human Rights' (2005) New Issues in Research Working Paper 111/2005, 4 <www.unhcr.org/afr/research/working/41f8ef4f2/fleeing-violence-poverty-non-refoulement-obligations-under-european-convention.html?query=fleeing%20violence> accessed 12 May 2019; Katie Sykes, 'Hunger Without Frontiers: The Right to Food and State Obligations to Migrants' in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds), *The International Law of Disaster Relie*f (Cambridge University Press 2014) 193; Klein (n 46) 427–428.

93 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

94 CAT (n 93) art 3 provides that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

95 Sykes (n 92) 193.

96 United Nations Human Rights Committee (UNHRC) 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 March 1992) UN Doc HRI/GEN/1/Rev 1, para 9.

97 *Union Inter-Africaine des Droits de l'Homme and others v. Angola* Communication no.159/96 (1997) <www.achpr.org/files/sessions/22nd/comunications/159.96/achpr22_159_96_eng.pdf> accessed 12 May 2019; Tardif (n 10) 4.

98 ECHR (n 85) art 4; Organization of American States (OAS), American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention) art 22(9); African Charter (n 85) art 12(5); League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Intl Hum Rts Rep 893 (2005) (Arab Charter) art 26(1).

99 UNHCR 'Note on International Protection' (31 August 1993) UN Doc.A/AC.96/815 (1993) para 11.

100 Brennan (n 46) 59.

does not amount to a breach of the principle of *non-refoulement* per se.[101] In fact, the right to seek asylum is not accompanied by any guarantee that the quest would be successful. The right is purely permissive.[102] As Justice Gummow of the Australian High Court notes, '…viewing it otherwise would amount to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals.'[103] What international law guarantees is that persons seeking asylum are to be afforded the opportunity to do so. It is this failure of States to allow migrants the opportunity to apply and potentially achieve asylum seeker status that is the infringement of international law. In essence, when, after appropriate procedures have been engaged, push-back measures result in the return of a migrant to a territory where there is no threat to their life or liberty, Italy is well within its rights to avoid responsibility under general international law, with no violation of human rights or humanitarian treaties.

Notably, it is immaterial whether push-back measures are characterised as lawful under Italian municipal laws. International judicial decisions leave no doubt that an act which is lawful under national law may constitute a breach of international law. In *S.S Wimbledon*,[104] the Permanent Court of International Justice affirmed that orders issued by a State could not prevail over an international treaty.[105] Similarly, the International Court of Justice in *Electronica Sicula S.p.A (El Si)*[106] emphasised that 'compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law.'[107] The ILC commentaries on State responsibility explain that, by virtue of membership of the international community, every State has an interest in the protection of certain basic rights and the fulfillment of certain obligations, a failure of which would be a breach of the laws of State responsibility.[108] The international legal principles applicable in situations of illegal migration by sea create a legal interest which ought to be protected by Italy, or by any other State wishing to control migration. The State cannot protect its own interest over and above the legal interest created by the international community.

IV. Addressing the Complex, Which Way Forward?

This article establishes that while border control measures, including push-back initiatives, constitute an exercise of jurisdictional authority, they must be subject to the international human rights obligations of the State. Unfortunately, the complexity arising from the conflict between international human rights law and State interests in relation to irregular migration

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101 Giuffre (n 43) 693.

102 ibid.

103 *Minister for Immigration and Multicultural Affairs v. Hussein Mohamed Haji Ibrahim* (2000) HCA 55, 138, 204 CLR 1 (Austl).

104 *SS Wimbledon (United Kingdom and others v France)* PCIJ Rep Series A No 1.

105 ibid.

106 *Electronica Sicula S.p.A (ELSI)* ICJ Reports 1989, 15.

107 ibid 51.

108 International Law Commission, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10 (ARSIWA), 33. <legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 21 December 2018.

by sea is one which will continue to linger unless and until destination States proactively strike the appropriate balance between conducting State policies and legislation and paying due regard to international legal principles on the subject. Conciliation between human rights and security concerns is possible; it is, however, necessary that the goal of State control of irregular migration is not achieved at the expense of the necessary prioritisation of protection of the human person.[109] Upholding basic human rights is achievable where States, though primarily aiming to achieve effective border control, take proactive steps to ensure the inclusion of effective strategies to protect the human rights of migrants and save lives on the Mediterranean.

In dealing with mixed migration flows, emphasising control and law enforcement can obscure rights, obligations, needs and vulnerabilities of parties. Consequently, countries need to develop a 'needs based protection approach' in dealing with illegal migration by sea. This means that the needs of the various migrant sub-groups require attention. In recent times, the EU has taken initiatives to better protect the human rights of migrants. For instance, joint sea border surveillances such as Frontex joint operations (Triton and Poseidon) and military operations (EUNAVFOR MED/Sophia) include training on fundamental rights for border guards.[110] Actions of this nature bolster the needs-based approach to protection, as persons who are first in contact with migrants are better equipped to deal with the phenomenon.

Destination countries argue that the continuous insistence on respect for principles of international law creates a situation whereby irregular migration cannot be effectively curtailed. These States contend that migrants (especially economic migrants) are encouraged to undertake the journey across the Mediterranean because they are aware that international principles afford them some level of protection.[111] While the insistence on the observation of international principles may contribute to the unwavering migration saga, a recent study by Steinhilper and Gruijters reveals that, contrary to the pull factor hypothesis, migrants will continue to attempt the treacherous journey across the Mediterranean in the hope of a better life if nothing is done to address the motivating factors of migration.[112] The protection chief of the UN Refugee Agency says that restrictive policies, like push-backs and border closures, do not stop people from undertaking dangerous journeys, and that combined efforts could be undertaken to address the continued movement of refugees and migrants.[113]

The issue of the conflicting interests of States regarding border management and migration arises because of the high rates of movement. Hence, curbing illegal migration as a phenomenon is imperative. The complexities of illegal migration are such that they cannot be

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109 *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* [1970] ICJ Rep 3, where the Court states that all States can be held to have a legal interest in the protection of international human rights and the obligation to protect them is *erga omnes.*

110 European Political Strategy Centre (EPSC), 'Irregular Migration via the Central Mediterranean From Emergency Responses to Systemic Solutions' Issue 22, Strategic Solutions (2 February 2017) 3 <ec.europa.eu/epsc/sites/epsc/files/strategic_note_issue_22_0.pdf> accessed 25 May 2019.

111 ibid.

112 Elias Steinhilper and Rob Gruijters, 'Border Deaths in the Mediterranean: What We Can Learn from the Latest Data' (*University of Oxford*, 2017) <www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/institutional> accessed 25 May 2019.

113 UNHCR, 'Better Protecting Refugees in the EU and Globally: UNHCR's Proposals to Rebuild Trust Through Better Management, Partnership and Solidarity' (UNHCR 2016) <www.refworld.org/docid/58385d4e4.html> accessed 25 May 2019.

successfully dealt with by States individually. The problem of migration by sea requires a global, multi-stakeholder strategy that builds on unified national efforts throughout the world to ensure that everybody takes responsibility for the issue. To pave the way for this strategy, stakeholders must, apart from coordinating efforts already underway in destination States, increase knowledge and awareness in States of origin. States producing high numbers of migrants should raise awareness of the risks of illegal migration and also of the deterrent measures that destination States are adopting. As the UN Secretary General noted,

> Those attempting to immigrate illegally do not know the risk involved in crossing straits, and after having invested in a long and expensive land journey they do not hesitate to invest in a dangerous sea passage.[114]

The scourge of illegal migration festers because States of origin do not show a holistic commitment to solving the problem. Improving the socio-economic welfare of their citizens implies that migrants engaged in the act of illegal migration by sea for purely economic reasons might be less inclined to undertake the journey. States of origin are thus enjoined to invest more in the socio-economic welfare of their citizens.

Furthermore, the process of illegal migration is highly reliant on the existence of persons such as smugglers and traffickers to aid movement. Migrant smuggling is a business model that relies on the principles of demand and supply.[115] While it may be difficult to cut off demand, States should tackle the ability of operators to supply the services of smuggling. The Smuggling and Trafficking Protocols provide the appropriate framework at the international level for tackling the issue of supply. This is because these Protocols criminalise smuggling, as well as trafficking, and create an obligation on States to cooperate in eradicating the offence through the established framework for maritime interdiction at sea, while safeguarding the safety and security of vessels and treating migrants in a humane fashion.[116] The success of these Protocols hinges on the coordination between law enforcement and judicial structures within and between States.

V. Conclusion

State interest in ensuring sufficient border control to manage illegal migrants by sea remains a priority for a destination State such as Italy. However, the legality of such actions are only ascertainable when they are placed within the boundaries of international principles relating to obligations and rights at sea. Whilst this paper does not excuse illegal migration by sea, nor the flagrant disregard for immigration laws of destination States such as Italy, it is clearly the case that migrants, irrespective of their status, enjoy certain rights flowing from international legal principles which coastal States should consider when undertaking border control measures for the purposes of curbing illegal migration by sea.

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114 Council of the European Union (n 33) 15.

115 Vayrynen (n 13) 19.

116 Smuggling Protocol (n 14) arts 7–9.

Emerging Legal Issues in Sub-Orbital Flight and Colonization under International Air and Space Law

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Keywords
INTERNATIONAL LAW; SPACE TOURISM; COMMERCIALIZATION

Abstract
Space exploration activities constitute an important part of International Air and Space Law. Space Law, which governs matters in outer space beyond the Earth's atmosphere, is a rather new area of law and is to a very large extent connected to Air Law. Not only have we witnessed a tremendous increase in air travel recently, human activities in space has also skyrocketed. Sub-orbital flight and colonization (also known as space tourism) is one of such developments in space activities today and is not without legal implications. This article seeks to x-ray and situates some of these legal issues emerging out of contemporary space exploration activities against the overarching framework of the UN Space Treaties.

Introduction

The commercialization of space due to the latest multifarious commercial space activities has come with emerging legal issues. Commercial air transport has evolved from an elitist means of travel to a commodity for all and sundry for the past 60 years since the advent into that realm. Sub-orbit flight on the other hand has been there since the last 50 years, although commercial human spaceflight is only emerging as a viable industry in most recent times. The first spaceflight carrying humans was undertaken by the USSR on 12 April 1961 wherein Yuri Gagarin travelled in the Vostok-1 mission.[1] Consequently, space law is maturing by the day, but of course, not without some emerging legal issues being thrown to the front burner.[2]

The last few decades have witnessed diverse forms of tourism, such as Adventure tourism, Agritourism, Ecotourism, Cultural tourism, Heritage tourism, Health tourism, Sport tourism, Disaster tourism, Medical tourism, virtual tourism and latest is space tourism. Just like it was the case with air travel, space tourism is evolving from being considered *science*

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1 See Eilene Galloway 'The History and Development of Space Law: International Law and United States Law' (1982) 7 Annals Air & Space Law 1, 295, 300; Associated Press, "Private Spaceship Makes First Flight". The Times of India, Kolkata, 12 October 2010; Roger D Launius and Dennis R Jenkins, 'Is it Finally Time for Space Tourism?' (2006) Astropolitics: INT'L J. SPACE POWER & POL'Y, 253, 255.

2 Roger D Launius and Dennis R Jenkins, 'Is it Finally Time for Space Tourism?' (2006) The International Journal for Space and Politics 253, 225.

fiction to becoming recognized as an important new target for the space industry. Space tourism has become the vogue where wealthy individuals or corporations are given the rare opportunity to travel beyond the Earth's atmosphere and experience orbital flights.[3] Part of the main attractions of space tourism is the uniqueness of the experience, the amazing and thrilling feelings of looking at Earth from space, status symbol, and various advantages of weightlessness – potential for extreme sports and health benefits, particularly for the elderly.[4] This connotes that beside scientific value of space, space tourism is the new venture and reasonable space access is fundamental for the development of this new space business.[5] Thus, space tourism is the new frontier in travel as man having conquered the earth, is now poised to colonize the universe.

Commercial orbital flight or space tourism is increasing in scope, requiring governmental organizations to play a vital role in exploring this untouched avenue. Part of this intervention would be to look into the exorbitance of orbital flight. It is incredulous that despite having used some billions to develop space technology, government space agencies have not reduced the cost of space travel from what it was when Yuri Gagarin first flew to orbit in 1961[6]. Several benefits have been put forward as reasons to encourage space tourism. From an economic point of view, the escalation of sub-orbital tourism has the potential to bring about the development of a large space tourism industry with increased prospects for orbital tourism services, which will be very beneficial both for the space industry, in addition to creating employment opportunities.

In the words of Adhikari, space tourism is an excellent starting point for other private space endeavors because according to him,

> "… It has the potential to bring in investors and enthusiasts, create immediate profit, and lay the groundwork for greater research and funding in other space applications. There can be no doubt that the prospect of commercial space tourism flights has captured widespread imagination. The public perception of commercial space travel has changed from mere fantasy to a possibility and will soon be a reality"[7]

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3 Dennis Tito spent $20 million on space tourism to become the first paying tourist in 2001 Tito the founder of Wilshire Associates and former JPL scientist traveled aboard Russian Soyuz capsule launched by Space Adventures Ltd. U. S. company where he spent 7 days aboard the International Space Station. See Atrey, Priti. Space Tourism – Future Industry". Current Developments in Air and Space Law. Priti Atrey, 'Space Tourism-Future Industry' (2012) NLUDRS 419.

4 ibid.

5 ibid.

6 In any event, private activities aimed at realizing space tourism have recently demonstrated the prospect of achieving sub-orbital space flights at less than 1% the cost of comparable flights performed by NASA in 1961. Aditya Jain and Others, 'Current Development in Space Tourism: Space Tourism – A Tool to Break the Existing Shackles'; The X Prize, a new technology breakthrough in commercial travel started in 2004 with Prize for $10 million for a Non-Government Organization to launch a reusable manned spacecraft into space twice within two weeks to be conducted as a sub-orbital flight carrying up to three passengers. This prize was won by Burt Rutan on 4th October 2004 in a special vehicle called Spaceship One attached and carried by an aircraft called White Knight. It may be recalled that a similar prize instituted by one Raymond Orteig for crossing the Atlantic from New York to Paris and went to Charles Lindberg for nonstop crossing of Atlantic on 20-21st May 1927.See Prof Ranbir Singh, Prof Sanat Kaul and Prof Srikrishna Deva Rao (ed), *Current Developments in Air and Space Law* (NLUD Press 2012)

7 Singh (n 6); Malay Adhikari, 'Space Tourism- Legal Issues and Challenges with Special Reference to Current Developments in Air and Space Law. India'(2012) NLUDRS 385.

The fact that every benefit comes with responsibilities is the reason why this segment sets out to discuss space tourism in detail, bring out the pith and substance thereof with special emphasis on the legal aspect of the venture.

In sum, human spaceflight is emerging as a viable industry due to the commercialization leading to new services, markets, routes, missions, and possibly lower prices. States would have to respond by regulating commerce, travel, and military and diplomatic national interests in space. Collectively, this will increase the importance of international and multilateral cooperation between governments, and underline globalization and international strategic business planning for commercial space companies.[8]

I. Meaning and Dimensions of Space Tourism

The World Trade Organization (WTO) and the United Nations Special Statistical Committee (1994) defined space tourism as '*the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure'.*[9] Thus, any commercial activity offering customers direct or indirect experience with orbital travel would constitute space tourism.[10]

The tourism aspect of commercial space experience as herein defined becomes realistic when the following distinct elements are available:[11]

(i) A discretionary income available for leisure travel;

(ii) Ample leisure time to spend on both preparations for and taking the trips themselves; and

(iii) An infrastructure supporting tourism that offers accommodations, food and amenities, transportation systems, and attractions to see and do at the place visited.

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8 Robert Goehlich, *A Representative Program Model for Developing Space Tourism* (2003) 14; Diana Howard (ed), *Space Tourism in India: A Collaborative Project off Institute of Air and Space Law*; David Ashford, "New Commercial Opportunities in Space"(2007) The Aeronautical Journal<http://www.spacefuture.com/archive/new_opportunities_in_commercial_space.shtml>accessed May 12 2019; Ivan Bekey, "Economically Viable Public Space Travel"(1998) Space Future Journal< http://www.spacefuture.com/archive/economically_viable_public_space_travel.shtml>accessed May 12 2019; Proceedings of 49th IAF Congress, 1998; Collins, Patrick. "Space Tourism—the Surprising New Industry". Proceedings of IEEE Aerospace Conference, 1997; Patrick Collins, 'The Space Tourism Industry in 2030'(2000) Space Future Journal<http://www.spacefuture.com/archive/the_space_tourism_industry_in_2030.shtml>accessed 12 May 2019; Norul Ridzuan Zakaria and Others, "The Symbiotic Relationship between Astronaut Program and Space Tourism Development-A Third World Perspective"(2007)Space Future Journal<http://www.spacefuture.com/archive/the_symbiotic_relationship_between_astronaut_program_and_space_tourism_development_a_third_world_perspective.shtml>accessed 12 May 2019; Zahari and Others,"The Symbiotic Relationship between Astronaut Program and Space Tourism Development—A Third World Perspective". Presented at 2nd IAASS Conference, Chicago, 15 May 2007.

9 Adhikari (n 8).

10 ibid: Hobe, Stephen. Et al. "Towards a New Aerospace Convention? Selected Legal Issues of Space Tourism". Proceedings of the Forty-Seventh Colloquium on the Law of Outer Space, 2004, 377.

11 ibid: Frans Von Der Drunk, 'Passing The Buck to Rogers: International Liability Issues In Private Spaceflight'(2007) 86 Nebraska Law Review, 400.

In addition to the distinct elements considered above as requirements for space travel, different processes are involved in the phenomenon. In view of the fact transportation remains one of the main aspects of space tourism it would mean flight to and from outer space as well as transportation within outer space. As such, there are different approaches of space tourism with different stages and therefore with different legal implications.[12]

In any event, the difference between an aircraft and spacecraft is getting blurred as the concept of sub-orbital flight is becoming a normal part of life – heralding the advent of space commercial travel. A sub-orbital flight is a hybrid which is both an air flight and a space flight. A flight which takes off as an aircraft but switches to rocket propulsion at a certain altitude to go up to about 100km vertical and then re-enters atmosphere.[13] Hence, a sub-orbital flight is like a normal air flight to begin with, but which later goes up practically vertically through air to enter space or micro gravity and then reenters air to save time on intercontinental travel.[14]

In sum, a sub-orbital spaceflight (or sub-orbital flight) is a spaceflight in which the spacecraft reaches space, but its trajectory intersects the atmosphere or surface of the gravitating body from which it was launched, so that it does not complete one orbital revolution.[15]

II. Stages and Legal Implications of Orbital Flights

The fact that space is the final frontier to everybody calls for caution in its use particularly when employed for non-scientific ends, such as for tourism purposes. As such, the need to invoke legal aspects regarding space tourism becomes necessary. It is important to state from the onset that the existing legal regimes governing space are insufficient particularly for future space tourism activities, as overstated in this section. In this connection, some of the issues to be considered include:[16]

(i) The issue of authorization and supervision of the space tourists,
(ii) The issue of registering the aircraft/space object carrying the tourist,
(iii) Jurisdiction of the state and control over the same; and
(iv) Passenger liability and more specifically, third party liability.[17]

Highlighted hereunder are the various stages leading to the process of space tourism. There are:[18]

(i) The first stage in sub-orbital flight begins at the *surface of the earth* – where it also ends. So mainly domestic law rules this part of space tourism. Thus, there are some exemptions by international space law that interfere.[19]

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12 Adhikari (n 8).

13 Kaul (n 6).

14 ibid.

15 Atrey (n 6).

16 Kaul (n 6).

17 The most controversial aspect as regards space tourism.

18 ibid.

19 For example, continuous supervision of non-governmental activities in outer space by states, obligation for the launching state to register space objects and to inform the Secretary General of the United Nations etcetera. See ibid.

(ii) *Airspace*, the second stage, is basically subject to state's territory and sovereignty. In respect of space objects, this rule is limited, and an international passage right is out of question. The rationale for this is the consideration that airspace is just a necessary stage to get into or back from the outer space[20].

(iii) *Orbital residence* is the third stage in this regard. The space station[21] is linked with a hotel-module as one project of space tourism plans.[22]

(iv) *Outer Space* is the fourth stage in this connection and the legal position is as contained in the OST. Specifically, Article VIII of the treaty[23] provides to the effect that a state party to the treaty on whose registry an object launched into outer space is carried, shall retain jurisdiction and control over such object, and over any personnel thereof while in outer space or on a celestial body. This provision means that national law, and consequently principles of inherent private international law, is applicable on space objects.[24]

(v) *Residence on celestial bodies* is the final stage, *which is* mainly regulated by the Moon Agreement, 1979. Additional provisions can be found in the Outer Space Treaty, but these are rather broad and imprecise. The basic rules of space law, like the freedom principle and the common-heritage-principle, are undoubtedly fully applicable. Added to this are the ecological and ethical dimensions, because permanent bases or colonies on celestial bodies will have to deal with weather-conditions that are rather different from what is obtainable on planet earth. The aspect of *terraforming* to establish an earth-like atmosphere and environment on a celestial body - is apart from technical difficulties less of a legal problem, but merely an ethical question.[25]

The questions of jurisdiction have to be regarded under the viewpoint of the ISS Agreement[26] which basically follows the link-up-principle. Liability in respect of the ISS Agreement could be a contractor or subcontractor of a Partner State, a user or customer of a Partner State, and a contractor or subcontractor of a user or customer of a Partner State. The Partner States are enabled to exclude by domestic law the applicability of the Liability Convention[27] concerning the ISS with effect against third parties.

Whether space is used to greater effect by governments or commercial interests, it is a common domain shared by all who operate in space and it is in the collective interest to

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20 ibid.

21 International Space Station.

22 See generally<http://www.nasa.gov/mission_pages/station/main/index.html>accessed 11 May 2019.

23 Outer Space Treaty (adopted 5 December 1979, entered into force 11 July 1984) 610 UNTS 205.

24 Adhikari (n 8).

25 ibid.

26 International Government Agreement on the Space Station< https://www.esa.int/Our_Activities/Human_and_Robotic_Exploration/International_Space_Station/International_Space_Station_legal_framework>accessed 12 February 2015.

27 United Nations General Assembly, *United Nations Treaties and Principles on Outer Space* (United Nations Publications 2002).

preserve the space environment both now and in the future.[28] The ISS is a major international endeavor and success. With the participation of five countries this nearly 10-year-old platform in space about 460 km in low earth orbit has added a new dimension to space flights. The ISS programme also achieved a major success bringing about a commonality of documentation between the Kennedy Space Centre in the US, The Guiana Space Centre in French Guiana and the Tanegashima Space Centre (TNSC) of Japan. This is certainly a milestone international achievement in space cooperation.[29]

At the crux of the matter is the need for a comprehensive as well as exhaustive space legal framework to regulate space tourism. Moreover, with many private entities delving into space adventure in a competing effort, it therefore means that space activity is currently at a crucial juncture where rules and regulations are required to control such flights because as more countries join in there can be a chaotic growth of suborbital traffic.[30] The position today is that the US Federal Aviation Authority (FAA) is involved in the global effort of preparing rules and regulations for this new endeavor driven by the private sector. The US Commercial Space Launch Act (CSLAA) was enacted in 2004 which entrusts Department of Transportation with the task of making regulation and FAA the responsibility of regulating for safety crew and space flight participants. Accordingly, FAA has issued Guidelines in 2005 for *Commercial Sub-orbital Reusable Launch Vehicle Operations* with space flight participants.[31] Other countries like UK have also enacted UK Outer Space Act which authorizes the Secretary of State to give a license for space activities. Similarly, other States like Russia, Ukraine have their own laws. More and more countries are coming up with their laws concerning commercial space flights but are not harmonized with each other.[32]

This initiative is a step in the right direction, although these legislations do not have international consensus or binding force. As long as these sub-orbital flights remain within the 'domestic' realm, (leaving a country and returning to the same country and not entering anyone other country's airspace), there is no legal issue. Provided these flights remain' domestic' there may not be an issue, but the moment they become international, many issues will come into play.[33] Howbeit, once a sub-orbital flight leaves one country and lands in another, it amounts to an international flight and many issues of international law come into play. We now also face the issues of launch vehicles having multiple owners/operators. For instance, Virgin Galactic is a US based company with its parent company in UK planning a fleet of five sub-orbital vehicles to carry six paying passengers per vehicle who may be of any nationality but will probably operate from US. The first space Tourist Dennis Tito was a US national, but he took a commercial space flight from a Russian Government owned Soyuz spacecraft from Kazakhstan in 2001 which docked with the ISS. In case of a mishap there would be legal issues of compensation.

The fact that successful orbital flights have taken place with announcement by other companies means that travel through sub-orbital trajectory is no more a futuristic dream but

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28 Kaul (n 6).

29 ibid.

30 ibid.

31 ibid.

32 ibid.

33 ibid.

an immediate possibility. In view of this development, the questions that come to mind include:[34]

(i) How these flights are to be treated,
(ii) Whether they come under air and therefore under the Chicago Convention of 1944,
(iii) Whether the space are flights,
(iv) Whether rules should not be made for them as done civil air flights,
(v) How the legal issues of compensation will be determined in the case of a mishap.

The above questions bring to the fore the need to review the present legal status of sub-orbital flights. The Council of ICAO has a clear mandate to adopt Standards and Recommended Practices for civil international aviation under Article 37 of the Chicago Convention[35]. The ICAO system is yielding positive results as air travel has become the safest mode of transportation. However, for Outer Space flights there are a separate set of Conventions under international law. As a result, the need to provide flight path and monitor the progress of a sub-orbital flight becomes even more essential as issues relating to re-entry are another set of technical requirements. As such, certain issues need to be looked into, which include safety, sovereignty, security, environmental, liability[36] as well as the provision of an institutional framework.[37]

In any event, while convergence is taking place between air and space in connection with the coming of commercial sub-orbital flights, there is no overemphasizing the fact that the legal regime governing the two also requires convergence, harmonization and a filling up of the vacuum in the laws governing the two sectors. COPOUS[38] has been working on two

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34 ibid.

35 It has achieved this by providing Air laws in the form of 'Standards and Recommended Practice'. All members' countries of ICAO have to follow it and ICAO conducts audit to check the implementation by each country terms of safety and security. There are 18 Annexes to the Chicago Convention laying down there SARPs in different categories. Ibid.
A huge investment as space travel will require a liability regime. The existing Montreal Convention 1999 (Successor to the Warsaw system) on legal liability extends only to air flights and there would be difficulties in case an accident takes place in space. The Liability convention for space provides damages under article II. It states that a launching state shall be absolutely responsible to pay compensation for damages caused by its space object on the surface of Earth or to an Aircraft in flight" While no vertical limit of air has been specified it does not specify the damage caused by space debris but only damage caused by the space object in air and on ground. It is therefore interesting to note that neither Montreal Convention 1999 nor the Liability Convention can mitigate the issue of a sub-orbital flight getting hit by space debris. The issue of launching state is another interesting feature. Today there are only a handful of launching states while procuring states, that is state of manufacture, are many more. As a result, the responsibility of a launching state becomes very high especially as more and more nano satellites will be put into orbit. Kaul (n 6).

36 ibid.

37 Such an agency or institution is required to provide Air Traffic Management (ATM) as well as Communication, Navigation and Surveillance (CNS) functions while the object is in space and at the point of re-entry.

38 UNCOPOUS is a committee of UN and is not empowered to make rules and regulations the way the Council of ICAO is. It is the institutional structure of COPOUS which inhibits it from making international law. The Council of ICAO, on the other hand, is empowered to do so.

major issues of space namely, use of Nuclear Power Sources in outer Space and developing standards for space debris mitigation.[39] Unfortunately, the achievements of COPUOS have been limited and while it has established good working relations with space faring nations, its scope and membership is limited. Another organization which is closely associated with aviation and space activities is the ITU. It has the most important function of allocating radio frequencies and spectrum to all countries which have now become a scarce commodity; it not only allots a bandwidth to a country, but it also allocates the parking slot to each satellite.[40] The ITU therefore, has a crucial role to play in aviation and in the space industry. These institutional efforts should be fused into one towards an effective space-faring experience. Consequently, there is need for additional amendment to the Chicago Convention to make standards and recommended practices for sub-orbital flights.

III. Requirements for Space Tourism Activities

A qualified space system requires certain essential features to be in place for successful space tourism activity and infrastructure. The most important requirements a space tourism system have to meet are summarized by Adhikari as follows:[41]

(i) The space tourism system has to come up to expectations of space tour participants, namely to the most preferred ones: looking at earth and experience of weightlessness. The vehicle design should therefore provide a sufficient number of windows and sufficient interior space to fly around.

(ii) High inclined orbits are favorable, covering a greater proportion of earth's surface.

(iii) Due to medical restrictions the acceleration level should be kept lower than 3G.

(iv) Although most survey participants prefer longer space trips, it would be recommended to limit the space tour to several hours in accordance to avoid space sickness. There is no general time limit until space sickness will occur, but it has been shown that in the first hours of space flight the space sickness rate is at low levels.

(v) By reducing flight time, some space tourists may think to get insufficient service for their money. To compensate for this feeling a kind of luxurious space camp should be implemented before each space flight. In providing technical information, health monitoring and professional space training, a space camp will intensify the feeling of becoming a "real astronaut". A great psychological momentum in gaining customer's content.

(vi) In general, appropriate procedures are required to proof health conditions of space tourists. Because of the fact that some tourists will be dismissed from space flight due to medical reasons, it would be recommended to accomplish health inspections very wise, best in connection with a space camp.

(vii) Most important, it would be essential to meet the demand price figures. Considering the market surveys, a sufficient demand will be established at ticket prices of $50,000 or less.

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39 Kaul (n 6).

40 ibid.

41 Adhikari (n 8).

While other issues exist as necessary for a hitch-free sub-orbital experience, the foregoing features are essential and worthy of consideration.

IV. Conclusion

The exploration of space and its attendant commercialization particularly with reference to orbital flights has become a 21st century reality due to technological advancement. If properly explored and exploited, this feat could become a lucrative industry, which will definitely lead to the furtherance of space law beyond its current scope. This requires investment into the sector by more states. However, the need to comply with international legal framework on space and orbital activities is crucial to the realization of this feat.

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Wading in Troubled Waters: Supporting the Work of the International Criminal Court (ICC) through Domestic Legal Institutions in Kenya

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Keywords
ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT; INTERNATIONAL CRIMES ACT (2009); POST-ELECTION VIOLENCE 2008; COMPLEMENTARITY

Abstract

This article discusses the role of Kenyan domestic legal institutions in supporting principles and institutions of international criminal justice. It discusses how these legal institutions have interacted, supported and even applied the principles of international criminal justice amidst a very hostile political climate. This article argues that the current calls for withdrawal from the Rome Statute of the International Criminal Court may be frustrated by these institutions because they have greater affinity to the principles of international criminal justice than political establishments. While acknowledging that the eradication of impunity should be a joint effort between domestic and international institutions and that the current tensions and calls for withdrawal are not good for everyone, the article argues that neither international institutions alone nor domestic systems can make progress unless there is collaboration as well as reforms in the entire international criminal justice system.

Introduction

This article explores an interesting phenomenon in Africa's relationship with the International Criminal Court (ICC), which is the apparent discord between the external policy agenda as espoused by political leaders, and the seemingly grounded support for the ICC and the international criminal processes by internal legal institutions in most African states. Whereas in their collective, African leaders have condemned the ICC and are actively seeking ways of curtailing its authority to deal with powerful political figures across the continent, their desire to disengage completely from the ICC will probably be difficult to attain. Some of the factors which make such an intent difficult to fulfil, resonate with just about everything that is problematic with Africa's relationship with the international system. For example, their dependency on the developed north eliminates the possibility of the continent charting an independent path in dealing with impunity. The other is the apparent inability of African states in their collective to influence "governance' beyond the continent,[1] a factor largely contingent on the paucity of resources

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1 Martin Welz, 'The African Union beyond Africa: Explaining the Limited impact of Africa's Continental Organisation on Global Governance' (2013) 19 Global Governance 425.

and their propensity to seek short term fixes to their problems. Then there is diversity and the impracticability of all 53 states in the continent speaking with one voice on any issue.[2]

Apart from the foregoing, one other factor that has become important lately and which invites further discussion, purposely because it steers the debate way from the emotive discourses around Africa's role in the international system, is the clear manifestation of the accommodation of the principles of international criminal justice and even support of the ICC by domestic legal institutions. Although focusing on domestic institutions may appear illusive considering that African political elite have in the past been able to manipulate these institutions to secure their own positions, a trend is emerging, especially in countries where new constitutions have been enacted such as South Africa and Kenya, where international law is considerably strengthened and the influence of its institutions widely acknowledged.[3] Domestic legal institutions in these countries that are modelled out of the new constitutional dispensations have imbibed international standards in a variety of ways that make elite manipulation more visible and somewhat problematic. So, as differences arise between the political elite and international bodies, such as the current haranguing around the role of ICC in Africa, domestic institutions that foster international standards have proven capable of mediating the differences and upholding the promise of international law.

It is in this context that the role of Kenya's domestic legal institutions in fostering the principles of international criminal justice is discussed. The purpose is twofold: to show how the domestic legal institutions have interacted, supported and even applied the principles of international criminal justice amidst a very hostile political climate, and to illustrate why the current calls for withdrawal from the Rome Statute may be frustrated by the domestic legal system that has a greater affinity to the principles of international criminal justice than political establishments. This article has three parts. The first attempts to broadly identify the points of divergence in the on-going tense relationship between African states and the ICC. This part begins with a narrative on Africa's involvement in the establishment of the court and then posits a few critical thoughts on why the relationship stagnated and then became hostile. The second part analyses the attempts that

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2 Theresa Reinold, 'Constitutionalization? Whose Constitutionalization? Africa's ambivalent Engagement with the International Criminal Court' (2012) 10 (4) ICON 1076, 1090. Mireille Affa'a-Mindzie, 'African Leaders Speak with one Voice, But on whose Behalf?' (*Global Observatory,* 26 February 2014http://theglobalobservatory.org/analysis/686-african-leaders-speak-with-one-voice-but-on-whose-behalf.html) <http://theglobalobservatory.org/analysis/686-african-leaders-speak-with-one-voice-but-on-whose-behalf.htm;> accessed 12 October 2016.

3 The South African post-apartheid Constitution adopted in 1996 has provisions which allow domestic courts to apply international law such as sections 231, 232, and 232. This is holding that the Constitution should be interpreted "to comply with international law". *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), Para 97. Mlambo asserts that: "The Rome Statute gives effect to international human rights law and enables the prosecution of customary international law crimes. As such, its provisions enjoy pre-eminence in our constitutional regime. Moreover, it has been domestically enacted. Its binding status is clear"). *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30. Article 2 of the Kenyan Constitution adopted in 2010 is much more explicit in this regard. J Osogo Ambani, 'Navigating past the 'dualist doctrine': The case for progressive jurisprudence on the application of international human rights norms in Kenya' in Magnus Killander ed, *International Law and Domestic Human Rights Litigation in Africa,* (Pretoria University Press, 2010) 25. Oppong argues that trends seem to be changing in favour of application of international law in domestic courts in Africa). Richard Oppong, 'Re-imaging International Law: An examination of recent trends in the reception of international law into national legal systems in Africa' (2006) 30 FordhamIntlLJ 296.

have been made to withdraw from the Rome Statute, both continentally and in Kenya, and suggests why these attempts have been mostly unsuccessful. The third part identifies aspects of the Kenyan legal system that have shown support to the principles of international justice. Based on the assumption that the future of international criminal justice and the continued viability of its institutions rests on the support of domestic institutions, this article identifies trends and developments in the Kenyan legal system that carry such a promise. The idea is to demonstrate that these developments, as well as the modes of operations of these legal institutions are making it difficult for political leaders to align their anti-ICC rhetoric with national standards and aspirations.[4] Finally, the article suggests that making assumptions about Africa's relationship with the ICC based solely on the rhetoric of political leaders and the tantrums of the African Union (AU) may be less useful than eliciting insights on how modern institutions that function within the constraints of political power may become key to ending impunity in the continent.

I. Disengaging from the ICC: Legal and Political Imperatives

Although Africa was the greatest supporter of the ICC before and immediately after it was created, it is now its greatest critic. This has prompted questions as to what has changed in the interim. One commentator has suggested that the reason for this change is rooted in Africa's ambivalence to international normativity, often reflected in its inability to translate global standards of governance into actual domestic practice.[5] This means that Africa's disenchantment with the ICC must be viewed in the wider context of the shift from politics to law in the international system,[6] or what Romano has characterised as the shift from the "consensual paradigm" to the "compulsory paradigm".[7] On the other hand, Africa's change of heart could be a reflection of its reawakening and therefore, assertiveness in addressing the weaknesses in the international system. Although doubtful, this view seems to rekindle the old memories of the early 1960s when a vibrant Africa entering the UN, shaped the course of politics and came away with several reforms in international governance. Currently, Africa's influence is minimal and there is only a handful of issues on which its voice is heard. As far as peace and security is concerned, one issue that the international community and the UN will have to take seriously, is the reform of some of its organs, especially the Security Council. As Akande *et al* note,

> Today, from the perspective of many African leaders, the ICC's involvement in Sudan has come to reflect their central concern about the UN—the skewed nature of power distribution within the UNSC and global politics. Because of the UNSC's legitimacy deficit, many African and other developing countries see its work as 'a cynical exercise of authority by great powers', in particular, the five permanent members. The

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4 An example is the Omar Al-Bashir case in South Africa where arrest of warrant was issued for Omar Al-Bashir and the government disregarded the court order. *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402. (24 June 2015) (where a warrant of arrest was issued for Omar Al-Bashir and the government disregarded the court order). See also Sarah Evans S, 'Govt Denied Leave to Appeal Al-Bashir Case' (*Mail & Guardian*, 16 September 2015 <http://mg.co.za/article/2015-09-16-govt-denied-leave-to-appeal-al-bahir-case>) <http://mg.co.za/article/2015-09-16-govt-denied-leave-to-appeal-al-bahir-case> accessed 20 October 2016.

5 Reinold (n 2) 1090.

6 Laurence Juma, 'Unclogging the Wheels: How the Shift from Politics to Law Affects Africa's Relationship with the International System' (2014) 23 (2) Journal of Transnational Law & Contemporary Problems 101.

7 Cesare Romano, 'The proliferation of international judicial bodies: The pieces of the puzzle' (1999) NYUJIntlL&Pol 713.

UNSC's (dis)engagement with article 16 since the Rome Statute became operative will have exacerbated rather than softened those impressions.[8]

Other scholars suggest that the current hostility to the ICC should be viewed in a political context.[9] They argue that the inability of states to enforce obligations arising from a treaty to which they are a party, correlates to the political risk that exists in countries that do not observe the rule of law, have weak systems of governance and poor record for human rights. In these countries, compliance with informal enforcement mechanisms, such as those of international tribunals, is at risk when political circumstances change or when such mechanisms threaten political establishments. That is why the ICC's involvement becomes involves a political risk that even jeopardizes the commitment to the Rome Statute. Connected to this view, is the fact in these countries, ratification of treaties bears no cost.[10] This in-turn invites non-compliance with informal rules and international treaties. Kenya is good example in this regard. The gradual breakdown of the rule of law and run-away corruption have made any attempts to enforce international criminal justice unpopular with the ruling elite. The change in attitude towards the ICC is therefore consistent with the political risk mentioned above.

Undoubtedly, these views play out rather critically in the review of Africa's relationship with the international system and may indeed influence the manner in which the international community responds to the tension between African Union and the ICC. It should be noted that mapping the interactions between the international criminal justice system and African states, and proffering solutions to the problems abiding in that relationship requires a much more sophisticated enquiry than has been provided by current political posturing and empty rhetoric of African leaders. One thing to note is that the interplay between politics and law in this regard, is a factor lawyers should not be shy to address, especially now that the tension is threatening the future of the Court. It should be recalled that the ICC was established outside the UN Security Council framework, to promote international rule of law by institutionalising checks on abuse of power and holding leaders accountable for international crimes without the undue interference of politics. It had nothing to do with political compromises or readjustment of geopolitical power. Unlike its predecessors, the International Criminal Court for Yugoslavia (ICTY), and International Criminal Court for Rwanda (ICTR),[11] the ICC is a permanent edifice that is not vulnerable to the so-called victors' justice. The court was designed with a noble universal purpose. Africa's participation in its establishment thus signified a watershed moment in the fight against impunity, given that the aberrations that prompted the establishment of the Court had a greater endurance in Africa. It was a strong statement of support for the rule of law. Given this history, what is happening now is somewhat of an anti-climax to the progressive aspirations of the past. Thus, the efforts to withdraw from the Rome Statute and disengage from international criminal justice processes that do not respect immunity of heads of state, whether motivated by the ambivalence of African

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8 Dapo Akande, Max Du Plessis and Charles Jalloh, *An African Expert Study on African Union Concern About Article 16 of the Rome Statute of the ICC* (2010), 6.

9 Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC); Politics of Election and the Law' (2014) 8(1) Journal of East African Studies 25. Beth Ann Simmons and Allison Dammer 'Credible Commitment and the International Criminal Court' (2010) 64 (2) International Organization 225.

10 Oona A. Hathaway, 'The Cost of Commitment' (*John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers*, 21 May 2003) <http://digitalcommons.law.yale.edu/lepp_papers/273/> accessed on 12 October 2016.

11 UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

states to global standards of governance or the genuine need for reform of international institutions, may eventually undermine the progress the international community has made thus far towards eradicating impunity and promoting the rule of law.

Notable efforts to disengage from the ICC have occurred at two levels—the continental level and the national level. Movements at both levels only began after the ICC moved against heads of state. And the two situations that standout in this regard are Sudan and Kenya. There is a wealth of literature on the genesis of the tension between Africa and the ICC arising from the two situations, and it may not be useful to repeat them here.[12] However, it may be worthwhile to mention that the indictment of the Sudanese President Omar Al Bashir in 2005 on charges of war crimes, crimes against humanity and genocide and the subsequent issuance of the warrant of arrest against him, marked the beginning of the contests between the African political leaders and the ICC.[13] Subsequent commencement of *proprio motu* investigation against Kenya's President, Uhuru Kenyatta, and Deputy President, William Ruto, and four other high ranking government officials, simply added fuel to the fire.[14] Although the Kenyan cases have now been terminated, African states still view the court as an imperialist tool used by western nations to bully developing states. The court is thus accused of ignoring the international law principle of immunity, and thus of failing to interpret its mandate in accordance with international law. A lot has happened since 2005 but what is pertinently clear is that African states and the African Union have been so outraged by these two situations, that they have made, and are still making efforts to disengage from the ICC.

II. Attempts to disengage from the ICC

The Kenyan situation is a bit intriguing. While Kenyan leaders have been very active at the AU level, internal developments depict a mixed response. There have been two attempts by the Kenyan parliament nudging the executive towards the process of withdrawal from the ICC. In both cases, the parliament passed motions supporting such withdrawal, but with little follow up being made to give effect to the wish of the legislature. The first attempt was in December 2010 followed by another attempt in September 2013. A few observations may be pertinent before an analysis of the actual episodes of attempted withdrawals. The first is that the ICC factor has always been used to square internal political problems. It is not about whether the ICC is good or bad for the purposes for which it was established, but how it can be used to secure political gains. That is why today, the politicians may want the ICC and tomorrow, they might want to reject it. As they oscillate between the two poles they carry government institutions with them and mess them up in the process. Second, the attempts to withdraw from the ICC have never enjoyed unanimous support. During the previous coalition regime, the factions led by Raila Odinga were bitterly opposed to any attempt to remove Kenya from the ICC. The same situation obtains today with the opposition members in parliament walking out during the withdrawal debate. Therefore, it cannot be said that Kenyans have at any one point unanimously supported the current efforts by the Uhuru government to remove the

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12 For example, Gwen P. Barnes, 'The International Criminal Court's ineffective enforcement mechanisms: The indictment of President Omar Al Bashir' (2011) 34 (6) Fordham IntlLJ 1589. Christine Bjork and Juanita Goebertus, Complementarity in action: the role of civil society and the ICC in rule of law strengthening in Kenya, '' (2011) 23 Yale HumRts & Dev L J 383.

13 The investigations by the Office of the Prosecutor (OTP) commenced after the UN Security Council referred the Darfur situation to the ICC. UNSC Res 1325 (31 March 2005) UN Doc S/RES/1593.

14 Max Du Plessis, 'Kenya Again Tests Africa's Commitment to the ICC' *Institute of Security Studies* (2011).

country from the Rome statute. Here again we see how the external policy is not quite in harmony with the domestic realities.

II.I Background

A little background may be useful to shed some light on the circumstances in which these attempts have been made, and why little success has been forthcoming. Kenya signed the Rome Statute of the International Criminal Court in 1999 and ratified it in 2005. At the time, there was little political risk because it seemed highly unlikely that any Kenyan would be tried by the court.[15] Moreover, the country was enjoying considerable peace as compared to most of its neighbours. Things changed after the post-election violence of 2007. Efforts to return things to normal, saw the establishment of a commission of enquiry to investigate the violence and make recommendations for future action. This Commission, known as the Waki Commission, recommended that a credible local regime for investigation and prosecution of those responsible for the instigating and committing egregious crimes, should be established. It also suggested that if such a tribunal was not established, then the matter ought to be referred to the ICC because the offences committed meet the threshold for international crimes falling within the jurisdiction of the The Hague court.[16] Such an option, the Commission suggested, would then be supported by a list of names of persons worthy of investigation, which it handed to Kofi Annan for onward transmission to the OTP, should that become neccessary. The recommendation to set up a special tribunal to deal with international crimes was deemed appropriate at the time because Kenya had not enacted a legislation to implement the Rome Statute, neither did the Penal Code, its primary criminal legislation, provide for such offences.[17] After the Waki Report was published, the government committed itself to the establishment of the tribunal. The Bill for the Special Tribunal was hurriedly drafted by the Attorney General and placed before parliament. In a bizarre bout of intemperate miscalculation, parliamentarians rejected the Bill despite the impassionate plea by President Mwai Kibaki and Prime Minister Raila Odinga.[18] A majority of Kenya's prominent politicians, outside the inner cohort of Odinga's ODM party, supported the idea of referring the cases to the ICC in apparent defiance to what they perceived as the PM's political agenda.[19] They proceeded to appropriate the short lived moral triumph over Odinga with relish, branding the PM's proposal as vague and malicious.[20] Having failed to establish a local tribunal, pressure began to build on Kofi Annan to approach the ICC and hand in the list of names suggested by the Commission for investigations, and he did so. There was also pressure on the government to fulfil the commitments it made in the accord. Having failed to secure parliamentary support for the establishment of the tribunal,

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15 Mueller (n 9) 26.

16 Government of Kenya, *Report of the Commission of Enquiry into Post Election Violence* (CIPEV 2008) 472.

17 Antonita Okuta, 'National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 JICJ 1065.

18 Thomas Hansen, 'Transitional Justice in Kenya: An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns' (2011-2012) 42(1) Case Western International Law Journal 8. Stephen Brown and Chandra Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya' (2012) 111 (443) Afr. Affairs 244.

19 The same politicians had also frustrated the efforts to establish a functional truth and reconciliation process. See Godfrey Musila, 'Options for transitional justice in Kenya: Autonomy and the challenge of external prescriptions' (2009) 3 International Journal of Transitional Justice 449.

20 Sunday Nation Team, 'Ruto: Why I Prefer the Hague Route' (*Daily Nation*, 21 February 2009 <http://www.nation.co.ke/News/-/1056/533390/-/item/0/-/uxybb5/-/index.html> accessed on 20 October 2016).

the government hastily set up the Truth Justice and Reconciliation Commission (TJRC) to deal with crimes committed during the post-election violence.[21]

In March 2010, Pre-trial Chamber II of the ICC authorised the prosecutor to begin investigation of the violence in Kenya with a view to bring charges against individuals most responsible for the crimes that were committed.[22] The prosecutor immediately announced that six Kenyans were under investigation. These included Uhuru Kenyatta and William Ruto. The six, except Sang, the radio journalist, were prominent government personalities—three cabinet ministers, one former minister, the secretary to the cabinet, and the former police commissioner. When the prosecutor, Louis Moreno Ocampo announced his decision to bring charges, Kenya's political class was rattled because unlike what they are used to, the international criminal justice process was beyond their control. However, because they had scuttled the process for establishment of a local tribunal, their immediate resolve was to assert Kenya's sovereignty and attempt to defeat the international legal process by political means. Politicians allied to those facing charges at the ICC, began to mobilise support for Kenya's withdrawal from the ICC altogether.[23] And this is how the legislature became involved in the process.

II.II The First Motion of Withdrawal

In December 2010, a motion for parliament to support the withdrawal of Kenya from the ICC was tabled by Isaac Ruto, a key ally of William Ruto, one of the suspects indicted by the ICC.[24] Prior to this there had been an intense campaign by politicians to depict the court as an instrument of imperialism. During the debate in parliament this view was unashamedly harped on by many speakers. One government Minister, who supported the motion, was quoted saying that the court was only for Africans and that "no American or British will be tried there".[25] The MPs voted in support of the motion thus paving the way for the government to begin cutting its ties with the ICC. The motion was seen as an affront to the government which many of them saw as being uncooperative in protecting Kenyan leaders. There were those who legitimised their call for withdrawal on the somewhat unfounded allegation that the Prime Minister was using the ICC to eliminate his political rivals. The politicians had conveniently forgotten that it was the Prime Minister that had urged them a few months back to establish a local tribunal. This attests to the dishonesty of Kenyan politicians in the whole ICC debate.

Although the motion was passed, supposedly paving the way for the government to adjust its relationship with the ICC, nothing took place. The coalition government was perhaps too tenuous to attempt something as drastic as adjusting its international relations with a powerful organ as the ICC. Moreover, given the embarrassment that it had suffered when it allowed Bashir into the country the risk might have been too great. Another factor could have been that the motion came at the twilight of the coalition government's tenure.

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21 Mba Nmaju, 'Violence in Kenya: Any role for the ICC in the quest for accountability' (2009) 3 African Journal of Legal Studies 90. The Truth, Justice and Reconciliation Commission Act 2008 was passed in October 2008.

22 Charles Jalloh, 'Situation in the Republic of Kenya, No ICC-01/09-19 Decision on Authorisation of Investigation' (2011) 105 AJIL 540.

23 Hansen (n 18) 10.

24 Eunice Rugene, 'Kenya Lawmakers vote to pull out of international criminal court' (*Monitor UK*, 24 December 2014 <http://www.monitor.co.ug/News/World/-/688340/1078072/-/10hdnbv/-/index.html> accessed 20 October 2016.

25 'Kenya MPs vote to leave ICC over poll violence claims' (*BBC News*, 23 December 2010 <http://www.bbc.com/news/world-africa-12066667> accessed 20 October 2016.

With elections looming, none of the key players could have been brave enough to devote their time towards sorting out matters with foreign policy implications, when there was already plenty of national issues deal with. But although the Kibaki/Raila coalition government did not take any action to withdraw from the treaty it wasn't entirely certain that it supported the ICC process. In fact, judging from some of its action, the government appeared to be a bit uncomfortable with the ICC process and was leaning more towards protecting the accused persons, than discharging its obligations under the Rome Statute. For example, the government despatched the then Vice president, Kalonzo Musyoka, on a diplomatic tour of African countries to seek support of its application for deferral of the cases under article 16 of the Rome Statute.[26] The request, which was formally lodged in February 2011, alleged that the deferral would foster peace and reconciliation. The request was not formally considered by the Security Council due to the differences amongst the parties in the coalition.

In the meantime, the ICC process proceeded. In March 2011, the ICC summoned the accused persons to appear before it for a confirmation of charges hearing. At this point the Kenyan government, perhaps energized by the motion of withdrawal, decided to seek dismissal of the charges against the accused on the grounds of admissibility. It became clear that the government was not interested in pursuing withdrawal from the ICC but rather pursuing the termination of the trial through procedures established by the Rome Statute. Perhaps this was upon realisation that any steps taken to withdraw from the treaty may not affect the on-going trials. The application was dismissed thus paving the way for the trial to proceed.[27] One can therefore conclude that the first motion of withdrawal was a wasted effort. It had no effect internally other than to whip political emotions, and externally too, on the ICC process, which was, after all, its intended target.

II.III The Second Motion of Withdrawal

The political onslaught on the ICC took a different turn as the Kibaki/Raila coalition government's term drew to an end. Much of the venom was now directed at Raila Odinga who was then a leading contender for the presidency. Indeed, the bitterness towards the ICC and Odinga fermented the relationship between Uhuru Kenyatta and William Ruto who were both presidential contenders as well. The two were able to form a coalition between their two political parties, URP and TNA, and contest for the positions of president and vice president respectively. In a highly charged campaign, the duo presented themselves as fighting for the sovereignty of country against external interference. When they won the election and assumed office, the onslaught against the ICC was energised as all government efforts were now solely directed at dealing with it and ensuring that the President and his vice president were absolved. Although they both pledged to cooperate with the ICC and "clear their names", which appeared as something of an anachronism, much of what they did in their administration was directed at frustrating the ICC trial. No wonder soon after their inauguration, the political discourse once again revived the move towards withdrawal of the country from the ICC. Against the backdrop of an all-out war against the ICC by government, another motion for withdrawal was tabled in parliament

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26 Walter Menya, 'Fresh Shuttle diplomacy on ICC Cases' (*The Star*, 1 May 2012) <http://www.the-star.co.ke/news/article-20219/fresh-shuttle-diplomacy-icc-cases> accessed 26 November 2016. This move was highly criticized by the Law Society of Kenya and other civil society groups as being wasteful. The Kenya national Commission of Human Rights lamented the use of public resources to protect "criminals".

27 *Case of the Prosecutor v William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang (*Decision) ICC-01/09-19 (30 May 2011).

on 5 September 2013. According to Adan Duale, the Majority Leader in Parliament, who proposed the motion, there had been a "fundamental change in circumstances relating to governance" since Uhuru and Ruto had been "lawfully' elected to lead the country.[28] Parliament was also urged to recommend the repeal of the International Crimes Act which domesticated the Rome Statute. The motion was vigorously debated with the members from the opposition vociferously challenging it. Eventually, the opposition MPs left parliament in protest and the motion was passed in their absence. The motion was, nonetheless, passed on 6th of September 2014. This time too, no steps was taken by the government to withdraw from the Rome Statute despite parliamentary approval.

III. Other Initiatives

After the confirmation of the charges against Uhuru and Ruto way back in March 2010, the duo used all kinds of methods at their disposal to frustrate the trial, while in public affirming their intention to cooperate with the court. This paradoxical posturing has been the hall mark of Uhuru Kenyatta and William Ruto's approach to the ICC criminal process. On the domestic scene however, there was no pretence about the disdain the two leaders had for the ICC and the international community that supported its work. For example, as the 2013 election drew near, the duo rallied the support of a cabal of leaders from the Kikuyu and Kalenjin communities during "prayer" meetings in which the ICC was roundly condemned. The process of galvanising ethnic support for the withdrawal or termination of the case against Uhuru Kenyatta and William Ruto began before they won the elections in 2013.[29] Part of the campaign was aimed at creating an image of unpopularity for the ICC's work in Kenya and mobilising a national consensus against government support for the ICC. After the two won elections in 2013, the approach did not change so much, only that now, they were in charge of a government that was obligated to cooperate with the ICC in line with its commitments as a state party to the Rome Statute. Thus, while officially, the duo attended the trials in The Hague, they did everything possible to frustrate the trial.[30] The paradoxical mix of defiance and reluctant cooperation more or less defined the government's relationship with the ICC since then. At the trial scene, a host of interlocutory applications were being lodged to either terminate the case or simply delay it,[31] while appearances in court were always a scene of pitiful performance by Kenyan legislators who went to The Hague in doves to voice their displeasure at the ICC proceedings and support the two leaders.[32] In addition, the

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28 Charles Jalloh, 'Kenya Should Reconsider Proposed Withdrawal from ICC' (*EJITALK* 18 September 2013) <http://www.ejiltalk.org/kenya-should-reconsider-proposed-withdrawal-from-the-icc/> accessed on 20 October 2016.

29 Moses Njagih, 'Gema Reveals Plans on ICC' (*Standard,* 24 March 2012) < > date accessed 11 May 2019. a meeting of the GEMA communities in Limuru in March 2011 resolved Uhuru Kenyatta had the right to contests Kenya's presidency despite the charges he was facing at the ICC. The meeting also condemned ICC as an imperialist agent and urged all Kenyans to distance themselves from it. S Owino, 'Application for a Delayed Trial is Unusual' *Saturday Nation* (Nairobi 24 March 2012).

30 Sella Oneko and Alfred Kiti, 'Kenya, Uhuru Kenyatta to Attend ICC Hearing at The Hague' (*AllAfrica,* 9 October 2014) <http://allafrica.com/stories/201410070947.html> accessed 12 July 2016.

31 There were several applications such as seeking to move the trial back to Kenya; excusal of physical presence during trial; challenges on lack of cooperation by the Kenyan government. Felix Olick, 'Will the ICC have a Positive Legacy in Kenya?' (*East African Standard*, 27 April 2014) <http://www.standardmedia.co.ke/?articleID=2000110378&story_title=will-the-icc-have-a-positive-legacy-in-kenya> accessed on 12 July 2016.

32 Tom Odula, 'Heroes Welcome for Kenya's International Court Suspects' *Associated Press* (Nairobi 11 April 2011).

government went on overdrive to mobilise African governments in support of a unified stand against the ICC. And while the duo appeared to cooperate with the court, on the background, witnesses were disappearing while others withdrew their testimony.[33] The plan was to "eliminate, intimidate, and bribe people who knew too much about the PEV, key individuals who were part of it, and civil society activists who were assisting and sheltering potential witnesses."[34] The purpose was to ensure that "the cases dropped for lack of evidence…and to destroy the credibility of other witnesses…."[35] The trials dragged on, but with difficulties. In the end, the Prosecutor found herself in a very difficult position. She simply had no evidence against Uhuru Kenyatta and was forced to withdraw the charges.[36] The same fate befell the cases of William Ruto and Julius Sang.

Despite all what went on and the efforts to withdraw being made, Kenya has not taken concrete steps to withdraw from the Rome Statute. One is therefore forced to question why there has been so much talk and political haranguing on the ICC issue and yet nothing tangible has been done to legally effect the withdrawal. If the true intention of the government was to withdraw from the treaty, why did it not follow the simple procedure set out in article 127 of the Rome Statute? All what is required of states is to give notice to the Secretary-General of the United Nations of their intention to withdraw. The provision does not establish what the notice should contain or how it should be brought to the attention of the Secretary-General of the United Nations. It could be a simple letter conveying the intention to withdraw. Thereafter, the withdrawal takes effect one year after the notice has been served. There is no requirement of any other processes, at least at the level of the United Nations. If the intention of the Kenyan government was to withdraw, why did it not serve its notice? Apparently, this is a step that the government is not willing to take, at least for now. There are geo-political considerations of course and the fact that the government is well aware of dangers of isolating itself from the community of nations. But there is another reason, which informs the basis of the enquiry in this article, which is the fact that no matter how grave political implications of the trials maybe, the ICC framework as a whole is not necessarily incompatible with the transitional justice processes established by the new Constitution (2010) and the legal framework that has evolved from it. And withdrawing from the ICC could mean destroying the pillars of the country's legal system.

In the next section I examine briefly the tenets of this compatibility to illustrate how constitutional imperatives for asserting principles of criminal justice in Kenya are consistent with ICC's work, and to support the argument that domestic legal institutions and the entire infrastructure for justice administration espouse affinity to international standards, which makes them amenable to positive cooperation with the ICC.

IV. Rome Statute's Compatibility with Domestic Law

33 Makau Mutua, 'How they tampered with Ocampo witness' (*Sunday Nation*, 18 March 2012) <http://www.nation.co.ke/oped/Opinion/How+they+tampered+with+Ocampo+witness+/-/440808/1368438/-/ucl9g2/-/index.html> accessed on 12 July 2016. Catrina Stewart, 'ICC on Trial Along with Kenya's Elite Amid Claim of Bribery and Intimidation' (*The Guardian*, 1 October 2013) <http://www.theguardian.com/world/2013/oct/01/icc-trial-kenya-kenyatta-ruto> accessed on 12 July 2016.

34 Mueller (n 9) 33.

35 Mueller (n 9) 34.

36 Mike Pflanz, 'Uhuru Kenyatta's ICC Prosecution Close to Collapse' (*The Telegraph,* 8 October 2014) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/11149256/Uhuru-Kenyattas-ICC-prosecution-close-to-collapse-as-lawyers-demand-acquittal.html> accessed on 12 July 2016.

The rhetoric of current political leaders has created the false impression that there is nothing in the Rome Statute that is compatible with African values, aspirations and norms. In Kenya, the ICC is vilified as an intrusive organisation that does not respect African leaders and which has nothing to offer to Kenyans by way of improving political governance and the administration of justice.[37] This claim belies the plethora of reforms in governance and in the judicial sector that have been undertaken since the Moi government was voted out of power in 2002. These reforms have sought to align the domestic institutions of justice administration with international criminal justice standards. In addition, there are several factors which show compatibility of the domestic legal framework with principles of international justice that are often taken for granted, but which, in my view, are important to highlight. To begin with, by ratifying the Rome Statute, Kenya moved closer to adopting international standards in dealing with impunity, while at the same time strengthening its methods of dealing with international crimes. Secondly, with the enactment of a new constitution in 2010 and the establishment of legal and administrative frameworks that support its implementation, a number of legal institutions have emerged that show compatibility with the ICC processes. If anything, these factors show how international law have become entrenched in the Kenyan legal system.

IV.I Constitutional Framework

The main constitutional imperative which affirms the compatibility of Kenya's legal system with the ICC is the entrenchment of international law in domestic adjudication.[38] Unlike in the past, domestic courts can now apply international law (treaties and general principles of international law) as part of Kenya's domestic law.[39] This change has been brought about by article 2 of the Constitution. It provides that, "the general rules of international law shall form part of the law of Kenya"[40] and also that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".[41] Although rules of customary international law are not expressly mentioned, one would assume that it was a mere drafting error and that the provision would be interpreted inclusively rather than exclusively. The other provision that is equally instructive is article 132 which lists, as part of the functions of the President, the duty to "ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries". There is enough in these provisions to infer that the international obligations that Kenya has committed to must be taken seriously. Moreover, the constitution has created an opportunity for the use of international and foreign law to resolve domestic disputes.[42] Indeed, there is ample evidence that international and foreign laws are already influencing domestic litigation in Kenya.[43] This phenomenon also correlates with intensification of reform movements, the re-emergence

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37 Ochiel J. Dudley, 'ICC's Inherent Weaknesses Hamper its Work' (*Daily Nation* 22 February 2012).

38 Nicholas Orago, 'The 2010 Kenyan Constitution and the Hierarchical Place of International Law in Kenyan Domestic System: A Comparative Perspective' (2013) 13(2*)* AfrHumRtsLJ 414, 439.

39 See for example *Pattni & Another v Republic* (2001) KLR 262 where the courts, although willing to "take account of the emerging consensus of values" embodied in the international human rights instruments, maintained that such laws were only of persuasive value.

40 Constitution of Kenya 2010, art 2(5).

41 Constitution of Kenya 2010, art 2(6).

42 Laurence Juma, 'Nothing but a Mass of Debris: Urban evictions and the right of access to adequate Housing in Kenya' (2012) 12 (2) African Human Rights Law Journal 470.

43 Ibid 470.

of regional and sub-regional frameworks for the administration of justice and the mobility and cross-pollination of rights practice that we now see across Africa.[44]

IV.II Domestication of the ICC Treaty

IV.II.I International Crimes Act 2009 [45]

The International Crimes Act (ICA) is in many ways a product of the negotiations that brought the post-election violence to an end and established the coalition government of Kibaki/Raila. Within the caucus negotiating on behalf of the main political parties, which had personalities such as James Orengo, who had themselves been victims of brutal repression in previous regimes, the question of how to deal with past violations of human rights and crimes committed during the violence was very much alive. Thus, their recommendation that the Commission of Enquiry into the Post-Election Violence (CIPEV) be established to investigate such violations came as a natural response to the situation. The Commission's work and its report published in October 2008, must have paved the way for the alignment of Kenya's justice system with international standards. Although parliament later reject the Commission's recommendation supporting the establishment of a local tribunal to deal with these crimes, it opted instead to domesticate the Rome Statute by enacting the International Crimes Act. This was done barely two months after the CIPEV report was published, in December 2008. Ironically, the Act was a product of mixed political calculations aimed at defeating justice rather than a genuine endeavor to improve Kenya's justice system and respond to past violations and crimes.

Despite the circumstances of its birth, the Act fits into the scheme of cooperation with State Parties envisaged by the Rome Statute. Article 88 of the Rome Statute requires state parties to establish procedures under national law that enable them to cooperate with the ICC. Kenya fulfilled this obligation by enacting the ICA. The Act proclaims that its purpose is, "to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions."[46] As far as creating the necessary nexus between international law and domestic law, certain provisions of the Act have been overtaken by the Constitution. For example, article 3 of the ICA which provides that the Act is binding on the Kenyan government, and article 4 which states that the Rome Statute has the force of law in Kenya. These two provisions are logical when viewed in the context of the dualist system in Kenya at the time the ICA came into force in 2009. Before the enactment of the Kenyan Constitution of 2010, treaties ratified by Kenya were not automatically incorporated into the laws of Kenya and were considered secondary to municipal law whenever conflict between the two legal regimes arose.[47] However, by virtue of article 2 of the Constitution discussed above, all treaties and general principles of international law have become part of domestic law.

IV.II.I.I Crimes under the Act

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44 Tijanyana Maluwa, 'The incorporation of international law and its interpretational role in municipal legal systems in Africa: An exploratory survey' (1998) 23 South African Yearbook on International Law 45.

45 'International Crimes Act' [ICA] (2008) No 16 Kenya Law Reports (ed 2012).

46 Ibid, Preamble.

47 Antonita Okuta, 'National Legislation for Prosecution of International Crimes in Kenya' (2009) 7 JICJ 1063. Discussing the dualist position of Kenya before the enactment of the Kenyan Constitution 2010.

The ICA refers to the Rome Statute definition of international crimes hence it does not provide an independent definition of crimes that fall under its jurisdiction. It follows, therefore, that article 6 of the ICA provides that the crime of genocide has the meaning ascribed to it under article 6 of the Rome Statute, while war crimes have the meaning ascribed to it under article 8 of the Rome Statute. However, the scope of crimes against humanity in the ICA goes beyond that of the Rome Statute to include definitions provided by conventional international law and customary international law that are not included in the Rome Statute.[48] Further, ICA incorporates the general principles of criminal law provided for under Part 3 of the Rome Statute such as *ne bis in idem*, *nullum crimen sine lege*, individual criminal responsibility, exclusion of jurisdiction over persons under 18, command responsibility, as well as exclusion of statutes of limitation and mental element requirement.[49] The principles of criminal law and the defenses available under Kenyan law are also applicable according to the act. However, it is noteworthy here that the act also provides that should there be inconsistency between the principles under the Rome Statute and those under Kenyan law, the Rome Statute principles are deemed to take precedence over those under Kenyan law. This is an outstanding provision in view of the dualist system in Kenya at the time of the enactment of the Act under which, as alluded to above, Kenyan law took precedence over treaty obligations in case of conflict.

IV.II.I.II Complementarity

The act is also compatible with the principle of complementarity under the Rome Statute according to which a national court concerned has primary jurisdictional over a matter and the ICC only gains jurisdiction in case of unwillingness or inability of that state to exercise its jurisdiction.[50] In this regard, the Kenyan High Court is empowered to try the crimes of genocide, war crimes and crimes against humanity if the crime is committed in Kenya, if the offence is committed by a person employed by the Kenyan government in the military or civilian capacity, if the perpetrator is employed by a state engaged in an armed conflict with Kenya, if the victim is a Kenyan citizen or a citizen of a country allied to Kenya during an armed conflict; or if the perpetrator is present in Kenya after the commission of the offence.[51]

IV.II.I.III Cooperative Mandate

The Act further regulates and provides procedures for Kenya's cooperation with ICC in various ways. The major type of cooperation it provides for, is with regard to the arrest and surrender of persons to the ICC. Following a request by the ICC under article 89 of the Rome Statute, the Act empowers the High Court of Kenya to issue a warrant of arrest against a person for whom an ICC warrant of arrest has been issued or who has been convicted by the ICC. The High Court of Kenya has already exercised this power, once in 2011, by issuing an arrest warrant against Bashir, the Sudanese president.[52] However, the duty to arrest and surrender persons to the ICC is not absolute and therefore the Kenyan Minister concerned, may under certain circumstances deny or postpone the execution of an arrest and surrender request.[53]

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48 ICA (n 45) Article 6 (4).

49 ICA (n 45) Article 7.

50 See the Admissibility criteria of the ICC under article 17 of the Rome Statute. See Rome Statute of the International Criminal Court (adopted in 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

51 ICA (n 45) Article 8.

52 *Kenya Section of The International Commission of Jurists v Attorney General & another* [2011] eKLR.

53 ICA (n 45) Articles 51-60.

Other types of cooperation provided for in the ICA match those required of a state party under article 93 of the Rome Statute. These include assistance in locating or identifying persons or things and this may only occur if the AG is satisfied that the person or thing is related to proceedings at the ICC and is located in Kenya.[54] The ICA also provides for assistance by way of production of documents, protection of witnesses, questioning persons, service of documents, identifying, freezing or seizing property associated with international crimes, enforcement of penalties, as well as assisting the ICC in gathering evidence.[55] The obligation to assist in gathering evidence was tested when the Office of the Prosecutor (OTP) filed an application to the Court to compel the Kenyan government to avail the financial statements of President Kenyatta.[56] However, the government argued that the request was in contravention of the Rome Statute, the ICA and the Kenyan Constitution and urged that the application be dismissed.[57] The Trial Chamber held that the government had failed to cooperate with the Court in this regard and that their action "not only compromised the prosecution's ability to thoroughly investigate the charges but ultimately impinged on the Courts ability to fulfil its mandate."[58]

The obligations Kenya owes to the ICC are not one sided as the Act also provides, in accordance with article 93 of the Rome Statute, for instances where the government of Kenya could seek assistance from the ICC. The assistance may be in relation to investigation or prosecution of crimes that fall under the jurisdiction of the ICC or crimes that are punishable under the laws of Kenya by a minimum penalty of 5 years imprisonment.[59] These requests may relate to any form of assistance which the ICC may lawfully give including transmission of documents or other forms of evidence obtained during the ICC investigation and trial as well as questioning of persons in the custody of the ICC.

IV.II.II Judicial Intervention: *Kenyan Section of the International Commission of Jurists (KICJ) v Attorney General and Minister of State for Provincial Administration and Internal Security* [60]

After the Kenyan government had invited and hosted Bashir during the promulgation ceremony of the new constitution in August 2010, there was a simmering discontent among opposition politicians and a great uproar from civil society groups. The visit was seen as having tarnished the image of the country internationally.[61] Within the political circles, the coalition government seemed divided. Prime Minister Raila Odinga revealed that he had not been consulted about Bashir's visit and placed the blame squarely on President Kibaki's door. The Prime Minister's position undoubtedly energized the civil

54 ICA (n 45) Article 76.

55 ICA (n 45) Part V.

56 *Prosecutor v Uhuru Muigai Kenyatta* (Decision) ICC-01/09-02/11 (December 3, 2014).

57 Ibid. Isaiah Lucheli, 'AG: Kenya won't disclose Uhuru's assets to ICC' (*Standard Digital News,* 24 December 2013) <http://www.standardmedia.co.ke/?articleID=2000100750&story_title=The%20Hague%20Trial:%20AG:%20Kenya%20won> accessed 10 October 2016.

58 *Prosecutor v Uhuru Muigai Kenyatta* (n 56) para 79.

59 ICA (n 45) Article 168.

60 *Kenya Section of The International Commission of Jurists v Attorney General & another* (n 52).

61 Xan Rice, 'Omar al-Bashir tarnishes Kenya's landmark day' (*The Guardian*, 27 August 2010) <http://www.theguardian.com/world/2010/aug/27/omar-al-bashir-war-crimes-kenya>accessed 10 July 2016.

society who now called on the government to honour its pledge of stamping out impunity. The government on its part remained adamant that it was merely responding to the need to promote good neighbourliness and bolster peace in the region.[62] However, this did not ease tension. So, when President Kibaki announced, during the 65th Session of the United Nations General Assembly held in New York, that he would convene an Inter-Governmental Authority Development (IGAD) summit to discuss, among other things, the forthcoming referendum for self-determination of South Sudan, speculation was rife as to whether Bashir would be invited to visit Kenya again. Civil society groups began to agitate for total ban or arrest of Bashir should he visit the country. The ICC also joined the fray. Its Pre-Trial Chamber wrote to Kenya seeking to be furnished with reasons why Kenya did not arrest and surrender Bashir despite two warrants of arrest,[63] and why it had failed to honour the two cooperation requests the Court had sent to states parties.

In his decision the judge affirmed that the Rome Statute was part of the laws of Kenya and cited article 2 (5) and (6) of the Kenyan Constitution both of which incorporate customary international law and treaties ratified by Kenya into the laws of Kenya. The judge also pointed out that the domestication of the Rome Statute by virtue of the ICA fortified the inclusion of the provisions of the Rome Statute into the Kenyan municipal law. Of particular concern to the court was article 4 of the ICA which provides *inter alia* that the provisions of the Rome Statute shall be enforceable in Kenya in relation to "the making of requests by the ICC to Kenya for assistance and the method of dealing with those requests". The Judge then waded into the principle of universal jurisdiction. On the strength of a number of foreign cases, such as *Pinochet*, relating to universal jurisdiction, he found that the duty to prosecute certain crimes within the Rome Statute was peremptory in nature and therefore could not be derogated from. In his view, the duty to prosecute international crimes under the Rome Statute had attained the status of *jus cogens* and customary international law and was therefore binding on all states whether they were parties to the Statute or not. On the strength of this argument, the judge concluded that the court had jurisdiction over the matter and could compel the government to either extradite or prosecute Bashir as required under the Rome statute.[64]

Although the respondents argued that articles 29, 32 and 33 of the ICA indeed provided that a request for a warrant of arrest should be made by a representative of the state and not private persons, the court held that the applicant had *locus standi* in the matter on the basis of public interest. In order to arrive at this conclusion, the court referred to the public interest decisions from various common law jurisdictions including the United Kingdom, Australia, and Canada.[65] The court then proceeded to issue a warrant of arrest against the Sudanese president and stated that any legal person, including the applicant, with the mandate and capacity to enforce the arrest warrant was at liberty to do so. The court, however, stated that in case of Bashir's visit, should the applicant lack the capacity to enforce the warrant, it (the applicant) would have the option to apply to the High Court

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62 'Kenya defends inviting Al-Bashir despite ICC warrants' (*Mail & Guardian* 27 August 2010) <> accessed 10 July 2016.The then Minister for Foreign Affairs, Moses Wetangula, issued an official statement confirming the government's position. "Kenya defends inviting Al-Bashir despite ICC warrants" *Mail & Guardian* 27 August 2010, <http://mg.co.za/article/2010-08-27-kenya-defends-inviting-albashir-despite-icc-warrants> (accessed 10 July 2016).

63 *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision) ICC-02/05-01/09 (4 March 2009) and *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision) ICC-02/05-01/09-95 (12 July 2010).

64 The reliance on universal principleprinciples and this manner of interpretation has incurred criticism from scholars. Philip Kasaija, 'Kenya's provisional warrant of arrest for President Omar al Bashir of the Republic of Sudan' (2012) 12 African Human Rights Law Journal 623, 631.

65 *Kenya Section of The International Commission of Jurists v Attorney General* [2011] eKLR para 20-24.

for an order of mandamus ordering the minister to enforce the warrant of arrest against Bashir.[66] Whether or not the government will have the courage to effect the warrant should Bashir step on Kenyan soil, remains to be seen.

V. Prospects for the Future

The picture which emerges from the foregoing discussions is that international standards of justice are more likely to be enforced by domestic institutions in Kenya than has probably been acknowledged. Indeed, the normative architecture that has been put in place, especially after the promulgation of the 2010 Constitution, together with systems of governance that have emerged from it, are undeniably aligned to principles of international criminal justice. Thus, it may be rightfully concluded that the domestic institutions may constitute a level of hindrance to political machinations aimed at weakening the ICC treaty. But even though this may be the case, there is no question that apart from the Bashir case, the Kenyan cases at the ICC have had perhaps the greatest impact on the courts relationship with African states.[67] And even now that the cases against Uhuru Kenyatta and Willim Ruto have all been terminated, their effects are still reverberating all through the continent and within AU circles. Some analysts have suggested that the Kenyan cases have undermined the future of ICC involvement in Africa.[68] Accordingly, the role and performance of the ICC "might well be thwarted as member countries and individuals respond to changing political incentives that differ from those of the court and penalize cooperation with it".[69] After all Kenya was very successful in mobilising AU member states to support their efforts to defeat the ICC criminal process against its leaders. Early in 2011, the AU accepted to back Kenya in its efforts to terminate the cases against its leaders and has since then been consistent in challenging the ICC involvement in Kenya. The AU then made several attempts to have the cases terminated including seeking the deferral under article 16 of the Rome Statute. At some instance it even made a ridiculous representation to the ICC asking the court to refer the cases to Kenya for trial![70] The AU was also able to use its numerical strength to secure concessions at the ICC Assembly of State Parties (ASP) meetings. One notable example is the special dispensation excusing Heads of States from attending their trial which is contained in 134 *quarter* adopted by the ASP at the 12th Plenary Meeting held in November 2013.[71] In addition, the efforts have been made to galvanise support of regional bodies as well. For example, in 2012 Kenya persuaded the East African Legislative Assembly to pass a

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66 Ibid, para 24.

67 Leila Sadat and B Cohen, 'Impunity through Immunity: The Kenyan Situation and the International Criminal Court' (Legal Studies Research Paper, Washington University in St Louis School of Law December 2015). They are arguing that the Kenyan cases may present a major challenge to the ICC's legitimacy and effectiveness.

68 Mueller (n 9) 26. O Maunganidze, 'Does the ICC Case Against Kenya's Leaders undermine International Peace and Security' (*ISS* 13 November 2013) <https://www.issafrica.org/acpst/news/does-the-icc-case-against-kenyas-leaders-undermine-international-peace-and-security> accessed 20 July 2016. Abdullahi Halake, 'Does ICC have an African Problem' (*Aljazeera* 7 February 2014<http://america.aljazeera.com/opinions/2014/2/kenya-trials-keytoiccafricarelations.html) > accessed 20 July 2016.

69 Mueller (n 9) 26.

70 Decision on Africa's relationship with the International Criminal Court (ICC), (October 2013) Ext/Assembly/AU/Dec 1.

71 ICC Resolution ICC-ASP/12/Res 7, Amendments to the Rules of Procedure and Evidence Resolution (27 November 2013) ICC-ASP/12/20. Sadat and Cohen (n 67) arguing that the rule is incompatible with Articles 63(1) and 27(1) of the Rome Statute of the International Criminal Court.

resolution that the ICC cases against Kenyan nationals be transferred to the East African Court of Justice.[72]

Kenya's campaign against the court went beyond the African continent. For example, at the 14th Session of the Assembly of State Parties (ASP) meeting in November 2015, Kenya had mobilised all the 33 African countries to support its demands that Rule 68 which allows for the use of recanted evidence be suspended and that a special panel be constituted to investigate the allegations of misconduct by the OTP.[73] Although Kenya made such a spirited attempt to convince other members that the use of recanted evidence in the Willian Ruto case went against the spirit and assurances by the 12th Session of the ASP held in 2013 that the rule would not be used retrospectively, its position lacked credibility. The OTP's response was perhaps much more telling of Kenya's insincerity in the matter and its purpose to thwart the trial and damage the ICC. In its response, the OTP informed members that the issues that Kenya was raising were the same as those that William Ruto's lawyers raised at the trial and the court's decision was still spending on the matter. As it transpired, the majority of members, mostly outside the African continent (except Mali and Cote d'Ivoire), opposed the demands.[74] Interestingly most African states neither came out to support Kenya nor opposed its demands. In the end Kenya was only able to get a marginal concession in the form of a restatement in the report of the proceedings that the rule would not be applied retrospectively.[75]

What should be concerning, is the damage Kenya's campaigns against the Court may have inflicted on the international criminal justice system as a whole. That is why the international community should be concerned about how the ICC conducts itself going forward. As suggested, perhaps a more collaborative approach to ending impunity that recognises the importance of the ICC but also strengthens domestic systems is the way to go. Secondly, the Kenyan cases have demonstrated the need to elaborate the issue of heads of state immunity so that it is not used to shield impunity. Whereas too many commentators agree that there is little ambiguity as far as criminal liability is concerned, the controversy created by article 98 and 27 of the Rome Statute has lingering effects and provides some window for contesting responsibility when heads of states are indicted by the Court. The concession by ASP in Rule 134 *quarter* which excuses heads of states from being present at their trials further exacerbates this uncertainty. The AU has been keen to capitalise on this fact and has requested for what it calls, "comparative analysis of the practical application of Article 27 and 98 of the Rome statute" so as to give due consideration to regional (read African) interests.[76] Although the AU concerns are not consistent with the goals of justice, there is indeed a case to be made for international elaboration of immunity that may remove any doubts about its applicability in criminal circumstances. In this regard, the UN together with other multilateral bodies could then encourage states to understand that political leaders are not immune from prosecution by international tribunals.

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72 Walter Menya, 'Kenya Fresh Shuttle Diplomacy on ICC Cases' (*The Star*, 30 April 2012) <> accessed on 11 May 2019. At the East African Community Summit held on 28th April 2012, the leaders recommended that the jurisdiction of the East African Court of Justice be extended to cover war crimes and crimes against humanity.

73 George Kegoro, 'Despite a Good Fight, Kenya got Hollow Victory at Assembly of State Parties Talks' (*Daily Nation*, 28 November 2015) <> date accessed 11 May 2019.

74 Mali and Cote d'Ivoire had opposed the listing of Kenya's demands in the agenda of the ASP.

75 This was no concession at all because Rule 68 already has a similar limitation of retrospective application.

76 Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC) (3 July 2009) Assembly/AU/Dec 245 (XIII) Rev 1.

VI. Conclusion

Undoubtedly, "domestic national tribunals and processes constitute the primary and lasting solution to impunity".[77] Their role of supporting international enforcement mechanisms is crucial but not fully exploited. Although the intention to frustrate international efforts to eradicate impunity and diminish the work of ICC is clearly evident, there is enough goodwill to defeat these intentions and continue with the work that started at Nuremberg. Moreover, there are indicators that completely dismantling the international justice mechanism will not be easy. Even in Kenya where there is a clear intention to do so from the ruling elite, the process of dismantling the institutions that support international criminal processes, is yet to begin. Despite the parliament's support for withdrawal from the ICC, it is not clear when the Kenyan government will begin to actualise this process. I have argued that even in the case of Kenya, there is still hope for creating a better relationship between the government and ICC as the former still enjoys grass-root support among the peoples of the continent and there is latent support within legal institutions. But the ICC as well as the international community must play their part by seizing opportunities to demonstrate that the Court is not targeting Africans or serving interests that are anti-African. I have suggested that the ICC needs to devise creative ways within its mandate of dealing with African situations that do not necessarily antagonise the continent but still gets the job done, as well as actively using its process to promote the goals of peace and reconciliation in the continent, as mandated by article 53 of the Statute in collaboration with like-minded domestic institutions.

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[77] Mutua (n 33) 7.

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The Role of the Energy Charter Treaty in Fostering and Promoting Energy Efficiency and Sustainable Development

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Keywords
ENERGY EFFICIENCY; ENVIRONMENTAL CONCERN; ACCOUNTABILITY; REGULATORY MEASURES; SUSTAINABLE DEVELOPMENT

Abstract

The paper aims to critically analyze whether the Energy Charter Treaty (hereafter "ECT") can be considered a viable instrument to foster and safeguard the concept of sustainable development, whilst simultaneously promoting foreign investment. First, an overview of the investment protection regime under ECT will be set out, assessing whether or not the ECT ensures that investments are in line with environmentally sound practices. Secondly, this study *examines* whether references to energy efficiency and environmental concern could signify that this treaty does not only place importance on investment protection, but also considers energy efficiency an equally important objective. Subsequently, this paper will argue that whilst the ECT can be read as promoting sustainable development, this goal is often not realized when the ECT provisions are applied in reality. Finally, the article will propose some reforms that could be made to the ECT which ensures observing key issue related to energy efficiency and sustainable development.

Introduction

The ECT provides a legal framework that creates predictability for foreign investment in developing countries. The ECT espouses predictability and non-arbitrariness (associated with the rule of law doctrine), which are cornerstones of a positive investment climate.[1] The current framework of ECT provides a secure and balanced investment climate for foreign investment to grow. The purpose of this instrument was to regulate States in their investment activity, and to protect and promote foreign direct investment.

Promoting substantial rules on energy regulation arguably increases foreign investment in developing countries.[2] The key aspects of this framework promote transparency, stability and predictability in investment, with appropriate contract enforcement mechanisms, allowing business to operate efficiently.[3] Equally, the ECT, amongst other international regulatory instruments, promote sustainable development in

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1 Hsu Locknie, 'Rule of Law and Foreign Investment' (2015) Rule of Law Symposium 2014: The importance of the rule of law in promoting development Research Collection School of Law 129.

2 John Alexander, 'The Rule of Law and Foreign Direct Investment in the Developing Word' (PhD Thesis, University of California, Irvine 2014).

3 Energy Charter Secretariat 'Role of the Energy Charter Treaty' (2009).

investment activities. This ought to ensure that those affected by foreign direct investment projects benefit from sustainable practices.[4] The inadequacy of the customary and international law governing States' duties in relation to alien property in developing countries prompted the international community to set minimum standards, governing States' investment activity.

The paper examines whether or not the ECT has, in reality, promoted sustainable development in investment practice. While the paper does not make a claim regarding the legal status of the principle of sustainable development, it will scrutinize whether the current articulation and reference of SD in the ECT effectively promotes the components of sustainable development.

I. Genesis and Objectives of the ECT

This section briefly remarks on the genesis and objectives of the ECT. The legal protection regime set out in the ECT will be discussed. The investment protection regime enshrined in the ECT framework offers extensive protection against the risk of regulatory changes; however, certain aspects of the ECT are weighted more so in favour of investor interests over State interests and the principle of sustainable development.

II. The Energy Charter Treaty's Principles and Objectives

The ECT is a unique multilateral treaty which was designed to unite the Former Soviet Countries with the rest of Europe by forming a common ground for foreign energy investment practice.[5] It aimed to create long-term cooperation between the former Soviet countries and European countries.[6] Former Soviet countries were oil-rich but economically impoverished, and therefore in dire need of capital investment to bolster their economic growth.[7] The end of the cold war granted an unprecedented opportunity to European countries to forge stronger economic bonds with Russia and its neighboring countries to support those States in their transition to market economies.[8] Hence, The ECT has retained a distinctively European flavor and the provisions enshrined in the treaty have their roots in investment liberalization.[9] Some scholars have even argued that the far-reaching investment protection regime contained in the ECT demonstrates how this regime was set out predominantly to protect the European countries' outward investment.[10]

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4 Adebola Adeyemi, 'Changing the Face of Sustainable Development in Developing Countries: The role of the International Finance Corporation' (2014) 16(2) Environmental Law Review 208.

5 Gerard Hafner, 'The 'Provisional Application' of the Energy Charter Treaty' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (Oxford Scholarship 2009) 599.

6 Lucy Reed, 'The Energy Charter Treaty: An Overview' (2008) 14 (2) Journal of International and Comparative Law 405,440.

7 ibid 408.

8 Emmanuel Gaillard and Mark McNeill 'The Energy Charter Treaty' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements* (Oxford University Press 2010) 44.

9 R J Stevenson, 'Energy Charter Treaty: Implications for Australia' (2001) 19(2) Journal of Energy & Natural Resources Law 116.

10 Regina S Axelrod, 'The European Energy Charter Treaty: Reality or Illusion?' (1996) 24(6) Energy Policy 497, 499.

The ECT focuses principally on the characterization of energy investment,[11] which makes this instrument markedly different from other treaties or bilateral agreements formed to protect and promote foreign investment. Article 2 of the ECT encapsulates the central theme of the treaty where it is explained that the treaty was formed "[…] to promote the long-term cooperation in the energy field, […] in accordance with the objectives and principles of the Charter".[12]

There are a number of objectives associated with the ECT; the most important one, which is claimed to be the cornerstone of the treaty, is the legal protection of foreign energy investment.[13] In light of this regime, the ECT's provisions on investment issues attempt to ensure the creation of a "level playing field" for energy sector investments throughout the Charter, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investment in foreign countries such as discrimination, nationalization, damages due to war etc. The ECT's deference to the principle of State sovereignty is enshrined in Article 18, 'Sovereignty over State Resources', wherein it is stated: "(1) The Contracting Parties recognize State sovereignty and sovereign rights over energy resources.[14] They reaffirm that the State sovereignty "must be exercised in accordance with and subject to the rules of international law."[15] It attempts to balance the desire of investors for extensive protection mechanisms and the need of the State to acknowledge its sovereignty over its natural resources and its discretion to regulate as it sees fit.

However, whether or not the inclusion of the principle of State sovereignty in Article 18 introduces real obligations on investors remains unclear. This paper will further scrutinize in the next section whether or not Article 18 has struck the optimum balance between investor protection and the principle of State sovereignty. In addition, the promotion of sustainable development is another agenda that ECT pursues.[16] It must be noted that the aim of promoting efficient energy and heightened environmental practices is well-grounded in the original intention of the treaty.[17] References to energy efficiency and environmental concerns signify that this treaty does not only place importance on investment protection, but also considers energy efficiency an equally important objective.[18] Crucially, the issue on climate change has been included in the treaty's preamble. This reference in the preamble indicates that the ECT at the time of its creation was wary of the implications of energy investment on

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11 Richard Happ, 'Dispute Settlement under the Energy Charter Treaty' (2002) 45 German Yearbook of International Law 331, 339.

12 The Energy Charter Treaty (Lisbon, 17 December 1994) 2080 UNTS 95, art 2.

13 Kaj Hober 'Investment Arbitration and the Energy Charter Treaty' (2010) 1 International Dispute Settlement 153,155.

14 Energy Charter Treaty (n 12) art 18(1).

15 Secretariat's statement on the principle of state sovereignty (7 June 2000) <http:// www.encharter.org/English/Secretrait/index.htm>17 June 2000.

16 Sheng Zhang, 'The Energy Charter Treaty and China: Member of Bystander' (2012) 13(4) Journal of World Investment 597, 600.

17 ibid 598.

18 Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warning and Promote Sustainable Development' (2008) 14 Journal of International and Comparative Law 391.

the environment.[19] It could also be argued that the inclusion of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects suggests that the treaty's environmental agenda is not devoid of any meaning, nor does the ECT pay mere lip service to the concept of sustainable development. This principle requires States to formulate a clear policy for improving energy consumption and productions and reducing negative energy cycles.[20] Article 19 of the ECT in the pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party – each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts.[21] Therefore, it can be argued that the ECT serves an important role in ensuring that investments are in line with environmentally sound practices. However, as it will be discussed in the next section, whilst the ECT can be read as promoting sustainable development, this goal is often not realized when the ECT provisions are applied in reality.

III. The Lack of Specification of the State Sovereignty Principle in the ECT

Article 18 (1) enshrines the principle of state sovereignty over the use of energy resources in the ECT. This principle aims to allow a state to fully or partially regulate its energy resources as it sees fit.[22] The subsequent provisions of Article 18 elaborate upon some of the specifications of this principle. Article 18(2) provides that the Treaty shall not prejudice Contracting Parties, or the rules governing their systems of property ownership and energy resources.[23] Article 18(4) provides that each State continues to hold the right to decide the geographical areas to be made available for exploration and development of its energy resources and the rate at which they may be depleted or otherwise exploited.[24]

The open-textured nature of Article 18 has led some scholars to question whether or not the invocation of this principle is practically possible or even conceptually plausible under the treaty.[25] The lack of a clear formulation of this principle means that State sovereignty lacks any real force, practically speaking.

The provision proves difficult to read alongside other provisions, such as Article 10(1). It appears to be declaratory of general international law principles, and it does not clearly define how a State can derogate from its obligations enumerated in earlier parts of the treaty. It seems to outline the inherent right to legislate issues related to public policy;[26] however, it is not explained how this should apply in reality. The subsequent statement of the ECT secretariat in which he specified that "this right must be exercised subject to the rules of

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19 ibid 395.

20 Andrei Konoplyanki and Thomas Waelde, 'Energy Charter Treaty and its Role in International Energy' (2006) 24(4) Journal of Energy and Natural Resources Law, 523, 535.

21 Energy Charter Treaty (n 12) art 10.

22 Yogesh Tyagi, 'Permanent Sovereignty over Natural Resources' (2015) 4(3) Cambridge Journal of International and Comparative Law 588, 590.

23 Energy Charter Treaty (n 12) art 18(2).

24 Energy Charter Treaty (n 12) art 18(4).

25 D E Fisher, "The Meaning and Significance of Resource Security" in A Gardner (ed), *The Challenge of Resource Security: Law and Policy* (The Federation Press, Sydney, 1993) 16.

26 Secretariat's Statement on the Principle of State Sovereignty (n 15).

international law"[27] failed to shed light on what would be the clear scope of this principle's application. Essentially, the treaty does not specifically address – in the event of conflict between the expropriation measures defined in Article 10 and the State sovereignty principle in Article 18 – which notion would trump.[28]

III.I The Importance of the Principle of Sovereignty in Ensuring Sustainable use of Natural Resources

The principle of sovereignty is a well-established principle, based in international law. This principle implies that States have a wide discretion to manage their own natural resources. Further, as McCaffrey would argue, the principle also dictates that States are under the duty to manage natural resources within their own jurisdiction in a sustainable and effective way, so as to conserve natural resources appropriately.[29] This author would argue that the lack of specification in international law as to the scope of State sovereignty has significantly undermined the pursuit of sustainable development goals, when balanced against the aim of increasing foreign investment. In addition, the ECT does not impose any obligation on States to manage their natural resources in "a rational, sustainable and safe way as to contribute to the development of their peoples."[30] In fact, the ECT is generally hesitant towards the quality or potential negative effects of FDI. More importantly, it can be argued that the ECT regulatory scheme does not grant States the discretion to determine the investment as being unsustainable based on any specific qualitative or quantitative criteria. This constitutes a major pitfall of the ECT regime in fostering and promoting the notion of sustainable development.

IV. The Neglect of the Concept of Sustainable Development in International Law

The issue of the sustainable development has now been situated on the forefront of the energy discourse.[31] New international instruments attempt to embody this concept within their structures in order to be more responsive to the contemporary needs of the energy market.[32] The energy market is rapidly evolving, and there is a radical shift in the approach of energy production and consumption. The concept of sustainable development has been incorporated into many international legal documents and has captured some of these changes within the energy market. However, the ECT fails to attend to such non-commercial interests making the instrument unable to respond to the needs of the market. There is a cursory reference to the concept of the sustainable development within the ECT which has rendered it devoid of any real meaning.

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27 ibid.

28 Tania Voon and Andrew Mitchell, 'Denunciation, Termination and Survival: The interplay of Treaty Law and International Investment Law' (2016) 31(2) ICSID Review 413.

29 Stephen C. McCaffrey, 'Keynote: Sustainability and Sovereignty in the 21st Century' (2013) 41 Denv J Int'l L & Poly 507.

30 UNGA, Agenda 21 (14 June 1992 Rio de Janeiro) UN Doc A/CONF.151/26.

31 Sussman (n 18) 402-404.

32 Daniel Esty, 'Integrating Trade and Environmental Policy Making: First Step in the NAFTA' in Druwood Zaelke (ed) *Trade and Environment: Law, Economics and Policy* (Island Press 1993) 50.

As discussed earlier, the ECT regime creates favourable conditions by imposing binding obligations on States with respect to their treatment of foreign investment. To this end, a wide asset-based definition of investment was adopted in this framework.[33] The term "investment" is envisioned in Article 1(6) which encompasses every kind of asset, owned or controlled directly or indirectly by an investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges.[34] This definition under the ECT is essentially a broad and open-ended list of every conceivable right or interest connected with investments.[35] The only limiting factor contained within the definition is that an investment ought to be closely related to an "Economic Activity in the Energy Sector".[36] However, the association with such activity and the necessary degree of such association that must exist for a dispute to fall under the ECT dispute mechanism is not yet clearly articulated.[37]

The tribunals in the *Yokus*[38] arbitration read Article 1(6) (b) of the ECT as containing the widest possible definition of an interest in a company with no indication that the drafters of the ECT intended to limit ownership to "beneficial" ownership. In *Petrobart limited V the Kyrgyz Republic,*[39] the tribunal considered that the claimant's claim for payment under an ordinary sales agreement for gas condensate constituted an "investment" within the meaning of article 1(6) (f).

This broad and commercially oriented definition does not include nor specify any qualitative criteria, nor refer to any social purpose of the investment in question.[40] It can be argued that the ECT fails to encompass the notion of sustainable development by including whether or not the investment in question is environmentally or socially destructive. In essence, based on the current articulation of the ECT regime, a given investment is not disqualified from the benefits of the ECT protection if it fails to meet sustainability criteria.

However, this author acknowledges that making distinctions between sustainable investments and unsustainable investments is a task to be borne by States rather than international instruments. It is evident that making determinations with respect to the sustainability of investments is fraught with conceptual uncertainty. It is suggested that there is no legal consensus on how various components of sustainable development can be optimally balanced and exercised. Provided that investments are invariably contextual and project specific, one is unable to strike an optimal balance between economic, environmental and social impacts of large investments in any legislation. A subjective assessment as to the sustainability of a given investment is required. Devising qualifying criteria to ascertain the

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33 Andre Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8. J World Investment & Trade 357, 364.

34 Energy Charter Treaty (n 12) art 1(6).

35 Kaj Hober, 'The Energy Charter Treaty- Award Rendered' (2007) 1(1) Dispute Resolution International 36, 50.

36 ibid 42.

37 Happ, (n 11) 341.

38 *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* UNCITRAL, PCA Case No. AA 227 (30 November 2009).

39 *Petrobart Limited v The Kyrgyz Republic,* SCC Case No. 126/2003, para 12.

40 Kaj Hober, *The Energy Charter Treaty - Chapter5- Investment Arbitration In Eastern Europe: In Search of A Definition of Expropriation* (Juris Arbitration Law 2007).

sustainability of one given investment would amount to significant uncertainty and potential unfairness.

IV.I The Significance of Reconceptualization of Sustainable Development Within the Treaty

The future drafters of the treaty should be mindful that the cursory reference to the concept of sustainable development undermines sustainable development as a legal norm; it becomes more of an aspirational notion, devoid of any legal effect. No clear delineation exists as to what constitutes criteria for sustainable development at present within the ECT. It appears that the ECT adopted a formulation of sustainable development based on a reconciliation between economic growth and environmental protection, as opposed to a stand-alone concept in and of itself.[41]

The ECT regime failed to delineate what constitutes sustainable development. Reference to the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing concepts[42] would go some way to remedy this deficiency. As suggested by Duncan French, a leading scholar in the field of sustainable development, a new conceptualization of sustainable development is required within the ECT framework. Future revisions of the ECT should reflect and acknowledge the three main subsidiary principles by including social, economic and environmental impact assessments of any specific investment project, to be assessed at a local level.[43] This new pragmatic reconceptualization of sustainable development, by contextualizing it in the form of social, economic and environment impact assessments, overcomes the conceptual difficulties associated with defining what constitutes sustainable development. This articulation gives the concept force, and provides local and affected groups with the authority to balance environmental, economic and social concerns against the goal of increasing foreign investment in a particular area.

IV.II Propositions to Streamline the Sustainable Development Process

As Thomas Waelde and Stephen Dow assert, there is a need to incorporate innovative investment promotion to stimulate investment specifically geared towards sustainable development goals.[44] Environmental protection is stipulated in terms of the ECT.[45] There is no friction or conflict between the investment protection regime and sustainable development goals. This author would argue that the ECT could be used to promote environmental concerns consistent with the sustainable development agenda. While the ECT is cognizant of its broader position within the international realm to promote energy efficiency and

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41 *The Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgement) [1997] ICJ Rep, para 140.

42 Plan of Implementation of the World Summit on Sustainable Development adopted at World Summit of Sustainable Development (4 September 2002 Johannesburg) UN Doc/Conf.199/20 (2002) para 4.

43 Duncan French, *International Law and Policy of Sustainable Development* (Manchester University Press 2005) 22.

44 Craig Bamberger and Thomas Waelde, 'The Energy Charter Treaty', *Energy law in Europe: national, EU and international law and institutions* (Oxford University Press 2001) 57.

45 Jan McDonald, 'The Multilateral Agreement on Investment: Heyday or Mal day for Ecologically Sustainable Development?' (1998) 22 Melbourne University Law Review 617, 624.

sustainable development,[46] this treaty has not been effective in developing the decisions on how the energy must be produced and developed in consistent with the sustainable development agenda. A number of steps could be taken to ensure the smooth operation of the concept of sustainable development.

The following measures are proposed by this author to help the application of sustainable development goals to the ECT regime.

A) Instead of setting out objective criteria to gauge the sustainable nature of investments, the ECT regime could establish sustainability impact assessments. Any given investment must undergo this assessment prior to qualifying for the benefits contained in ECT. This process can include, for example, avoiding wasteful use of natural resources and promoting efficient waste minimization policies. Muchlinski's writings suggest that the best way to guarantee that States comply with the results of such assessments is to impose specific contractual obligations on States.[47]

B) The ECT ought to impose more onerous reporting requirements on investors. This could constitute reporting guidelines on economic, environmental and social performance of any given investment. The reporting system could operate prior to any investment being made and the reporting could be designed to monitor the social and environmental performance aspects of one investment. If the reporting requirement is not met to a satisfactory standard, then the host States will have the discretion to impose fines on investors or revoke their right to continue with the investment project.

C) The ECT could introduce a new framework for investor conduct that is consistent with the principle of sustainable development. The ECT arguably reinforces what is acceptable, with respect to the conduct of investors. The ECT could expressly include best practice norms, standards and guidelines in the treaty text. If investors violated the standards contained in the provisions, a host State could institute proceedings to have the investors' rights abrogated.

V. Conclusion

As it stands, the ECT regime does not impair the concept of sustainable development. Indeed, aspects of the ECT framework actively promote sustainable development. The ECT is problematic, however, in that it only partially integrates the concept of sustainable development. The ECT lacks specification as to how to best promote sustainable development in practice. If the regime were to be revised, this author would argue for the integration of sustainable development principles by clearly delineating the scope of investment obligations and providing consistent and coherent mechanisms to promote sustainable development. The above suggestions highlight how the concept of sustainable development can have real effect through an incorporation in the treaty of impact assessments, reporting requirements and a code of conduct for investors. The ECT should refer to all aspects of sustainable development – social, economic and environmental. Social development, in particular, should be referred to in future drafts of the treaty; as a concept, it includes good governance, respect for human rights and the promotion of human health. Future treaty drafters should be mindful of evolving international standards in order to a treaty optimal for the sustainable development agenda.

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46 Sussman (n 18) 392.

47 Peter T Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 1995).

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Re-Imagining the Concept of Forced Migration in the Face of Climate Change

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CLIMATE CHANGE; CLIMATE MIGRANTS; REFUGEES, PERSECUTION

Abstract

This article analyses the impacts of climate change which are no longer only within the scientific realm. This analysis reveals the effects of climate change and the challenges that it poses to the current refugee definition and the existing regime of refugee protection in international law. An all-inclusive refugee definition under international law, to include climate change as a Convention ground for people to seek refugee status is argued for herein. Judicial expansion of the definition and the development of soft law principles to cater for climate migrants is also discussed. Nevertheless, it is also noted that there exist numerous challenges in the re-imagination of the concept of forced migration in the face of climate change. Political considerations as well as a lack of State will and consensus on the existence of climate migrants have been the most visible challenges yet.

Introduction

From desertification to rising temperatures and even sinking islands, climate change and the effects thereof are visible to all.[1] While predictions vary, climate change is expected to contribute to the displacement of millions of people.[2]

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1 Lauren Nishimura, 'Climate Change Migrants': Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaption Strategies' (2015) 27 International Journal of Refugee Law 107. See also Frank Laczko and Christine Aghazarm, *Migration, Environment and Climate Change: Assessing the Evidence* (IOM 2009) 9-11; Martin Parry and others (eds) *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC 2007) 13, 35, 110; Thomas Stocker and others (eds), *Climate Change 2013: The Physical Science Basis* (Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, IPCC 2013) 4-12; The Paris climate conference (COP21) in December 2015, 195 countries adopted the first-ever universal, legally binding global climate deal (to come into effect in 2020) which sets out a global action plan to put the world on track to avoid dangerous climate change by limiting global warming to well below 2°C, signifying the dire effects of climate change.

2 Nishimura (n 1) 108; Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 Law & Policy 502, 506 (noting that estimates for climate change displacement range from 50-200 million by 2080); C Beyani, 'Report of the Special Rapporteur on the human rights of internally

Despite this reality, little to no research has been undertaken to address the resulting increase in migration. At present, no international agreement exists that explicitly accounts for climate-induced migrants ('climate migrants').,[3] nor is there academic consensus on whether climate migrants really exist.[4] Debate has long been centred on whether climate migrants can be considered under the definition of a refugee as provided by international and regional conventions and, if so, how to expand existing international refugee law to encompass climate migrants. Proposed solutions and calls for action are yet to produce meaningful agreement on how to proceed.[5] Instead, States and international decision-makers are at an impasse, and legal gaps in the protection of these refugees remain.

This article first examines the refugee definition in the *Convention Relating to the Status of Refugees* of 1951 (1951 Convention), which is the key legal document in defining who is a *refugee*, their rights and the legal obligations of States. This analysis is focused on the question of whether climate migrants are provided for among the various classes of refugees protected by the 1951 Convention.

Assuming that climate migrants are not catered for in the existing international legal framework, this article questions whether they should be included and who would fall under such a category. Alternatively, should a whole new framework be created for them? A critical assessment of the obstacles such an effort would face is undertaken in the second part of this article.

An analysis of existing situations of climate migrants and of literature on this topic forms the basis of this article. Questions that are analysed herein include: how many have migrated due to climate change? Where have they migrated to? Has the migration been temporary or permanent, internal or international?[6]

The main contribution of this article is to show that the refugee definition as developed in 1951 (just after World War II) has, over time, failed to provide for new developments in refugee situations and particularly for environmental migrants. The research suggests that, just as climate change has become a great phenomenon in today's world, the environmental migrants that it produces should be protected under the existing regime of international refugee law.

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displaced persons' (9 August 2011) UN Doc A/66/285 (citing IPCC estimate that climate change could displace 150 million by 2050).

3 The closest one is the Paris Agreement (n 1) but note that this agreement is only dealing with curbing climate change and not climate-induced immigrants.

4 J Barnett and M Webber, 'Accommodating Migration to Promote Adaptation to Climate Change' (*Commission on Climate Change and Development* 2009) <https://www.unisdr.org/files/11872_AccommodatingMigration1.pdf > accessed 11 May 2019.

5 For example, while the issue of migration entered into United Nations Framework for Climate Change Convention (UNFCCC) discussions and draft negotiations text in 2008, and was included in the Cancun Adaptation Framework in 2010, further concrete action or incorporation of migration induced by climate change under the UNFCCC or into regional and international planning has stalled. See Koko Warner, 'Climate and environmental change, human migration and displacement: Recent policy developments and research gaps' (UN/POP/MIG-9CM/2011/10**,** UNU-EHS 12 February 2011) 4 (outlining initial mobilization of the humanitarian community and subsequent UNFCCC delegate and Party discussions that brought migration issues into the UNFCCC climate change negotiations process); See Nishimura, (n 1) 2.

6 See generallly Laczko and Aghazarm (n 1) 9.

I. Climate Migrants and Their Status under Current International Refugee Law

In a bid to understand who is a 'conventional refugee', it is prudent to look at the context of the 1951 Convention; therein lies the conundrum faced by climate migrants, as climate change has greatly tilted the scales in modern times particularly in the context of forced migration.

I.II Context of the 1951 Refugee Convention

The history of international refugee protection began with the League of Nations, with the International Committee of the Red Cross (ICRC) being the 'initiator of the international protection system set up by the League of Nations.'[7]

World War I, its preliminaries and its aftermath in the Near East caused considerable upheavals in the States involved and especially in the Russian Empire.[8] Large numbers of refugees left Russian territories for various countries of Europe or Asia Minor, Central and East Asia between 1918 and 1922.[9] Emergency relief was provided, mainly by charitable organisations. However, these organisations could not extend their support beyond material assistance.[10] This prompted the Joint Committee of the International Committee of the Red Cross and the League of Red Cross Societies to call a conference of the principal organisations concerned, where it was decided to invite the Council of the League of Nations to appoint a High Commissioner to define the status of refugees, secure their repatriation or employment outside Russia and coordinate measures for their assistance.[11]

Tragic events in the Ottoman Empire had affected various ethno-religious communities long before World War I.[12] Therefore, in order to protect and assist the refugees from the Ottoman Empire, the mandate of the High Commissioner of the League of Nations was extended from Russian Refugees to Armenians in 1924 and to 'other categories of refugees' (Assyrians, Syrians, Kurds and a small group of Turks) in 1928.[13] These institutions afforded international protection to refugees on the basis of international legal instruments generally concluded within the framework of the League of Nations, such as the Convention Relating to the International Status of Refugees of 28 October 1933.[14]

The 1933 Convention became a pivotal instrument in international refugee law. It dealt with issues such as legal questions, labour conditions, welfare and relief, education and exemption from reciprocity. It also provided for the creation of committees for refugees. Most

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7 Gilbert Jaeger, 'On the History of the International Protection of Refugees' (2001) 83 International Committee of the Red Cross 727.

8 ibid.

9 ibid.

10 ibid.

11 John Simpson, 'The Refugee Problem' (OU, 1939) 199.

12 Jaeger (n 7) 729.

13 ibid.

14 ibid.

importantly, it elevated the principle of *non-refoulement* to the status of international treaty law. In addition, the 1933 Convention served as a model for the 1951 Convention.[15]

A further international instrument of that period is the resolution which the Intergovernmental Committee on Refugees (IGCR) adopted on 14 July 1938 in Evian to define its functions.[16] This resulted in protection being extended, for the first time, to would-be refugees inside the country of potential departure.

The next phase in international protection was the creation of the International Refugee Organisation (IRO).[17] The IRO was established in 1946 through a UN Resolution of the United Nations General Assembly. It became widely known as 'the resettlement agency', as its principal activity was the resettlement of refugees and displaced persons.[18] It was intended to wind up its operations in June 1950, however, it became evident that the refugee problem would not be solved by that date. Therefore, the Commission of Human Rights adopted a Resolution expressing the wish that early consideration be given by the United Nations (the UN) to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality, as regards their legal and social protection and their documentation.[19]

On the basis of the aforementioned Resolution and a request by the Economic and Social Council, the Secretary General, in consultation with interested commissions and specialised agencies, undertook a study that resulted in 'A Study of Statelessness' ('the Study'), a key document in the more modern history of international refugee protection.[20] The Study examined in detail various aspects of the 'state of stateless persons' (which includes refugees).[21] The main elements of the 1951 Convention can be found in the Study, which also very clearly shows the derivation of the 1951 Convention from the pre-war conditions.[22]

The Study also elaborated on 'the organ responsible for protection' and discussed the merits of the type of international organ required, among them continuance of the IRO, albeit in another form.[23] Having considered the Study, the Economic and Social Council appointed,

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15 ibid, 730; See Article 3 of the Convention relating to the International Status of Refugees of 28th October 1933, 'Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country.'

16 T Sjoberg, *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees (IGCR) 1938 – 1947* (Lund University Press 1991).

17 Jaeger (n 7) 732.

18 ibid.

19 See, Supplement 1 to the Economic and Social Council Official Records 1946, 13-14; See also Jaeger (n 7) 732-3.

20 Jaeger (n 7) 732-3; See UN Ad Hoc Committee on Refugees and Stateless Persons (UNHCR), 'A Study of Statelessness' (United Nations, Lake Success, New York, 1 August 1949) <https://www.unhcr.org/protection/statelessness/3ae68c2d0.org> accessed 11 May 2019.

21 UNHCR (n 20).

22 Jaeger (n 7) 734.

23 ibid.

on 8 August 1949, an ad hoc committee on Refugees and Stateless Persons to 'consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and draft the text of such a convention'.[24] The Council's intention was that a final draft of the Convention be approved by the UN General Assembly.[25] A conference was convened in December 1950 to sign the convention, which was then adopted in July 1951. The UN General Assembly also decided in December 1949 to establish, as of 1 January 1951, a High Commissioner's Office for Refugees and, on 14 December 1950, the Statute of the Office of the United Nations High Commissioner for Refugees was adopted.

Since that period, a growing number of States have ratified and implemented the 1951 Convention and its 1967 Protocol.[26] Furthermore, regional organisations have developed their own conventions, such as the Organisation of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 (OAU Convention), which modifies the definition of who exactly is a refugee in the African context, in addition to the requirements provided for in the 1951 Convention. The current situation is that refugee law has become an important part of the world; it is inevitable that there will be refugees in one way or another. Thus, the question that should be answered is this: who exactly is a refugee?

I.II Refugee Definition

A refugee is defined as:

> …any person, who, owing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of the country.[27]

The threshold of a 'well-founded fear of persecution' is that which is reasonably possible to face persecution on return. This issue of persecution is dealt with later in this article.

It must be noted that the Article 1(3) of the 1967 Protocol Relating to the Status of Refugees,[28] removes the geographical and temporal restrictions that had hitherto existed under the 1951 Convention .The 1951 Convention had restricted refugee status to those who were considered so 'as a result of events occurring before 1 January 1951', as well as giving State parties to the Convention the option of interpreting this as 'events occurring in Europe' or 'events occurring in Europe or elsewhere', the 1967 Protocol removed both the temporal and geographic restrictions.

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24 See ECOSOC Resolution 248 (IX); UNHCR (n 20); See also Jaeger (n 7) 735.

25 Jaeger (n 7) 735.

26 The UN Convention relating to the Status of Refugees is the key international legal document relating to refugee protection. It defines who is a refugee and outlines the rights of refugees and the legal obligations of States towards refugees. It also underpins the work of UNHCR. There are currently 144 States Parties to the 1951 Convention and 145 to its 1967 Protocol, with 142 States Parties to both the Convention and Protocol; See UNHCR, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' (June 2014) <http://www.unhcr.org/3b73b0d63.html> accessed 11 May 2019.

27 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1(a)(2).

28 Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

The refugee definition provided under the 1951 Convention has been subsequently expounded in the 1969 OAU Convention to include people fleeing external aggression, internal civil strife, or events seriously disturbing public order in African countries.[29] The OAU Convention thus enabled millions of people in need of protection to be covered and assisted with greater legal and operational facility in Africa and other parts of the world where the Convention has inspired similar legal developments or applications of refugee law.[30] In addition, this unique definition explicitly introduces objective criteria, based on the conditions prevailing in the country of origin, for determining refugee status and requires 'neither the elements of deliberateness nor discrimination inherent in the 1951 Convention'.[31]

This definition has been further expanded by other regional instruments, such as the Montevideo Treaty of 1889, which includes political asylum seekers as refugees,[32] and the Cartagena Declaration of 1984,which also includes internal conflicts (aggression) as a reason for the fear of persecution.[33] This, in essence, expands the OAU Convention definition which caters for external aggression.

An examination of the definition of a refugee provides the first angle of refugee protection, as it ensures that only people fitting into a particular description protection can be ed under the Conventions and national laws. At face value, this would not seem to be a protection angle, however. Closer examination reveals that the definition identifies who exactly a refugee is; otherwise without it, there would be situations where every person who felt the need to move to another country, or who was simply not satisfied with the living conditions in their country, or even fugitives, would be able to use refugee law as an avenue of escaping. However, refugee status is not permanent, meaning that the protection extended to a person who meets the criteria in the definition has a limited life-span.[34] Hence, an emerging issue regarding the definition of a refugee concerns those who are fleeing countries which are slowly ceasing to exist, such as pacific countries which are sinking. Such people currently do not fall within any of the categories of persecution. This article discusses below whether climate-induced migrants are protected by existing regimes of refugee protection and, if not, what should be done.

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29 The Organization of African Unity Convention: Governing Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 10 UNTS 45 art 1(2).

30 Fatoumata Lejeune-Kaba, 'OAU Convention remains a key plank of refugee protection in Africa after 40 years' (2009) <http://www.unhcr.org/4aa7b80c6.html> accessed 11 May 2019.

31 See R Mandal, 'Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")' (2005) UNHCR <https://www.unhcr.org/protection/globalconsult/435df0aa2> accessed 11 May 2019; See also M Sharpe, 'Analytical Overview of the 1969 (OAU) Convention for the SRLAN' Rights in Exile Programme <www.refugeelegalaidinformation.org/african-union-refugee-definition> accessed 11 May 2019; See also E Arbodela, 'The Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' 3 International Journal of Refugee Law 185, 192.

32 Treaty on International Penal Law (23 January 1889) art 16.

33 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984) art 3(3).

34 Convention Relating to the Status of Refugees (n 27) art 1(c)(5).

I.III What are the Criteria for one to be Considered a Refugee?

The refugee definition, as quoted, elicits three conditions that must be met for one to be considered a refugee:

a) Alienage: 'is outside the country of his nationality';
b) Persecution and the grounds thereof;
c) Well-founded fear

These three grounds are assessed individually below and the case of climate-induced migrants is analysed, with the aim of ascertaining whether they meet the conditions.

a) Alienage: 'Is Outside the Country of His Nationality'

A claimant of refugee status must be outside of their country of origin.[35] Basically, one must have crossed an international border so as to enjoy the benefit of claiming such status.[36] This form of departure does not require an external factor (in this context, any form of persecution) to necessitate it. The decisive factor is the assessment of the 'fear' of persecution in the form of a 'forward looking apprehension of risk.'[37] The well-founded nature of this fear is discussed below.

b) Persecution and the Grounds Thereof

Although the requirement to show a well-founded fear of 'being persecuted' is at the core of the refugee definition, the 1951 Convention does not define persecution and neither does any other document.[38] The ordinary meaning of persecution from the Oxford Dictionary is 'hostility and ill-treatment, especially because of race or political or religious beliefs; oppression'.[39] Persecution is also defined as 'the sustained or systematic violation of basic human rights.'[40]

The 1951 Convention simply uses the words *'[…] life or freedom was/would be threatened […]'*41 to indicate the nature of persecution. This fear of persecution must be individualized, as seen in Article 1(A) and (C) of the 1951 Convention. In dissecting the term 'fear of persecution', the United States Supreme Court[42] determined that 'fear does not have to be realized

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35 In essence, a refugee must be without the privilege of protection of a third State; See Guy Goodwin-Gill *The Refugee in International Law* (OUP 2007) 63; See *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural Affairs* (2005) HCA 6 where the Australian courts concurred with the Australian Government's position that Australia does not 'owe protection obligations' to asylum seekers who would be 'adequately protected in a safe third country' to which they can go; See S Taylor, 'Protection Elsewhere/Nowhere' (18 International Journal of Refugee Law 2006) 283; See also J Hathaway and M Foster, *The Law of Refugee Status* (CUP 2014) 17.

36 Goodwin-Gill (n 35) 63.

37 Hathaway and Foster (n 35) 105.

38 "There is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success": UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' (December 2011) UN Doc HCR/IP/4/Eng/REV.3, para 51; See also A Grahl-Madsen, 'The Status of Refugees in International Law' (1966) 1, 193; See also J Hathaway and M Foster, (n 35) 182.

39 *Oxford English Dictionary Online* (OUP 2019) <en.oxforddictionaries.com/definition/persecution> (accessed 11 May 2019).

40 Hathaway and Foster (n 35) 183.

41 Convention Relating to the Status of Refugees, (n 27) art 31 and 33.

42 *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US 421 (1987), 430; See also *INS* v. *Stevic* 467 US 407 (1984) 422.

… probability is enough… it does not have to be actualized.'[43] The Court was of the view that a refugee claimant 'need not prove that it is more likely than not that he or she will be persecuted in his or her home country', the probability of the same happening is enough.[44]

The 1951 Convention identifies five grounds of persecution which have correspondingly developed in the field of non-discrimination.[45] This linkage to discrimination has been considered a *necessary* element of persecution; however, this article will not delve into that discussion.[46]

i. Race

With regard to race, account should be taken of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD) which defines race to include distinctions based on '*race, colour, descent, or national or ethnic origin*.'[47] It must be noted that the broad interpretation of the term 'race' includes groups defined by ethnicity as well as real or perceived physical or cultural distinctiveness of their members. 'Racial persecution' frequently leads to large scale persecutions. For instance, apartheid in South Africa[48] and the Rwandan Genocide,[49] which was a result of the Hutus versus the Tutsis.

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43 This test was established by the Supreme Court of the United States in *Immigration and Naturalization Service (INS) v Cardoza-Fonseca* 480 US 421 (1987) 440 per Stevens J; This phrasing was approved by the Supreme Court of Canada in *Chan v Canada* 3 SCR 593 (1995), para 120 which saw no material difference between this standard and 'serious possibility,'" and also by the High Court of South Africa in *Tantoush v. Refugee Appeal Board* ZAGPHC 191 (2007) para 97.

44 *INS v Cardoza-Fonseca* (n 42) 449; See also *R v. Secretary of State for the Home Department, Ex parte Sivakumaran* 3 WLR 1047 (1987) 994, per Lord Keith; See also *HJ (Iran) v Home Secretary* UKSC 31 (2010) para 89 per Lord Walker; See also *Kwiatkowsky v. Canada (Minister of Employment and Immigration)* 2 SCR 856 (1982) 864.

45 See generally Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* (Clarendon Press 1978) 75-87; Goodwin-Gill (n 35) 70; See also specific literature on this topic EW Vierdag *The Concept of Discrimination in International Law* (Springer 1973); WA McKean, 'The meaning of Discrimination in International & Municipal Law' (1970) 44 BYIL 177; The substantive linkage to non-discrimination was recognized by the Canadian Supreme Court in *Attorney-General v Ward* 2 SCR 689 (1993).

46 Goodwin-Gill (n 35) 70 (emphasis added).

47 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 1 December 1965, entered into force 4 January 1969) UNTS 660 195 (ICERD); See also UNHCR Handbook (n 38) para 68-70, for a description of this ground. The *Handbook* provides that 'race … has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races'"" in the common usage," para 68.

48 'After the National Party gained power in South Africa in 1948, its all-white government immediately began enforcing existing policies of racial segregation under a system of legislation that it called apartheid. Under apartheid, non-white South Africans (a majority of the population) would be forced to live in separate areas from whites and use separate public facilities, and contact between the two groups would be limited, hence leading to various uprisings against this form of persecution.' See generally History.com Editors, 'Apartheid' (*A&E Television Networks,* 7 October 2010) <https://www.history.com/topics/africa/apartheid> accessed 11 May 2019.

49 In April 1994, 800,000 men, women, and children perished in the Rwandan genocide, perhaps. As many as three quarters of the Tutsi population were murdered by the Hutus due to allegations that they were the cause of the country's increasing social, economic, and political pressures. See generally 'Genocide in Rwanda' (*United Human Rights Council*) <http://www.unitedhumanrights.org/genocide/genocide_in_rwanda> accessed 11 May 2019.

ii. Nationality

'Nationality', in this case, not only encompasses 'citizenship' but also refers to ethnic or linguistic groups and may, therefore, overlap with race.[50] This envisages the persecution, for instance, of a national of State B who is resident in State A, is driven out of the State of residence and is denied the protection of State B. Particularly prevalent is the right of a national to enter their own State.[51] It should be noted, though, that nationality as contained in Article 1(A)(2) of the 1951 Convention is 'usually interpreted loosely to include origins and membership of particular ethnic, religious, cultural and linguistic communities'.[52]

iii. Religion

For a long time, religion has been the basis upon which communities have singled out others for persecution, for instance during the Holocaust.[53] Religion itself can take different manifestations.[54] As is the case with the other Conventional refugee grounds, it is the perception of the persecutor that is relevant.[55]

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50 UNHCR Handbook (n 38) paras 74-76.

51 Goodwin-Gill (n 44) 101-103, 164-167.

52 Goodwin-Gill (n 35) 73; See also Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 art 10(1)©D which adds 'common geographical or political origins or [a group's] relationship with the population of another State'.

53 This was a systematic, bureaucratic, state-sponsored persecution and murder of six million Jews by the Nazi regime and its collaborators; *Holocaust* is a word of Greek origin meaning 'sacrifice by fire."' History.com Editors, 'The Holocaust' (*A&E Television Networks*, 14 October 2009) <http://www.history.com/topics/world-war-ii/the-holocaust> accessed 11 May 2019.

54 *Ajayi and Olushola Olayin v MCI* FC IMM-5146-06 Martineau 2007 FC 594 (2007) the claimant alleged that her stepmother wanted to circumcise her and her father wanted to force her to participate in an initiation ritual. She also claimed a fear of supernatural powers and beings. The Court held that it was not patently unreasonable to conclude that the claimant had no objective fear of persecution. A person's' fear of magic or witchcraft can be real on a subjective basis, but objectively speaking, the State cannot provide effective protection against magic or witchcraft or against supernatural forces or beings from beyond. The State could concern itself with the actions of those who participate in such rituals but, in this case, the claimant testified that she did not fear her stepmother or father. See 'Chapter 4 - Grounds of persecution' (Immigration and Refugee Board of Canada) <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef04.aspx> accessed 11 May 2019.

55 See for instance *Yang, Hui Qing v MCI* FCTD IMM-6057-00) Dubé (2001) In this case, the claimant feared persecution by the authorities in China due to her adherence to Falun Gong beliefs and practices. The Court held that the CRDD should have found Falun Gong to be partly a religion and partly a particular social group. Applying the reasoning in *Canada (Attorney General) v Ward* 2 S.C.R. 689 (1993), para 73 regarding political opinion, the Court held that if Falun Gong is considered by the government of China to be a religion, then it must be so for the purposes of this claim. A question was certified regarding the scope of the term 'religion' used in the Convention refugee definition; however, it appears that no appeal was filed.

iv. Membership of a particular social group

The 1951 Convention, in Article 33(1), together with Article 2 of the Universal Declaration of Human Rights,[56] recognizes 'social' factors as potential avenues of persecution. The prohibition of the same can also be traced verbatim to Article 2 of the International Covenant on Economic, Social and Cultural Rights of 1966 and Article 26 of the International Covenant on Civil and Political Rights. Hathaway and Goodwin-Gill agree that this ground is open for development, as the term 'social group' is not defined in the *travaux preparatoires* of these Conventions.[57] Both authors go on to indicate that hist could mean groups defined by unalterable characteristics such as gender, sexual orientation or family affiliation, by past status such as class or caste or by voluntary association such as a union or students.

v. Political Opinion

A broad interpretation of political opinion is 'any opinion on any matter in which the machinery of state, government, and policy may be engaged'.[58] Persecution on the grounds of political opinion could be based on such factors as political party differences, feminism,[59] domestic violence,[60] union activity, whistle blowing or even neutrality.[61]

c) Well-Founded Fear

'Well-founded fear of being persecuted' is the most important phrase in the refugee definition.[62] It embraces two elements of the definition: a subjective one of being 'well-founded' and an objective one of 'fear'.[63] While fear is a subjective emotion,[64] the determination of refugee status requires that it must be well-founded, that is, it must have an objective basis.[65] This bipartite test has been recognised, for instance, in Australia, where the High Court indicated that the 'well-founded fear' 'has both subjective and objective elements and necessitates consideration of the mental and emotional state of the individual and, also, the objective facts

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56 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

57 Goodwin-Gill (n 35) 74, 85; Hathaway and Foster (n 35) 50.

58 The word 'engaged' was interpreted in *Femenia, Guillermo v MCI* FCT.D IMM-3852-94) Simpson (1995). The claimants asserted that their political opinion was that they opposed the existence of corrupt police and advocated their removal and prosecution. They argued that this was an opinion on a matter 'in which the machinery of state, government and policy may be engaged."' Madam Justice Simpson concluded that the State is 'engaged' in the provision of police services, but not in the criminal conduct of corrupt officers. In her view, that was not conduct officially sanctioned, condoned or supported by the State and therefore, the claimants" asserted political opinion did not come within the *Canada (Attorney General) v. Ward* 2 S.C.R. 689 (1993), para 73 characterizations of political opinion. See Chapter 4 - Grounds of Persecution (n 53).

59 See *Fatin v INS* 12 F3d 1233 (1993).

60 See *Matter of R-A-* 24 I&N Dec 629 (2008).

61 See *Rivera-Moreno v. INS* 213 F3d 481 (2000).

62 See UNHCR Handbook (n 38), para 37; See also Hathaway and Foster, (n 35) 91.

63 Hathaway and Foster (n 35) 91; See also UNHCR 'Advisory Opinion on the Interpretation of the Refugee Definition' (23 December 2004), para 6-7 this is in fulfilment of UNHCR 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 December 1950) UNGA Res 428(V) annex para 8; See also UNHCR Handbook (n 38), para 38; See also, See UNHCR 'Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees (April 2001), para 11.

64 Ibid.

65 Ibid.

relating to the conditions in the country of their nationality.'[66] Canadian Courts have also adopted this approach.[67]

Basically, in claiming refugee status, one must substantiate their claim in order to fulfil the objective element of 'fear'. Also, 'fear is a forward-looking appraisal of risk'.[68] Hence, the issue is not whether the claimant had good reason to fear persecution in the past, but whether, at the time the claim is being assessed, the claimant has good grounds for fearing persecution in the future.[69] According to general principles of the law of evidence on matters of the burden of proof, 'he who alleges must prove' (*emper necessitas probandi incumbit ei qui agit)* – in the case of refugee claims, this means the asylum-seeker. This burden of proof (*onus probandi*) is discharged by providing a credible testimony and personal experiences which have given rise to the fear of persecution. However, because of the particularly vulnerable situation of asylum-seekers and refugees, the responsibility to ascertain and evaluate the evidence is shared with the decision-maker.[70]

Furthermore, in evaluating the asylum-seeker's testimony, the applicant's fear should be considered well-founded if he/she 'can establish, to a reasonable degree, that his continued stay in his country has become intolerable […]'[71] Lastly, for a claim of well-founded fear to be established, there must be 'a reasonable chance; a reasonable degree of likelihood; support by relevant factors such as human rights record of country of origin; the testimony of the claimant; past persecution and persons in similar situations.'[72] Hence, having already discussed the criteria that must be satisfied for one to be considered a refugee, the fundamental question then becomes: do climate migrants meet these criteria?

III. Climate Migrants: Do they Meet the Criteria of the Refugee Definition?

There is no widely accepted definition of who an 'environmental refugee' is. The Climate Institute, however, defines climate migrants as, 'people fleeing from environmental crises, whether natural or anthropogenic events, and whether short or long term.' [73]An inability to gain a livelihood due to environmental degradation, natural disasters or development projects obligates climate migrants to migrate from their homelands. This must be distinguished from

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66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* 206 CLR 57 (2001), para 62 per Gaudron J; See also J Hathaway and M Foster, (n 35) 92.

67 See *Canada (Attorney General) v. Ward* 2 S.C.R. 689 (1993), para 64; see also *N´emeth v. Canada (Minister of Justice)* 3 SCR281 (2010), para 98; See generally J Hathaway and M Foster, (n 35) 92.

68 Hathaway and Foster (n 35) 92.

69 *Mileva v. Canada (Minister of Employment and Immigration)* 3 F.C. 398 (1991) 404.

70 UNHCR Handbook (n 38), para 196; See also J Hathaway and M Foster, (n 35) 119; UNHCR Advisory Opinion (n 62), para 9.

71 UNHCR Handbook (n 38), para 42; See also UNHCR Advisory Opinion (n 62), para 10.

72 See J Hathaway and M Foster, (n 35) 113; See also *Chan v. Canada,* (n 42), para 120. The Canadian Court has also made clear that there is no substantive difference among the various formulations often employed to define well-founded fear, noting that what is required is 'proof that there is a "reasonable chance," a 'reasonable'"' possibility, or a "serious possibility"'' of being persecuted: *Németh v Canada (Justice)* 2010 SCC 56 (2010), para 98.
Climate Insitute: Environment and Security <http://climate.org/archive/topics/environmental- security/index.html> accessed 23rd May, 2019.

the concept of economic migrants. Economic migrants are people who have left their own country and seek, by lawful or unlawful means, to find employment in another country.[74] For climate migrants, the reasons for their displacement include land degradation, drought, deforestation, natural disasters, and other environmental changes that interact destructively with poverty and population pressure.[75]

In lieu of the select definition above, it is paramount to consider an environmental refugee as per the definition and conditions enumerated in Article 1(A)(2) of the 1951 Convention, in order to ascertain whether they fit within that definition.

a) Alienage: 'is outside the country of his nationality'

As previously discussed, in order for one to be considered a refugee and enjoy the benefit of such status, they must have crossed an international border.[76] Climate migrants are people fleeing from environmental crises, for example severe drought. These are people who, for one reason or another, must leave their 'natural habitat' and go to a neighbouring country for instance, in order to ensure their survival. As previously indicated, this form of departure does not require an external factor such as climate change to necessitate it; the key point is that one must cross an international border.

b) Well-founded fear of persecution and the grounds thereof

Having crossed an international border, the most difficult task for climate migrants is to prove persecution under the previously discussed grounds. As for race, climate migrants do not fall under this criterion, since the persecution is by the environment. With respect to nationality, they also do not fall under this criterion since the 'persecution' is not on account of their nationality of the State. They neither fall under the criterion of religion, nor the criterion of political opinion.

The question, therefore, is whether the grounds of persecution under the 1951 Convention are exhaustive or require expansion. The answer is not straightforward. This is because there is much concern that 'any expansion of the definition would lead to a devaluation of the current protection for refugees recognized by the Convention.'[77] Governments have a vested interest in keeping the refugee definition as narrow as it is because of the obligations they have to refugees; in this manner, any possible extension would result in reduced support for refugees.[78]

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74 See Jeff Crisp and Damtew Dessalegne, 'Refugee protection and migration management: the challenge for UNHCR' (2002) UNHCR 1.

75 Norman Myers, *Environmental Exodus: an emergent crisis in the global arena* (Climate Institute 1995) 17. See also Sarah Reed, 'Environment and Security' (*Climate Institute*, August 2007) <http://climate.org/archive/topics/environmental-security/index.html> accessed 11 May 2019.

76 Goodwin-Gill (n 35) 63.

77 Petra Ďurková and others, 'Climate refugees in the 21st century' (2012) Regional Academy of the United Nations 3, 8-9.

78 Roger Zetter and others, 'Environmentally displaced people, Understanding the linkages between environmental change, livelihoods and forced migration' (2008) 1 Refugee Studies Centre <https://www.rsc.ox.ac.uk/publications/environmentally-displaced-people-understanding-the-linkages-between-environmental-change-livelihoods-and-forced-migration> 11 May 2019.

c) Membership of a particular 'social group'

The term 'social group' is not defined in the *travaux preparatoires* of the 1951 Convention and other Human Rights Conventions that mention the term.[79] This in and of itself makes it difficult to come to an internationally acknowledged consensus as to what the term really means.[80] The UNHCR, on the other hand, has provided helpful guidance in defining a particular social group by stating that:

> A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[81]

It is generally accepted that a particular social group cannot be defined by the persecution to which it is subjected.[82] Whereas being a member of a particular social group is an essential element for one to be considered a refugee, the same has to be accompanied by a reasonable likelihood of persecution on a Convention ground. This is deduced to be a cumulative connection and not an alternative one.[83]

In this regard, can 'climate migrants' be considered part of a 'particular social group'? The answer would be in the affirmative. The UNHCR guideline on Membership of a Particular Social Group (MPSG) explains the 'social perception' concept by indicating:

> If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable nor fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.[84]

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79 Goodwin-Gill (n 35) 74, 85; J Hathaway and M Foster, (n 35) 50.; See also J Hathaway and M Foster, *Membership of a particular group: Discussion article No.4: Advance Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002* (15(3) International Journal of Refugee Law 2003) 477. See also statement by J McHugh in *A v Minister for Immigration & Ethnic Affairs* 190 CLR 225 (1997).

80 But, the UNHCR has submitted that the ordinary meaning of the term 'particular social group' 'contains no inherent limitation on the range of factors which can serve to distinguish a group of persons from society at large' See, UNHCR's Intervention: *Islam (A.P.) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.) (Conjoined Appeals)* (1999).

81 UNHCR 'Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees' (7 May 2002) HCR/GIP/02/02, para 11.

82 *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* UKHL 20 (1999); *NS (Social Group – Women – Forced marriage) Afghanistan CG* UKIAT 00328 (2004), para. 53; C Querton, 'The Interpretation of the Convention Ground of `Membership of a Particular Social Group´ in the Context of Gender-related Claims for Asylum: A critical analysis of the Tribunal's approach in the UK' RLI 8; See also, UNHCR Guidelines on International Protection (n 79), para 11-13.

83 Goodwin-Gill (n 35) 364; *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* UKHL 20 (1999) per Lord Hoffmann; UNHCR 'Guidelines on International Protection: Gender-Related Persecution*'* (2002), para. 2; Querton, (n 80) 8-9.

84 UNHCR Guidelines on International Protection (n 79)*,* para. 13; *Secretary of State for the Home Department v K and Fornah v Secretary of State for the Home Department* UKHL 46 (2006).

Following the above explanation, it would seem that, for instance, if farmers who rely on the land for their food find themselves lacking food due to a famine, they may constitute a particular social group if, in their society, they are recognized as a group which sets them apart.

Hence, people in regions where climate change has induced their migration may, for all intents and purposes, be termed as people belonging to a particular social group. This is because, as deduced by the UNHCR, they may share a common characteristic other than their risk of being persecuted, or may be perceived as a group by society, for example pastoralists, farmers or people of one community living in a particular region. This characteristic is one that is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights, for example the right to food in a drought situation or the right to housing in a sinking island situation. The next section herein delves into the discussion of whether 'climate change' can be considered a 'Conventional persecutor'.

IV. Climate Change: An Agent of 'Persecution'?

The concept of persecution, though not defined in international law, is central to the determination of refugee status.[85] However, the Preamble to the 1951 Convention conveys the message that 'persecution encompasses all serious violation of human rights.'[86] Furthermore, the *travaux preparatoires* of the 1951 Convention do not show whether its authors intended to include a requirement that a well-founded fear of persecution must emanate from the government or those perceived to be acting in its interest.[87]

As for the agents of persecution, the UNHCR Handbook provides that, apart from the authorities of a country, persecution can also emanate from 'sections of the population'. This elicits the view that 'persecution that does not involve State complicity is still, nonetheless, persecution'.[88]

All in all, climate change seems not to have been provided for in the analysis of who 'agents of persecution' can be. The focus is more on State and non-State actors as agents of persecution and climate change does not fall under either of these two categories. Climate change has adverse effects on people and their property. People cannot live in houses where floods can sweep over them at any hour of the night; or can they live in areas where a famine threatens to wipe out an entire community. Hence, roughly 20 million climate migrants later,[89] climate change is indeed making matters worse by increasing the intensity and frequency of evolved drivers of displacement such as droughts, floods and other extreme weather conditions.[90]

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85 UNHCR 'Agents of Persecution - UNHCR Position' (14 March 1995), para 3; UNHCR Handbook (n 38), para 51; A Grahl-Madsen, (n 38) 193; Hathaway and Foster, (n 35) 182.

86 UNHCR Agents of Persecution (n 83) para 3.

87 ibid para 3.

88 ibid para 5; UNHCR Handbook (n 38) para 65.

89 Disasters displaced an average of 27 million people each year between 2008 and 2013. See 'Global Estimates 2014: People displaced by disasters' (2014) IDMC <http://www.internal-displacement.org/publications/global-estimates-2014-people-displaced-by-disasters> accessed 11 May 2019.

90 UNHCR 'Climate Change and Displacement in the 21st Century' (Oslo, Norway, 5-7 June 2011) <https://www.unhcr.org/protection/environment/4ea969729/nansen-conference-climate-change-displacement-21st-century-oslo-6-7-june.html> accessed 11 May 2019.

Climate change is a reality that the UNHCR has also recognized as being a threat in the evolving nature of refugee migration.[91] It is estimated that, by 2050, 50 to 300 million people may be displaced for climatic reasons such as sea level rise, increased water scarcity, desertification, floods etc.[92] Nevertheless, as climate change continues unabated, the 1951 Convention defines a refugee as a person with a genuine fear of being persecuted for membership in a particular social group or class. The environmental refugee – not necessarily persecuted, yet necessarily forced to flee – falls outside this definition. As such, climate change cannot be termed as a 'persecutor' per the Convention and climate migrants largely remain 'invisible' to the law, not recognized, not counted.

It is prudent to opine that times have changed, and the Conventional persecution grounds are slowly being replaced by evolving 'persecution' grounds, particularly with regard to phenomenon caused by climate change, such as floods, famine and sinking islands. It is about time that, as the world deals with climate change and develops agreements towards the same, climate migrants should be kept in mind. 'A rising tide lifts all boats. But, in the age of melting glaciers, that tide is an ominous threat driving more refugees to flee and, if ignored, swallowing humanity itself.'[93] It is time that climate migrants are unveiled from the cloak of invisibility and recognized by the law. The next section focuses on how to protect climate migrants and the challenges that lie therein.

V. Protecting Climate Migrants Under International Law

Climate change has seen a flurry of world-wide forums bid to tackle this 'force of nature'. As the situation is likely to become more pressing, it is vital to consider now the status of climate migrants and the need for their protection and, furthermore, to give meaning to the old English adage, that 'a stitch in time, save nine'.

The analysis here is aimed at showing that the paramount objective should not be a new refugee regime for environmental refugees, but a collective international effort for better international accountability, cooperation and feasible environmental protection standards.[94]

V.I Situations of Climate Migrants

In order to ascertain the existence of climate migrants, this article analyses the situations in Somalia and Tuvalu., particularly in relation to climate migrants.

a) The Case of Somalia

Apart from political instability, which has long been touted as the main reason that Somali citizens moved to Kenya as refugees, climate change has been a key player. Many Somali

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91 "What we are now seeing are more and more people that are forced to flee because of lack of water, because of lack of food, because of extreme poverty and many of these situations are enhanced by climate change." António Gutteres, United Nations High Commissioner for Refugees

92 UNHCR 'Climate change and its possible security implications' (11 September 2009) UN Doc A/64/350.

93 Andrew Lam, 'The Rising Tide – Environmental Refugees' (2012) New America Media <http://newamericamedia.org/2012/08/the-rising-tide----environmental-refugees.php> accessed 11 May 2019.

94 M Stavropoulou, 'Drowned in definitions' (2008) Forced Migration Review 31, 11-12.

were forced to leave their land due to years of insufficient rains and drought and set off in search of relief.[95]

Their movements saw them cross an international border and end up in northern Kenya, where the Dadaab refugee complex became their home. This is a camp with a capacity of 90,000, but at the time of their arrival in 2011-2012, became home to roughly 300,000 (mostly Somali) refugees.[96] In the aftermath of the drought, famine, and flooding, another 152,000 Somali refugees made their way to Dadaab,[97] which was at one point termed the world's biggest refugee camp.[98]

This, in effect, shows the ramifications of climate change and the migrations necessitated by harsh environmental conditions. However, with the lack of legal recognition, it would be difficult to accord climate refugees the same protection as Conventional refugees. In this regard, as rightly put by Nathan Thanki, *'*as a matter of compassion, environmentally displaced people should be thought of at the very least conceptually as equally vulnerable compared to Conventional refugees.*'*[99] It is on this premise, and as a matter of personal opinion, that Kenya exercised its good neighbourliness to accept the climate migrants, because returning them would be a case of sending them back to their 'death'.[100]

b) The Case of Tuvalu

Tuvalu, a Carteret Island of Papua New Guinea, faces a number of climate change -related issues. Tuvalu's population of 11,000 is clustered together on 9 islands, comprising a total land area of 10 square kilometres. Its highest elevation is just 15 feet above sea level.[101] One-fifth of Tuvalu's population have already left their homes to seek refuge on larger islands.

Complex situations such as coastal erosion, destruction of sea walls and inundation by saltwater means that most of the small gardens of swamp taro and vegetables upon which families depend for food are no longer fertile.[102] The displaced communities are being moved to Bougainville. but most residents are unwilling to move due to the fear of losing their homes and culture.[103]

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95 M Dahir and M Perry, 'A Famine We Made?' (2011) Time 38-41.

96 E Weir and others, 'Horn of Africa: Not The Time To Look Away' (2011) Refugees International <http://www.refintl.org/policy/field-report/horn-africa-not-time-look-away> accessed 11 May 2019.

97 'Somalia Famine and Drought Situation Report 19' (2011) OCHA <https://reliefweb.int/sites/reliefweb.int/files/resources/OCHA%20Somalia%20Situation%20Report%20No.%2019_2011.10.25.pdf> accessed 11 May 2019.

98 Albert Kraler and others, '"Climate Refugees" – Legal and policy responses to environmentally induced migration' (2011) European Parliament <http://www.statewatch.org/news/2011/dec/ep-climate-change-refugees-study.pdf> accessed 11 May 2019.

99 Nathan Thanki, 'Somali 'climate refugees' in Kenya: a consideration and a suggestion' (2012) *Earth in Brackets* available at, <http://www.earthinbrackets.org/2012/04/28/somali-climate-refugees-in-kenya-a-consideration-and-a-suggestion/> accessed 11 May 2019.

100 Allan Mukuki, 'The refugee influx dilemma': Is Kenya at a crossroad' (2013) 11.

101 Cole Mellino, 'Meet the world's first climate change refugees,' (*EcoWatch* 2016) <http://ecowatch.com/2016/01/05/first-climate-refugees/> accessed 12 May 2019.

102 Ben Farell, 'Pacific islanders face the reality of climate change . . . and of relocation,' (2009) UNHCR <https://www.unhcr.org/…/pacific-islanders-face-reality-climate-change-relocation.html> accessed 12 May 2019.

103 ibid.

These communities are already facing the impacts of climate change, and their unique locations and more traditional livelihoods make them particularly vulnerable to the consequences. In spite of the numerous challenges, the New Zealand Immigration and Protection Tribunal allowed a Tuvaluan family to be granted refugee status despite being environmental immigrants.[104] It must be noted that the tribunal's decision to let the family stay in New Zealand as permanent residents was not based on the impacts of climate change in Tuvalu. Indeed, the Tribunal deliberately refrained from making a finding on this point.[105] Nevertheless, this is one of first cases in which the concept of climate migrants was adjudicated upon.

Further, in 2014, Teitiota's bid to become the world's first climate change refugee was rejected. The 37-year-old moved to New Zealand with his wife in 2007 after deciding that their life on the low-lying Kiribati Island of Tarawa was no longer sustainable because of rising seas. He sought leave to appeal the tribunal's decision at the High Court, but that was dismissed.[106]

Despite this dismissal, Justice John Priestley continued to make what was possibly the first legal recognition of climate migrants. He stated that, 'At a stroke, millions of people who are facing medium-term economic deprivation, or the immediate *consequences of natural disasters* or warfare would be entitled to protection under the Refugee Convention.'[107]

While the appeal decision was based on purely humanitarian and discretionary grounds, as opposed to any domestic or international legal obligation,[108]Justice Wild concluded the judgment by stating:

> No-one should read this judgment as downplaying the importance of climate change. It is a major and growing concern for the international community. The point this judgment makes is that climate change and its effect on countries like Kiribati is not appropriately addressed under the Refugee Convention.[109]

It can be rightly deduced from the above statement that it is not that climate migrants should not be protected, but that the legal ground for protecting them is lacking at this point.

This conundrum, as faced by the New Zealand tribunal, therefore leads to the question: having confirmed that climate migrants indeed exist, can international law as it currently is used to protect them?

V.II Can climate migrants be protected under international law as it is?

El-Hinnawi's 1985 report to UNEP provided the first known definition of climate migrants:

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104 A Maas, 'Tuvalu climate change family win NZ residency appeal' (2014) NZ Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11303331> accessed 12 May 2019.

105 See Jane McAdam, 'No "Climate Refugees" in New Zealand,' (2014) Brookings <http://www.brookings.edu/blogs/planetpolicy/posts/2014/08/13-climate-refugees-new-zealand-mcadam> accessed 12 May 2019.

106 See Kenneth Weiss, 'The Making of a Climate Refugee,' (2015) Foreign Policy <http://foreignpolicy.com/2015/01/28/the-making-of-a-climate-refugee-kiribati-tarawa-teitiota/>.

107 *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* NZHC 3125 (2013 (emphasis added).

108 Jane McAdam (n 103). See also similar deliberations by New Zealand Tribunals and Courts *AF (Kiribati)* NZIPT 800413 (2013); *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* NZHC 3125 (2013); *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* NZCA 173 (2014).

109 *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* NZCA 173 (2014) 41.

> Climate migrants are defined as those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life. By 'environmental disruption' in this definition is meant any physical, chemical and/or biological changes in the ecosystem (or the resource base) that render it, temporarily or permanently, unsuitable to support human life.[110]

This idea of climate migrants has been widely criticized by various scholars. The critics have termed it a 'mythical' concept rather than actual reality. They claim that their movement is necessitated by a myriad of other reasons and not from environmental change alone. These reasons include economic, social, institutional and political factors, combined with other harmful processes and events such as civil war and poverty.[111]

This criticism reflects a serious scepticism about the severity of the situation of people displaced by climate change, particularly because there are no uniform statistics to verify the existence of such displacement.[112] The critics of the concept of climate migrants are more focused on the concept of 'persecution' as contained in the 1951 Convention.[113] As discussed, this is where the 'rubber meets the road', because it is highly disputable that climate change can meet the threshold of persecution on the Convention grounds of *race, religion, nationality, membership of a particular social group or political opinion.*

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110 Essam El-Hinnawi, *Environmental Refugees* (Nairobi, United Nations Environment Programme 1985) 4. El-Hinnawi's definition fails to distinguish between people displaced beyond the borders of their own state and internally displaced persons (unlike many definitions of 'refugees', including the Geneva Convention). For the purposes of this study, the focus is on those displaced beyond the borders of their own state.

111 For a general discussion on this see Richard Black, *Refugees, environment and development* (Longman 1998); Richard Black, 'Environmental refugees: Myth or reality?' (2001) UNHCR <https://www.unhcr.org/research/working/3ae6a0d00.html> accessed 12 May 2019; Barbara Kavanagh and Steve Lonergan, 'Environmental degradation, population displacement and global security' (1992) Canadian Global Change Program 1; Gaim Kibreab, 'Migration, environment and refugeehood' In B. Zaba & J. Clarke (eds), *Environment and population change* (Ordina Editions 1994); Gaim Kibreab, *People on the edge in the Horn: Displacement, land use and the environment in Gedaref Region, Sudan* (London, James Currey 1996); Gaim Kibreab, *Environmental causes and impacts of refugee movements: A critique of the current debate* (Disasters, 1997) 20-38; Shin Lee, 'In limbo: Environmental refugees in the third world' in N. P. Gleditsch (ed), *Conflict and the environment* (Kluwer Academic, 1997); Steve Lonergan, 'The role of environmental degradation in population displacement, in environmental Change and Security Program Report' (1997) 4 Woodrow Wilson International Center for Scholars, 5-15; J McGregor, 'Refugees and the environment' in Richard Black & V Robinson (eds), *Geography and refugees: Patterns and processes of change* (Belhaven Press 1993), 157-170; Astri Suhrke, 'Pressure points: Environmental degradation, migration and conflict' (Chr. Michelsen Institute 1992); Astri Suhrke, 'Pressure points: Environmental degradation, migration and conflict' in L Reed (ed), *Occasional article series of the project on environmental change and acute conflict* (University of Toronto and American Academy of Arts and Sciences 1993), 3-31; Astri Suhrke, 'Environmental degradation and population flows' (1994) 47 Journal of International Affairs 473; Astri Suhrke and A Visentin, 'The environmental refugee: A new approach' (1991) 2 Ecodecision 73; WB Wood, 'Hazardous journeys: Ecomigrants in the 1990s' in D Conway and JC White (eds), *Global change: How vulnerable are north and south communities?* (Indiana Center on Global Change and World Peace 1995); WB Wood, 'Ecomigration: Linkages between environmental change and migration' in *Migration policy in global perspective series occasional article no. 3*, New York: The International Center for Migration, Ethnicity and Citizenship, 1996; WB Wood, 'Ecomigration: Linkages between environmental change and migration' in AR Zolberg and PM Benda (eds), *Global migrants, global refugees* (Berghahn 2001) 42.

112 Derek Bell, 'Environmental refugees: What rights? Which duties?' (2004) Res Publica 10, 2 and 138.

113 Bell (n 110) 138.

This begs the question of whether the 1951 Convention definition of a refugee can be expanded to include climate migrants. The answer to this would be a biased 'yes', and regional refugee conventions point towards this answer. In lieu of the various refugee definitions initially deduced from the various international and regional Conventions, it is evident that there has been a successful expansion of the definition of a refugee so as to cater for a wider range of refugees, such as political asylum seekers and people fleeing from internal and external aggression. This emergence of 'new'[114] refugee situations necessitated special attention in different parts of the world. Therefore, the enlargement of the definition of a refugee is necessary so as to include and protect those new types of refugees arising from new situations, such as people fleeing from environmental disasters.[115]

To cast light on the definition in the OAU Convention, it introduces objective criteria for determining refugee status. These criteria are based on the conditions prevailing in the country of origin, and require 'neither the elements of deliberateness nor discrimination inherent in the 1951 Convention'.[116] In this regard, people fleeing from floods, drought, hurricanes and sinking islands are fleeing from the 'environmental' 'conditions prevailing in their country of origin', just like political asylum seekers and those fleeing from external or internal aggression. All they need to rid them of the 'cloak of invisibility' is legal recognition.

Hence, just like the regional Conventions, it would be possible to expand the definition of a refugee to include people fleeing from climate change hazards. While this is more of a policy issue, it is one which can be led by the United Nations. This is because the United Nations is a key institution with the capacity to develop multilateral solutions to global problems and to defend and uphold the basic human rights of climate migrants, such as dignity and formal attention and protection.[117]

With more and more people fleeing their homes to save their lives as a result of environmental hazards, the words of Article 14 of the Universal Declaration of Human Rights come into play. :'*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*'[118] While this 'spins' back the debate discussed previously, as to what exactly constitutes 'persecution' and whether climate change should be considered a 'persecutor', this is a discourse that can be undertaken 'more positively' by the various actors and agencies at the United Nations. This is so particularly in order to develop a policy to formally recognizes climate migrants within the existing international refugee protection framework.

This is a problem that is bound to worsen in the coming years. As the world discusses the effects of climate change in major conferences and summits, it should not forget the 'resultant casualties' of the same. Sooner or later, the number of climate migrants will swell to astronomical figures that will no longer elicit the debate as to whether they exist or not, but

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114 The word 'new' is used to signify the shifting tide from 'conflict' related refugees as envisaged by the 1951 Convention, to new classes of refugees like political asylum seekers.

115 Livia Bacaian, 'The protection of refugees and their right to seek asylum in the European Union' (2011) 70 University of Geneva <https://www.unige.ch/gsi/files/6614/0351/6348/Bacaian.pdf> accessed 12 May 2019, 17.

116 Mandal (n 31). See also M Sharpe (n 31); Arbodela (n 31) 192.

117 Karen McNamara, 'Conceptualizing Discourses on Environmental Refugees at the United Nations' (2007) Population and Environment, 22.

118 Proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A.

that of how to protect them. In this regard, a brief discourse on how the European Court of Human Rights (ECtHR) has aimed to protect refugees in an even wider sense is important to put things into a judicial perspective. This will bolster the discourse on the expansion of the Convention definition.

V.III ECtHR and the protection of refugees: Expanding the scope even further

It has been noted by the UN General Assembly, through the Secretary General, that those who flee from environmental disasters such as famine may not be simply economic migrants since they are not moving out of choice. They are refugees from hunger.[119] This means that 'they are fleeing out of a state of necessity, not out of choice'.[120]

In this regard, the ECtHR has expanded the scope of protection within Article 3 of the European Convention of Human Rights (ECHR),[121] which provides for the prohibition of torture or inhuman or degrading treatment or punishment. This expansion has been seen, for instance, in the context of political asylum seekers. While the Court has agreed that the Convention and its Protocols does not provide protection to asylum seekers,[122] it has gone further to provide protection to individuals 'where substantial grounds have been shown for believing that an individual, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 [of the ECHR] in the country of origin.'[123]

Hence, in the above instance, the ECtHR implied an obligation not to expel the person in question back to their country of origin.[124] In this regard, the Court has undertaken an 'evolutive' interpretation of human rights,[125] particularly in relation to refugees. An evolutive interpretation of the ECHR is the basis through which the Court keeps the meaning of human rights both contemporary and effective.[126]

It must be noted that, at the time of writing this article, there was no direct European case law that dealt with the issue of climate migrants.[127] However, the ECtHR has, in a number of instances, ruled that a State must take appropriate measures to minimise the damage

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119 Livia Bacaian (n 113) 19.

120 UNGA 'The right to food' OHCHR A/62/289 (22 August 2007) 20.

121 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 5.

122 *Vilvarajah and Others v the United Kingdom* Series A no 215 (1991) para 102.

123 This is relation to linking the definition of who a refugee is and the principle of *non-refoulement*. See *Chahal v The United Kingdom* 70/1995/576/662 (European Court of Human Rights (ECtHR), 15 November 1996) para 74.

124 *Soering v the United Kingdom* Series A no 161 (1989), para 90-91; *Cruz Varas and Others v Sweden* Series A no. 201 (1991), para 69-70; *Vilvarajah and Others v the United Kingdom* Series A no. 215 (1991), para 103.

125 The principle of interpreting human rights in light of modern circumstances is established in the case of *Tyrer v The United Kingdom* 5856/72 (ECtHR, 25 April 1978)*;* The ECtHR considers the Convention to be a 'living instrument'.

126 Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 German Law Journal 1730.

127 Finn Myrstad and Vikram Kolmannskog, 'Environmental Displacement in European Asylum Law' (2009) 11 European Journal of Migration and Law <https://doi.org/10.1163/157181609789804321> accessed 12 May 2019, 316.

that may occur to its citizens. Failure to do so may, in more instances than not, result in a breach of the Convention.[128] This is because a State, in that 'failure', will have failed to afford protection to its citizens. It is my opinion that this is the critical point in relation to climate migrants. If a State cannot protect its citizens from environmental harm (which is the case in most instances), then it is unable to afford protection to them in the Convention way. In this regard, if individuals who moved to other States, for example because of drought, were returned to the place they fled, in ECtHR terms this will be a violation of the principle of *non-refoulement*, because the individuals will be subjected to inhuman or degrading treatment. This is taking into consideration that they are climate migrants for all intents and purposes.

Hence, it is evident that the ECtHR has taken a broad approach to Article 3 of the ECHR. It must be noted that, in as much as the scope of Article 3 ECHR is different from the Conventional scope of refugee protection, it is aimed at affording wider protection to a broad class of individuals who are not necessarily protected by the 1951 Convention. It is in this way that climate migrants can be afforded protection and be recognized legally. This will be made possible if climate change and hazardous environmental conditions are considered as actors of serious harm.[129] The necessity of considering climate change as an actor of serious harm will go a long way towards ensuring that refugees are protected beyond the scope of the Conventional State and non-State actors. Although this is a concept that is seemingly not feasible at present with the current refugee situation,[130] it is not impossible that it can be researched upon and a consensual international policy developed on this basis.

In lieu of the above approach by the ECtHR, it is prudent to discuss the feasibility of an entirely separate Convention for environmental refuges and the practicality thereof as suggested by some scholars.[131]

VI. Feasibility of a Separate Convention and the Challenges Thereof in Protecting Climate Migrants

As indicated, my position on this topic is biased to the fact that creating a new convention would not be the best answer to the challenges that climate migrants pose to international law. This position is informed by the results of a ministerial meeting hosted by UNHCR in

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128 *Elefteriadis v Romania* 38427/05 (ECtHR, 25 January 2011). See also *Fadeyeva v Russia* 55723/00 (ECtHR, 9 June 2005).

129 Adam Reuben, ''Environmental Refugees' and the possibility of subsidiary protection' (*Keep Calm and Talk Law* 2015) <http://kctl.uk/8h> accessed 12 May 2019.

130 AFP, 'Europe is thinking very carefully about what the refugee crisis is going to cost them' (2015) Business Insider UK <http://uk.businessinsider.com/afp-eu-to-weigh-economic-costs-of-refugee-crisis-2015-9?r=US&IR=T> accessed 12 May 2019.

131 Dana Falstrom, 'Stemming the Flow of Environmental Displacement: Creating a Convention to protect Persons and Preserve the Environment' (2002) 13 Colombia Journal of International Environmental Law and Policy 1, 18; See also Roger Zetter, 'Protecting Environmentally Displaced Persons: Developing the Capacity of Legal and Normative Frameworks' (2011) Refugee Studies Centre, 16.

December 2011, which shows how contentious the issue of environmental displacement still is with States and their reluctance to allow for such a discussion to take root.[132]

Falstrom proposes that a convention designed specifically for protecting environmentally displaced person would be a more feasible alternative. This scholar proposes that a new convention should be shaped in a similar way to the United Nations Convention against Torture of 1984.[133] Her proposition is aimed at addressing both the cause of the problem (environmental issues) and the result (climate migrants).[134]

Falstrom asserts that this would provide temporary protection for environmentally displaced persons, as well as require States to take steps to remove the causes of such migration.[135] However, and rightfully so, Falstrom does acknowledge that the creation of such a treaty would require a great deal of energy and time.[136]

Despite Falstrom's plausible suggestion, it has been criticised by authors who term today's politically charged environment as a key hindrance to the initiative. It does not give any hope of a global, rights-based and effective instrument.[137] That is to say, States lack the political will required to negotiate a new instrument to protect climate migrants.[138] A statement made in an interview by Jane McAdam with Saber Chowdhury MP, Member of the All Parliamentary Committee on Climate Change, Bangladesh, in Dhaka, 21 June 2010, puts this into perspective:

> 'I think the first thing, before you go into the protocols and structures, what I think is needed is political weight, whether the appetite is there for governments, especially in the developed world, the Annex I countries to address the issue in Bangladesh, because I think if you have that will, if you have that willingness, that acceptance ... then you can always work something out. I think one of the problems is that we're getting too involved in discussions on what sort of a structure we should have without first

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132 UNHCR. 2011. 'Ministerial meeting' (2011) <http://www.unhcr.org/pages/4d22fd496.html> accessed 12 May 2019. See also Vikram Kolmannskog, 'Climate Change, Environmental Displacement and International Law' (2012) 24 Journal of International Development <https://doi.org/10.1002/jid.2888> accessed 12 May 2019,1078.

133 As with the Convention Against Torture, she suggests that states 'offer temporary protection to those fleeing from environmental problems, and also assume obligations and duties in order to solve these problems within their own jurisdictions, thus preventing the creation of environmental refugees from the start."' Her grounding is that such a Convention would require specific obligations from State parties to prevent the root causes from occurring. Dana Falstrom (n 129), 2 and 21. See also Aurelie Lopez, 'Protection of Environmentally-Displaced Persons in International Law' (2007) 37 The Environmental Law, 402; Frank Biermann and Ingrid Boas, 'Preparing for a warmer world: towards a global governance system to protect climate refugees' (2010) 10 Global Environmental Politics, 60–88; David Hodgkinson and others, 'Copenhagen, climate change 'refugees' and the need for a global agreement' (2009) 4 Public Policy, 159; Bonnie Docherty and Tyler Giannini, 'Confronting a rising tide: a proposal for a convention on climate change refugees' (2009) 33 Harvard Environmental Law Review 349.

134 Falstrom (n 129), 2. See also Lopez (n 131) 402-403 and 408.

135 ibid 18.

136 ibid 23-26.

137 Vikram Kolmannskog and Lisette Trebbi,'Climate change, natural disasters and displacement: a multi-track approach to filling the protection gaps' (2010) International Review of the Red Cross; See also Jane McAdam, 'Swimming against the tide: why a climate change displacement treaty is not the answer' (2011) 23 International Journal of Refugee Law, 2–27; See also See Kolmannskog (n 130) 1078.

138 McAdam (n 135) 15-16.

> actually having the political will ... So, I think the Bangladeshi position is that first the countries have to accept the concept and once they accept it, then I'm sure we can find some sort of an adjustment.'[139]

It is paramount that, firstly, the concept of climate migrants is standardised in a manner that all States accept. It would be from this point onwards that States would meet at the negotiation table with a meeting of the minds and not with divergent interests.

It should be noted that this concept of creating a new convention has been tried over and over again to no avail, in a bid to come up with a new treaty:[140]

1. UNFCCC Protocol on the Recognition, Protection, and Resettlement of Climate Refugees;[141]
2. Draft Convention on the International Status of Environmentally-Displaced Persons;[142]
3. Convention on Climate Change Refugees;[143]
4. A Convention for Persons Displaced by Climate Change;[144]
5. An additional protocol to the European Convention on Human Rights.[145]

At time of writing, resistance to accepting Conventional refugees within the borders of EU States, for example, due to their numbers, has been well documented.[146] This then begs the question, if Conventional refugees find it difficult to acquire refugee status, how much more difficult will it be for climate migrants who will be governed by their own Convention?

In lieu of the above discourse, and in echoing McAdam's position, it would be more feasible to begin by developing regional soft law declarations on the protection of climate

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139 ibid 16.

140 ibid 7.

141 Frank Biermann and Ingrid Boas (n 131) 60; see also, Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50 Environment Science and Policy for Sustainable Development 8; for criticism of their approach see M Hulme, 'Commentary: Climate Refugees: Cause for a New Agreement?' (2008) 50 Environment Science and Policy for Sustainable Development; For another UNFCC-based proposal see Angela Williams (n 2) 502.

142 Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges) (2008) 4 *Revue Européene de Droit de l'Environnement* 375. Article 2(2) defines 'environmentally-displaced persons' as 'individuals, families and populations confronted with a sudden or gradual environmental disaster that inexorably impacts their living conditions and results in their forced displacement, at the outset or throughout, from their habitual residence and requires their relocation and resettlement'. A 'right to resettlement' is elaborated in Article 9: States parties are to establish 'transparent and open legal procedures for the demand and grant or refusal of the status of environmentally-displace [sic] person based on the rights set forth in the present chapter'.

143 Docherty and Giannini (n 131) 349-350 and 373; Docherty and Giannini proposed an 'independent' or 'stand-alone' convention defining 'climate change refugee' and containing 'guarantees of assistance, shared responsibility, and administration'.

144 An Australian-based project also seeks to 'establish an international regime for the status and treatment of such persons.' 'A Convention for Persons Displaced by Climate Change' (2012) <http://www.ccdpconvention.com/index.html> accessed 12 May 2019.

145 Committee on Migration, Refugees and Population, 'Environmentally Induced Migration and Displacement: A 21st Century Challenge' (23 December 2008) Council of Europe Doc 11785, para 6(3) and 121.

146 Rick Lyman, 'Eastern Bloc's Resistance to Refugees Highlights Europe's Cultural and Political Divisions' (2015) The New York Times <http://www.nytimes.com/2015/09/13/world/europe/eastern-europe-migrant-refugee-crisis.html?_r=0> accessed 12 May 2019.

migrants.[147] Soft law is considered a new quasi-source of international law and it can be defined as 'normative provisions contained in non-binding texts, aimed at covering those weak provisions of international agreements not entailing obligations.'[148] This will provide a more feasible head-start for developing responses. A new international instrument on climate migrants would result in a debacle of the competing interests of all States in their different contexts.[149]

It has been argued that soft law can play an important role in consolidating existing norms into a clear and transparent understanding of the application of existing human rights norms to the situation of migrants of all kinds.[150]

In summation, as much as there is an urgent need to protect climate migrants, this article suggests that developing a whole new convention is not the answer, because of the highly politicised international environment. This is not to say that it is totally against such an idea. On the contrary, the idea is feasible but, as indicated earlier, this would be taking the 'long way round'.

Instead, expanding the refugee definition in the 1951 Convention is a viable position. But again, as shown above, this is an initiative that has been highly debated. The concept of judicial pronouncement has also been discussed but, aside from the New Zealand case law mentioned above, no court has yet determined the rights of climate migrants. The middle ground therein would be to develop soft law guidelines on the same. The aim of these guidelines would be to first consolidate and apply existing international human rights norms into sets of guiding principles for different groups, including climate migrants.

Further, these guidelines would improve mechanisms for inter-agency collaboration and thus ensure implementation of these norms and principles for the protection of different groups of refugees. This position would make it easier to affect an internationally agreeable policy change and an eventual definition change in the long run. This would, in effect, assist in sealing the 'refugee definition gap' by legally recognizing climate migrants.

VII. Conclusion and Recommendations

In conclusion and as discussed, expanding the established refugee definition to encompass climate migrants would require a combination of political will from States and an acceptance of the concept. Further, the ECtHR has shown that a refugee, whether a political asylum seeker or a criminal facing the death sentence, is no less entitled to their basic rights and needs

147 Such as The Niue Declaration on Climate Change, Annex B to Forum Communiqué, 39th Pacific Islands Forum, Alofi, Niue, 19-20 Aug. 2008, Doc. PIFS(08)6. See Jane McAdam, (n 135) 26. See also Alexander Betts, 'Towards a Soft Law Framework for the Protection of Vulnerable Irregular Migrants' (2010) 22 International Journal of Refugee Law, 209.

148 Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (OUP 2000) (emphasis added) 292.

149 McAdam (n 135) 26.

150 Stefanie Grant, 'International Migration and Human Rights' (*Global Commission on International Migration* 2005) <https://c-faculty.chuo-u.ac.jp/~andyb/GM/GMHR/Grant%202005.pdf> accessed 12 May 2019; Alexander Aleinikoff, 'International Legal Norms on Migration: Substance without Architecture' (2007) International Migration Law: Developing Paradigms and Key Challenges 467; Alexander Betts (n 145) 215.

than their traditional counterparts. Hence, using human rights concepts to expand the refugee definition has a natural appeal.[151]

Hence, since judicial precedence has not pronounced the rights of climate migrants and political interests have taken centre stage on this issue, the UN, as the organized community of States, must take the lead on this issue. The UN must take it upon itself to develop a policy that formally recognizes climate migrants within the existing international refugee protection framework. This is best done, as suggested, via a soft law regime of guidelines. The author's recommendations towards this approach would be:

1. Definition of an Environmental Refugee

This would be the starting point in giving recognition to an environmental refugee in lieu of the ever-changing climate conditions. This would give credence and legal recognition to this type of refugee.

2. Standards of Protection

Identification of types and levels of protection should be made available to climate migrants on a humanitarian grounding. Which rights would be involved and what would be the content of the protection provided to climate migrants? These are central issues that the discussions on the standard of protection must address.

3. Concept of Burden-Sharing

As stated, it is estimated that there will be 200 million refugees by the year 2050. This is by no means a small number. Hence, the concept of burden-sharing would be an important consideration because usually certain States are more overwhelmed with refugees than others. Refugees are a burden that is to be shared by the international community as a whole. In this regard, States should agree on a formula for sharing the burden in hosting them and not leaving it all to just a few developing States.

4. International Organisational Involvement and Responsibility

International organisations such as the UNHCR and IOM, as well as NGOs, could be helpful in ensuring the implementation of soft law guidelines. It must be noted that the 1951 Convention lacks an implementation authority and, as such, that has made it difficult for the UNHCR to ensure compliance with the Convention. Soft law guidelines should be developed in a way to ensure that that concerned international organisations promote and ensure adherence by States to the guidelines' norms and principles. This will help in ensuring international cooperation and assistance in dealing with climate migrants.

The main assertion of this article is that, while it is paramount that the debate on the protection of climate migrants remains on the right track, the main objective should not be to create a new regime for their protection. The aim should be to rid the entire process of political interference and lack of consensus on the international arena, and to channel efforts towards better international accountability, cooperation, environmental protection and, finally, creating a feasible legal recognition of climate migrants. This should be done within the available frameworks of judicial pronouncements, amendment of the definition in the 1951 Convention or the establishment of soft law guidelines. These are easier solutions than the 'long way round' of a new convention. This would in essence require all States to look beyond their political stands, meet at the negotiation table and identify that, indeed, climate migrants are here with us, and determine what should be done to protect them.

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151 Jessica Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 New York University Environmental Law Journal 480, 488.

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A New Dawn? Statelessness and Assam

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Keywords
ASSAM; STATELESSNESS; GENOCIDE; WARNING SIGNS; INDIA

Abstract

This article explores the ongoing crisis of statelessness that has been created because of a petition made by the people of Assam, India to update the electoral rolls in the state. As a result of the process, which has been approved by the Supreme Court of India, an estimated 4 million people have become stateless. The government has stated that these 4 million people risk deportation back to Bangladesh. This article will briefly examine the history of the situation that has unfolded in Assam; discuss the role *of* statelessness and how it may lead to genocide, underscoring the importance to act and find robust solutions. Finally, the author will conclude by discussing potential actions that India should take in order to resolve future cases of statelessness, specifically examining the Global Compact on Refugees and other instruments provided for within international refugee law.

I. Introduction: Citizenship in Assam

The state in northeastern India, Assam, enjoys a diverse, complex, and rich history. In 1950, three years after Indian independence, both leaders of Pakistan and India, in response to communal violence in Assam and Tripura wrote the Nehru - Liaquat Ali Khan Agreement and assured minorities that 'there shall be freedom of movement and protection in transit.'[1] In 1951, a National Register of Citizens (NRC) was prepared and created following the 1951 census.[2] The names of the people on this list qualified as citizens and were eligible to vote in elections. Four years later the Indian Parliament enacted the Citizenship Act which determined how India's citizenship was determined and acquired. 'In 1964, the Prevention of Infiltration from Pakistan Act was passed, and a special Border Police Force was raised'[3] and between April and June 1965, India and Pakistan went to war over Kashmir.[4]

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1 Nehru -Liaquat Ali Khan Agreement (8 April 1950).

2 Office of the State Coordinator of the National Register (NRC), '*National Register of Citizens'* Government of Assam <http://www.nrcassam.nic.in/faq01.html> accessed 29 June 2019.

3 Nandita Saikia and others, 'Trends in immigration from Bangladesh to Assam, 1951-2001: Evidence from Direct and Indirect Demographic Estimation' (2016) Zakir Husain Centre for Educational Studies IMDS Project 5.

4 Aviral Virk, 'Who Really Won the India-Pakistan 1965 War?' (2018) The Quint <https://www.thequint.com/news/india/who-really-won-the-india-pakistan-1965-war> accessed 29 June 2019.

In 1971, the violent birth of Bangladesh caused over 5 million refugees to seek safety within India because of internal unrest within Pakistan that resulted in genocide and crimes against humanity.[5] The civil war between East and West Pakistan resulted in a war between India and Pakistan. By 1972 after the war between India and Pakistan concluded, reportedly close to 6.8 million refugees returned to Bangladesh.[6] Under the Indira-Mujib Treaty which came into effect after the war concluded, India agreed that all migrants who entered India on or before March 24, 1971 would not be considered 'de facto illegal.'[7]

By 1978, many Assamese protested the fact that non-citizens were given the right to vote in the state elections.[8] As a result, various factions formed - the most notable - the All Assam Students Union (AASU) in 1979. These factions began protests that led to what was called the Assam Movement, and they 'set out to demand that the Indian State take concrete measures to stop the illegal influx' of immigrants.[9] Although the Movement was non-violent in nature, it became riddled with violence.[10] While the Movement continued, the 1981 census was cancelled.[11] As the Movement progressed in the 1980's ethnic clashes were continually reported, and the instability of the Assamese government did not help matters.[12] In 1983, the Government of India decided to hold state elections in Assam, despite the continued flare up of anti-foreigner sentiment. The government utilized the same electoral rolls that the Movement challenged in the late 1970s. On February 18, 1983, ethnic violence described as the 'Hobbesian war of all against all' erupted and unofficial estimates state 3,000 people were killed during the 'Nellie Massacre.'[13] In response to the petitions of the Movement and the violence, in December 1983 the Indian parliament enacted the Illegal Migrants (Determination by Tribunals) Act (IMDT) for the state of Assam.[14] The IMDT allowed citizens within Assam to challenge the status of those who may be foreigners or illegal migrants.[15]

After the Nellie Massacre, the Government of India under the leadership of Rajiv Gandhi pursued options for peace in Assam, which led to the creation of the Assam Accords. The Assam Accords included several provisions, but the most relevant one stipulated:

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5 Aasha Khosa, 'How India responded to the influx of 10 million refugees' (2015) Governance Now <https://www.governancenow.com/news/regular-story/how-india-responded-the-influx-10-million-refugees> accessed 29 June 2019.

6 ibid.

7 Hiranya Nath and Suresh Nath, 'Illegal Migration into Assam: Magnitude, Causes, and Economic Consequences' (2011) SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.1750383> accessed 29 June 2019 10.

8 Sanjib Baruah, *India Against Itself: Assam and the Politics of Nationality* (University of Pennsylvania Press 1999) 115 and 121.

9 Uddipana Goswami, *Conflict and Reconciliation* (Routledge 2014) 6.

10 See Nandana Dutta, *Questions of Identity in Assam: Location, Migration, Hybridity* (Age Publications 2012).

11 Sanjib Baruah, 'The Partition's long shadow: the ambiguities of citizenship in Assam, India' (2009) 13(6) Citizenship Studies 593, 593.

12 Shorbori Purkkayastha, 'Nellie Massacre- Xenophobia, Politics, Caused Assam's genocide' (2018) The Quint <https://www.thequint.com/explainers/nellie-massacre-explained> accessed 29 June 2019.

13 Baruah (n 8) 132.

14 The Illegal Migrants (Determination by Tribunals) Act (1983) No 39 <http://www.india-eu-migration.eu/media/legalmodule/Illegal%20Migrants%20Act%201983.pdf> accessed 29 June 2019.

15 The Illegal Migrants (Determination by Tribunals) Act (n 14) para 8.

> Illegal aliens who had entered the state between January 1966 and March 1971 would be disenfranchised for ten years and those who came after March 1971 would be deported. It was agreed that the state government formed after the election of 1983 would resign, the state assembly would be dissolved, and fresh elections based on revised electoral rolls would take place in December 1985.[16]

India also amended the aforementioned Citizenship Act to reflect what was agreed upon in the Assam Accords.[17] While the office to implement the Assam Accords was created in 1985, the process has continued to be slow. Triparate meetings were held in 2005. The AASU appeared positive about conversations that took place about border security and an update to the NRC.[18] The AASU's demand to scrap the IMDT was denied. However, not long after the Supreme Court of India struck down the IMDT.[19] Therefore, the governing law to be used as stipulated by the Supreme Court was the 1950 Immigrants (Expulsion from Assam) Act, together with the 1946 Foreigners Act and the Foreigners Tribunal Order of 1964. The Foreigners Act gives the state government authority to regulate or restrict entry of foreigners. This also means that the state authority may determine how people are deported. It is then that the Foreigners Tribunal provides a 'reasonable opportunity' for the person accused of being a foreigner to represent themselves and produce evidence in support of their case for citizenship.[20]

One of the turning points of the situation in Assam was litigation filed in 2009 by a nonprofit organization called Assam Public Works (APW). APW filed a petition against the Union of India to 'delete the names of illegal migrants from voters' lists in Assam and updat[e] the NRC.'[21] The Supreme Court of India responded by taking up leadership in ensuring the NRC would be updated in subsequent cases. Since 2014, the Supreme Court has monitored progress to ensure the terms laid out in its orders are met. The drafts of the registry continue to be published. Concerns have been raised by the first draft which omitted the names of several families.[22] Some of concerns expressed related to corruption in the process, the specific targeting of impoverished people during citizen sweeps, and disregard of documentation provided by people.[23] As of July 2018, the draft excluded approximately 4 million people from the NRC list. These people will become stateless if they lose during the appeals process. As of 1 November 2018, the Indian Supreme Court allowed 5 more additional documents to be utilized to determine whether a person was an Indian citizen

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16 Baruah (n 8) 139.

17 ibid.

18 'Review of Assam Accord fruitful: AASU' (2005) The Hindu <https://www.thehindu.com/2005/05/08/stories/2005050813281000.htm> accessed 29 June 2019.

19 See Anupama Roy and Ujjwal Kumar Singh, 'The Ambivalence of Citizenship' (2009) 41(1) Critical Asian Studies 37.

20 Foreigners (Tribunals) Order 1964 (23 September 1964) para 3.

21 *Assam Public Works v The Union of India* (Writ Petition (Civil)) (2018) No 274/2009.

22 Dr. Pushpita Das, 'Publication of the National Register of Citizens: a positive step, but what next'(2018) Institute for Defence Studies and Analyses <https://idsa.in/idsacomments/publication-of-the-national-register-of-citizens_pdas_040118> accessed 29 June 2019.

23 Tarique Anwar, 'Assam's NRC Officials "Fudging" Data to Make People Indian or Foreigner?' (2018) NewsClick <https://newsclick.in/assams-nrc-officials-fudging-data-make-people-indian-or-foreigner> accessed 29 June 2019.

or not. The Court has appeared to set a final deadline for challenges for December 15, 2018.[24]

What is supposed to be separate but appears to have become conflated[25] with the NRC issue is the Foreigners Tribunals.[26] These Tribunals have been set up to detect and deport foreigners.[27] However, the reason for conflating both processes may be easily understood as those who are excluded from the NRC list are classified as "D" voters and are sent to Foreigners Tribunals, set up throughout Assam, which in turn determine whether they are to be deported.[28] The Supreme Court has delegated the Gauhati High Court[29] to monitor these tribunals, which face their own criticism for being unprofessional.

The Supreme Court of India also ordered negotiations to take place with Bangladesh to deport those who are declared foreigners back to Bangladesh. Bangladesh has not acknowledged that the deportees are Bangladeshi citizens. So far, most of the people who have not been able to authenticate their citizenship based on the poor standards have found themselves detained in overcrowded jails.[30] The Government of Assam is in the process of expanding construction of detention facilities to hold more people.[31] Sadly, the NRC process appears to have created an atmosphere of violence that is worse than in the 1980s.[32] Unfortunately, given the confusion over the NRC, and the upcoming Lok Sobha elections, history will not be instructive but repetitive.

While this process has been ongoing, the possible deportations of alleged foreigners have not placated groups. The Citizenship Bill (2016), which would amend the Citizenship Act, seeks to grant citizenship to many minority groups who reside in India and in turn has raised the ire of many people, including those in Assam.[33] The Supreme Court in the

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24 PTI, 'High-level panel to chalk out plans on fate of people left out of final NRC in Assam' (2018) LiveMint <https://www.livemint.com/Politics/bJUh0TMdo3OODznBwHSJNI/Highlevel-panel-to-chalk-out-plans-on-fate-of-people-left-o.html> accessed 29 June 2019.

25 Ipsita Chakravarty, 'Assam has received sanction from Centre to build a detention camp for "foreigners"' (2018) Scroll.in <https://scroll.in/article/887351/assam-has-received-sanction-from-centre-to-build-a-detention-camp-for-foreigners> accessed 29 June 2019.

26 For more information on the Tribunals see Government of Assam 'Foreigners Tribunal' <https://homeandpolitical.assam.gov.in/portlets/foreigners-tribunal> accessed 29 June 2019.

27 It should be noted that consistent throughout Indian scholarship is the fact that it is nearly impossible to determine the actual amount of "illegal migrants" or "foreigners" as I will later discuss in this article. Nath (n 7).

28 'India: Assam's Citizen Identification Can Exclude 4 Million People' (2018) Human Rights Watch <https://www.hrw.org/news/2018/07/31/india-assams-citizen-identification-can-exclude-4-million-people> accessed 29 June 2019.

29 *Assam Sanmilita Mahasangha & Others (Petitioners) versus Union of India & Others (Respondents)* (Writ Petition (Civil)) (2012) No. 562 <http://nrcassam.nic.in/images/pdf/01.pdf> accessed 29 June 2019, 67.

30 Bikash Singh 'Centre sanctions detention camp for "foreigners" in Assam' (2018) The Economic Times <https://economictimes.indiatimes.com/news/politics-and-nation/centre-sanctions-detention-camp-for-foreigners-in-assam/articleshow/65083124.cms> accessed 29 June 2019.

31 Chakravarty (n 18).

32 Debarshi Das, 'Today's Assam Looks More and More Like the Violence 1980's' (2018) The Wire <https://thewire.in/rights/assam-violence-nrc-polarisation> accessed 29 June 2019.

33 PTI, 'AASU 28 other student bodies in Assam announce protests against Citizenship Bill' (2018) The Week <https://www.theweek.in/wire-updates/national/2018/10/31/cal7-as-citizenship-protests.html> accessed 29 June 2019.

meantime chastised the Assam government for "inaction against the detected illegal immigrants and those in detention centres."[34]

II. The Status Quo and Statelessness

It is important to remember that India is not a party to the 1951 Refugee Convention or accompanying protocols. Despite this, the United Nations Refugee Agency (UNHCR) operates in different parts of the country and assists with the influx of refugees where it is permitted to do so.[35] One of the greatest challenges, it appears, is under Indian law where 'the term foreigner is used to cover aliens temporarily or permanently residing in the country. This places refugees, along with immigrants, and tourists in this broad category.'[36]

Under the 1954 Convention on Statelessness ('Statelessness Convention'), a stateless person is defined as someone who 'is not considered as a national by any State under the operation of its law.'[37] In 1961 the United Nations adopted the Convention on the Reduction of Statelessness ('1961 Convention'). The 1961 Convention, as will be discussed later, 'sets rules for the conferral and non-withdrawal of citizenship to prevent cases of statelessness from arising.'[38]

India has not ratified relevant international treaties including United Nations 1951 Convention Relating to the Status of Refugees ('Refugee Convention') or the Statelessness Convention.[39] India has a duty under customary international law and its treaty obligations to prohibit arbitrary deprivation of nationality, to avoid non-discrimination in matters pertaining to nationality, and to avoid statelessness.[40] This duty to not deprive people of nationality is particularly emphasized in the Universal Declaration of Human Rights in Article 15.

Within the Indian national system, the Indian Constitution and the Citizenship Act guard the parameters regarding citizenship. The Citizenship Act is complemented by the Citizenship Rules, which are the rules of procedure. The Citizenship Act allows people to

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34 Bidisha Barman, 'In Assam's Mangaldoi, struggle to get listed on NRC emerges as major poll issue; Muslims determined to vote in large numbers' (2019) FirstPost <https://www.firstpost.com/politics/in-assams-mangaldoi-struggle-to-get-listed-on-nrc-emerges-as-major-poll-issue-muslims-determined-to-vote-in-large-numbers-6289511.html> accessed 29 June 2019.

35 Rina Chandran, 'Poverty and politics trip up urban refugees in India' (2018) Reuters <https://www.reuters.com/article/us-india-refugees-rights/poverty-and-politics-trip-up-urban-refugees-in-india-idUSKBN1IC001> accessed 29 June 2019; United Nations High Commissioner for Refugees, 'India' (2011) UNHCR Global Appeal 2011 <https://www.unhcr.org/4cd96e919.pdf> accessed 29 June 2019.

36 Arjun Nair, 'National Refugee Law for India: Benefits and Roadblocks' (2007) 11 Institute of Peace and Conflict Studies <http://www.ipcs.org/issue_briefs/issue_brief_pdf/51462796IPCS-ResearchPaper11-ArjunNair.pdf> accessed 29 June 2019.

37 Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960), art 1(1).

38 Convention on the Reduction of Statelessness, (adopted 30 August 1961, entered into force 13 December 1975) 3.

39 While India has not signed these treaties, it has since 1995 been a member of the UNHCR Executive Committee and Executive Committee member of the International Office of Migration since 2008. Sanjeev Tripathi, 'Illegal Immigration from Bangladesh to India: Toward a Comprehensive Solution' (2016) Carnegie India <https://carnegieindia.org/2016/06/29/illegal-immigration-from-bangladesh-to-india-toward-comprehensive-solution-pub-63931> accessed 29 June 2019.

40 Alice Edwards, 'The meaning of nationality in international law in an era of human rights' in Alice Edwards and Laura Van Wass (eds), *Nationality and Statelessness* (CUP 2015) 25.

obtain citizenship through 'registration' unless one is an 'illegal migrant,' thereby disqualifying them from this particular process.[41] The Citizenship Act has two sections relating to termination and deprivation of citizenship, but contains no procedure to prevent statelessness.[42]

Based on the lack of protection for stateless people in the national laws, it comes as no surprise that the Assam government would promote a policy option of statelessness. However, it is also clear that the situation in Assam was not created overnight, and many variables have caused this perilous situation to be ripe for creating a large stateless population *and* continued human rights violations to continue.

It appears the status quo NRC issue was created by three overarching variables: (1) the lack of legitimate demographic information; (2) ethnic violence; and (3) hate speech by political parties. These three variables all intertwine with each other to have created a policy choice that revocation of citizenship is the only way to respond to perceived threats from illegal immigration.

Lack of Information

An examination is warranted as to whether the information that is constantly recycled through political forces is accurate. The Assam government did not update the NRC annually.[43] Given the disturbances there was no census taken in Assam in 1981. The next censuses were taken in 1991, 2001, and 2011 respectively. These censuses do not substantiate any of the claims of the numbers of 'foreigners' present in Assam.[44] The census report analysts appear only to make *conjectures* that an influx of immigration[45] is the reason why the census reflects a growing Muslim population demographic. None of the census reports or other instruments reflects how illegal populations of people have been identified or calculated. This is perhaps because India's Census Act, 'fails to provide basic clarifications regarding who are to be counted under census exercises, and the grounds required in order to be counted as part of the population, (i.e. being a citizen or a non-citizen).'[46]

In addition, it appears in most demographic analysis completed by scholars after 1991, most of them add the concern that the Hindu population could become a minority in the state of Assam, when in fact a multitude of variables may be causing that concern, such as low birth rates among Hindus, religious conversions, and migration due to a lack of employment opportunities.[47] The AASU has continually repeated that updating the NRC

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41 Sitharamam Kakarala, *India and the Challenge of Statelessness: A Review of the Legal Framework Relating to Nationality* (National Law University Delhi Press 2012) 37.

42 ibid 46.

43 R. Dutta Choudhury, 'Regular NRC update would have checked influx: AASU' (2017) The Assam Tribune <http://www.assamtribune.com/scripts/detailsnew.asp?id=nov2917/at057> accessed 23 June 2019.

44 Sanjoy Hazarika, 'Defining Citzenship: Assam on the Edge Again' (2018) Economic and Political Weekly 1. See also Nath (n 7).

45 Dr Bhupen Kumar Nath and Dilip C Nath, 'The Change in Religion and Language Composition in the State of Assam and in Northeast India: A Statistical Analysis since 1951 to 2001' (2012) 2(5) International Journal of Scientific and Research Publications 1.

46 ibid 48.

47 One such example is Dibya Jyoti Kalita's paper which rings the alarm bells in the conclusion; Dibya Kalita, 'Migration and Population Growth in Assam: a District Level Study' (2015) 356-368.

has nothing to do with religion, but its purpose is to address illegal immigration from Bangladesh.[48] Researchers state that the 2001 census results indicated a 5.39 percent *decline* in the growth of Assam's population.[49] Further, according to the tally prepared by the Assamese state government during its operation phase from 1985 – 2005, the IMDT managed to deport a total of 1,547 people out of 112,791 referred cases.[50] The numbers do not come close to matching the numbers that are continually used to claim there is a problem of illegal migrants in Assam. Sanjoy Hazarika, International Director of the Commonwealth Human Rights Initiative notes, 'studies are needed on either side of the border to look at diminishing and growing populations in villages and districts, driven by migration.'[51]

Ethnic Tensions

Prior and subsequent to the Nellie Massacre, ethnic violence has continued to occur in Assam, particularly with the Bodo movement calling for a separate state called Bodoland. The ethnic clashes have been grotesque. As one journalist reported:

> In October 1993, Bodo-Muslim clashes affected around 4,000 families in Kokrajhar and Bongaigaon, in 1994, 113 were killed in Barpeta; Bodo-Adivasi clashes in 1996 and 1998 saw almost 400 people killed and over 3 lakh displaced; again in 2008, Bodo-Muslim clashes left 65 killed and over 2 lakh displaced. Similarly, Karbi-Kuki clashes in Karbi-Anglong in 2003-04 saw 98 killed and some 11,000 displaced; Karbi-Dimasa clashes in 2005 led to 103 deaths and nearly 50,000 being displaced.[52]

This of course does not include the bombings in 2008 and 2014.[53] Also during this time period there was a flare up in violence between the Bodos and Muslim population in 2012 which killed approximately 60 people and displaced over 150,000.[54] The Bodo leaders state that resource scarcity is one of the main reasons that they conduct 'ethnic cleansing' and strive to have a home state like that of Israel.[55] The Bodos also attribute these problems to illegal immigrants from Bangladesh. Although the demographic data is neither studied nor researched to identify what are the true causes of scarcity, this scarcity and anti-immigrant platform has mobilized the Bodos and other groups.

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48 Karishma Hasnat, 'Assam Students Union vows to Provide Legal Help to 'Indians' Caught in NRC Tangle' (2018) News18 <https://www.news18.com/news/india/assam-students-union-vows-to-provide-legal-help-to-indians-caught-in-nrc-tangle-1804669.html> accessed 29 June 2019.

49 'Census shows drop in Assam population' (2001) The Hindu <https://www.thehindu.com/thehindu/2001/03/30/stories/1430203e.htm> accessed 29 June 2019.

50 'White Paper on Foreigners Issue' (May 2015) Assam Government Home and Political Department <https://assam.gov.in/web/home-and-political-department/white-paper1#23> accessed 12 May 2019, 2.3.2.

51 Hazarika (n 20) 2.

52 TNN, 'A distraught tribal: The genesis of Assam ethnic violence' (2012) The Economic Times <https://economictimes.indiatimes.com/news/politics-and-nation/a-distraught-tribal-the-genesis-of-assam-ethnic-violence/articleshow/15458830.cms> accessed 29 June 2019.

53 Nilim Dutta, 'India's 'other' war: Jihadi paranoia and ethnic militancy' (2015) DAWN <https://www.dawn.com/news/1164657> accessed 29 June 2019.

54 Samrat, 'Violence in Assam has Deep Roots' (2012) New York Times <https://india.blogs.nytimes.com/2012/07/26/violence-in-assam-has-deep-roots/> accessed 29 June 2019.

55 ibid.

Another factor contributing to the violence is the activities of the United Liberation Front of Asom (ULFA), which was formed in 1979 to create an independent socialist Assam. The ULFA's support waned after the end of the Movement, but since 1990, at the very least, been deemed a terrorist organization. ULFA has blamed 'illegal migrants' for 'creating a chaotic situation and threatening Assam's existence.'[56] The group also wants to expel the Indian army as well those who are considered illegal migrants. Recently ULFA launched a recruitment drive to increase its numbers in order to continue its efforts to create an independent Assam.[57] The anti-immigrant sentiment appears to be a rallying point for groups to justify or continue violence.

Politics and Hate

Given the lack of credible information and the ethnic tensions in Assam, it is no surprise that political factions in the Assamese government and national Indian government have capitalized on anti-foreigner rhetoric and amassed political support for their parties in one way or another. On the local level, since 1915 the government of Assam has been consistently vocal that Muslim immigration from Bangladesh (and Bengal prior to that) has been a problem.[58] It was Assamese Governor S.K. Sinha's report in 1998, which stated, 'as a result of population movement from Bangladesh, the spectre looms large of the indigenous people of Assam being reduced to a minority in their home state' that has continued to be repeated and cited as a basis for action. Sinha erected a fence along the shared border with Bangladesh and subsequently the Bharatiya Janata Party (BJP) 'began to warn of a "Muslim Avalanche from Bangladesh" repeating fear narratives for several electoral cycles.'[59] It appears that most of this rhetoric is aimed at disenfranchising a large voting population or 'vote banks' of Muslims who appear to be the majority in Assam.[60] However, research conducted by the Centre for Policy Research focusing on Assam elections and voting patterns concluded:

> The large Muslim population has become central to any electoral understanding of Assam. Yet, as we have argued here, Muslim politics in Assam is quite complex, if not fractured. There is no consolidated Muslim vote bank, nor is it necessarily meaningful to consider such a possibility. The Muslims are still far from a kingmaker in Assam.[61]

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56 Rizwana Shamshad, *Bangladeshi Migrants in India: Foreigners, Refugees, or Infiltrators*? (Oxford University Press 2017).

57 Rajeev Bhattacharyya, 'ULFA goes on a recruitment overdrive in Assam as outlawed group's cadre strength thins out' (2017) FirstPost <https://www.firstpost.com/india/ulfa-goes-on-a-recruitment-overdrive-in-assam-as-outlawed-groups-cadre-strength-thins-out-3505511.html> accessed 29 June 2019.

58 Chandan Kumar Sharma, 'Immigration, indigeneity and identity' in Dilip Gogoi (ed), *Unheeded Hinterland: Identity and Sovereignty in Northeast India* (Routledge 2016) 92.

59 Kristin Hoelscher and Jason Milkian, "The violence of migration from Bangladesh to India" in Jason Miklian and Ashid Kolas (eds), *India's Human Security: Lost Debates, Forgotten People, Intractable Challenges* (Routledge, 2013).

60 The term "vote banks" were coined by M.N. Srinivas as "a population, usually a caste or religious identity group that trades its votes wholesale for patronage from a political candidate or party." Bhanu Joshi and others "Understanding the Election in Assam (Part 2)" Centre for Policy Research <http://cprindia.org/sites/default/files/working_papers/Understanding%20the%20election%20in%20Assam%20%28Part2%29.pdf> accessed 29 June 2019, 3.

61 Joshi (n 46) 7.

In spite of this, the rhetoric is likely to continue because the BJP has identified Assam as a key area in the upcoming 2019 elections in the Lok Sabha.[62] The rhetoric towards the four million that have been identified as non-citizens (despite clear evidence of irregularities with the process) has intensified and reached a new level of dehumanization.[63] Sadly, this same fear mongering and anti-immigrant rhetoric is also used by the Supreme Court of India in its decisions involving Assam and the Citizenship laws.[64] If the propaganda that foreigners are attempting to take over Assam or that Bangladesh is trying to usurp Assam into its territory were true, it would have happened by now,[65] given the radical numbers that continue to be repeated by those in Assam and in the BJP.

III. From Statelessness to Genocide: Warning Signs?

Before delving into the central question of this article, whether the Global Compact on Migrants and Refugees could provide relief for the situation in Assam, it is important to discuss the warning stages of genocide, which are present in Assam as a result of the NRC fiasco.

There are ten warning stages that indicate genocide is likely to occur. The ten stages of genocide are 'classification, symbolization, discrimination, dehumanization, organization, polarization, preparation, persecution, extermination, and denial.'[66] The stages do not happen in a linear fashion and may happen simultaneously. The author notes that in the context of what is happening in Assam, and as discussed earlier, it is clear that at least five to six stages are currently present.[67]

Within the ten stages of genocide, rendering people stateless (*de jure* stateless) is likely to occur during two possible stages. The first is during the classification stage, which is defined as 'us versus them' and emphasizing the difference between peoples. In this stage, it is likely that rhetoric and behavior by the government or factions in civil society, calling for movement towards a policy that underscores this classification, will likely escalate. As discussed earlier in the article, this is already occurring on both the local level in Assam and on the national level through various members of the BJP. The second possible occurrence is during the discrimination stage, where statelessness is highly likely to occur because the

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62 Naresh Mitra, "Want Assam rural polls to be held soon, says BJP" (2018) Times of India <https://timesofindia.indiatimes.com/city/guwahati/want-assam-rural-polls-to-be-held-soon-says-bjp/articleshow/64916087.cms> accessed 29 June 2019.

63 Press Trust of India, "Bangladeshi migrants are termites, will be struck off voter list: Amit Shah" (2018) Business-Standard <https://www.business-standard.com/article/politics/bangladeshi-migrants-are-termites-will-be-struck-off-voter-list-amit-shah-118092200396_1.html> accessed 29 June 2019.

64 *Referring to Assam Sanmilita Mahasangha & Ors vs Union of India & Ors* (Writ Petition (Civil)) (2014) No 562 of 2012.

65 Anindita Dasgupta, 'The myth of Assamese Bangladeshi' (2018) HIMAL South Asian <http://himalmag.com/the-myth-of-the-assamese-bangladeshi/> accessed 29 June 2019.

66 Dr. Gregory Stanton, 'The Ten Stages of Genocide' (1996) Genocide Watch <http://www.genocidewatch.org/genocide/tenstagesofgenocide.html> accessed June 29 2019; this was originally written in 1996 at the U.S. Department of State as the 'Eight Stages of Genocide' presented at the Yale University Center for International and Area Studies in 1998 and revised in 2013.

67 The Common Good Foundation, 'Stateless in Assam: Precursors to Genocide and Crimes against Humanity?' (2018) Genocide Watch <http://docs.wixstatic.com/ugd/e5b74f_0abf14c4e86946d2bdb06572597ffca6.pdf> accessed 29 June 2019, paras 35-37.

identified group in most cases loses their basic rights, such as citizenship.[68] This has been evident from the application of the NRC process mainly towards the Muslim minority in Assam.

IV. The Global Compact on Migration and Refugees

In 2016 the United Nations General Assembly (UNGA) adopted a political declaration, known as the New York Declaration to address and respond to the 'growing global phenomenon of refugees and migrants'[69] particularly through 'large movements.' The New York Declaration attempts to define 'large movements' as reflecting 'numbers of people arriving, economic, social, and geographic contexts, and the capacities of States to respond.' In addition large movements have 'political, economic, social, developmental, humanitarian, and human rights ramifications.'[70] The UNGA through the New York Declaration sought to address the root causes of large movements of refugees and migrants through 'increased efforts aimed at early prevention of crisis situations based on preventive diplomacy.'[71] The New York Declaration provided the initial framework for the 'Comprehensive Refugee Response Framework' (CRFF) which is an 'integral part'[72] of and informs both the Global Compact on Refugees (GCR) and the Global Compact on Migration (GCM). India supported and signed the New York Declaration.[73]

Refugees

Briefly, the CRFF makes four recommendations which include easing pressuring on host societies, encouraging and supporting refugee self-reliance, expanding third-country solutions, and supporting conditions in countries of origin for safe and dignified return.[74] For successful implementation of the CRFF a mindset shift within the four areas identified.[75] These recommendations are enveloped in the GCR, which like the GCM, is not legally binding. For the purposes of this article, it is important to focus specifically on the statelessness aspects of the GCR. The GCR is complimented by the statelessness conventions [76] and the mandate holder of the GCR is the UNHCR. The GCR provides certain tools that may be of use to India, as a host country. The first tool of great importance would be collecting reliable data on those who are refugees and stateless people.[77] This

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68 Stanton (n 52).

69 United Nations General Assembly, 'New York Declaration for Refugees and Migrants' (13 September 2016) A/71/L.1, para 2.

70 ibid para 6 and 7.

71 ibid para 12.

72 Report of the High Commissioner for Refugees, 'Part II Global Compact on Refugees' (September 13 2018) A/73/12, para 10.

73 Pallavi Saxena and Nayantara Raja, 'The imperative to offer refuge' (2018) The Hindu <https://www.thehindu.com/opinion/op-ed/the-imperative-to-offer-refuge/article24203930.ece> accessed 29 June 2019.

74 Randall Hansen, 'The Comprehensive Refugee Response Framework: A Commentary' (2018) 31(2) Journal of Refugee Studies 131.

75 Manisha Thomas, 'Turning the Comprehensive Refugee Response Framework into Reality' (2017) 69 FMR Review <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/latinamerica-caribbean/thomas.pdf> accessed 29 June 2019.

76 Report of the High Commissioner for Refugees (n 71) para 5.

77 ibid para 46.

would be of benefit to India considering the data currently does not exist to support the arguments advanced by the Assamese and Indian government. Another tool outlined is the 'contribut[ion] of resources and expertise for the establishment of mechanisms for identification, screening and referral of those with specific needs to appropriate and accessible processes and procedures.'[78] This specifically includes procedures for statelessness. This is a critical resource not only because it may help India, but because it may bring about a decrease in human rights violations which are ongoing in the NRC process. For example, the Assam government is collecting biometric data for those who are appealing the decision of being placed on the NRC list and who have been identified as needing to be placed on the list.[79] Further, many people who are in the camps have legitimate paperwork to prove that they should have the right to vote and are not 'foreigners.'[80]

Other potential avenues to provide redress for host countries include the civil registries, encouraging countries to accede to the Conventions on Statelessness. India was part of the 181 countries who voted in favor of the GCR in December 2018 and part of the 152 countries who voted in favor of the GCM, which we now discuss.[81] Perhaps the GCR will provide India with more resources on how to deal with statelessness and refugees, but the GCR much like its sister compact, will not be able to address the ethnic tensions and hate campaign hurdled towards alleged foreigners.

Migrants

The GCM contains 23 objectives for managing migration. These objectives include reducing vulnerabilities faced by migrants, collecting and utilizing data, eradicating trafficking in persons, and working towards a safe and dignified return and readmission for migrants. Given the context of the GCM it is not likely that this will provide any relief in the near term for the situation in Assam.

V. The Way Forward?

India's response to the events in Assam has reached a crossroads. On one hand, it must balance the protection of human rights for the over four million people likely to become stateless after the final publication of the NRC. On the other hand, it must consider the possibility that any perceived retractions have the possibility of igniting violence and polarizing groups within Assam even further. The Supreme Court's involvement in the process should have brought comfort that human rights and the prevention of mass atrocities would be a priority. Unfortunately, as this is not the case, it is highly unlikely that a petition could be made to the Court to stop the current process given all variables discussed earlier in this article. One significant push that could be made is to ask India's

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78 ibid para 60.

79 'Biometric details lead to NRC confusion in Assam' (2019) NorthEast Now News <https://nenow.in/north-east-news/biometric-details-leads-to-nrc-confusion-in-assam.html> accessed 29 June 2019.

80 Chandrima Banerjee, 'Assam's refugees hope for return of citizenship bill' (2019) The Times of India <https://timesofindia.indiatimes.com/city/guwahati/assams-refugees-hope-for-return-of-citizenship-bill/articleshow/68449043.cms> accessed 29 June 2019.

81 Patricia Zanine Graca, 'UN Global Compact on Refugees and Migration' (2018) International Policy Digest <https://intpolicydigest.org/2018/12/24/un-global-compact-on-refugees-and-migration/> accessed 29 June 2019.

Supreme Court to align its orders and the orders of the Guahati High Court with the 'Tunis Conclusions' during the appeals process for those that are excluded from the final NRC list.

The Tunis Conclusions recommendations, created as a result of roundtable discussions regarding the 1961 Convention on the Reduction of statelessness,[82] specifically focused on loss and deprivations of citizenship, provide for certain interpretations on the 1954 Convention and could add balancing factors to the process in order to stave off statelessness and mass atrocities. The three largest elements that should be included are: 1) definitive standard for deprivation of citizenship; 2) non-discrimination; and 3) a legitimate and proportionate purpose.

Based on the reports that have been documented within Assam, it is clear that there is no clear or firm standard that identifies what constitutes deprivation of citizenship.[83] The national laws of India appear to have exceptions carved out for the state of Assam. In one instance it may be that the laws of India without the Assam exceptions provide broader protections for those who are now stateless. Further, there is a risk some people may have been cleared through the IMDT process but are facing trial again through the Foreigner Tribunals. Corruption appears rampant based on civil society reports.

The second element focuses on preventing discrimination on the grounds of religion.[84] Although many civil society organizations and the Courts themselves may state that this is not a policy directed towards a minority, the rhetoric from the national and the actions state government indicate otherwise. Recently a news report indicated that the names of some who are considered 'foreigners' appeared on the draft list for the NRC.[85] The authorities in the State of Morigaon district have begun to delete these names. While this may seem innocent, a closer inspection reveals from the 2011 census the Muslims comprise the majority in the district.[86] Therefore it is important that the Supreme Court of India emphasize zero tolerance for discrimination towards particular religious groups and for the Courts within Assam to avoid tolerating this kind of discrimination.

The third element has two functions and asks two questions; does it serve a legitimate purpose and is it proportionate?[87] Of all the elements, this is the most critical for India to evaluate as it has been consistently reported that the Foreigners Tribunals are not operating with appropriate judicial standards and revocation of citizenship has been arbitrary. The revocation of citizenship by those who have spent years in Assam working and have no ties to any other country serves no purpose except to placate groups who use hate speech as a means to become the majority. The revocation of citizenship is not proportionate considering the Citizenship Act allows for registration of those who have

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82 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' (2013) UNHCR <https://www.refworld.org/pdfid/533a754b4.pdf> accessed 29 June 2019.

83 'Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' (2014) UNHCR (Tunis Conclusions) <http://www.refworld.org/docid/533a754b4.html> accessed June 29 2019, para 16.

84 ibid para 18.

85 Prasanta Mazumdar, 'Declared foreigners, suspected foreigners make it to National Register of Citizens' (2018) India News Express <http://www.newindianexpress.com/nation/2018/aug/03/declared-foreigners-suspected-foreigners-make-it-to-national-register-of-citizens-1852746.html> accessed 29 June 2019.

86 'Morigaon District: Census 2011 data' Census 2011 <https://www.census2011.co.in/census/district/161-morigaon.html> accessed 29 June 2019.

87 UNHCR Expert Meeting (n 63) paras 19-24.

been in India after a certain time period. Therefore, the national law provides a remedy for people whose paperwork may be dismissed by inconsistent standards.

It should be emphasized that while the warning signs are in place for statelessness and genocide to occur in Assam, it is not too late to change the course of direction. While there will be cases of statelessness based on variables at play on the national and local levels, adding the standards gleaned from the Tunis Conclusions may be one way to increase the quality of decisions made at the local level with regards to citizenship. In addition, civil society must continue its pressure to prevent India from creating havoc not only within the state of Assam but causing unnecessary tension between itself and Bangladesh.

VI. Conclusion

Based on the historical events in Assam, it may be appropriate to suggest that statelessness is an inevitable policy choice given the lack of accurate information, the ethnic tensions, and the platform used by the government. In the case of Assam, the revocation of citizenship of millions of people will continue to have dire consequences because of the gaps within India's refugee laws and policies. Some of these laws, as explored above, are antiquated, as well as the motives behind some of the new policy regulations that are coming from the national and local legislatures.

The Global Compact on Refugees may bring some needed solutions in allowing India to march forward and lessen the amount of human rights violations that will snowball into genocide, given the warning signs that have appeared. The issue, by itself, is a complicated one to unpack, but that does not necessarily mean the solutions have to be as complicated. The Global Compact on Refugees offers some pathways for India to address the NRC issue in a humane and orderly way. However, in the short term the Tunis Conclusions may be a tool that the Supreme Court could utilize before the July 31, 2019 deadline for the NRC.

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The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: *Rosenberg* to *Al-Mahdi*

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Keywords
INTERNATIONAL LAW; CULTURAL HERITAGE DESTRUCTION; ARMED CONFLICTS

Abstract

This paper intends to examine and analyse the role, if any, played by motive and intent in the legal qualification and prosecution of cultural heritage destruction. The ongoing power struggles in the Near-East and the Northern Africa regions have had devastating effects on the people living in the region as well as on cultural heritage sites.[1] Nevertheless, such conflict-related destruction of cultural heritage is not new, as exemplified by the persecution of Jews prior to the Second World War. Different legal instruments such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict [2] and the United Nations Security Council Resolution 2347[3] were adopted to protect cultural heritage barring importance for all of humankind. By comparing these instruments and assessing different cases, I will study the evolving role of these factors in the legal qualification and prosecution of cultural heritage destruction. As such acts continue to take place in countries such as Syria and Afghanistan and cause the destruction of a millennium's worth of cultural memorabilia, a better understanding of the reasons behind such occurrences is key to effective prosecution.

Introduction

"The best way to take someone down is to strike him in the cultural and religious aspect, at everything that is important to him."[4]

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1 Cultural heritage is "The physical and intangible elements associated with a group of individuals which are created and passed from generation to generation" as defined by Derek Fincham in Derek Fincham, 'The Distinctiveness of Property and Heritage' (2011) 115 PennStLRev 641, 668.

2 UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) (1954 Hague Convention).

3 United Nations Security Council Resolution 2347 (24 March 2017) UN Doc S/RES/2347.

4 *Prosecutor v Ahmad al-Faqi al-Mahdi* (Witness Testimony) ICC- 01/12-01/15 (27 September 2016).

The current and constant power struggles in the Near-East and the Northern Africa regions has had devastating effects on the people living in the region as well as to its common cultural heritage sites.[5] Nevertheless, such conflicts in which cultural heritage has been affected by arms can be dated back to earlier times such as the persecution of Jews prior to the Second World War (WWII). The most notorious example of such persecution is illustrated by the Night of Broken Glass in which synagogues, Jewish homes and businesses were torched to the ground together with hundreds of years' worth of cultural memorabilia. In light of such horrendous outcomes, different mechanisms were established to tackle this issue and attempt to protect common heritage barring importance for all of humankind.

This paper will assess the terms cultural property and cultural heritage. Furthermore, it will look at the differences between tangible cultural property which include "monuments, buildings, cultural sites, and works of art such as painting, sculpture, or the like"[6] and intangible cultural property such as, oral poetry or musical traditions, ceremonial and ritual traditions and compare them to the wider definition of cultural heritage. Additionally, two well-known cases which had a major influence on the protection of cultural heritage and showcase the development curve of such protection provided by international criminal law will be assessed. To conclude, the current stage where international criminal law stands today will be discussed and exemplified by the *Al-Mahdi* case.[7]

I. Main International Instruments for the Protection of Cultural Heritage

Different measures for the protection of cultural heritage in the event of armed conflict can be dated back as far as 1863 when the Lieber code, which was published during the American civil war, was created and in which such protection is mentioned in several provisions amongst other topics. The Lieber Code was a set of instructions written by Francis Lieber for the better governing of the armed units of the United States in the field during the civil war. The Code inspired following mechanisms such as the 1899, 1907 Hague Conventions which were based on its texts to attempt at increasing the protection levels for cultural heritage. These two conventions very specifically mention that 'All seizure of, destruction or willful damage done to […], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.' [8] Nonetheless, one must not forget that these provisions do not operate in situations where military necessity dictates otherwise. Furthermore, incidents such as the torching down of the Leuven University Library and the bombing of the Cathedral of Rheims during the first World War proved beyond doubt the insufficiency and inefficiency of protective measures guaranteed by the existing provisions.

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5 Cultural heritage defined by Derek Fincham (n 1).

6 Jiri Toman, *Protection of Cultural Property in the Event of Armed Conflict* (1st edn, Dartmouth Publishing Company 1996) 40. In addition, the terms cultural property and cultural heritage will be used interchangeably in the paper.

7 *Prosecutor v Ahmad al-Faqi al-Mahdi* (n 4).

8 Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) art 56.

I.I The 1954 Hague Convention and its Two Protocols from 1954 and 1999

Consequently, the newly founded United Nations Educational, Scientific and Cultural Organization (UNESCO) in conjunction with the Dutch government decided to organise a conference for establishing new and improved ways to tackle the issue at hand. The outcome of this conference was the adoption of two sets of rules: the 1954 Convention on the Protection of Cultural Property during Armed Conflict (1954 Hague Convention) and its first protocol (1954 First Protocol) which was later updated by the 1999 Second Protocol. This was an important step towards better protection of cultural property as the convention is the first comprehensive international agreement having such protection as its main task. Additionally, the convention is to be appreciated for providing the first legal definition of cultural property which includes both moveable and immoveable property.[9] On the one hand the definition is highly esteemed by many since its broadness allows for a wide variety of objects to be included and protected by it. On the other hand, some argue that perhaps the definition is too broad, as Green contends that it is '[…] so vague that is clear, some measures of dissemination to inform the military […] will be absolutely vital […]'.[10] Moreover, the 1954 Hague Convention initiated a special protection regime for certain immovables which are of '[…] very great importance'. [11] Under this regime, attacking such protected immovables is prohibited and an obligation to refrain from placing such immovables under threat is placed on the parties. Nevertheless, this protection can be waived under the claims of 'unavoidable military necessity'.[12] This term, which will be discussed later in this paper, is regarded by many as a controversial issue since it is left relatively undefined which renders both the basic and special protection guaranteed by the Convention to be inefficient since such necessity can be interpreted in a wide plethora of ways. Additionally, the eligibility conditions of the special protection regime are perceived by many states to be stringent and as a result these states are often discouraged from considering to register their cultural properties for the programme. As a result of these rigorous conditions, there is only an insignificant amount of five properties registered for special protection, all of which are located in developed countries.[13]

The abovementioned shortcomings of the 1954 Hague Convention and the armed conflicts that were abundant in the end of the 1980s and beginning of the 1990s such as the Gulf War and the breakout of Yugoslavia, urged academics and legal scholars to emphasise the need for adopting a new instrument to tackle the faults of the Convention. This view, which was shared by UNESCO and its member states, led to a report in 1992 by UNESCO's director general in which it was maintained that 'Various factors seem to indicate that the Hague Convention no longer meets current requirements […]'.[14] After different alternatives were considered, it was decided that the best option to correct the faults found in the 1954

9 1954 Hague Convention (n 2) art 1.

10 Leslie Green, *Essays on the Modern Law of War* (2nd edn, Brill Nijhop 1999) 235.

11 1954 Hague Convention (n 2) art 8.

12 ibid art 11(2).

13 These properties are the Vatican, three properties in the Netherlands, and one in Germany.

14 Report by the Director-General on the reinforcement of UNESCO's action for the protection of the world cultural and natural heritage (1992) UN Doc 140 EX/1.

Hague convention would be to produce another protocol and as such, the 1999 second protocol was born.

The new protocol introduced new features one of which was a new category of protection which it referred to as 'enhanced protection'. This category applied protection to certain property which is of 'the greatest importance to humanity'. In addition to a property being of such great importance, in order for the protection to apply, two additional requirements must be met, namely, the property must be recognized as of great importance and protected by national law and a declaration must be made by the controlling party that it is not and will not use the property for military purposes.[15] After a property has been registered in the list, it becomes immune from military use and attack.[16] This immunity is rendered null and void once the property has been turned into military objective. However, even in such case, the attacking party must do its utmost to prevent damage to the property and if this is not feasible, then the Protocol obliges that the decision to carry on the attack must be taken at the 'highest operational level of command'.[17]

Another instrument which the 1999 Second Protocol introduced is individual criminal responsibility for violations of the articles found in the 1954 Hague Convention and its two protocols.[18] In addition, the Protocol also declares that such violations are to be subject to universal criminal jurisdiction, meaning that a member state in which an alleged criminal is located is under the obligation to either extradite or prosecute them.[19] Furthermore, in order to oversee the application of the of the Protocol, the 1999 Second Protocol Committee which comprised of twelve state parties, was created. The Committee, elected for a four-year term, also is the body determining, cancelling or suspending enhanced protection for a certain property.[20]

Besides the positive traditions the 1954 Hague Convention and its two protocols introduced, they also had a birth defect which bound them to life-long hardships. This, perhaps problematic, substantive issue was the inclusion of the notion of imperative military necessity. This necessity cannot and should not be equated with military convenience or even with ordinary notions of military necessity. It is defined by Kertsch as a situation in which 'the military objective cannot be reached in any other manner'.[21] Thus, when the Khmer

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15 UNESCO, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999) (1999 Second Protocol) art 10.

16 Marina Lostal, *International Cultural Heritage Law in Armed Conflict- Case Studies of Syria, Libya, Mali, The Invasion of Iraq and The Buddhas of Bamiyan* (Cambridge University Press 2017) 33.

17 1999 Second Protocol (n 15) art 13(c)(i). See the almost complete destruction of the Monte Cassino monastery by the allied forces during WWII after they had received mistaken intelligence report confirming presence of Axis armed forces in the vicinity of the property.

18 1999 Second Protocol (n 15) art 15.

19 In case an extradition agreement does not exist, articles 16 and 18 of the 1999 Second Protocol can make the required legal basis available. 1999 Second Protocol (n 15), art 16 and 18.

20 1999 Second Protocol (n 15) art 27.

21 Karl Partsch, 'Protection of Cultural Property' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press 1995) 377, 388.

Rouge fortified itself in and around the Angkor Wat to decrease the chances of attack, it violated the relevant rule.[22]

The 1999 Second Protocol further interprets the term imperative military necessity by determining that it can only be utilised when the 'cultural property has, by its function, been made into a military objective and there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective'. [23] On the one hand the notion of imperative military necessity is supported for its relative realistic and practical attitude which recognises and understands the reality of war. However, the term is also subjected to criticism by those who claim that it 'would weaken the rules obligating parties to refrain from military actions that might expose cultural property to damage or destruction'.[24] In addition, the protocol's definition is criticised since it is only applicable to those who signed and ratified it. This means that states which only ratified the 1954 Hague Convention and its first Protocol enjoy a wider margin of interpretation than the states which ratified both the convention and the two protocols.

I.II UN Security Council Resolution 2347 for the Protection of Heritage

UN Security Council (UNSC) Resolution 2347 is widely considered to be a 'game changer' for the international community in its attempt at protecting cultural heritage.[25] To understand this, one must first assess article 25 of the UN Charter which states that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council […]'.[26] Ratner explains this by saying that decisions taken by the UNSC do not need any further grounding in international law to be binding as they are by nature binding.[27] Therefore, this resolution which aims to enhance the recognition and awareness of endangered cultural heritage and which followed numerous resolutions made by the UNSC can be considered binding on all UN member states. In these past resolutions, cultural heritage was a secondary consideration at best as can be seen by the different resolutions following certain occasions like the wars in Afghanistan (1990s), the invasion of Iraq (2000s) and the ongoing conflicts in Mali and Syria (2010s).[28] However, dedicating an entire resolution for the protection of cultural heritage, as the Council did with Resolution 2347, signals and reaffirms that the

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22 According to Sandesh Sivakumran, the Cambodian civil war during the period in question was most likely international armed conflict.

23 1999 Second Protocol (n 15) art 6(a).

24 Wayne Sandholtz, *Prohibiting Plunder- How Norms Change* (Oxford University Press 2007) 182.

25 UNSC Res 2347 (n 3).

26 Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 01 UNTS XVI, art 25.

27 Steven Ratner, 'The Security Council and International Law' in David Malone (ed), *The UN Security Council- From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 601.

28 UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483, para 7; UNSC Res 2071 (12 October 2012) UN Doc S/RES/2071; UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085; UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139; UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199.

protection of cultural heritage plays an integral part in maintaining international peace and security.

II. Cultural Property or Heritage: Problematic Terms

The discussion regarding the definition of cultural heritage versus cultural property is a complex one and has yet to produce a globally exclusive definition. To begin with, certain authors interpret the term 'cultural property' to be more explicit than the term 'cultural heritage'; therefore, believe that both terms could be used to complement each other. However, others disagree and suggest that 'cultural property cannot be seen as a counterpart of the cultural heritage'.[29] This separation of terms is clearly visible when glancing at the 1954 Hague Convention and the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention which use the term 'cultural property' while Council of Europe regulations,[30] the 1972 World Heritage Convention, and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage use 'cultural heritage'.[31] Furthermore, Alper Taşdelen explains the difference between the two terms by arguing that '[c]ultural heritage emphasizes the (…) emotional bond between certain items and their source nation, whereas cultural property stresses (…) ownership and the fact that cultural objects are material goods which can be traded (…)'.[32]

The basic definition of cultural property is that something can be the property of a cultural group; thus, grant a set of collective rights regarding ownership, use, and in some cases, even title to the property if it is held in individual hands. The term, consequently, raises numerous questions relating to cultural groups, the nature of property and the correlation between them. Nevertheless, an attempt to decipher the meaning of 'Cultural heritage' will lead one to the definitions found in the 1954 Hague Convention and the 1970 UNESCO Convention which could suggest that the category of cultural heritage is broader than, and perhaps covers that of cultural property.[33] Furthermore, Blake proposes that the strongest

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29 Manlio Frigo, 'Cultural Property v Cultural Heritage: A "Battle of Concepts" in International Law?' (2004) 86 International Review of the Red Cross 367, 377.

30 See European Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970) ETS No 066; See also Convention for the Protection of the Architectural Heritage of Europe (adopted 3 October 1985, entered into force 1 December 1987) ETS No 121.

31 Janet Blake, 'On Defining the Cultural Heritage' (2000) The International and Comparative Law Quarterly 61, 65; The 1978 UNESCO Recommendation gives the following definition: 'movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest." UNESCO, 'Recommendation for the Protection of Movable Cultural Property' United Nations Educational Scientific Cultural Organization (28 November 1978).

32 Alper Taşdelen, *The Return of Cultural Artefacts: Hard and Soft Law Approaches* (Springer International Publishing 2016) 4.

33 Manlio Frigo (n 29) 369; The 1954 Hague Convention (n 2) art 1 defines cultural property as "movable or immovable property of great importance to the CH of every people; UN Educational, Scientific and United Nations Educational Scientific and Cultural Organization Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954) art 1; UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted on 14 November 1970, entered into force 24 April 1972) (1970 UNESCO Convention) art 2. The 1970 UNESCO convention states in article two that 'the illicit import, export and transfer of ownership of

argument against the use of the term 'cultural property' is that it is too limited in scope to encompass the possible range of both tangible and intangible cultural property.[34] Moreover, Blake states that the 'tangible' element relates only to physical remains which tend to naturally fall under law protecting cultural heritage, while 'intangible' usually relates to knowledge or ideas and clearly portrays the limitations of applying the term cultural property to such elements. Additionally, Prott criticizes 'cultural property' and suggests 'that it is a purely Western legal category which is far too narrow' and that it should be disbanded to allow for the broader term of cultural heritage to take place.[35]

To conclude this section, it is well established that the term cultural heritage is widely recognized and globally used by many non-legal professions in both the past and the present who are highly unlikely to use the term cultural property unless in a legal context. However, even the law which encompasses the notion of cultural property is losing its' importance as legal scholars increasingly recognize that it is inadequate for the vast range of matter covered by 'cultural heritage'.[36]

III. Protection of Cultural Heritage: Progress Curve

Historically not much consideration was given to the protection of cultural heritage sites in times of an armed conflict. The reigning motto was that the aim legitimizes the acts and therefore religious, ethnical, and cultural memorabilia were destroyed to allow for the aim to be realized. However, through different historical advancements this motto has suffered a considerable amount of damage and recently this damage has intensified with more and more international organizations such as UNESCO along with the United Nations itself condemning such actions.[37]

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cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property'.

34 "Tangible cultural property might include monuments and complexes of buildings, sites of archaeological or historic significance, ancient works of art (including rock carvings and cave paintings), ethnographic items, places associated with the development of a technology or industry, landscapes and topographical features, grave sites, sacred places and ritual sites, natural features endowed with special cultural significance to a people, items of clothing or jewelry, weapons, daily utensils, ritual items, musical instruments, objects associated with certain historical characters, coins, carved obsidian or ivory, fossils, skeletal remains, pollen samples, ancient copper or tin mines. Intangible cultural property might include the know-how related to a particular type of ship-building, oral poetry or musical traditions, ceremonial and ritual traditions, aspects of the way of life of certain societies and the special relationship between certain peoples and the land they inhabit." Janet Blake (n 31) 66. In addition, according to UNESCO, cultural heritage is the legacy of physical artefacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations. UNESCO, 'Tangible Cultural Heritage' (UNESCO Office in Cairo) <http://www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/> accessed 29 June 2019.

35 Lyndel Prott, 'International Standards for Cultural Heritage' UNESCO World Culture Report (UNESCO publishing 1998) 222-236.

36 Lyndel Prott and Patrick O'Keefe, 'Cultural Heritage or Cultural Property?' (2007) 1 International Journal of Cultural Property 307, 319.

37 UNSC Res 2347 (n 3); See also UNESCO Res 49 (2 November 2015) UNESDOC 38 C/48.

III.I Nuremberg International Military Tribunal- *Alfred Rosenberg*

In addition, international law was traditionally viewed as a body of laws created for states and used to govern their relations. Nevertheless, it has developed significantly over time and is now believed to apply to individuals and places a responsibility to adhere to it at both the domestic and international level in front of tribunals and courts. Perhaps the most visible start of this process was the ratification of the 1907 Hague Regulations concerning the Laws and Customs of War on Land (1907 Hague Regulations) which, although are thought by many to fail at protecting cultural property during the First World War (WWI),[38] were used as customary international law by the Nuremburg International Military Tribunal (Nuremberg Tribunal) to prosecute German major war criminals for their war-crimes in WWII.[39]

Many scholars contend that the Nuremberg Tribunal had a sole purpose of prosecuting German high-ranking officials only in relation to the mass atrocities Germany committed against civilian populations under their supervision. The abovementioned is perhaps true, however, in some of the Nuremberg cases the contrary is upheld. The Nuremberg trials set a precedent for crimes committed against cultural heritage and established individual criminal responsibility for such crimes. A closer assessment of article six of the Charter of the International Military Tribunal (IMT Charter), which the court used in its judgements, reveals that war crimes possess a wide definition which includes 'plunder of public or private property' as well as the 'wanton destruction of cities, towns or villages' not justified by military necessity.[40]

One of the German high-ranking officials to be prosecuted was Alfred Rosenberg, who was one of the most influential Nazi ideologists. During his career, Rosenberg held many highly authoritative posts. One of these roles was the head of the Einsatzstab Rosenberg unit which '…became a synonym for the worst plundering of art works in the modern history'.[41] Rosenberg's case depicts the aforementioned in an excellent way since, as an expression of individual criminal responsibility, he was tried and found guilty of several war crimes. This includes the part he played in organizing and directing the infamous Einsatzstab Rosenberg which plundered museums and confiscated different artifacts amongst other crimes.[42]

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38 The Versailles Treaty, which marked the end of WWI, established extensive reparations caused by the Germans. Several looted artefacts were forcefully returned to their original owners, for example, 'The Germans were ordered to return the original Koran of the Caliph Othman, which was removed from Medina by the Turkish authorities, and the skull of the Sultan Mkwawa, which was removed from the Protectorate of German East Africa, to the King of the Hedjaz.' Peace Treaty of Versailles (Versailles 28 June 1919) article 246. However, it must be remembered that although reparations were ordered, '…no German was ever prosecuted for damage to cultural property during World War I …', David Keane, 'The Failure to Protect Cultural Property in Wartime' (2004) 14 DePaul Journal of Art, Technology & Intellectual Property Law 1, 8.

39 David Keane (n 38) 5.

40 Charter of the International Military Tribunal (adopted on 8 August 1945) (IMT Charter), art 6(b).

41 Victoria Birov, 'Prize and Plunder: The Pillage of Works of Art and the International Law of War' (1998) 30 NYUJIntIL&Pol 201, 210.

42 Nuremberg International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg 1947) 295 <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> accessed 29 June 2019.

Regardless of his conviction, several scholars are raising question of doubt regarding the integrity of those who adjudicated the case. Birov writes that '…countries presiding over proceedings, [for example] the former Soviet Union, participated in their own cultural pillage (…) in retaliation for Hitler's destruction of cultural heritage in Russia'.[43]

Regardless of the controversies surrounding it, the outcome of Rosenberg's trial stands as an important precedent according to which individuals may be held criminally liable for the pillage and destruction of cultural heritage. Birov adds that '…this precedent is enormously influential in advancing international law in this area'.[44]

III.II International Criminal Tribunal for the Former Yugoslavia- *Pavle Strugar* and *Duško Tadić*

On 6 December 1991, the old city of Dubrovnik was heavily bombarded as part of the hostilities happening at that time in the Balkan states. One of the men responsible for this military campaign was Pavle Strugar, the commander of the Second Operational Group of the Yugoslav People's Army (JNA) whom were operating in the wider Dubrovnik area. As part of their operations in the area, the group took part in the unlawful and highly criticized shelling of Dubrovnik's old city. This tragic occurrence turned out to be of great significance since it led to a further development of cultural property protection under international law. In the aftermath of the hostilities in the former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was created by a UN Security Council Resolution 827 with the main purpose of prosecuting international humanitarian law violations during the hostilities.[45]

One of the cases brought before the tribunal was on Pavle Strugar, who was tried for his responsibility and role in the bombardment of Dubrovnik's old city and found guilty of the war crime of 'destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'.[46] The ICTY chamber found him guilty in two instances and chose to portray the importance of cultural heritage protection by noting that cultural heritage destruction is a war crime irrespective of whether it was an international or non-international conflict since 'the jurisprudence of the International Tribunal indicates that protection of cultural property in customary international law applies in all situations of armed conflict'. [47] Furthermore, the ICTY stated at the occasion of the conviction of those responsible for the shelling of

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43 Victoria Birov (n 41) 211; In addition, 'Estimates reveal that 1,000,000 books, 175,000 coins and medals, and 55,000 paintings, sculptures, and artworks taken from Germany are being exhibited in Russian state museums.' 'Russia Keeps WWII-Looted' (1998) Newsday.

44 Victoria Birov (n 41) 211.

45 UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

46 Updated Statute of the International Criminal Tribunal for the former Yugoslavia (adopted 25 May 1993, published September 2009) art 3(d) <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> accessed 29 June 2019.

47 *Prosecuter v Enver Hadzihasanovic and Amir Kubura (*Appeals Chamber) ICTY-01-47 (11 March 2005) para 44-48.

Dubrovnik, that 'the destruction of assets listed on the World Heritage List constituted a factor of aggravated individual responsibility'.[48]

In addition to the *Strugar* case, the ICTY also gave a very important ruling in the highly influential *Prosecutor v. Tadic* (*Tadic*). Duško Tadic, a Bosnian Serb, was born in Kozarac, Bosnia and Herzegovina in 1955. He became a leading member of the Serbian Democratic Party (SDS) which is still considered by many to be an extremely nationalistic party which strives for the creation of Greater Serbia and is known for its xenophobic ideologies.[49] As a leading member of the SDS and different paramilitary groups, Tadic was charged with multiple offences including war crimes. However, for the purpose of this paper, the importance of this case stems from it being the ICTY's declaration that the intentional destruction of cultural heritage is criminalized under customary international law which cemented protection of cultural heritage as binding upon all states.[50]

In conclusion of both cases mentioned above, a significant amount of progress was made by the ICTY in protecting cultural heritage during armed conflict. The Tribunal crystalized destruction of cultural or religious heritage as a war crime and through its elaborate case law shed light on future prosecution of such crimes.[51]

IV. Protection of Cultural Heritage: Current Stage

IV.I International Criminal Court (ICC): *Ahmad Al Faqi Al Mahdi (Al Mahdi)*

Another significant sign of progress is the initiation of investigations into the situation in Mali and the subsequent production of an arrest warrant against Ahmad Al Faqi Al Mahdi (Al Mahdi), one of the religious leading members of the Salafi-jihadist group called Ansar Al-Din. This group is regarded to be accountable for the vast majority of crimes against cultural heritage committed during the internal armed conflict in Mali between 2012 and 2013.[52]

Al-Mahdi, also known as Abou Tourab, was born in a city called Agoune which is approximately 100 kilometers from the historic town of Timbuktu. He served as the head of the 'Hisbah' also referred to as the Islamic religious police in Timbuktu and was one of the four Ansar Al-Din top commanders in the city during its vicious occupation of the city in 2012. On 26 September 2015, Al-Mahdi was extradited from Niger, to which he had escaped from Mali, to the custody of the ICC, who indicted him on numerous charges of war-crimes, specifically those found under Article 8(2)(e)(iv) of the Rome Statute which states that war

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48 Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (OUP 2016) 129.

49 Greater/ Great Serbia is a term used by Serbian Nationalists to describe a Serbian state which would incorporate all traditionally important regions, including some which are outside of Serbia but are populated by Serbs; In addition, the US government is still investigating and sanctioning the SDS as can be seen in US Department of the Treasury, 'Recent OFAC Actions' (US Treasury, 2004) <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20041216.aspx> accessed 29 June 2019.

50 *Tadic Case* (Decision) ICTY-94-1 (2 October 1995), para 98.

51 Andrzej Jakubowski, 'State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts' (2015) 1 Santander Art and Culture Law Review 147, 154.

52 Mapping Militant Organizations, 'Ansar Dine' (Stanford University, 2009) <http://stanford.edu/group/mappingmilitants/cgi-bin/groups/print_view/437> accessed 29 June 2019.

crimes include 'intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'. [53]

Scholars hailed the ICC for its handling of the *Al-Mahdi* case and called it a big victory for the ICC and international criminal law. To the surprise of many, the case unfolded relatively quickly and in an efficient manner. From the official Malian referral of the case to the ICC until the end of the Al Mahdi trial with the granting of the judgement only four years had passed, a record time for the notoriously slow court.[54] Although some have applauded the quick and efficient prosecution of Al-Mahdi, others criticized the court's choice of adjudicating the relatively unknown Al-Mahdi for a rather insignificant crime.[55]

The conviction was a noteworthy legal development in international criminal law for several reasons. Firstly, it showcased the ICC prosecutor's interest in adjudicating cases in which cultural heritage sites are deliberately targeted and wrecked during armed conflicts. Furthermore, such adjudication gives out signals that the ICC will not tolerate future violations of international criminal law regarding the protection of cultural heritage and will vigorously prosecute such attacks by those found guilty.[56] The abovementioned is considered by many as an important development especially in such time where armed conflicts around the world cause a significant amount of damage to cultural property.[57]

Secondly, *Al-Mahdi* was the first case brought before the ICC for prosecution which concerned the destruction of cultural heritage and it may offer insights into the different layers of substantive international criminal law in the specific area and how the ICC interprets the relevant legal provisions found in the Rome Statute in addition to other sources of law and how it uses them to define 'war crime' in the context of destruction of cultural property.

Thirdly, Al Mahdi, for the first time in the court's history, pled guilty in exchange for a betterment in his sentencing.[58] Although the facts of *Al-Mahdi* are quite unique, it is interesting to examine the effects that admission of guilt, expression of remorse and proper

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53 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(e)(iv).

54 Mark Kersten, 'Some Thoughts on the al Mahdi Trial and Guilty Plea' (2016) Justice in Conflict <https://justiceinconflict.org/2016/08/24/some-thoughts-on-the-al-mahdi-trial-and-guilty-plea> accessed 29 June 2019.

55 Amnesty International's Senior Legal Advisor Erica Bussey said that '…we must not lose sight of the need to ensure accountability for other crimes under international law, including murder, rape and torture of civilians…'; Amnesty International, 'Mali: ICC trial over destruction of cultural property in Timbuktu shows need for broader accountability' (2016) Amnesty International <https://www.amnesty.org/en/latest/news/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/> accessed 29 June 2019.

56 Marina Aksenova, 'The Al Mahdi Judgment and Sentence at the ICC: A Source of Cautious Optimism for International Criminal Justice (2016) EJIL <https://www.ejiltalk.org/the-al-mahdi-judgment-and-sentence-at-the-icc-a-source-of-cautious-optimism-for-international-criminal-justice/> accessed 29 June 2019.

57 Marina Lostal, 'Prosecutor v Al Mahdi: A Positive New Direction for the ICC?' (2016) OpinioJuris <http://opiniojuris.org/2016/10/26/prosecutor-v-al-mahdi-a-positive-new-direction-for-the-icc/> accessed on 29 June 2019.

58 Mark Kersten (n 54).

cooperation with the investigative process had on the court's judgement. The *Al-Mahdi* case might be used as a guide for future cases, considering the different methods of action used by the ICC when it deals with plea agreements and might shed some light on sentencing of defendants who admit their guilt to the court.

Al-Mahdi is a great example of a growing idea according to which the destruction of cultural heritage should be equated to an attack on the values of humanity as a whole. Moreover, since law is closely connected to the general norms of society, the increasing recognition of international law that the destruction of cultural heritage is an international crime can and should continue. Regardless of the few cases ending up in courts, it is supremely important for the protection cultural heritage, that international criminal law regard such attacks in a serious manner which should lead to severe consequences.[59]

V. Conclusion

Recent armed conflicts such as those in Syria, Iraq, Afghanistan and Mali feature multiple issues which the international community must stand up to and act against when attempting to protect cultural heritage armed conflicts. These challenges and the severity of the threat stemming from them, oblige the international community to reach an agreement regarding whether to use the term cultural property or cultural heritage and how state should act to protect it.

This paper showcased the extensive debate regarding the different terms and discussed the progress of cultural protection by the international community using international law. Regardless of the optimistic message this paper wishes to convey, perhaps international law cannot invest more effort into protecting cultural property in times of armed conflict because frequently, the majority of that effort is used to protect life. This is the reality of war, and despite the increasing protection provided by international law, war is always accompanied by uncertainty. Keane adds that '[i]f war cannot be prevented, it may seem that the destruction of cultural property cannot be prevented'.[60] Nonetheless, it is a prevailing hope that as the protection of cultural heritage increases in capacity and international law '…erodes the impunity of wartime…' that the perceived legitimacy of the regime governing cultural heritage will gain a wider margin of acceptance.

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59 Amy Strecker, 'The Destruction of Cultural Heritage as a War Crime: The Al Mahdi Case (2016) Leiden-Delft-Erasmus <https://www.leiden-delft-erasmus.nl/en/news/the-destruction-of-cultural-heritage-as-a-war-crime-the-al-mahdi-case-at-the-icc> accessed 29 June 2019.

60 David Keane (n 38) 38.

Legality of Autonomous Weapons Systems and their Implications on Existing International Humanitarian Law Principles Approach: New Haven School of International Legal Theory

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AUTONOMOUS WEAPONS; NEW HAVEN APPROACH; INTERNATIONAL HUMANITARIAN LAW

Abstract

The objective of this paper is to legally analyze the issues surrounding the use and regulation of Autonomous Weapons Systems (AWS) and their implications on the existing principles of International Humanitarian Law (IHL). The research and mode of approach towards this issue will be directed in consonance with the New Haven School of International Legal Thought. The paper will begin by defining the terms 'AWS' and 'New Haven school' for the purpose of this study. Subsequently, it will highlight the various notable issues of contention with relation to existing principles of IHL. In doing so, the paper will earmark these issues under the scope of the New Haven method and conclude exclusively to that school of international thought.

In its conclusion, this paper will emphasize the need for AWS in today's world, and how regulation, rather than prohibition, would be the ideal solution towards addressing the conundrum of their legality. It will also distinguish the key elements of the New Haven school and how these were directly incorporated into this paper so as to arrive at the predicated resolution, emphasizing the need for legality of AWS to attain world peace and order.

Introduction

It is no secret that today the international community faces a conundrum regarding the regulation and legality of Autonomous Weapons Systems (AWS). On one hand, most States, civil society organizations and people across the world have called for an outright ban on the use of any fully automated weapons (FAWs) in times of war,[1] considering the grave nature of their operation (whereby there is no human control, implying a regime of non-accountability). However, while the concern over a lack of responsibility for the acts of these machines takes the limelight, there is still active work being done in relation to

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1 Campaign to Stop Killer Robots <http://perma.cc/BYN8-YMQP]> accessed 12 May 2019.

progress in this line of technology,[2] albeit only by powerful, developed nations. This boils down to States acquiescing to the not-so-distant future, where they see the extreme likelihood of robots taking over human warfare and changing the dynamics of International Humanitarian Law (IHL) as we know it. This is not only affecting our existing legal and moral framework but creating an atmosphere of social change.

This has always been the case. War is an ever-evolving aspect of society, as can be evidenced through history. *Jus in bello* was never just a mere legal aspect distinctive from the policymakers behind it, as it addressed many different actors including combatants, civilians, States and even civil society groups. The commonality amongst all of them was their fight to ensure the achievement of the community goal of peace, with primary consideration towards human life and dignity.

Mankind has always adapted and evolved in a manner that endeavors to ensure efficiency in war and the achievement of the ultimate goal of peace, with the minimal possible loss. It is at this juncture that AWS take center stage. As can be seen, there exists no legal regimen for automated weapons and their use, considering the nature of this technology is still at its infancy.[3] However, prior to that, we must answer the key question of what Autonomous Weapons Systems are and whether they are in use already.

I. Definition of AWS

Before turning to the law, it is necessary to frame the issue and define it. According to the International Committee of the Red Cross (ICRC), fully autonomous weapons systems are defined as 'any weapon system with autonomy in its critical functions—that is, a weapon system that can select (search for, detect, identify, track or select) and attack (use force against, neutralize, damage or destroy) targets without human intervention.'[4] This definition does not include *human in the loop* (or) *human on the loop* weapon systems which are already in use today.[5] For the purpose of this study, the focus will adhere to FAWs, as defined by the ICRC.

Therefore, from the above definition, the crux of full autonomy is a capability to identify, target, and attack a person or object without human interface. In short, FAWs require no human input. Once they have been activated, they possess the power to attack of their own accord. This creates a rippling effect in the arena of international law, more specifically that of war-time regulation, or IHL. Who would be responsible for the acts of these machines? Can there still be a legal framework for war if humans are replaced?

I.I New Haven Approach to International Law

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2 Jeffrey Thurnher, 'The Law That Applies to Autonomous Weapons Systems' (2013) 17 American Society of International Law Insights 4.

3 John Lewis, 'The Case for Regulating Fully Autonomous Weapons' (2015) 124 Yale Law Journal 1309, 1312.

4 Neil Davidson, 'A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law' (2017) UNODA Occasional Papers, No 30, 5.

5 Human Rights Watch, 'Losing Humanity: The Case Against Killer Robots' (2012) <www.hrw.org/ sites/default/ files/reports/arms1112ForUpload_0_0.pdf> accessed 12 May 2019. See also Michael Schmitt, 'Autonomous Weapons Systems and International Humanitarian Law: A Reply to the Critics' (2013) 4 Harvard National Security Journal 231 (emphasis added).

The New Haven School is a policy-oriented approach to international law, pioneered by Myres S Dougal, Harold D Lasswell and Michael W Reisman.[6] According to this theory of international law, the legal system is principally based on sociological choices made in furtherance of any given policy. It is an interdisciplinary study of sociological elements and their direct impact on law and policy. The primary jurisprudential and intellectual tasks are the prescription and application of policy in ways that maintain community order and simultaneously achieve the best possible approximation of the community's social goals.[7] Rather than being just a set of rules, law is a policy-oriented process of decision making; it is embedded in society and its goal is to promote values, in particular human dignity.[8]

Through the course of the paper, I will seek to highlight the legality of AWS through the lens of this school of international law, by drawing tenets to various existing IHL principles. This paper will also discuss the possible extension of the existing legal framework to accommodate the use of these weapons in order to achieve society's common goals of world peace and order.

II. Objectives of War: Development of Society, War and Peace

From a policy-oriented approach to legality, the need for AWS is of prime importance. The battlefield tempo outpaces a soldier's ability to make rational decisions in combat. To eliminate mishaps that stem from the same, it is imperative to look at other forms of intelligent, autonomous decision-making in the conduct of war.[9] AWS can reduce the number of lives lost in combat, access areas otherwise inaccessible or dangerous and enhance force multiplication capabilities (ie referring to a factor or a combination of factors that give personnel or weapons the ability to accomplish greater things than without it). [10]

It is suggested that continued advances in autonomy will result in a reduction in atrocities.[11] AWS solves the problem of 'scenario fulfilment'- a phenomenon whereby humans in stressful situations neglect or distort new information to fit their pre-existing beliefs. Therefore, AWS are an ethical imperative since they are invulnerable to patterns of premature cognitive closure.[12]

The ultimate goal of any armed conflict is to maintain or restore peace and world order. To achieve this goal without causing egregious violations of human rights, it is

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6 BS Chimni, *The Policy-Oriented or New Haven Approach to International Law: The Contributions of Myres S Dougal and Harold Lasswell* (Cambridge University Press 2017) 104–178.

7 Michael Reisman, 'The View from the New Haven School of International Law' (1992) Faculty Scholarship Series 867.

8 Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (OUP 2016) Ch 5.

9 Ronald Arkin, 'The Case for Ethical Autonomy in Unmanned Systems' (2010) 9 Journal of Military Ethics 4, 332.

10 US Department of Defence, Autonomy in Weapon Systems (21 November 2012) (Directive)USD(P) 3000.09, 92.

11 Ronald Arkin, 'Governing Lethal Behaviour in Autonomous Robots' (2009) Georgia Tech Mobile Robot Laboratory.

12 Scott Sagan, 'Rules of Engagement' in Alexander George (ed), *Avoiding War: Problems of Crisis Management* (Westview Press 1991).

necessary to comply with the legal framework established for conducting lawful armed conflict. Nevertheless, this would still involve inevitable human casualties, as humans are the main actors in any war or conflict. How would conflict eliminate the human aspect of war and the violence that ensues through such a struggle? A military objective may be attacked under the condition that, to attain the advantage sought, the attack is the least intrusive option available, with the minimal possible collateral damage.

It is under this hypothesis that AWS could signal the end of war as we know it and, more importantly, ensure the preservation of human dignity and life. The introduction of machines into armed conflict will reduce the involvement of humans. The retaliating force, whether it be a State or any other armed opposition group, will realize the threat they face, and the entire purpose of their struggle will come into question.

Through the years, what we have come to observe is that, with the advancement of weaponry, there seems to be greater reluctance to engage in conflict. In fact, we live in increasingly peaceful times. On average, fewer humans are experiencing violence today than ever before,[13] and there are fewer and less violent armed conflicts than has previously been seen.[14] At the same time, warfare capabilities are growing and to be able to stay ahead of this curve requires the advancement and use of newly developed weapons.

It is, however, imperative to note that the call for development and legality of FAWs does not imply a reduction in accountability for violations of the laws of war. Rather, it is suggested that it would create a larger sense of accountability, as the use of FAWs has positive effects not only on the conduct of armed conflict but on the greater good of the human race.

III. Conformity with International Humanitarian Law Principles

The development or creation of any weapon should be done in accordance with the law of armed conflict (LOAC). With specific reference to AWS, their development and use would be required to conform to the core principles of IHL, namely distinction, proportionality, humanity and military necessity.[15] Under Article 36 of *Additional Protocol I to the Geneva Conventions of 1949* (Additional Protocol I),[16] States must review new weapons systems to ensure that they are not indiscriminate in nature or likely to cause unnecessary injury.[17]

III.I Proportionality

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13 Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Penguin Books 2012).

14 Joshua Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide* (Penguin Publications 2011).

15 Greogory Noone and Diana Noone, 'The Debate over Autonomous Weapons Systems' (2015) 47 Case Western Journal of International Law 1, 28.

16 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 36.

17 Jeffrey Thurnher, 'The Law that Applies to Autonomous Weapon Systems' (2013) 17 American Society of International Law Insights <www.asil.org/insights/volume/17/issue/4/law-applies-autonomous-weapon-systems> accessed 12 May 2019.

The proportionality principle will not be violated by AWS due to the existence of 'collateral damage estimate methodology' (CDEM). This is a procedure that takes several factors into account, such as the precision of weaponry and the probability of civilian presence near the target. If the probability of collateral damage is higher, the required level of command approval for AWS can also be programmed as higher, producing reliable results.[18] Since the standard of assessing the proportionality of an attack is 'reasonableness', any assessment of proportionality must be based on information reasonably available at the time of attack. It is only logical that the same standard be applied to AWS.

III.II Distinction

Distinction is operationalized in a number of rules, the two most fundamental being the customary law prohibitions on making civilians and civilian objects the object of an attack.[19] These rules are codified in Articles 51(2) and 52(1) of *Additional Protocol I* respectively. Evidently, this implies that it would be unlawful to use AWS to directly attack civilians or civilian objects. That is the case for all forms of weaponry, and thus this argument against the use of AWS must be ignored as a red herring.[20]

This issue is of specific interest in relation to the element of doubt. Where an issue arises regarding the status of an individual in an armed conflict, Article 50(1) of *Additional Protocol I* codifies the presumption that the said individual must be immune from attack. The factor of doubt is to be considered in terms of human reasonableness and to translate it to automated weapons systems therefore poses an apparent challenge.

It is at this juncture that the regulation of AWS can levy a higher sense of accountability for an attack made by a FAW. Further developments can be made, such as establishing a higher threshold for the deployment of AWS.

III.III Martens Clause & Humanity

Research suggests that AWS could lessen the effects of war. This follows the reasoning that, where a soldier might be forced to make lethal defensive decisions, the AWS might be in a position to incapacitate instead of kill or be programmed not to 'prioritize their continued existence',[21] thereby postponing the use of force and giving effect to the Martens Clause (ensuring that an individual is protected by the principles of humanity when laws of war are inapplicable).[22] Arguments for AWS development claim that it can reduce human casualties, collateral damage and war crimes by making war less inhumane through lessening the human element of warfare.[23] That is to say, AWS may perform better than humans because when combatants do violate IHL, it is usually for one or more

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18 Schmitt (n 5) 19.

19 Schmitt (n 5) 15.

20 Noone (n 15) 29.

21 P Lin and others, *Autonomous Military Robotics: Risks, Ethics and Design* (prepared for the US Department of Navy, Office of Naval Research, 2008) 52.

22 Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 317 International Review of the Red Cross.

23 Arkin (n 9) 332–339.

of several reasons, among which are fear, anger, frustration, revenge, stress, and self-preservation.[24]

This rationale is identical to that which highlights the effectiveness of Unmanned Aerial Vehicles (UAVs or 'drones') in complying with IHL. UAV operators do not have self-preservation concerns forcing them to make a split-second decision on whether or not to pull the trigger. They have the ability to follow their target and acquire more information from multiple sources that will allow them to make the best decision possible.[25]

Considering the uncertainty inherent in armed conflict and the cataclysmic disasters during war that can result from human error, a policy-oriented approach based on decision-making that aims to maintain human dignity can possibly be the solution in the future.

III.IV Accountability

This paper analyzes the issue of the legality of AWS from the basic premise that the purpose of IHL is to minimize harm as understood in terms of suffering— primarily the suffering of civilians, but also the suffering of combatants.[26] Arguments have been made that armed conflict 'is about committing evils and choosing between evils'.[27]

While the 'autonomous' nature of FAWs appears to distance decision-makers from the harms they inflict, commanders remain responsible for the initial use of FAWs. The mere fact that a human might not be in control of a particular engagement does not mean that no human is responsible for the actions of the autonomous weapon system.[28] A commander must give the order to deploy a FAW and set the parameters of its use. The use of AWS does not take away responsibility from humans but in fact increases the possibility of holding humans accountable for war crimes. By way of giving the order and overseeing the operation of the FAW, the commander by no means absolves him- or herself of responsibility for the actions of the weapon system. In assessing accountability, focus must be shifted from the immediate loop of the targeting decision to the 'wider loop', where there is always human involvement in the activation process.[29] Accountability

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24 Ryan Tonkens, 'The Case Against Robotic Warfare: A Response to Arkin' (2012) 11 Journal of Military Ethics 149, 152–155.

25 Michael Schmitt, 'Unmanned Combat Aircraft Systems (Armed Drones) and International Humanitarian Law: Simplifying the Oft Benighted Debate' (2012) 30 Boston University International Law Journal 595, 597.

26 Eric Posner, 'A Theory of the Laws of War' (2003) 70 University of Chicago Law Review 297, 299–300; Michael Schmitt, '21st Century Conflict: Can the Law Survive?' (2007) 8 Melbourne Journal of International Law 443, 445.

27 Gabriella Blum, 'The Laws of War and the "Lesser Evil"' (2010) 35 Yale Journal of International Law 1, 39.

28 William Fenrick, 'The Prosecution of International Crimes in Relation to the Conduct of Military Operations', in Terry Gill and Dieter Fleck (eds), *The Handbook Of The International Law Of Military Operations* (OUP 2010), 501–505.

29 UNGA 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heynes' (9 April 2013) A/HRC/23/47, para 77.

could also be assigned in advance,[30] and a requirement introduced to install recording devices that would enable transparency, reinforcing the credibility of IHL.[31]

IV. Conclusion

This paper has set forth a foundational argument for the legality of AWS, through the lens of the New Haven Approach to International Law. Three key elements[32] of this approach separate it from the clutches of a positivist or realist structure, namely:

IV.I Decision-Making Phase

This is where a decision can be taken that fosters social values which are worthy of protection. Such values will also be used as benchmarks to judge the appropriateness of the decision. In the instant case, the social value under protection is that of human life and dignity and, in consequence, the emphasis on peace over war. I am under the strong conviction that, by allowing for the creation of a legal regime for AWS, both these objectives can be accomplished.

IV.II Emphasis on Contextuality

Another important aspect of the New Haven School is that any decision must take into account a number of factors, which include the accumulated trend of past decisions, the institutional and temporal aspects of a situation and the values and goals by which one should be guided and pursue. Under this pretext, our history of war and its evolution have shown a transcendence in the use of weaponry, from rudimentary tools such as bows and arrows, to ammunition and long-range guns, to the use of bombs and distant targeting mechanisms. Throughout, the goal has always been to have the upper hand in an armed conflict and to be able to cause maximum harm to the enemy while facing minimal suffering. The use of AWS would accomplish that goal and satisfy the condition based on contextuality.

IV.III Decision Must Presuppose a Policy Choice

As stated by Gerald Fitzmaurice and Percy Spenders in their joint dissenting opinion in the *South West Africa* cases, 'law cannot just be found "out there".'[33] It involves a process of choice between different arguments based on legal plausibility, and the New Haven School provides a methodology whereby such decisions can be evaluated.

On this premise, the entire argument regarding the legality of AWS can be summarized insofar as the urge towards a push for regulation, rather than prohibition, of AWS is concerned. Based on an interdisciplinary pretext, the consequences of such a legal

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30 Ronald Arkin, 'The Robot Didn't Do it: A Position Paper for the Workshop on Anticipatory Ethics, Responsibility and Artificial Agents' (University of Virginia 2013) 1.

31 M Sassòli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' (2014) 90 International Law Studies of US Naval War College.

32 Bianchi (n 8) 96.

33 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (Preliminary Objections, Judgment) [1962] ICJ Rep 319 Joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice 465, 466.

regime backed by sound policy measures may result in the following circumstances:

A. *A complete end to war*:
If war transforms from an act of actively killing human adversaries into an act of tactical and strategic combat engagement of warfare machinery, the utility of war might diminish.

Moral improvements in the battlefield:

B. As mentioned above, the reduction of human involvement in war may lead to the elimination of all biases and errors prone to mankind.

It is true that these would not be the only ramifications of war with FAWs, as there are reasonable grounds to expect that the threshold of war may decrease alongside a plausible increase in the abuse of power by powerful nations against their powerless counterparts. These consequences are overshadowed by the presence of existing legal regimes to govern armed conflict as well as the commitment to an overall community goal of maintaining peace and order. Therefore, regulation of legality rather than an outright prohibition can position the world towards achieving such an objective.

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