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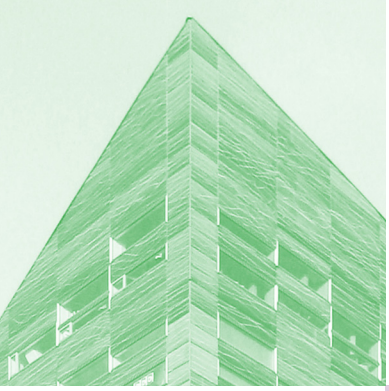

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CRAFTING HORIZONS

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PRESIDENT'S NOTE

Dear reader,

Hereby I would like to proudly introduce 2nd 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(2) presents you with several articles on the various topics of International Law. Importantly, this issue has a particular ficus on the right to self-determination in 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, Dr. Michael Hanson discusses how the global fight against terrorism is impeded by States providing resources to terrorist groups. He argues that the enforcement of international laws against terrorism must be strengthened, through diplomatic pressure, strong sanctions and increased assistance to failed States, in order to adequately tackle State sponsorship of terrorism and therefore succeed in suppressing terrorist groups and their activities.

In the second article, Dr. Brian-Vincent Ikejiaku explores the right of economic self-determination in third world States, arguing that these States are effectively prevented from exercising this right due to control, exploitation and domination by powerful States, international financial institutions and multi-national corporations. He uses the well-being and liberal-economic legal theories to conclude that efforts to realise economic self-determination in the third world can only succeed if Western States give up this hegemonic control.

Vincent Iwunze critically examines the ways in which UNCLOS has enhanced and stabilised fishing rights for the benefit of all States, contesting that these benefits have, as yet, eluded developing coastal States. Features of UNCLOS, including the EEZ and the concept of allowable catch, are discussed to highlight the perceived benefits of the Convention. Thereafter, the challenges to developing States, such as poor fisheries management and lack of subsidies are discussed, before the author recommends measures to improve the exploitation of fisheries by developing countries.

In the fourth contribution, Jean Pierre Mujyambere considers the international crimes committed by Yerodia in the DRC, with a focus on the obstacles faced by his victims in bringing their case before domestic and foreign courts. He argues that the decision of the ICJ to uphold Yerodia's immunity contributes to shielding Yerodia from justice and silencing the victims.

Gino J Naldi discusses the right to self-determination in the context of the ICJ's recent Advisory Opinion on the separation of the *Chagos* archipelago from Mauritius. Highlighting

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the continued relevance of the issue of colonial self-determination, he concludes that the Opinion gives greater clarity to the law in this regard and that negotiating a sensible solution which Mauritius can freely accept or reject is the best way forward.

In the next contribution, Leyla-Denisa Obreja explores States' obligations of due diligence in preventing intimate partner violence. The article discusses the obligation to address both primary and secondary human rights violations to this end and the relationship between State intervention and the right to private and family life. It is argued that participation of the victim in the risk-assessment process is key to effective State intervention.

Lastly, Shadi Sakran considers the question of whether the Palestinian people are entitled to exercise the right to self-determination. In so doing, he considers the constitutive and declaratory theories of recognition, deciding that neither is satisfactory in this regard. He concludes that the right to self-determination is linked inextricably to the status of the territory inhabited by the relevant peoples and that peoples in occupied territories, such as Palestine, are entitled to exercise that right.

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 is focusing more on promotional activities in order to increase its visibility within the University of Groningen and internationally. Due to this, GroJiL will be organising a series of academic and social events deemed International Law Evenings to discuss various topics within international law from different standpoints, inviting students of the University of Groningen to join in on the discussion through additional interactive activities. The Evenings will be planned in collaboration with student associations and student-run non-governmental organisations of Groningen. The evenings would ultimately achieve the goals of the journal to discuss and strive towards innovations of international law by starting conversations amongst the students of the University of Groningen.

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

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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Open Submissions

Articles on the topic of self-determination

State Sponsorship: An Impediment to the Global Fight against Terrorism

Dr Michael Hanson*

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Keywords:
TERRORISM; STATE TERRORISM; STATE-SPONSORED TERRORISM; GLOBAL FIGHT; CIVILIAN; NON-COMBATANT AND LEGAL SETUPS

Abstract

Following the terrorist attack on the United States of America on 11 September 2001, global efforts against terrorism have increased. Notwithstanding these efforts, terrorist attacks continue across the globe amidst accusations that some States provide support for terrorists. This work examines the State sponsorship of terrorist groups in light of the global fight against terrorism. The methodology used here is doctrinal. This work finds that the continuous provision of resources to terrorist groups by some States against the dictates of relevant existing international legal setups operates as an impediment to the global fight against terrorism. It concludes that cutting off State support for terrorists remains the *sine qua non* for achieving success in the global war against terror. To do this requires the strengthening of international laws on terrorism, increasing diplomatic relations to expose involved States, imposing and enforcing strong sanctions against supporting States, reduction of such States' meddling in activities of other countries, increased assistance to failed States and decreased assistance to involved States.

1. Introduction

The earliest cases of what could be considered as acts of terrorism were perpetrated by the Jewish Sicarii (dagger men) and the Zealot group, over 2000 years ago in Rome.[1] This was followed by the assassins in Persia (now Iran and Syria) between 1090 and 1272.[2] In spite of the acts of these groups, it was only during the French Revolution of 1789–1799 that the phrase 'State terrorism', or 'State-sponsored terrorism', was used to identify the acts of violence carried out by the ruling Jacobins to intimidate the regime's enemies and compel obedience to the State.[3] During this period, the term 'terrorism' was associated with State terror and the reign of terror in France until the middle of the 19th century, when the term had also began to

* Dr Michael D Hanson, LLB, BL, LLM, PhD, Lecturer, Department of International Law and Jurisprudence, Faculty of Law, University of Uyo, Uyo, Nigeria. Email: michaelhanson2007@yahoo.com. GSM: 08028442301.

1 Christian Akani, '2011 Terrorism Act in Nigeria: Prospects and Problems' (2013) 2(8) International Journal of Arts and Humanities 218, 218.

2 Brigitte L Nacos, *Terrorism and Counterterrorism* (4th ed, Pearson Education 2012) 35.

3 Ali S Yusuf Bagaji and others, 'Boko Haram and the Recurring Bomb Attacks in Nigeria: Attempt to Impose Religious Ideology through Terrorism?' (2012) 8(1) Cross-cultural Communication 33, 37. See Bruce Hoffman, *Inside Terrorism* (Columbia University Press 1998) 33, cited in Nacos (n 2) 1.

be associated with non-governmental groups.[4] However, in spite of its long existence and prevalence, terrorism remains a complex term with no universally acceptable legally binding or criminal law definition.[5] This arises from the perception given to it from different people and groups all over the world. Whereas people or groups who disagree with the course of those who commit political violence against civilians or non-combatants condemn them as terrorists, those who share or sympathise with the grievances of the perpetrators consider them as freedom fighters, militants, revolutionaries, rebels, warriors and so on.[6] This is why it is often said that 'one man's terrorist is another man's freedom fighter'.[7] Accordingly, many individuals and groups, as well as some States, view these individuals or groups not as terrorists but as freedom fighters, militants, rebels or nationalists. This perception is part of what makes some of these States provide support for these terrorists, which assists them in the perpetration and perpetuation of terrorism across the world. These are the States involved in the sponsorship of terrorism.

This work is divided into seven parts. Part one is the introduction. In part two, an exposition of what constitutes State terrorism is undertaken, in order to elucidate the existing controversies with regards to the recognition of States as perpetrators of terrorism. Part three analyses State-sponsored terrorism and identifies States labelled as sponsors and the vicissitudes associated with such labels. Part four examines extant international legal instruments used in combating terrorism. Part five provides analyses on resource mobilisation for terrorist groups. It shows the existence of a connection between the availability of resources as a necessary prerequisite for the emergence, existence and persistence of terrorist groups and their activities. Part recommends measures that could be used in addressing States' involvement in the sponsorship of terrorist groups around the world. Part seven concludes.

2. State Terrorism

Although disagreement over the definition of terrorism continues to dominate contemporary research, it generally refers only to those unlawful, violent and brutal acts which are intended to create fear or terror, for religious, political, economic, social or ideological objectives, and deliberately target or disregard the safety of non-combatants. While the modern usage of the word 'terrorism' is associated with political violence perpetrated by insurgents, having civilians as the target, some scholars have accommodated the concept of State terrorism and State-sponsored terrorism in their interpretation. Thus, State terrorism is considered to refer to acts of terrorism committed by a State against foreign targets or against its own people.[8] According to Gus Martins, State terrorism is terrorism committed by the government or quasi-governmental agencies and their personnel against perceived threats which could be directed against both domestic and foreign targets.[9] Noam Chomsky defines State terrorism to mean

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4 Chris Millington, 'Terrorism in France' (*History Today,* 8 January 2015) <historytoday.com/terrorism-france> accessed 15 December 2019.

5 Manzoor Khan Afridi, 'Military Operation as a Response to Terrorism: A Case Study of Malakand Division, Pakistan' (2014) 5(20) Mediterranean Journal of Social Sciences 2001.

6 Nacos (n 2) 11.

7 Walter Laqueur, *The Age of Terrorism* (Little, Brown and Company 1987) 302; see also Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' (2002) 3(4) Police Practice and Research 287, 287.

8 Anthony Aust, *Handbook on International Law* (2nd ed, Cambridge University Press 2010) 265.

9 Gus Martins, *Understanding Terrorism: Challenges, Perspectives and Issues* (Sage 2006) 111.

terrorism practiced by States (or governments) and their agents and allies.[10] State terrorism, therefore, comes to focus when terrorism is described in terms of the violent nature of the act against civilians, without considering the perpetrators.[11] Thus, violent acts perpetrated by governments and their agents against civilians and non-combatants (more often than not, secretly) are usually referred to as State terror or State terrorism.[12] Where a State openly or secretly performs acts of terrorism, or supports the acts performed by a group, or acquiesces in their performance of the acts, such a State is held to be involved in State terrorism.[13] It has been maintained that governments and their agents can practice terrorism in their countries or abroad and that the use of such violence is usually concealed to avoid public attribution of responsibility.[14] Therefore, aside from revolutionaries and nationalists, evidence abounds that terrorism has been used, in the recent past, by governments as an instrument to maintain State control.[15] Moreover, when used by the State against civilians and non-combatants, terrorism can be, and has been in many instances, equally as brutal as the actions of non-State actors, or even far deadlier.[16]

State terror, or State terrorism, has been identified in Germany, Italy and France.[17] In Germany, beginning in the 1920s, violent groups organised under Adolf Hitler attacked political opponents within Germany. These acts of terrorism perpetrated by Hitler and his groups brought him to power in 1933 and beyond. The state of violence during Hitler's years resulted in the death of more than ten million innocent civilians at the hands of his government.[18] In Italy, the reign of Benito Mussolini with his fascist regime also witnessed the use of State apparatus to commit violence against civilians.[19] There was also unspeakable State terror in the then Soviet Union during the reign of Joseph Stalin. During this time, millions of civilians were tortured and killed by the government. In recent times, some States continue to use violence against innocent civilians, which has led to the death of millions within their borders. A justification sometimes employed by these States for such acts is that they are fighting rebellions, terrorists or militants.[20] However, in so doing, no line is drawn between innocent civilians, who are involved in genuine protests, and terrorists, rebels and militants, who have taken up arms against the State for their selfish criminal or political goals. It has been observed that no case of non-State political violence is ever close to the enormity of the atrocities committed by States against their citizens.[21]

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10 Noam Chomsky, 'What Anthropologist Should Know About the Concept of Terrorism' (2002) 18(2) Anthropology Today.

11 ibid.

12 Nacos (n 2) 30.

13 G Lopez and M Stohl, *Terrible Beyond Endurance?: The Foreign Policy of State Terrorism* (Greenwood Press 1988) 207–208.

14 M Crenshaw, 'How Terrorists Think: What Psychology Can Contribute to Understanding Terrorism' in L Howard (ed), *Terrorism, Roots, Impact, Responses* (Praeger 1992) 4.

15 IA Oche, 'Africa And The Resurgence of Terrorism- Revisiting The Fundamentals' (2014) 2(2) Global Journal of Arts Humanities and Social Sciences 1, 2.

16 Nacos (n 2) 30.

17 ibid.

18 ibid.

19 ibid.

20 ibid.

21 ibid 31.

According to RJ Rummel, cited by BL Nacos, State terrorism, or State terror, is not within the definitional concept of terrorism.[22] Although acts which constitute terrorism are sometimes carried out by States against civilians or non-combatants, these acts are, nevertheless, not regarded as terrorist acts in modern society and as such are not considered as terrorism. Notably, in recent times, when a State is associated with acts of terrorism, several terms are used to identify these acts. They are sometimes referred to as war crimes, crimes against humanity, human rights violations, genocide and atrocities.[23] Therefore, the modern perspective on terrorism takes into consideration not only the nature of violence and the targets, but also the perpetrators, which must be non-State actors. According to the Chairman of the UN Counter Terrorism Committee, there is no reference to State terrorism in twelve previous international conventions on terrorism and, as such, State terrorism was not an international legal concept. He maintains that when States abuse their powers they should be judged under international conventions dealing with war crimes, international human rights law, and international humanitarian law, rather than international anti-terrorism statutes.[24] Similarly, according to Kofi Anan, the use of force by States is already regulated under international law and there is therefore no need for any debate on so-called State terrorism.[25]

It is important to note that the argument that a State carries out terrorist acts has been often used by terrorists themselves, maintaining that there is no difference between their acts and those of the government and State, particularly during reprisal attacks by governments. This argument has also been maintained by some sympathisers of terrorists.[26] Notwithstanding the position that in modern times, acts of violence carried out by a State against its civilians are not regarded as terrorism, it has been argued that considering these as acts of terrorism would actually minimise the enormity of the systematic political violence and mass killings of civilians by those exercising State power.[27]

3.State Sponsors of Terrorism

Although States are not considered, in the modern world, to carry out acts of terrorism within their borders, some States are sponsors of terrorism. When States support groups whose political violence is directed against civilians or non-combatants in a foreign country, they are considered as sponsors of terrorism. In that case, instead of carrying out terrorist acts directly, these States sponsor, aid and assist terrorists or terrorist organisations or even acquiesce in the acts of terrorist groups within and outside their borders. These States are referred to as State sponsors of terrorism and the terrorism carried out by these sponsored terrorists or sponsored organisations is referred to as State-sponsored terrorism. The leaders of these States could therefore, in modern times, be held accountable for such atrocities. This was the case with Charles Taylor, the erstwhile President of Liberia. In April 2012, Charles Taylor was found guilty of eleven charges of war crimes, including terror, murder and rape, levelled against him

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22 ibid 30.

23 ibid.

24 An Address by the Secretary General of the UN at the 4453rd meeting of the UN Security Council in 2002. See UNSC 'Addressing Security Council, Secretary-General Calls on Counter-Terrorism Committee to Develop Long-Term Strategy to Defeat Terror' (18 January 2002) Press Release SC/7276.

25 Michael Lind, 'The Legal Debate is Over: Terrorism is War Crime' (*Financial Times,* 2 May 2005) <vietamericanvets.com/Page-PointofView-TheLegalDebate.htm> accessed 15 December 2019.

26 Walter Laqueur, *No End to War: Terrorism in the Twenty-first Century* (Continuum 2003) 237.

27 ibid.

at the UN-backed Special Court for Sierra Leone (SCSL) in The Hague.[28] In May 2012, he was sentenced to a 50-year prison sentence.[29] In its ruling, the Court held that, from 1997, Charles Taylor knew about the campaign of terror being waged against the civilian population in Sierra Leone and about the sale of 'blood diamonds' in return for weapons.[30]

In recent times, notable countries have been accused by the United States of America of being State sponsors of terrorism, on the grounds that they allowed the use of acts of terrorism within their borders or refused to assist in dealing with persons or organisations involved in terrorism within and outside their borders. Some of these States include Afghanistan during the Taliban regime and before the US invasion, Iran since 1984, Sudan before the eviction of Osama Bin Laden, Libya before the US invasion and deposition of Muammar Gaddafi and Iraq before the US invasion of Iraq and deposition of Saddam Hussien following the 9/11 attack. It was this issue of the State sponsorship of terrorism that made the United States of America propose the war on terror and fight it with its coalition allies against Iraq and Afghanistan, which were believed to have been State sponsors of Osama Bin Laden and Al Qaeda. Thus, the USA, alongside its allies, invaded Iraq under the allegation that Iraq was producing and stockpiling weapons of mass destruction, which could get into terrorist hands and which also represented a threat to world peace and security. It was also alleged that Iraq had ties with Bin Laden's Al Qaeda group, which masterminded the bombing of the twin towers of the American World Trade Centre on 11 September 2001. The justification offered for the invasion of Iraq was to prevent terrorism, or future attacks by Iraqi government-sponsored terrorists, against the United States of America, its allies and other nations of the world.[31]

In the present period, and with the global interest in the fight against terrorism, certain countries are still being listed as currently sponsoring terrorism. These countries include Iran, Syria, Libya and Sudan.[32] Many other countries have recently been accused of sponsoring terrorism, either by aiding, abetting, assisting or harbouring terrorists. These include Qatar and Turkey. In the case of Iran, it has been reported that much of the terrorism in the world is orchestrated by Iran, especially those acts directed against the USA.[33] In 2015, Iran was shown to have remained the most prominent State sponsor of terrorism.[34] The country has allegedly provided a wide range of support, including financial, training and equipment, to terror groups around the world. For example, Iran was shown to have provided arms and cash to terrorist groups and Shia militias in Lebanon, Syria, Iraq, Afghanistan and Yemen.[35] Other

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[28] Jon Silverman, 'Taylor Sierra Leon War Crimes Verdict Welcomed' (*BBC News,* 26 April 2012) <bbc.com/news/world-africa-17864387> accessed 15 December 2019.

[29] Ben Brumfield, 'Charles Taylor Sentenced to 50 Years for War Crimes' (*CNN News*, 31 May 2012) <cnn.com/2012/05/30/world/africa/netherlands-taylor-sentencing/index.html> accessed 15 December 2019.

[30] Owen Bowscott, 'War Criminal Charles Taylor to Serve 50 Years Sentence in British Prison' (*The Guardian*, 10 October 2013) <theguardian.com/world/2013/oct/10/former-liberian-president-charles-taylor-british-prison> accessed 15 December 2019.

[31] Chris Opukri and Kimiebi Ebienfa, 'International Terrorism and Global Response: An Appraisal' (2013) 1(3) American Journal of Humanities and Social Sciences 109, 112.

[32] Peter Huessy, 'Which Nation is (Still) the Number One Sponsor of Terrorism' (*Gatestone Institute – International Policy Council,* 3 October 2016) <gatestoneinstitute.org/9041/iran-terrorism-sponsor> accessed 15 December 2019.

[33] ibid.

[34] ibid.

[35] ibid.

groups sponsored by Iran include Hezbollah, Hamas, the Palestinian Islamic Jihad, Houthi rebels in Yemen and Shia militias in Bahrain.[36] Iran, together with other States that sponsor terrorism, provides safe havens around the world where terrorists are able to organise, plan, raise funds, communicate, recruit, train, transit and operate.[37] Iran had provided training and facilitated the 9/11 hijack in collaboration with Hezbollah and, since 9/11, Iran harboured senior Al Qaeda operatives and facilitated the flow of fighters and funds to Al Qaeda through Iran.[38] Iran had also previously financed the attack on the Pan Am flight that blew up over Scotland in December 1988, the 1996 terror attacks against Americans at Khobar Towers in Saudi Arabia, the 1998 bombings of the American embassies in Kenya and Tanzania and the 1983 bombings of the Marine barracks and embassy in Lebanon.[39] Iran has also been found guilty in US Courts for sponsoring terrorism, which resulted in the freezing of its assets in favour of the terrorists' victims.[40] Especially threatening is Iran's missile and technology cooperation with North Korea, which has raised fears regarding Weapons of Mass Destructions (WMD) getting into terrorist hands.[41]

The involvement of Qatar and Turkey in the sponsorship of terrorism has been associated with Hamas, Al Qaeda and other terrorist groups. Hamas, which has long been designated as a terrorist organisation and treated as such by many governments, including the United Arab Emirates, Saudi Arabia and Egypt, still receives support from Qatar and Turkey. These countries are two firm allies of Hamas. Both give public and financial assistance estimated to be in the hundreds of millions of dollars to Hamas. Qatar is also known to host Hamas's political bureau, which includes Hamas leader Khaled Meshaal, who stepped down in 2017. Hamas' leader also visited the Turkish President Recep Tayyip Erdogan, who decided to break Hamas out of its political and economic seclusion. According to Erdogan, Hamas was to be seen as a political organisation rather than a terrorist one. In 2007, Qatar and Turkey were the only countries that backed Hamas when Hamas ousted the Palestinian Authority from the Gaza Strip. Between 2008 and 2009, Qatar also strengthened ties with Hamas such that Hamas'[42] leader was invited to attend the Doha Summit, where Qatar pledged USD 250 million to repair the damage caused by Israel in the war on Gaza. Consequently, Israel's[43] blockade was described by Qatar as unjust and immoral. This explains why Qatar has been handing out political, material and humanitarian support to Hamas. As this relationship continues at time of writing, some countries, including Saudi Arabia, Egypt, Bahrain and the

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36 ibid.

37 ibid.

38 ibid.

39 ibid

40 Asa Fitch, 'Iran Sues US in International Court over Frozen Assets' (*The Wall Street Journal,* 16 June 2016) <wsj.com/articles/iran-sues-u-s-in-international-court-over-frozen-assets-1466027629> accessed 15 December 2019.

41 ibid.

42 Jonathan Schanzer, 'How Hamas Lost the Arab Spring' (*The Atlantic,* 21 June 2013) <theatlantic.com/international/archive/2013/06/how-hamas-lost-the-arab-spring/277102/> accessed 15 December 2019.

43 CBN News, 'Qatar Pledges Aid to Hamas-Fatah Gov't' (*CBN News,* 9 August 2014) <cbn.com/cbnnews/israel/2017/november/qatar-pledges-aid-to-hamas-fatah-gov-t> accessed 15 December 2019; Adnan Abu Amer, 'Hamas Ties to Qatar Have Cost' (*Al-Monitor,* 22 April 2013) <al-monitor.com/pulse/fr/originals/2013/04/hamas-qatar-relationship-independence.html> accessed 15 December 2019.

United Arab Emirates have labelled Qatar a terrorist haven, as it continues to harbour Hamas leader Meshaal, among other terrorists. Qatar also harbours Husam Badran, the spokesperson for Hamas and a former leader of the Hamas military wing in the West Bank, who instigated several deadly suicide bombings of the second intifada, including the Dolphinarium discotheque bombing in Tel Aviv, which killed 21 people. For its part, Turkey has been involved with Hamas by providing a safe haven to its members, including Saleh al-Arouri, a senior Hamas officer alleged to have orchestrated the June 2014 abduction and killing of the three Israeli teenagers and to have started the 50-day war between Israel and Palestine. Al-Arouri now lives in Turkey.

While Saudi Arabia has joined in accusing Qatar of supporting terrorism, its involvement in supporting terrorism must not be underestimated. Saudi Arabia is shown to be the world's largest source of funds and promoter of Salafist Jihadism, which forms the ideological basis of Al Qaeda, the Taliban, ISIS and other violent Islamic extremist groups. In 2009, the Pakistan based Lashkar-e-Taiba, which carried out the 2008 Mumbai Terrorist attack, was shown to have used a Saudi-based shell company to fund its activities in 2005. Saudi Arabia has been alleged to be the soil in which Al Qaeda and its sister terrorist organisations are flourishing. In 2016, it was maintained that Saudi Arabia had spent millions promoting Wahabism, the radical form of Sunni Islam that inspired the 9/11 hijackers and currently inflames the Islamic State. ISIS is ideologically, financially and logically supported and sponsored by Saudi Arabia, who has long been alleged to be responsible for exporting extremist Islamic ideology across its borders. Although Saudi Arabia has joined Egypt, Bahrain and the United Arab Emirates in raising serious concerns regarding Qatar's[44] support for terrorism, it must be maintained that Saudi support for terrorism dwarfs Qatar's support of terrorist groups in the Islamic world. In spite of these accusations, Saudi Arabia has become a strong ally of the US in the fight against terrorism and extremism in the Middle East and beyond.[45]

4.International Legal Regimes on Terrorism

Against the exisiting backdrop, the need to prevent, suppress or eliminate State-sponsored terrorism has given rise to several treaties, conventions, protocols and resolutions by the United Nations. One example is UN Security Council Resolution 1373.[46] This Resolution calls on all member States to work together to prevent and suppress terrorist acts. It reaffirmed that every State has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts.[47] The Resolution, made under Chapter VII of

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[44] Dedan Walsh, 'Wikileaks Cables Portrays Saudi Arabia as a Cash Machine for Terrorist' (*The Guardian,* 5 December 2012) <theguardian.com/world/2010/dec/05/wikileaks-cables-saudi-terrorist-funding> accessed 15 December 2019.

[45] Bob Corker, 'Saudi Terrorism Support Dwarfs' (*Al Jazeera,* 13 July 2017) <aljazeera.com/news/2017/07/bob-corker-saudi-support-terror-dwarfs-qatar-170713043902732.html> accessed 15 December 2019.

[46] UN Security Council Resolution 1373 (28 September 2001) UN Doc S/Res/1373.

[47] Phillip E Agbebaku, 'The UN and Global Coalition Against Terrorism' in Thomas A Imobighe and ANT Eguavoen (eds), *Terrorism and Counter Terrorism: An African Perspective* (Heinemann Educational Books Nigeria Ltd 2006) 139.

the UN Charter, also provides that all States shall prevent and suppress the financing of terrorist acts, freeze the funds of terrorists, deny terrorists access to information and afford the greatest measure of assistance in the criminal investigations and proceedings against terrorists, amongst other provisions.

As well as this Resolution, there are several conventions and protocols that deal with terrorism. These include: the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft;[48] the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970;[49] the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971;[50] the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[51] the 1979 International Convention against the Taking of Hostages;[52] the 1980 Convention on the Physical Protection of Nuclear Material;[53] the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation;[54] the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;[55] the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988;[56] the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;[57] the 1997 International Convention for the Suppression of Terrorist Bombings;[58] the 1999 International Convention for the Suppression of the Financing of

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48 International Convention for the Suppression of Terrorist Bombings (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219. This convention was ratified by the Nigerian State on 7 April 1970.

49 Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 860 UNTS 105.

50 Convention on the Suppression of Terrorist Bombings and on Financing (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177.

51 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February) 1035 UNTS 167.

52 International Convention Against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205.

53 Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101. This Convention was amended in 2005 by the 2005 Amendments to the Convention on the Physical Protection of Nuclear Material.

54 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (adopted 24 February 1988, entered into force on 6 August 1989) 1589 UNTS 474. This Convention was ratified by the Nigerian State on 25 March 2003.

55 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted March 1988, entered into force 1 March 1992) 1678 UNTS 221. The Nigerian State ratified the convention on 24 February 2004.

56 Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 374.

57 Convention on the Marking of Plastic Explosives for the Purpose of Identification (adopted 1 March 1991, entered into force on 21 June 1998) 2122 UNTS 374. This Convention was ratified by the Nigerian State on 10 May 2002

58 International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256. This Convention was adopted by the Nigerian State on 24 September 2013.

Terrorism;[59] the 2005 Amendments to the Convention on the Physical Protection of Nuclear Material;[60] the 2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;[61] the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism[62] and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation. These treaties are the international normative framework for combating terrorism. They contain a series of legally binding standards for nation States geared towards the prevention and control of terrorism. They deal with particular acts of terrorism and place obligations or responsibilities on State parties to comply with their provisions. The principal obligation is to incorporate the crimes defined therein into the domestic criminal laws of State parties and to make these punishable by sentences that reflect the gravity of the offence.[63]

In compliance with the demands of these instruments, States across the world have enacted domestic legislation criminalising terrorism in their respective jurisdictions. Some States have adopted the international conventions on specific acts of terrorism as agreed and made them part of their domestic laws. Others have referred to these conventions in their domestic legislation, thereby making them part of their law. Unfortunately, many States, some of which are parties to many treaties on terrorism, have failed to ensure the enforcement of these laws within and outside their jurisdictions. This failure is partly associated with their involvement in the mobilisation of resources for terrorist groups.

5.Mobilising Resources for Terrorists Groups

The mobilisation of resources for terrorist purposes, or the making available of resources for terrorist groups, has been stated by scholars to be one of the causes of, or an explanation for the existence of, terrorism in the world. This is rooted in the Resource Mobilisation Theory of Terrorism. According to this theory, what gives rise to terrorism is the ability of terrorists to access certain resources, without which violent attacks cannot be carried out. McCarthy and Zald, together with McAdam, maintain that the probability of the emergence of any social protest movement depends not only on the opportunities offered by the relevant social situation, but also on the capability of the movement to mobilise certain basic resources.[64] This is so because, specifically, a terrorist campaign requires materials (including money, weapons, political space and technology), people (militants, collaborators, supporters and sponsors) and symbols (clearly linked to the ideologies that motivate terrorists to commit terrorist acts). Material is required by terrorists to finance their dastardly activities. The amount of money

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[59] International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS. The Nigerian State signed this Convention on 1 June 2000 and it was ratified by the Nigerian State on 16 June 2003.

[60] Amendment to the Convention on the Physical Protection of Nuclear Material (adopted 8 July 2005, entered into force 8 May 2016) INFCIRC/274/Ref.1/Mode.1.

[61] 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 14 October 2005, entered into force 28 July 2010) 1678 UNTS I-29004. As of February 2016 it had been ratified by 36 States.

[62] International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 25 October 2012) 2445 UNTS 89. This Convention was ratified by the Nigerian State on 25 September 2015.

[63] International Convention for the Suppression of Financing of Terrorism (n 64) art 4.

[64] Luis de la Corte, 'Explaining Terrorism: A Psychosocial Approach' (2007) (1)(2) Perspective on Terrorism 1, 5.

involved is usually huge and is often provided by organisations, individuals and State entities sometimes in the form of donations. Despite the existence of legal setups prohibiting financial transactions for the sponsorship of terrorism, some of these financial provisions are made transferable to terrorist groups through financial institutions, non-financial institutions and individuals with State support amidst high, but secret, technological competence. The weapons needed for terrorism are also usually massive. They are transported into target States, particularly through land borders and seaports, despite the prohibitions of relevant international legal regimes and domestic legislation. The political space that is conducive for the accumulation of weapons, training of terrorist fighters and accommodation of terrorist leaders is also required to hatch and carry out acts of terrorism. People are also required to carry out terrorist acts. Fighters are required to be recruited and trained. Coordinators are also required to be recruited and trained. Collaborators, sponsors and supporters are required in order to facilitate the activities of the terrorists from one point to another. They could be in the target States or neighbouring States, but they are key instruments in the planning and execution of acts of terrorism. They provide money, weapons, training facilities and a safe haven for terrorists. Symbols that clearly link terrorists to the ideology that motivates them are also required for acts of terrorism to be carried out. The ideology could be founded on religion, ethnicity or tradition. It is this ideology that motivates the terrorists and drives them to carry out atrocities against innocent civilians in their quest to achieve their goals. According to this theory, these are the resources required for any terrorist campaign, without which terrorism cannot occur. This position is strongly held by Waldman.[65]

Notably, a greater part of terrorists' time and effort is dedicated to obtaining the above resources. Bovenkerk and Chakra both agree that, in order to obtain these primary resources, terrorists may engage in activities such as theft, extortion, robbery, human trafficking, gunrunning, kidnapping or various legal and illegal businesses.[66] These criminal activities, which are usually carried out to mobilise resources for terrorism, often enjoy a smooth sail in a country where security is porous and/or in a failed State. Aside from engaging in these activities, many terrorist organisations have support from States that are sympathetic to the course of the terrorists or are otherwise interested in the political balance favourable to them. Accordingly, since an open confrontation would impugn on the sovereignty of the target State, these States clandestinely provide the required material supports for terrorist groups, including the training of members used in carrying out terrorist attacks on the target States. These issues have been raised by many target States, who continuously accuse the supporting States of sponsoring terrorism in their countries. This has been done several times by India, which has accused Pakistan of giving support to Lashkar-e-Taiba (LeT), who have perpetrated terrorism in India.[67] Pakistan is shown to use various terrorist groups as proxies but vehemently denies involvement with these groups, and avoids establishing a connection that would serve as evidence of a relationship.[68]

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[65] ibid.

[66] Frank Bovenkerk and Bashir Abou Chakra, 'Terrorism and Organized Crime' (2004) 1(2) UN Forum on Crime and Society 3.

[67] Prem Mahadevan, 'India and Global Discourse on State-sponsored Terrorism' (2017) 2(3) Rising Power Quarterly 185, 187.

[68] Nathaniel F Manni, 'Iran's Proxies: State Sponsored Terrorism in the Middle East' (2012) 3(3) Global Security Studies 34.

Accusations have been made against numerous States regarding their roles in the provision of resources to alleged terrorist groups. These States include the US, which has been at the forefront of the global campaign against terrorism amidst accusations that their hands, too, are unclean. Iran is one of the States consistently labelled by the US as a State sponsor of terrorism. Several terrorist groups in the world identified as being sponsored by Iran include, Hamas, Palestinian Islamic Jihad (PIJ), Hezbollah and Al Qaeda.[69] Similarly, Qatar has recently been accused by the gulf States of Saudi Arabia, United Arab Emirates (UAE), Bahrain and Egypt for supporting terrorist groups in the region. Amid accusations and counter-accusations of State sponsorship of terrorist groups, not much has been done by the world community to address the involvements of States in funding terrorism. Collective military efforts by the world community against States accused of the sponsorship of terrorism have never been undertaken and investigative reports of such allegations have scarcely been implemented against involved States. The imposition of sanctions against States identified as sponsors of terrorism has, until recently, been limited to sanctions imposed by the US. This has led to the international community not being taken seriously by some States, which continue to fund and allow terrorist groups to use their territories for the recruitment, training, arming and planning of terrorist attacks on target States. Thus, the availability of both human and material resources in perpetrating terrorism better explains the rise and continued existence of terrorists and terrorist organisations in many countries today, with continuing attacks on soft targets. Until drastic measures are taken, this trend will persist.

6. The Way Forward

With States participating in terrorism by way of sponsorship, the fight to end terrorism has become more complex. For effective action to deal with State sponsorship of terrorism, international laws on terrorism must be strengthened. The definitional disagreement must be resolved in order to bring all States at parity regarding what constitutes terrorism. This is in light of the collective need to condemn its use and ultimately bring about a resolve to punish the perpetrators, as well as the sponsors, of terrorism. This will assist in the establishment of a law that will be universally applicable in dealing with terrorism and the sponsors thereof across the globe. This legal instrument should be made to reflect existing international legal instruments on terrorism, in order to ensure compatibility, ease enforceability and avoid inconsistencies or contradictions. Particular attention must be given to the enforcement of the 1999 International Convention against Terrorist Financing and other related conventions. State parties must ensure the enforceability of these conventions. It is now time that international agreements be given a new nature. Accordingly, punitive measures must be incorporated into these agreements in order to ensure compliance and avoid defiance. In so doing, State sponsors would halt their continuous involvement in providing supports to terrorist groups.

Increasing diplomatic relations to expose and deal with terrorist-supporting States and reducing the interference by those States in the activities of other countries constitute two of the measures needed to address the problem of State sponsorship of terrorism. The UN must be fully and consistently involved in the affairs of States which currently support terrorism or host proxies from terrorist-supporting States. Relying on good diplomacy and incentives, the

[69] ibid.

superpowers and their allies should take stronger action against States that host terrorist groups and their proxies within their borders. This will limit the ability of terrorist-supporting States to influence the politics of weak States, and make them recognise that the time has come to comply with international legal regimes. The collective actions of UN member States, leading the neutralisation of ISIS in Syria and Iraq, show the power of multilateral pressures and diplomacy. This combination of international pressure and good diplomacy, if applied on a continuous and sustained basis, would stem the tide of State sponsorship of terrorism. Moreover, military actions as a strong response should be used by target States against terrorist targets in other countries and those countries' base of support for the terrorists. Thus, States should take strong measures against other States that sponsor terrorism.[70] The US, for instance, is fully within its rights to conduct a proportional military response against suitable, identifiable, and involved targets in Iran or any other country identified with the sponsorship, in any form, of acts of terror in the US. This response will in many ways be considered similar to the military operations carried out against Al Qaeda in Pakistan and those against Iraq. The Iranian government has, through the Iran Quds Force, carried out acts of terrorism and provided material support to the Taliban and other terrorist groups. The Tehran government must be restrained and held responsible for the conducts of the Quds Force.

The imposition and enforcement of strong sanctions against supporting States remains a significant measure commonly used against States associated with terrorism. Accordingly, for progress to be made in this regard, a number of sources of State sponsored terrorism in the world, like Iran, must be shut down.[71] This could be done in many ways, for example: economic sanctions on such States, their allies and countries doing business with them, which includes a ban all foreign investment, loans, credits, subsidised trade and refined petroleum exports; denial of aid to such States or the withdrawal of such aid where it was provided previously and use of tough immigration laws against their citizens, particularly top government functionaries and business moguls, which includes denial of visas and restrictions on information gathering and sharing, particularly information on security. These sanctions must be strictly enforced. The enforcement of imposed sanctions should be made collectively by UN member States so that affected countries will have no leeway but to abandon their support of terrorist groups. A situation where one country imposes sanctions on another, yet other countries maintain business ties with that country, weakens this measure. For instance, although the US has imposed several sanctions on Iran in recent times, Russia, China and some members of the European Union are still doing business with Iran.[72] This situation has weakened the imposition of sanctions against State sponsors of terrorism from achieving the desired goal. To forestall this, the world's superpowers must agree, through the UN, to take concrete, significant and decisive action against Iran and any other State supporting terrorism, with the intention to curb their support for terrorists and their networks. The plight of civilians in States affected by terrorism should take precedence over the political and economic interests of the superpowers. Sanctions imposed by the UN with the unequivocal approval of the

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70 James Jay Carafano, 'Forty-Second Plot Highlights State-Sponsored Terrorism Threat' (*The Heritage Foundation,* 12 October 2011) <report.heritage.org/wm3392> accessed 15 December 2019.

71 Huessy (n 32).

72 Anjli Raaval and others, 'China defies US sanctions by Tapping Iran Oil Supplies' (*Financial Times*, 27 June 2019) <ft.com/content/6b944786-9809-11e9-8cfb-30c211dcd229 > accessed 15 December 2019.

superpowers will most likely prove more effective than those of the past, which Iran was able to circumvent with the support of these superpowers.

Increasing diplomatic relations to expose involved States should also be used in dealing with State sponsorship of terrorism. Public diplomacy should be increasingly used in order to expose the States involved in the sponsorship of terrorism. Such a campaign should document the involvements of State sponsors, specific aids and assistance, the quandaries of victims, the number of recorded fatalities and the hopelessness felt by surviving citizens displaced from their homes. The UN should provide a permanent platform for individuals and States to broadcast the activities of those States involved in the sponsorship of terrorism, in order to expose them.

Increasing assistance to failed States and decreasing assistance to involved States is yet another measure that should be used against State sponsorship of terrorism. Failed States have been identified as safe havens for terrorists. It is here that terrorists remain, recruit, train and plan for the execution of terrorist violence. Mobilisation of resources securely takes place in safe havens where supplies are unhindered and sometimes undetected. In order to prevent such States from becoming hotbeds for the planning of acts of terrorism, UN member States should relentlessly assist them. This will deter States that sponsor terrorism from using such States as a conduit for their acts supporting terrorist violence. Furthermore, any assistance provided for States identified as sponsors of terrorism should be completely withdrawn. This will warn such States and force them to change their policies. These measures, which are in line with UN Resolutions to counter the threats of terrorism, are identifiable measures that could deter States from supporting terrorists across the world.[73]

7.Conclusion

Many countries have expended enormous resources in dealing with terrorism. The international community has done much to ensure that terrorist violence across the world is thrown into the abyss of history. However, the more the war against terrorism is taken to the terrorists, the more terrorist violence continues amidst support provided by certain States. This State sponsorship has remained a significant impediment to the global fight against terrorism. Accordingly, cutting off State support for terrorists remains the *sine qua non* for achieving success in the global war against terror.

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[73] Agbebaku (no 52) 140.

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Enhanced Fishing Rights under the United Nations Convention on the Law of the Sea, 1982: The Challenges Confronting Developing Countries

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FISHING; SEA; CONVENTION; CHALLENGES; DEVELOPING COUNTRIES

Abstract

Prior to the adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982, fisheries played only a minor role in the economies of most developing countries. Fisheries resources in waters adjacent to the coasts of many developing countries were largely exploited by fishers from the developed nations of the world who had the requisite technologies for deep-sea fishing. These technologies were lacking in developing countries, resulting in sub-optimal marine fishing. However, the adoption of UNLCOS in 1982 introduced novel principles for the governance of marine fisheries. It was widely believed that these innovations would enhance and stabilise fishing rights, redistribute income from marine fisheries to the advantage of developing countries and reduce the incidents of international conflicts concerning fishing rights. This paper critically examines the various ways through which UNCLOS has enhanced and stabilised fishing rights for the benefit of all States, especially developing countries. It asserts that due to various challenges that continue to confront developing countries with respect to the utilisation of marine fisheries, the benefits anticipated to accrue to them under UNCLOS have remained elusive throughout the thirty years since the Convention was adopted. The paper makes suggestions for the improvement of fisheries resources utilisation among developing countries.

1. Introduction

The importance of the sea to mankind cannot be over-emphasised. Comprising three-quarters of the surface of the Earth,[1] it has, through the ages, been a means of trade and transportation. In the modern age, the sea has become even more beneficial to mankind as its resources are progressively revealed by science and technology. While deep-sea oil exploration has provided

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[1] EE Essien, *Essays in International Law of the Sea* (Golden Educational Publishers 1994) 108; E Holmina, 'Common Heritage of Mankind in the Law of the Sea' (2005) 1 Acta Societas Tis Martensis 187.

a significant source of the energy required to meet the needs of the world,[2] and the seas have been found to hold enormous quantities of minerals,[3] there are more than a few countries whose foreign exchange earnings are connected substantially, if not totally, to deep-sea fishing.[4]

As technology developed, the exploitation of the fisheries resources of the sea also developed. Technology took fishing from the immediate maritime belts of coastal States to the deep sea, following the manufacture of distance-fishing vessels, the introduction of freezing technology, the development of railway networks, sonar, Global Positioning System (GPS) and the discovery of canning methods for the preservation of fish.[5]

Given the continuously increasing capacities of States to embark on deep-sea fishing, and considering the foreign exchange earning profiles of fishery resources for the traditional distance-fishing countries,[6] it would be natural to expect that States would exhibit tendencies of territoriality over the sea and try to appropriate parts of it for exclusive fishing rights. They did. History is, therefore, strewn with cases of disagreements over fishing rights between nations, a factor that may have prompted Professor Essien to assert, rather figuratively, that 'ever since the Biblical Jonah and the whale, nations have been arguing over fishing rights.'[7]

However, since the capacities for deep-sea fishing have been and remain disparate between nations, some nations have benefited more from fisheries resources than others. While the developed nations have, over the years, exploited different parts of the seas with their distance-fishing fleets and thereby earned enormous resources, the developing ones, which lack the technology and technical know-how to do so, watched helplessly from the sidelines. It was, indeed, a case of developed countries distance-fishing for their own benefit in the backyards of developing countries, depleting the fisheries resources of the coastal waters of these developing nations. The consequence of this unhealthy state of affairs was a rivalry between the developed nations which, in furtherance of their economic interests, wanted a narrower territorial sea for coastal nations, and the developing nations which, for the purpose of preserving the fisheries and other resources of their coastal waters, preferred a wider territorial sea.

This state of affairs also left the issue of States' fisheries jurisdiction in a state of kaleidoscopic flux since States arbitrarily declared as their own and appropriated variegated

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2 Offshore oil production is about 27 million barrels of oil per day (about 30% of world oil production per day) while offshore gas production accounts for approximately half of the world's total gas production. See US Energy Information Administration, 'Offshore Production Nearly 30% of Global Crude Oil Output in 2015' (2016) <eia.gov/todayinenergy/detail.php?id=28492> accessed 30 November 2019.

3 International Seabed Authority, 'Deep Seabed Mineral Resources' <isa.org.jm/mineral-resources/55> accessed 20 October 2019.

4 FAO, 'Information on Fisheries Management in the Republic of Iceland' <\fao.org/fi/olfsite/FCP/en/ISL/body.htm> accessed 29 October 2019; Z Hongzhou, 'China's Fishing Industry: Current Status, Government Policies and Future Prospects' (China as a Maritime Power Conference, Arlington, 28–29 July 2015) 1–2.

5 Jean-Paul Troadec, 'Harvesting the Seas' in Patrick Safran (ed), *Fisheries and Aquaculture - Volume I* (EOLSS Publications 2009); S Cullis-Suzuki and D Pauly, 'Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations' (2010) 34 Marine Policy 1036.

6 Iceland, Norway and Japan are examples.

7 Essien (n 1) 12.

breadths of fishing zones. It was not until 1982, through the instrumentality of UNCLOS,[8] that certainty and innovatory changes were infused into the regime of fisheries jurisdiction in the international law of the sea.

This paper examines the various ways in which fishing rights have been enhanced and stabilised among States under UNCLOS and the challenges confronting developing countries in the maximisation of Convention benefits in this regard. The paper proceeds in five major parts. Part 1 introduces the subject matter, while Part 2 reviews the law and practice relating to fisheries jurisdiction and fishing rights among States in the period before UNCLOS. Part 3 examines the position of the law under UNCLOS, while in Part 4, the paper critically examines the challenges confronting developing countries in the maximisation of the economic prospects offered by enhanced marine fishing rights under UNCLOS. In Part 5, the author submits suggestions for improving the economic benefits accruable to developing countries from their marine fisheries under UNCLOS.

2. Law and Practice Prior to UNCLOS (1982)

As previously noted,[9] prior to the adoption of UNCLOS the issue of fishing rights and fisheries jurisdiction was in a state of flux, as States unilaterally determined and declared the extent of their fisheries jurisdiction. There were no commonly accepted yardsticks for such determinations. The developed, distance-fishing nations with sophisticated fishing fleets and equipment exploited the fisheries resources off the coasts of the less developed nations, unhindered. To prevent this, the developing coastal nations declared territorial seas wider than the customarily accepted three nautical miles.[10]

The problem of fishing rights was therefore one of the factors that prompted the International Law Commission (ILC) to prepare a set of rules of international law that would govern the use of the seas by States. In 1956, the ILC adopted its Report on the Law of the Sea at its Eighth Session.[11] It was based upon the Report that the General Assembly of the United Nations (UN) convened at the First UN Conference on the Law of the Sea.[12] The Conference, held in Geneva from 24 February to 29 April 1958, produced four separate conventions.[13] The fourth of the four conventions was the Convention on Fishing and Conservation of Living Resources of the High Seas.[14] This Convention focused on fishing and

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8 The Convention was the outcome of the third UN Conference on the Law of the Sea convened in 1973 pursuant to General Assembly Resolution 3067 (XXVIII). The Convention was signed on 10 December 1982 at Montego Bay, Jamaica and adopted by 130 votes to four with 17 abstentions; United Nations Convention on the Law of the Sea (UNCLOS) (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, 1834 UNTS 3, 1835 UNTS 3.

9 See Introduction.

10 Essien (n 1) 6–7.

11 International Law Commission, 'Report of the International Law Commission on the Work of its Eighth Session' (4 July 1956) UN Doc A/CN.4/104.

12 Essien (n 1) 12.

13 Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 22 November 1964) 516 UNTS 205; Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Convention on Fishing and Conservation of Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285; Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

14 The Convention entered into force in 1966. See Convention on Fishing and Conservation of Living Resources of the High Seas (n 13).

the conservation of fisheries and required coastal States to introduce conservation measures in areas of the high seas adjacent to their territorial seas.[15] The Convention, however, did not grant exclusive fishing rights to coastal States. Aside from this, the critical issue of fishing zones, which would have introduced some semblance of limits to the exploitation of fisheries resources in the coastal waters of the developing nations, was also left unsettled under the Geneva Convention on the Territorial Sea.[16]

Much like the 1958 UN Conference on the Law of the Sea (UNCLOS I), the Second UN Conference on the Law of the Sea (UNCLOS II) failed to reach an agreement on the issue of the limits of the territorial sea. The question of fishery zones was thus not resolved by participating States. From 1958, the majority view was that 'in the absence of agreement to the contrary, fishing beyond the limit of a lawful territorial sea was open to all States in accordance with "freedom of fishing" on the high seas.'[17] Various States therefore unilaterally extended their territorial seas, while others did so through bilateral and multilateral agreements. Iceland, for example, unilaterally declared a twelve-mile exclusive fishing zone, which was recognised in the *Fisheries Jurisdiction* cases.[18] In fact, a survey conducted by the Food and Agricultural Organisation (FAO) in 1967 showed that 33 states, including the UK, unilaterally declared exclusive fishing zones, mostly for twelve nautical miles.[19]

On 17 November 1960, Britain and Norway signed an agreement which would allow them, *inter alia*, to claim exclusive fishing rights in a fishing zone between six and twelve miles off their coasts, provided that States whose vessels had been fishing in the outer six miles of the fishing zone for the five years immediately preceding 1 January 1958 would continue to do so for a period of ten years from 31 October 1960.[20] Based on this agreement, Norway extended its fishing zone from four miles to six miles on 1 April 1961, and in September of the same year further extended it to twelve miles, allowing, however, British vessels to fish in the outer six miles until 31 October 1970. A similar agreement was signed between Britain and Iceland under which Britain recognised Iceland's twelve-mile exclusive fishing zone subject to the right of British vessels to fish in the outer six miles until 11 March 1964. In 1962, a similar agreement was also concluded between Norway and the former Soviet Union.[21]

Since a trend appeared to have emerged among the traditional European fishing States through those agreements, European nations adopted the European Fisheries Convention in 1964,[22] which included the arrangements in the 1961 Anglo-Norwegian agreement and others that followed it. This Convention recognised the right of States Parties to fish in the outer six

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15 UNCLOS (n 8) arts 1–4.

16 Malcolm Shaw, *International Law* (5th edn, Cambridge University Press 2003) 157; David Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004) 467.

17 Harris (n 16).

18 *Fisheries Jurisdiction Case (UK v Iceland)* (1974) ICJ Rep 1974 3; *Fisheries Jurisdiction Case (FRG v Iceland)* (1973) ICJ Rep 1973 175; Iceland's claim of a 50-mile exclusive fishing zone was held to be illegal.

19 Food and Agricultural Organisation (FAO), 'Limits and Status of the Territorial Sea, Exclusive Economic Zone, Fisheries Conservation Zones and the Continental Shelf' (1971) 10(6) International Legal Materials 1255.

20 The agreement incorporated the provision of a United States/Canadian proposal at the second 1960 UN Conference on the Law of the Sea. The Conference did not adopt the proposal as it failed by one vote.

21 Essien (n 1) 14.

22 European Fisheries Convention (adopted 9 March 1964, entered into force 15 March 1966) 581 UNTS 57.

miles of the twelve-mile fishing zones of other State Parties if such States Parties had been fishing in that zone between 1 January 1953 and 1 December 1962.[23]

In the Americas, Canada passed the Territorial Sea and Fishing Zone Act of 1964. Like the European Fisheries Convention, Canada asserted a twelve-mile fishing zone allowing, however, limited fishing rights to the US, France, UK, Spain, Portugal, Italy, Norway and Denmark in certain parts of the coast of Canada.[24] The US followed suit in 1966 by claiming exclusive fishing rights in a nine-mile zone, additional to its original three-mile territorial sea.[25]

It is worth noting that, despite the agreements between these European States, and notwithstanding the European Fisheries Convention of 1964, conflicts over fishing rights could still not be kept at bay among European coastal States. Iceland, for example, whose chief foreign exchange earner was fishery resources, unilaterally declared a 50-mile fishing zone and excluded other States from fishing within that limit. This particular declaration was, however, declared illegal by the International Court of Justice (ICJ) in the *Fisheries Jurisdiction* cases.[26]

Among the developing States, the thrust of legislation and policy was for extended territorial seas for security, political and economic considerations. With the insistence of the developed coastal States on having exclusive fishing rights over fishing zones declared by and for themselves, and the unrelenting inclination of the developing ones, for various reasons,[27] to have a wider breadth of territorial sea, a universal, comprehensive regime for marine fisheries governance became a desideratum. It was for this reason that a major part of the negotiations between the developed and developing countries at the Third UN Conference on the Law of the Sea (UNCLOS III)[28] was dedicated to the exploitation, management and conservation of marine fisheries.

3. The Position under UNCLOS

UNCLOS, in several ways, introduced innovations in the law of the sea aimed at ensuring certainty in the rights of States to use the sea and exploit the resources therein. As previously noted, prior to 1982, there was no universally accepted limit of the territorial sea and fishing zone of coastal States. UNCLOS succeeded in establishing a twelve-mile territorial sea measured from the baselines of coastal States.[29] This put to rest the uncertainties that characterised the unilateral and arbitrary declarations of preposterous breadths of territorial seas and fishing zones by coastal States.

The greatest developments under UNCLOS, through which fishing rights have been enhanced and stabilised, are to be found in the introduction of the novel Exclusive Economic

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23 Essien (n 1) 14.

24 ibid 16.

25 ibid.

26 *Fisheries Jurisdiction Cases* (n 18).

27 Essien is of the view that, in the case of Nigeria, both fishing interests and the desire to bring more of the oil deposits of the coast within the country actuated the extension of the territorial sea; see Essien (n 1) 17.

28 The Conference at which UNCLOS was adopted; see UNCLOS (n 8); Shaw (n 16) 560–561.

29 UNCLOS (n 8) art 3.

Zone (EEZ);[30] the concept of Allowable Catch;[31] management of migratory/straddling fish species[32] and provisions on the protection and preservation of the marine environment.[33]

3.1 The Exclusive Economic Zone

A major objective of the developing coastal States that participated in UNCLOS III was to prevent the distant-water fishing vessels of the technologically advanced States from unrestricted fishing in waters adjacent to the territorial seas of developing countries. As developing countries lacked the technology for deep-sea fishing, the developed, technologically advanced countries with the requisite capabilities harvested fish in that part of the seas without restriction prior to UNCLOS. However, aware of the enormity of fisheries resources in this area of the sea and realising the earning potential of their rich sea fisheries, the developing coastal States aspired to have and exercise exclusive fishing rights in those waters adjacent to their territorial seas.

At UNCLOS III, the desire of the developing countries for exclusive fishing rights in waters adjacent to their coasts was realized through the concept of the EEZ. Under UNCLOS, a coastal State is entitled to establish a 200-mile EEZ measured from the baseline.[34] In Article 56, the Convention vests on coastal States sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. These are the same rights claimed by third world countries through their agitation for exclusive resource control in that zone of the sea.

The EEZ is a resource-oriented concept and was believed by developing countries to hold the possibilities of economic prosperity, as it would allow them control of the resources of the waters adjacent to their coasts, particularly fish stocks. While coastal States are to exercise sovereign rights in the EEZ, all other States, whether coastal or landlocked, are to enjoy the freedoms of navigation and over-flight and of the laying of submarine cables and pipelines.[35]

The extent to which the EEZ-related provisions of UNCLOS have been beneficial to coastal States is ascertainable from the huge fisheries earnings from that sea zone for the traditional fishing nations of the world such as Iceland[36] and Norway.[37] On the part of the developing nations, it has drastically reduced the incidences of over-fishing and fish stock depletion in their waters by the developed, distance-fishing nations. It has also offered opportunities for the redistribution of fisheries resources and a new international economic

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30 UNCLOS (n 8) arts 55, 56.

31 UNCLOS (n 8) art 61(1).

32 UNCLOS (n 8) art 64.

33 See UNCLOS (n 8) Part XII.

34 UNCLOS (n 8) art 57.

35 UNCLOS (n 8) art 58(1).

36 75% of Iceland's export comprises fish products. Its annual fish harvest in recent years has fluctuated by around 1.7 million tonnes, with a landed value of USD 800 million; see Birgir Runolfsson, 'ITSQs in Icelandic Fisheries: A Rights Based Approach to Fisheries Management' (presented at workshop on The Definition and Allocation of Use Rights in European Fisheries, Brest, May 5–7 1999) <notendur.hi.is/bthru/brest.pdf> accessed 29 November 2019.

37 In 2013 alone, Norwegian vessels delivered 2.1 million tonnes of fish, crustaceans and molluscs with a landed value of NOK 12.5 billion. This was still three percent less than catches and earnings for 2012. See Statistics Norway, 'Fisheries, 2013, Preliminary Figures' (2013) <ssb.no/en/fiskeri> accessed 29 November 2019.

order.[38] Following the adoption of UNCLOS, between 1982 and 2002, the net exports of fisheries commodities by developing countries (ie deducting their imports from the total value of their exports) increased from USD 4 billion to USD 17.4 billion.[39]

Another respect in which the EEZ has proved invaluable to coastal States, particularly those of the developing world, is in the effort made under the Convention to redistribute fisheries resources.[40] The redistribution was intended largely to be from developed, distance-fishing nations to developing coastal States off whose coasts the former used to carry out large-scale fishing. As observed by Wijkman in 1982, a total of about USD 1.2 billion would be redistributed to coastal States as fisheries resources under UNCLOS.[41]

Coastal States are accordingly in a position to make the best use of fisheries in that area of the sea, not only by exploiting them but also by conserving and managing them to their own economic advantage. A coastal State with a robust fisheries management policy can therefore conserve, manage and exploit the fisheries resources of its EEZ and maximise the economic benefits therefrom. It is for these reasons that '[t]he EEZ regime was seen as one of the vehicles in the 1982 Convention for achieving a new international economic order that would redress the economic balance in the interest of developing states'.[42]

3.2 The Concept of 'Allowable Catch'

As shown above, the concept of the EEZ under the UNCLOS has afforded developing coastal States the legal backing to exclude the distance-fishing fleets of the developed nations from exploiting fisheries resources in waters adjacent to their territorial seas. They are now in a position to conserve, manage and exploit the fisheries of the EEZ in manners suitable to their economic interests.

However, with this right of exclusive fishing in the EEZ comes the responsibility of ensuring that the fisheries resources of that zone are optimally exploited by the coastal nation exercising that right of exclusivity. UNCLOS enjoins coastal States to promote the objective of optimum utilisation of the living resources of the EEZ.[43] Since some nations (especially developing ones) lack the financial resources and technological capabilities to engage in the magnitude of deep-sea fishing carried out by the developed, distant-water fishing States, the possibility exists that they may not optimally exploit the fisheries resources of their EEZs, resulting in resource under-utilisation. It is for this reason that UNCLOS has provided for the concept of 'allowable catch'. Under Article 61 of the Convention, each coastal State shall determine the allowable catch of the living resources in their EEZ. Allowable catch refers to the quantities of various species of the living resources of the EEZ a coastal State has

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38 Harris (n 16) 475 para 8.

39 Håkan Eggert and Mads Graeker, 'Effects of Global Fisheries on Developing Countries: Possibilities for Income and Threat of Depletion' (2009) Environment for Development 1.

40 Lawrence Juba, 'World Marine Fish Catch in the Age of Exclusive Economic Zones and Exclusive Fisheries Zones' (1991) 22 Ocean Development and International Law 1; Giulio Pontecorvo, 'The Enclosure of the Marine Commons: Adjustment and Redistribution in World Fisheries' (1988) 12 Marine Policy 361.

41 PM Wijkman, 'UNCLOS and the Redistribution of Ocean Wealth' (1982) 16 Journal of World Trade Law 31.

42 Harris (n 16) 475.

43 UNCLOS (n 8) art 62.

considered appropriate for exploitation without endangering the living resources of the zone by over-exploitation.

Having determined its allowable catch, the coastal State shall then determine its capacity to harvest the living resources of the zone.[44] Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch.[45] These provisions of the Convention are intended to address the problem of possible under-utilisation of the living resources of the EEZ, especially fish stocks. In this way, the coastal State still earns income from licensing fees paid by other States for fishing access.

These provisions, allowing other States to enter and harvest the surplus of a coastal State's allowable catch, were intended to address the problem of possible under-utilisation of fisheries resources, however they pose yet another problem. This problem is the tendency for such other States to over-exploit the fishery resources beyond the surplus of the allowable catch or exploit, in the process, fish species that are not within the allowable catch, thus reducing their populations below the maximum sustainable yield. For the purpose of enhancing and stabilising fishing rights, UNCLOS III anticipated this possibility and included provisions in UNCLOS that encourage States to adopt laws and regulations that stipulate terms and conditions with which the other States parties must comply when harvesting the surplus of an allowable catch.[46] Such laws and regulations should relate, *inter alia*, to the various measures contained in Article 62(4) of the Convention,[47] intended to prevent abuse in harvesting the surplus of the allowable catch.

3.3 Management of Migratory/Straddling Fish Species

Fish recognise and respect no Convention maritime boundaries.[48] In fact, some species[49] move inconveniently across maritime boundaries.[50] Such species live different stages of their life-cycle in different marine habitats. By their nature, such species may grow in one marine

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44 UNCLOS (n 8) art 62(2).

45 ibid.

46 ibid.

47 Such measures include the licensing of fishermen, fishing vessels and equipment, including: payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the fields of financing, equipment and technology relating to the fishing industry; determining the species which may be caught and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period; regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used; fixing the age and size of fish and other species that may be caught; specifying information required of fishing vessels, including catch and effort statistics and vessel position reports; requiring, under the authorisation and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data; the placing of observers or trainees on board such vessels by the coastal State; the landing of all or any part of the catch by such vessels in the ports of the coastal State; terms and conditions relating to joint ventures or other cooperative arrangements; requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research; enforcement procedures.

48 Wijkman (n 41) 27.

49 For a list of highly migratory fish species see UNCLOS (n 8) annex 1.

50 Lawrence Juba, 'The Exclusive Economic Zone Management' (1987) 18 Ocean Development and International Law 305.

habitat and, when mature and harvestable, migrate to another. Such migration may be from one EEZ to another or from an EEZ to the high seas, where they become amenable to exploitation by all States in consonance with the freedom of fishing in the high seas. The migratory nature of such species tends to negate the Convention idea that coastal States should conserve, manage and exploit the living resources of their EEZ to the exclusion of other States. The pre-UNCLOS era left the issue of migratory fish species and their management unaddressed.

This lacuna was envisioned during UNCLOS III. UNCLOS, therefore, enjoined States to implement measures for the effective management of migratory fish. It laid the foundation upon which States are to build for the purpose of developing arrangements for the management of migratory fish stocks. Under the Convention, three migratory fish categories are identified, depending on the extent and direction of migration. These are highly migratory species,[51] anadromous stocks[52] and catadromous stocks.[53] Highly migratory species are fish species that regularly migrate long distances across international waters.[54] Anadromous stocks are those that migrate from saltwater habitats to freshwater habitats or those that migrate shoreward from the sea,[55] while catadromous stocks refer to fish stocks that migrate seaward or from freshwater to saltwater habitats.[56]

Since catadromous stocks migrate seawards, the possibility exists that they might migrate from the EEZ of the State of origin to that of another State. If there were no regulations, such stocks having been conserved, managed and maintained by the State of origin will end up being harvested by the other State. UNCLOS envisaged and took measures to deal with such a situation. Where such species migrate in this way, whether as juvenile or maturing fish, the management, including harvesting, of such fish shall be regulated by agreement between the State of origin and the other State concerned, taking into account, however, the responsibility of the State of origin in the maintenance of the species.[57] In respect of migratory fish stocks, UNCLOS therefore set up a platform for States to ensure, through agreement, effective management of migratory species to their mutual economic benefit. This is something which, before the Convention, was left to the unrestrained whims of States.

Despite the efforts of UNCLOS to encourage States to reach agreements on the modalities of managing migratory fish species, conflicts still arose regarding the exploitation of those trans-boundary fish stocks. It was in response to such conflicts that the UN convened the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in 1995.[58] The Conference adopted the United Nations Fish Stocks Agreement (UNFSA).[59]

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51 UNCLOS (n 8) art 64.

52 UNCLOS (n 8) art 66.

53 UNCLOS (n 8) art 67.

54 RP Khodorevskaya, GI Ruban and DS Pavlov, *Behaviour, Migrations, Distribution, and Stocks of Sturgeons in the Volgan-Caspian Basin* (Books on Demand GmbH 2009).

55 ibid.

56 ibid.

57 UNCLOS (n 8) art 67(3).

58 The Conference was held in New York from 24 July to 4 August 1995.

59 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of the Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3; 78 States and entities have ratified the Agreement to date.

The Agreement, according to Nandan, is a strong and far-reaching instrument and by far the most comprehensive agreement relating to the conservation and management of fish stocks.[60]

The UNFSA requires the management of straddling/highly migratory fish stocks on a sub-region by sub-region basis through Regional Fisheries Management Organisations (RFMOs).[61] Following the UNFSA, various RFMOs have been established on sub-regional basis,[62] with the objective, among others, to 'agree, as appropriate, on participatory rights [of States Parties] such as allocations of allowable catch or levels of fishing effort.'[63] Although existing RFMOs have been shown to have their imperfections,[64] they have succeeded in curbing the problem of incessant fisheries crises, especially those pertaining to allowable catch, in sub-regions where they have been established.[65]

3.4 Protection and Preservation of the Marine Environment

For sea fisheries to be properly conserved, managed and profitably exploited, it is necessary for the marine environment to be protected and preserved, since adverse changes in fish habitat are bound to alter fish populations. Unless the marine environment is protected, whatever effort is made by States, whether through the UN, regional or sub-regional arrangements, to enhance the development of fisheries resources and protect fishing rights, would be effectively discounted by pollution of the marine environment.

As another way of stabilising and enhancing fishing rights under the UNCLOS, States dedicated the whole of Part XII of the Convention to the protection and preservation of the marine environment. The provisions are intended to enable States to take measures to prevent, reduce and control pollution of the marine environment. Under the Convention, 'pollution of the marine environment' is defined as:

> The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[66]

Under UNCLOS, States have a general obligation to protect and preserve the marine environment against pollution.[67] They are required to take measures individually or jointly to

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60 Statement of Satya Nandan, Secretary-General of the International Seabed Authority, 'Agenda Item 49; Oceans and the Law of the Sea' (59th Session of the General Assembly of the United Nations, 17 November 2004) 5.

61 UNFSA (n 59) arts 7, 8.

62 These include: the South East Atlantic Fisheries Organisation (SEAFO); the Western and Central Pacific Fisheries Commission (WCPFC), otherwise known as the Tuna Commission; the Inter-American Tropical Tuna Commission (IATTC); the North-East Atlantic Fisheries Commission (NEAFC); the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47.

63 UNFSA (n 59) art 10(b).

64 For a detailed study of the problems associated with RFMOs, see Anthony Cox, 'Quota Allocation in International Fisheries' (OECD Food, Agriculture and Fisheries Papers No 22, 2009) <dx.doi.org/10.1787/218520326143> accessed 29 November 2019.

65 ibid.

66 UNCLOS (n 8) art 1(4).

67 UNCLOS (n 8) art 192.

prevent, reduce, or control pollution of the marine environment from land-based sources,[68] the atmosphere,[69] through dumping,[70] by vessels plying the seas,[71] from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil within national jurisdiction[72] and from activities in the area.[73]

States must also co-operate and, directly or through international organisations, carry out studies, research and programmes for the prevention, reduction and control of pollution in the marine environment.[74] States act in concert in this regard, mainly through the International Maritime Organisation (IMO)[75] and the United Nations Environmental Programme (UNEP).[76] The IMO, within its environmental mandate, has developed and adopted a range of international instruments to address marine pollution arising from international shipping.[77] Its efforts in this regard have led to reduced marine pollution arising from the activities of vessels plying the high seas.

Recognising the obvious lack of resources and capacity among developing nations to adequately confront the problem of marine pollution, the Convention requires that such countries be granted preference by international organisations in the allocation of appropriate funds and technical assistance and the utilisation of the specialised services of international organisations.[78] Thus, where resources available to international organisations for assisting States in marine pollution prevention are limited, preference is to be given to developing countries in the allocation of such resources. UNCLOS also contains copious provisions relating to enforcement of the Convention and the local maritime laws and regulations of States for the purpose of ensuring compliance by persons carrying out activities that constitute

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68 UNCLOS (n 8) art 207.

69 UNCLOS (n 8) art 212.

70 UNCLOS (n 8) art 210.

71 UNCLOS (n 8) art 211.

72 UNCLOS (n 8) art 214.

73 UNCLOS (n 8) art 215; the 'area' under art 1(1) UNCLOS is used to refer to the seabed, ocean floor and subsoil beyond the outer edge of the continental break or margin of a coastal State.

74 UNCLOS (n 8) arts 200–202.

75 The IMO is a UN specialised agency with a mandate to promote, secure and ensure environmentally sound, efficient and sustainable shipping.

76 UNEP is an agency of the UN that coordinates UN environmental activities and assists developing countries in implementing environmentally sound practices.

77 Such instruments include the International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (adopted 29 November 1969, entered into force 6 May 1975) 970 UNTS 211; International Convention on Oil Pollution Preparedness, Response and Cooperation (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS 51; International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975) 973 UNTS 3; Convention on Prevention of Pollution by Dumping of Wastes and other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120; International Convention on the Control of Harmful Anti-fouling Systems on Ships (adopted 5 October 2001, entered into force 17 September 2008) IMO Doc AFS/CONF/26; the International Convention for the Control and Management of Ships' Ballast Water and Sediments (adopted 13 February 2004, entered into force 8 September 2017) IMO Doc BWM/CONF/36.

78 UNCLOS (n 8) art 203.

potential threats to the marine environment. Flag States,[79] port States[80] and all coastal States[81] are required to ensure the enforcement of maritime laws and regulations over vessels in order to prevent pollution of the marine environment.

4. The Challenges Confronting Developing Countries

The view is held by various scholars that UNCLOS holds many economic prospects for developing countries.[82] It is their thinking that the Convention brought with it the seed of a new international economic order under which developing countries stand to reap many economic benefits. One of the areas in which they expected that developing countries would have an advantage is in the exploitation of sea fisheries. As discussed above, the EEZ revolutionised fishing rights globally, vesting the exclusive right to conserve, manage and exploit the living resources of the zone in coastal States for their own economic benefit. The EEZ proves beneficial to developing countries which, before the Convention, watched the distance-fishing fleets of the developed countries exploit the fisheries of that zone as part of the high seas.[83] Today, developing countries can, through well thought-out fisheries laws, regulations and policies, maximise the benefits of their fisheries resources within the expansive EEZ.[84]

A contrario, over three decades since the adoption of the UNCLOS, most developing countries have yet to develop effective fishing policies that cater to the needs of management, conservation and optimal utilisation of fisheries resources. Although the problem of unsatisfactory fisheries management is a global one,[85] the situation is worse among developing

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79 UNCLOS (n 8) art 217.

80 UNCLOS (n 8) art 218.

81 UNCLOS (n 8) art 220.

82 Harris (n 16) 475 para 8; Essien (n 1) 108–116; Ken Roberts, 'Legal and Institutional Aspects of Fisheries in West Africa' (1998) 10 International Journal of African Law 88; see generally UNCLOS (n 8) preamble, which aspires that the Convention should 'contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole, and *in particular, the special interests and needs of developing countries, whether coastal or land locked.'* (emphasis added).

83 Overseas Development Institute (ODI), 'Fisheries and the Third World' (Briefing Paper 2, June 1984).

84 In fact, during the period 1989–2002, the net exports of fisheries commodities by developing countries (ie deducting their imports from the total value of their exports) increased from USD 4 billion to USD 17.4 billion. This was greater than the net exports of other agricultural commodities such as rice, cocoa, tobacco, and tea; see research work commissioned by Environment and Trade in a World of Interdependence (ENTWINED) and Foundation for Strategic Environmental Research, Eggert and Graeker (n 39) 1.

85 For example, in the last decade, in the North Atlantic Region, commercial fish populations of species like cod, hake, haddock and flounder have fallen by as much as 95%, prompting calls for urgent measures. Despite also the high level of awareness and development among the developed countries, marine area protection and conservation has not been impressive across the world. In fact, it is estimated by UNEP that less than one percent of the world's oceans are currently Marine Protected Areas (MPAs) and according to the Food and Agricultural Organisation (FAO), over 70% of the world's fish species are either fully exploited or depleted; see United Nations Environment Programme (UNEP), 'Overfishing: A Threat to Marine Biodiversity' <unis.unvienna.org/documents/unis/ten_stories/09fisheries.pdf> accessed 29 November 2019; according to Eggert and Graeker, more than 20% of fish stocks have crashed across the world, 40% are overexploited and the remaining 35% are fully exploited, a trend that is bound to threaten ecosystems and lead to poor yield and low income; see Eggert and Graeker (n 39) 2; D Pauly and others, 'Towards Sustainability in World Fisheries' (2002) 418 Nature 689; EB Barber and others, 'Impacts of Biodiversity Loss on Ocean Ecosystem Services' (2006) 314 Science 789, 789–90.

countries.[86] For these countries (especially those in Africa), it has been either a case of overfishing without any plan for yield sustainability, or sub-optimal utilisation of fisheries as a result of lack of capacity resulting in low fishing effort.

Whether as overfishing or fisheries under-utilisation, poor fisheries management has serious adverse economic consequences for developing countries. The most obvious economic impact of poor fisheries management on developing countries is direct loss of the value of the catches that could be taken by developing coastal States if their fisheries were properly managed. Aside from the loss to GNP, 'actual revenue can accrue to the coastal state in the form of landing fees, licence fees, taxes and other levies which are payable by legal fishing operators'.[87] Aside from its direct macro-economic impacts on developing economies, there are also indirect and more subtle impacts on the global economy. These include the impacts resulting from loss of income and employment in other industries and activities in the supply chain, both upstream and downstream.[88]

A major cause of poor fisheries management among developing countries is the absence of clear fisheries policies and the necessary political will to enforce laws and regulations. Since most developing countries are characterised by a low governance level, fisheries policies are not formulated with the importance they deserve, especially in countries where there are more profitable resources. As a result, regulations are incomprehensive and enforcement perfunctory. Although some have legislation providing copious regulations for fishing activities in their waters, most developing countries are most lackadaisical about the enforcement of regulations. Both artisanal and industrial fishing are, therefore, largely unregulated. As Eggert and Greaker have observed, 'management is often de facto open access, where vessels with or without permission to fish land as much as they can catch due to limited monitoring and enforcement activities'.[89] Monitoring,[90] control[91] and surveillance[92] (MSC), which are imperatives for effective fisheries management, are either non-existent or ineffective where they do exist. The consequence is thriving illegal, unreported and unregulated (IUU) fishing in developing countries' waters. It is estimated, for example, that nineteen percent of current landed value in sub-Saharan Africa is being caught by IUU fishing.[93] The elimination of IUU fishing among developing countries will correspond to improved foreign exchange earnings for the countries concerned where the IUU fish are export fish,[94] and contribute to food security of artisanal fishermen where the IUU fish are locally consumed fish.[95]

Due to overfishing, which is a consequence of poor fisheries management, South Africa, for example, is faced with a dire case of overfishing, so much so that the country is left

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86 ibid.

87 Marine Resources Assessment Group (MRAG), 'Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries' (Synthesis Report, June 2005) 5.

88 ibid.

89 Eggert and Graeker (n 39) 1.

90 'Monitoring' is the continual measurement of fishing effort, characteristics and catches.

91 'Control' refers to the entire legal framework within which fisheries resources may be exploited.

92 'Surveillance' embraces all measures required to ensure compliance with the established legal framework.

93 MRAG (n 87) 11.

94 In Seychelles, for example, IUU fishing involves mainly export tuna; ibid.

95 In West Africa, IUU fishing is predominantly in respect of inshore shrimp and demersal fish consumed locally; ibid.

with less than five percent of its original fish populations.[96] In South Africa, due to poor conservation and management, fisheries have been so over-exploited that it has become difficult to sustain yields. Such fish stock depletion does not only pose a danger to the ecosystem, but also 'poses a major threat to the food supply of millions of people'.[97] A study of illegal fishing in ten developing countries,[98] between 2003 and 2004, showed that Guinea alone lost over USD 100 million to illegal and pirate fishing within that period.[99]

At the other extreme are developing countries that suffer sub-optimal utilisation of their fisheries resources. Ghana and Nigeria are examples of this. Ghana has rich fisheries, but under-utilisation has necessitated fish importation. With an estimated annual fish requirement of 880,000 tonnes, Ghana's production stands at an average of 420,000 tonnes leaving a deficit of 460,000 tonnes which is compensated for through fish imports.[100] In the case of Nigeria, despite its high potential for fish production, it still depends on fish imports to meet its domestic fish demands.[101] It is generally believed that if Nigeria's fisheries resources are 'rationally managed and exploited, the country can attain sufficiency in fish production'.[102] The result of fisheries under-utilisation has therefore been the legal or illegal harvesting of the surplus catch by the fishing vessels of the developed countries. It is in fact estimated that 50–60 percent of the world's catch is made by European fishermen and that a large part of that is from waters under the jurisdiction of developing countries.[103]

For the prevention of the under-utilisation of fisheries resources owing to low fishing efforts, Article 61 of UNCLOS requires coastal States to determine the total allowable catch of the living resources of their EEZ, and under Article 62(2) they are then to determine their catch capabilities. The surplus is to be made available to other States for exploitation through agreements or other arrangements.[104] This provision of the UNCLOS is, as earlier pointed out, intended to prevent fisheries resource under-exploitation. However, the determination of both allowable catch and a country's catch capability requires the availability of accurate marine biodiversity data and information which are not readily available in developing countries. The result is an obvious inability of developing countries to accurately determine their total allowable catch and their harvesting capacities. With the paucity of such data and information, it is difficult to determine and allocate surplus to States with the necessary capability and fishing effort. Developing countries are, therefore, deprived of revenues that

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96 Environment South Africa, 'Methods to Help South Africa's Overfishing Problem' (17 June 2016) <environment.co.za/wildlife-endangered-species/methods-to-help-south-africas-overfishing-problem.html> accessed 29 November 2019.

97 ibid.

98 Guinea, Somalia, Angola, Mozambique, Papua New Guinea, Sierra Leone, Liberia, Seychelles, Kenya and Namibia.

99 MRAG (n 87) 6.

100 Theodore Kwadjosse, 'The Law of The Sea: Impacts on the Conservation and Management of Fisheries Resources of Developing Coastal States – The Ghana Case Study' (2009) <un.org/Depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/kwadjosse_0809_ghana.pdf> accessed 14 December 2019 3.

101 FD Sikoki, 'Fishes in Nigerian Waters: No Place to Hide' (Inaugural Lecture Series No 100, University of Port Harcourt, 31 January 2013) 43.

102 ibid 13.

103 Publications Office of the European Union, 'Fisheries: Fisheries and Poverty Reduction' (2002) <europa.eu/legislation_summaries/defelopment/sectoral_development_policies/r12512_en.htm> accessed 29 November 2019.

104 UNCLOS (n 8) art 62(2).

ought to accrue from licensing fees, vessel registration fees, and landing fees. Even where allocations were possible and licences were granted to foreign fishers, bribery and corruption proved major obstacles to realising targets as vessel licensing was irregular, catches were not being reported and permits were granted to fishers who did not meet the required criteria.[105]

There has also been a failure, or lack of co-operation, between neighbouring developing coastal countries on maritime surveillance. With limited surveillance capabilities over their expansive waters, cooperation becomes necessary but is usually lacking. With the limited solo efforts of these States at surveillance, it has proved difficult to eliminate IUU fishing.[106]

Modern fisheries management requires cooperation agreements among States on a regional or sub-regional basis for the effective management of migratory/straddling fish stocks. It is for this reason that UNCLOS enjoins States in the same region to cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the EEZ.[107] This is strengthened by Article 8 of the UNFSA which imposes a duty to cooperate through RFMOs, by providing that only members of RFMOs, or non-members which agree to apply the conservation and management measures adopted by RFMOS, can have access to the particular fishery. This requires not only the establishment of RFMOs among developing countries in the same region, but also ensuring the effectuality of such organisations. It has been estimated that highly migratory/straddling fish species account for as much as one-third of world's marine capture fish harvests.[108] This illustrates the economic importance of these fish species. Although several RFMOs or similar bodies have been established in various developing regions of the world for the management of trans-boundary fish stocks both within the EEZ and beyond,[109] many other regions have yet to establish them. In most cases, cultural, linguistic, geographical and historical differences between countries in the same region militate against the establishment and efficient operation of RFMOs. In West Africa, for example, these factors have made difficult the establishment and successful operation of RFMOs.[110]

RFMOs play the significant role of gathering data on fisheries resources of the particular fisheries concerned and allocating allowable catch or fishing effort among members.[111] In regions where there are no RFMOs, or where they exist but are ineffective, it is difficult to gather data and impossible to devise an acceptable allocation system that ensures yield sustainability.

In some regions of Africa, certain maritime boundaries are still unclear, making the operation of RFMOs difficult. For instance, despite UNCLOS, Angola and Namibia have yet

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105 Eggert and Graeker (n 39) 11.

106 ibid 13.

107 UNCLOS (n 8) arts 63(1), 118.

108 Gordon Munro, Annick Van Houtte and Rolf William, 'The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects' (FAO Fisheries Technical Paper No 465, 2004) <fao.org/3/y5438e/y5438e00.htm> accessed 29 November 2019, 7.

109 In Africa, for example, there have been the Commission for Eastern Central Atlantic Fisheries created in 1967; the Ministerial Conference on Fisheries Cooperation Among States Bordering the Atlantic Ocean created in 1989 and the Sub-Regional Fisheries Commission created on 29 March 1985.

110 Roberts (n 82) 10.

111 UNFSA (n 59) art 10(b); Cox (n 64) 11.

to finalise their EEZ and continental shelf boundaries,[112] and Angola and South Africa have yet to establish their maritime boundaries.[113] Aside from uncertainties over boundaries, some developing countries still, in practice, make extra-Conventional claims of expansive territorial seas and sometimes undeclared breadths of EEZ. Benin and Sierra Leone, for example, maintain territorial seas of 200 miles;[114] Nigeria claims one of over 12 miles;[115] while Cameroon asserts a claim of a 50-mile territorial sea without any declared EEZ.[116] This in many ways hinders the use of MCS measures to protect fisheries jurisdiction and manage fisheries in those regions. Even where they exist among developing countries, most RFMOs have generally been deemed ineffective as regards their abilities to ensure the conservation of fish stocks.[117]

Equally militating against the maximisation of the benefits of enhanced fishing rights under UNCLOS in developing countries is the absence of subsidies for the fishing industry. In the developed countries of Japan, Russia and China, as well as in Eastern and Western Europe, subsidies have long been provided for the fishing industries, aimed at developing distant water fleets for the global catch race.[118] According to Sumaila and Pauly, in conservative terms, about USD 30–34 billion worth of subsidies are provided by governments annually to the fishing industry.[119] This, unfortunately, is a rarity in developing countries.

Subsidies can be internal or external. They are internal when they are provided by the domestic government and external when they are made available by foreign governments or organisations. Through subsidies, industrial fishing is encouraged as fishers are provided with the necessary capital needed to increase fishing effort and therefore also increase harvests.

Due to poverty, corruption and oftentimes misplaced priorities, such subsidies are hardly available in most developing countries. This has perpetuated low fishing efforts in those countries, resulting in fisheries under-utilisation. Good subsidies do not only promote growth in fishing effort (where it is considered economically advisable), but also attend to the needs of stock conservation and management through improvement of fisheries monitoring, surveillance and control.[120]

5. Recommendations

Governments of developing coastal countries must begin to prioritise the fisheries resources of their EEZs as a national revenue source. The development of the concept of the EEZ was championed by developing States in response to the massive exploitation of their sea fisheries by the distant water fishing fleets of industrialised States. Since the creation of the exclusive economic zone, however, most developing countries have yet to efficiently exploit the huge fisheries resources of the EEZ.

As inefficiency in the operations of public corporations is a common feature of developing countries, the private sector should be largely involved in the management and

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[112] Roberts (n 82) 120.
[113] ibid.
[114] ibid.
[115] ibid.
[116] ibid.
[117] Cullis-Suzuki and Pauly (n 5) 1036–1042; Roberts (n 82) 116.
[118] Eggert and Graeker (n 39) 15.
[119] UR Sumaila and D Pauly (eds), 'Catching More Baits: A Bottom-Up Re-estimation of Global Fisheries Subsidies' (2006) 14(6) Fisheries Centre Research Reports 1.
[120] Eggert and Graeker (n 39) 16.

exploitation of sea fisheries in developing countries. These countries stand to earn huge revenues from licensing and other fees paid by industrial fishers. Aside from revenues, with the private sector largely involved, a value chain will develop which will in turn create much-needed employment opportunities in these countries. All these will, in the long run, have expansionary effects on developing economies. Governments of developing countries must begin to see sea fisheries as potential contributors to their national economy and begin to diversify their economies in that direction.

No effort at maximising the benefits of EEZ fisheries of developing countries will yield appreciable results without a virile and robust system of enforcing maritime laws and regulations. These countries are not in deficit regarding maritime laws and regulations, but the enforcement thereof is a problem. The consequence has been open-access fishing in the waters of these countries by fishermen from all over the world. Governments of developing States must therefore muster the political will to enforce their maritime laws and regulations irrespective of how powerful the offenders might be. Relevant law-enforcement agencies should be adequately equipped to protect and secure waters in those countries from IUU fishing. Vessels and aircraft equipped with radars, electronic emission scanning equipment and other modern surveillance gadgets should be made available for the onerous task of modern maritime surveillance.

In addition to the governments of developing countries securing and protecting their maritime zones, they must also increase the fishing efforts of their own countries. Excluding illegal fishers without themselves doing enough fishing will only result in the under-utilisation of fisheries resources, which is asynchronous with the fisheries management prescriptions of UNCLOS.[121] For third world countries affected by the sub-optimal utilisation of fisheries, fishing effort must be increased. To achieve this, both internal and external subsidies should be introduced to encourage industrial fishing. Argentina offers a good example of a developing country that increased fishing effort over a short period of time using mainly external subsidies. Under an agreement entered into in 1994, the EU gave subsidies to Argentina for the establishment of joint ventures with local firms in order that EU member States' vessels could have access to Argentina's EEZ. Under the agreement, the EU gave subsidies to Argentina to an estimated tune of USD 230 million.[122] As a result of that arrangement, between 1985 and 1995, Argentina's fishing effort increased, with the aggregate motor power of its fishing fleet rising from 25,000 horsepower (hp) in 1990 to almost 200,000 hp in 1995.[123] Correspondingly, the country's fish export grew by almost 500 percent over the same period.[124] The Argentinian experience can be replicated in other third world countries where fishing effort is low.

In the case of developing countries plagued by overfishing, policies must urgently be formulated, and legislation enacted, that are geared towards reducing exploitation and returning fish yields to sustainable levels. Such policies and legislation must seek to curb IUU

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[121] A major policy of the Convention is fisheries resource conservation and management aimed at ensuring optimal resource exploitation and preventing resource under-utilisation. This is the very purpose of such Convention concepts as allowable catch, harvesting capacity and surplus allocation under Part V of the Convention; see UNCLOS (n 8) Part V.

[122] Eggert and Graeker (n 39) 1.

[123] ibid.

[124] ibid.

fishing through effective restrictions that allow access only to licensed fishers. Overfishing is, however, not only a consequence of IUU fishing. It is also, in some cases, a result of excess fishing by the coastal State itself. In developing countries where this is the case, law and policy should be aimed at reducing fishing efforts. This can be achieved by reducing the aggregate motor power of the coastal State's fishing fleet.[125] Such reduction could be for a definite or indefinite period. In this way, yield sustainability could be ensured over time.

Most developing countries have no clear-cut fisheries management policies. Resultantly, there are usually no objectives, nor mechanisms, for decision-making and no plans for ensuring implementation and compliance. Yet, these are essential elements that constitute any workable fisheries management policy, without which management is useless. Alabsi and Komatsu have pointed out thus:

> Fisheries management usually must have a policy framework which sets objectives to achieve and mechanisms to follow in decision-making. Next, it must have a suite of laws and regulations to control stakeholders' behavior. Finally, it must have an enforcement power to ensure compliance and implementation of these rules in practice. How appropriate these tools are to a specific fishery, will determine the type and success of the resulted management.[126]

This makes it imperative for governments of third world countries to articulate and develop fisheries policies that set out clear objectives, establish legal and regulatory frameworks and set up implementation mechanisms. In this way, performance can always be evaluated and relevant institutions strengthened. Leaving fisheries to ad hoc management and knee-jerk reactions in developing countries will perpetuate fisheries over-exploitation or under-utilisation, both of which are features of poor fisheries management.

Although UNCLOS enjoins states to establish RFMOs in their various regions,[127] developing countries have yet to take advantage of such organisations. RFMOs, *inter alia*, ensure effective collective management of migratory/straddling fish species by coastal countries in the region. They allocate fishing quotas to members and thus ensure optimal resource utilisation of migratory fish and reduce conflicts over fishing rights among coastal States in the region. Among developing countries where such organisations have yet to be established, migratory fish are lost as they migrate to the high seas, where they are harvested by distant-water fishers from developed countries in line with the doctrine of high seas freedom. There is, therefore, need for RFMOs to be established in various regions and subregions of Africa, Asia and Latin America, for the avoidance of resource loss and conflicts over fishing rights.

6. Conclusion

The UNCLOS is reputed to have greatly enhanced and stabilised fishing rights and thus minimised the international fisheries-related maritime disagreements of the pre-Convention era. With the wider fisheries jurisdictions granted to coastal States under the Convention and

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[125] This will, however, prove difficult where, as in most developing countries, there are no reliable data on the harvesting capacities of fishing fleets upon which fishing efforts could be determined and upon which policymakers may make decisions.

[126] Natheer Alabsi and Teruhisa Komatsu, 'Characterisation of Fisheries Management in Yemen: A Case Study of a Developing Country's Management Regime' (2014) 50 Marine Policy 91.

[127] UNCLOS (n 8) art 63.

considering the economic importance of fish in today's world, it was reasonably expected that coastal States would maximise fishing efforts in their waters, enact laws and regulations and develop national fisheries policies for national economic growth. This has not been the case in most developing countries. The combined factors of inadequate fisheries policy, poverty, corruption, ignorance, poor maritime law enforcement and a characteristic lack of political will to develop fisheries have all contributed to diminishing earnings from sea fisheries in developing countries.

Developing coastal countries must take full advantage of their enlarged fisheries jurisdiction under UNCLOS, not only to meet local fish demand but also to boost foreign exchange earnings. In a globalised world of capitalist economic competition, diversification of national economies has become a survival strategy. The development of fisheries resources (with which most developing coastal States are abundantly blessed) remains one of the best chances in any genuine effort in the diversification of the economies of developing coastal States.

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Elusive Justice for Victims of the Abdoulay Yerodia International Crimes of August 1998 in the Democratic Republic of the Congo

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VICTIMS; INTERNATIONAL CRIMES; YERODIA; DEMOCRATIC REPUBLIC OF CONGO; TUTSI; INTERNATIONAL COURT OF JUSTICE

Abstract

In order to access justice, victims of human rights abuses must first find a jurisdiction that is willing to hear their case. In the Abdoulay Yerodia Ndombasi (*Yerodia*) case in the Democratic Republic of Congo (DRC), victims of Yerodia's intentional crimes brought their case in Belgium because they were unable to introduce it in domestic courts. Belgium launched an international arrest warrant against Yerodia who, at the time of accusation by Belgium, was Foreign Minister of the DRC. This has led to a dispute between the DRC and Belgium before the International Court of Justice (ICJ). The DRC accused Belgium of violating the diplomatic immunity of its Foreign Minister. However, the international crimes in question were committed before Yerodia became Foreign Minister of the DRC and the ICJ rendered its decision in his case after he had ceased to hold that position. Despite this, the ICJ ruled in favor of Yerodia's diplomatic immunity and consequently this decision has only protected him from criminal liability. This paper examines first the historical background of the discrimination of Yerodia's victims to support the claim that they cannot access justice in the DRC. It also argues that the ICJ's decision in this case has only contributed to shielding Yerodia from justice rather than preserving smooth operation of the DRC's diplomatic activities abroad. Finally, this paper suggests that the ICJ's decision in this case has closed the doors to victims in their endeavors to access justice.

1. Introduction

It has been more than two decades since the DRC witnessed conflicts in which a plethora of gross violations of human rights occurred in the context of targeted inter-ethnic violence. Most crimes committed during this violence remain unpunished, a situation that may contribute to their reoccurrence in the future. These tragic events include the massacres of the Tutsi in August 1998. The immediate trigger of these killings were certain speeches advocating racial hatred, which were made during the outbreak of the second civil war in August 1998 by some high ranking authorities in the DRC including, among others, the late President Laurent Désiré Kabila and his former Private Secretary and Chief of Cabinet

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Yerodia.[1] That war was fought in opposition to the Kabila regime by the rebels of the Rally for Congolese Democracy (RDC) and the Movement for the Liberation of Congo (MLC). Officially, the rebels claimed to oppose the expansion of a new dictatorship in the DRC.[2]

To respond to the insurgency, the Kabila regime mobilised members of other Congolese communities to exterminate the Tutsi in the DRC. The Tutsi were accused of conniving with foreign forces to destabilise the country and were referred to as 'scum and vermin that must be methodically eradicated and with determination.'[3] Although at time of writing no research has yet been conducted to identify the exact number of victims, these hateful speeches spread a destructive ideology against the Tutsi in the DRC which resulted in the massacres of thousands. According to Vollhardt, one of the characteristics of these speeches is dehumanisation of the victims.[4] For example, during the 1994 genocide in Rwanda, the Tutsi were compared to 'cockroaches.' Similarly, in the DRC in August 1998, the Tutsi were compared to 'vermin and scum.'

Due to extensive involvement of the DRC's high-ranking officials in the heinous killing campaigns, victims were unable to bring their cases in domestic courts in the DRC. However, some family members of victims, who resided in Belgium, filed their actions in a Belgian court.[5] On11 April 2000, Judge Damian Vandermeesch of the Brussels Tribunal of First Instance issued an international arrest warrant against Yerodia, in which he described the crimes committed as crimes against humanity and war crimes.[6] The Yerodia arrest warrant was issued in a case which also investigated Kabila, his former Minister of information Didier, Mumengi, former communications manager in the presidential office, Dominque Sakombi, and his former Interior Minister, Gaeta Kakudji.[7] In Belgium, this case was filed under the Belgian Law of June 16th 1993 as amended by the law of 10 February 1999. This law concerns the punishment of the grave breaches of international humanitarian law and provides Belgian courts with jurisdiction over international crimes such as genocide, crimes against humanity and war crimes, irrespective of the nationalities and residences of the victims and accused and the places where the alleged crimes took place.[8]

Instead of cooperating with the Belgian justice system in order to hold a perpetrator of international crimes accountable for his wrongdoing, the DRC's authorities chose to shield Yerodia from justice. In this regard, they instituted proceedings against Belgium at the ICJ to seek cancelation of that arrest warrant. In its application, the DRC claimed a

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1 Alberto Luis Zuppi, 'Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice' (2003) 63 Lousiana Law Review 309, 311–312.

2 Erna Sif Bjarnadóttir, 'Conflict In The Democratic Republic Of Congo: A Study Of "New Wars"' (Master thesis, University of Iceland 2017) 31.

3 Safari Chizungu, 'Yerodia Guerre Aux Tutsi RDC 1998' (10 October 2013) <youtube.com/watch?v=gyajJhWgcQY> accessed 1 December 2019.

4 Johanna Ray Vollhardt, 'Destructing Hate Speech in DRC: A Psychological Media Sensitization Campaign' (2007) 5 Journal of Hate Studies 15, 26–27.

5 Zuppi (n 1) 311.

6 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) (2002) ICJ Rep 3.

7 Cours d'Appel de Bruxelles, 'Arret 16 Avril 2002 (Yerodia)' <competenceuniverselle.files.wordpress.com/2011/07/arret-16-avril-2002.pdf> accessed 1 December 2019.

8 Jan Wouters and Leen de Smet, 'The ICJ's Judgment in the Case Concerning the Arrest Warrant of 11 April 2000: Some Critical Observations' (2001) 4 Yearbook of International Humanitarian Law 373.

violation of the functional immunity of its incumbent Foreign Minister by Belgium.[9] The ICJ rendered its final judgment in this case a year and a half after Yerodia ceased to hold that position and ordered Belgium to cancel its arrest warrant. In its decision, the ICJ upheld the DRC's complaint.[10]

However, although the DRC's authorities used the outbreak of war in August 1998 to justify the massacres of the Tutsi nationwide, it is widely known that the Tutsi have been the subject of many forms of injustice on the basis of their ethnicity in the DRC for many years. Therefore, the first section of this paper examines the historical background of the discrimination and marginalisation of the Tutsi in the DRC, matters considered to be the direct precursor to the massacres of August 1998. Although the ICJ did not directly address the crimes of which Yerodia was accused in Belgium, its decision has contributed to shielding him from justice. The same decision obstructed the access to justice of the victims in the DRC as well as in other foreign judicial forums. Hence, the second section of this paper examines whose justice in this case (victims or perpetrator of international crimes) as well as the implication of the ICJ decision on victims' right to access justice.

2. Historical Background of the Discrimination Against the Tutsi in the DRC: The Precursors to the Massacre in August 1998

From the colonial period until the present, the Tutsi have undergone numerous injustices in the DRC because of their ethnicity. Since it has been proven in numerous cases that ethnic politics culminate in suspicions among communities and generate violence,[11] this situation has resulted in the violation of many of their rights, including their right to life. Before the independence of 1960, the colonial administration had put in place some policies that excluded the Tutsi from the governance of the DRC. For a better understanding of why the DRC's authorities called for the extermination of the Tutsi in August 1998, one needs to revisit the history of their discrimination and marginalisation in the DRC, as briefly discussed below.

2.1 Exclusion of the Tutsi from Governance During Colonial Administration

2.1.1 The Historical Settling of the Tutsi in the DRC

Although there is some controversy regarding the settling of the Tutsi in the DRC, many available historical sources confirm that they arrived in three main groups from the region which is today known as the countries of Rwanda and Burundi. The first group, known as 'Banyamulenge', was already present in the South Kivu province in Eastern DRC before the demarcation of the borders of African countries during the Berlin Conference that took place between 1884–1885.[12] Some of the Banyamulenge were looking for pastures for their livestock; others fled the conflicts that occurred during the reign of Ruganzu II Ndoli of 1510–1543 and others fled the famine that occurred under the reign of Yuhi IV Gahindiro around 1746–1802, both from the former kingdom of Rwanda.[13] The second group of Tutsi came to the DRC during Belgian colonial rule in the 1930s, under the migration waves known as 'the Transplantation of Rwandan and Burundian populations in the Kivu

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9 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Application Instituting Proceedings) (2002) ICJ Rep 3 [174].

10 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 6).

11 Emily Paddon and Guillaume Lacaille, *Forced Migration Policy Briefing: Stabilising the Congo* (Refugee Studies Centre, University of Oxford 2011) 6.

12 SL Rukundwa, 'The Banyamulenge of the Democratic Republic of Congo: A Cultural Community in the Making' (2009) 60 Theological Studies 369, 369–371.

13 ibid.

provinces and recruitment of manpower to work in plantations and mines.'[14] Most of the members of this second group settled in the current North Kivu province. The third group came to the DRC fleeing persecution in Rwanda and Burundi, following ethnic conflicts which took place at various intervals between 1959–1961 and 1963–1973 after these countries became independent.[15] However, members of this third group who came from Burundi returned to Burundi shortly after independence, and those who came from Rwanda returned to Rwanda after the 1994 genocide of the Tutsi. In other words, the Tutsi discussed in this article, who were victims of the massacres of August 1998 in the DRC, are the Banyamulenge and those who emigrated to the DRC in the 1930s.

The term 'Tutsi' is used in this article to include all members of the Tutsi community of the DRC, while the term 'Banyamulenge' refers specifically to the Tutsi who live in the high plateaus of the Uvira, Fizi and Mwenga zones in the South Kivu province, who settled in that region before the demarcation of the borders of the African countries.

2.1.2 Colonial Administrative Policy Excluding the Tutsi from Governance

The exclusion of the Tutsi from governance in the DRC began during the Belgian colonial administration. This colonial power regulated the administrative institutions for the first time in the DRC with the decree of 6 October 1891. That decree simply recognised different local entities which already existed, but it simultaneously suppressed those which belonged to the Banyamulenge in the South Kivu province.[16] Some experts on the region, such as Koen, argue that the creation of these native authorities by the Belgian colonial administration was only a strategy to control the local populations and to integrate their local authorities.[17] Turner also confirmed the idea of controlling ethnic groups, but he added that during that period, the Banyamulenge were reputed to be uncooperative with the colonial administrative power and therefore were excluded from local administration.[18] The geographer, Weis, also wrote towards the end of the colonial period that, during colonial rule, the Banyamulenge faced severe discrimination because they resisted paying taxes and participating in the population census, as well as because they threatened to rule over other Congolese communities and to reduce the influence of Europeans over the DRC.[19] Other experts of the region attribute the suppression of the Banyamulenge chieftaincies in the South Kivu province by the colonial rule to the fact that they opposed its policy of land exploitation introduced in the 1930s. That policy focused on agriculture. The Banyamulenge opposed it as they were concerned for the survival of their livestock and, consequently, their local administrative entities were suppressed and annexed to those of other communities.[20] In the North Kivu province, the situation was the same because the Tutsi and other Kinyarwanda-speaking communities, notably Hutu populations, were also denied access to customary powers because of their origin.[21]

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14 FM Ndahinda, 'Collective Victimization and Subjectivity in the Democratic Republic of Congo: Why do Lasting Peace and Justice Remain Elusive?' (2016) 23 International Journal on Minority and Group Rights 137, 156.

15 ibid.

16 Rukundwa (n 12) 381–382.

17 Koen Vlassenroot, 'Citizenship, Identity Formation & Conflict in South Kivu: The Case of the Banyamulenge' (2002) 29 Review of African Political Economy 499, 502.

18 Thomas Turner, *The Congo Wars: Conflict, Myth & Reality* (Zed Books Ltd 2007) 81–82.

19 ibid.

20 Rukundwa (n 12) 381–382.

21 Jason Stearns and others, *Banyamulenge: Insurgency and Exclusion in the Mountains of South Kivu* (Rift Valley Institute 2013) 17.

The denial of customary power to the Banyamulenge and other Tutsi, as well as other Kinyarwanda speaking communities during the colonial rule, has led to their exclusion from governance in the DRC and this issue has always been a subject of tension and conflict between the Tutsi and other communities in the DRC. This is because, in the DRC, indigenous authorities are regarded as highly important by the local population. Powers at the local level are defined mono-ethnically even though the inhabitants of a local entity come from different ethnic groups.[22] For example, there is a collectivity of Bafuliru (one of the communities of the Uvira district in South Kivu), but the inhabitants of that entity are from different ethnic groups and this is the case in most local entities in the DRC. This exclusion has had a negative effect on the exercise of democratic rights by the Tutsi in the DRC because at time of writing many of their compatriots still consider them as foreigners in their own country, a sentiment which nourished their killings in August 1998.

2.1.3 Ethnic Violence Against the Banyamulenge During the 1964 Post-colonial Conflicts

The DRC gained independence on 30 June 1960, but six months later, on 17 January 1961, its first prime minister, Patrice Lumumba, was assassinated.[23] Although Lumumba was not killed in a civil war, his death was the beginning of various types of conflict in the DRC.[24] His former education minister, Pierre Mulele, launched an uprising against the Kinshasa regime, which he considered to have colluded with foreign powers to assassinate Lumumba. That insurrection reached the areas of Fizi, Uvira, and Mwenga in the South Kivu province where the Banyamulenge lived under the command of rebel leader Simba.[25] Among Simba's commanders in that area was the late President Kabila, who had his headquarters in the Hewa Bora mountains in the Fizi District. Although members of other communities in South Kivu joined that rebellion *en masse*, the Banyamulenge were reluctant. Consequently, that conflict quickly turned into an inter-ethnic military campaign against the Banyamulenge, where they were brutally killed and their properties looted.[26] In other words, in the native region of the Banyamulenge in South Kivu, the post-independence conflict was turned into an inter-ethnic conflict between the Banyamulenge and the rebels led by the late President Kabila. In response, the Banyamulenge created a militia group called *'abagiriye*' which means 'the warriors' in English or '*les guerriers*' in French. These warriors played a major role in chasing President Kabila out from the mountains of Hewa Bora to Tanzania in 1967.[27] President Kabila returned to the DRC political scene in 1996, where he was accompanied mostly by the same Banyamulenge and other Tutsi whom he fought against during the post-independence conflict of the 1960s.

It is remarkable that the call for the extermination of the Tutsi by the late President Kabila's regime in August 1998 had an element of this bitter historical past. In their messages, the DRC's authorities justified these killings 'as a means to resolve the problems

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22 Mahmood Mamdani, *Understanding the Crisis in Kivu: Report of the CODSRIA Mission to the Democratic of Congo* (Center for African Studies 1997) 12.

23 Marianne Thamm, 'From Our Archives: The Assassination of Patrice Lumumba, the Ghosts of History and the Policing of Remembrance' (*Daily Maverick,* 2016) <dailymaverick.co.za/article/2016-01-22-the-assassination-of-patrice-lumumba-the-ghosts-of-history-and-the-policing-of-remembrance/> accessed 1 December 2019.

24 Jonathan Cole, 'The Congo Question: Conflicting Visions of Independence' (2006) 43 Emporia State Research Studies 26, 27.

25 Stearns and others (n 21) 16.

26 ibid.

27 Jason Stearns and others, *Mai Mia Yakutumba: Resistance and Racketeering in Fizi, South Kivu* (Rift Valley Institute 2013) 16.

of the Tutsi in the DRC once and for all.' As a significant number of the soldiers and politicians from the Tutsi community in the east of the DRC had rallied the rebellion, the late President Kabila's regime likely had the goal of revenge, because the Tutsi (Banyamulenge) had contributed to the blocking of his political ambitions since the 1960s, after independence. This can be deduced from many of his speeches that followed the outbreak of war in 1998. In his various public speeches, the late President Kabila indicated that the liberation war in the Congo begun during the 1960s insurrections against neo-colonialism rather than with the *Alliance des Forces Démocratique pour la Libération du Congo* (AFDL) in October 1996.[28] In other words, the killing of the Tutsis of August 1998 in the DRC was not a spontaneous reaction by the DRC's authorities to the outbreak of the war in the two Kivu provinces. Rather, it had a correlation with the past relationship of the Tutsi with those in power, especially the late President Kabila and Yerodia, who were among the rebellion leaders during the post-colonial conflicts.

2.1.4 Controversy over the Congolese Nationality of the Tutsi

The question of the ethnicity of the Tutsi in the DRC was also manipulated by politicians during the Mobutu regime. In the 1970s, when Mobutu realised that he had totally defeated the post-independence insurrections in all parts of the country, he began to consolidate his power by exploiting ethnicity. A debate on the Congolese nationality of the Tutsi and other Kinyarwanda-speaking peoples in the DRC was discussed at the national level from the 1970s.[29] This debate brought the Zaire/DRC parliament to adopt a law in 1972 that granted nationality to all persons who arrived in the DRC before 1959. This law replaced that of 1964, which considered as Congolese only those persons who were in Congolese territory before October 1908.[30] However, the law of 1972 was heavily criticised by many politicians in Zaire/the DRC, as a result of the growing influence of the Tutsi in the Mobutu regime.[31] In 1981, the law of 1972 was amended and the cut-off date was moved back to that in the law of 1964 because it limited Zairian/DRC citizenship to the descendants of tribes which were established in the Congo/DRC before August 1885.[32] Technically, that law did not affect the Banyamulenge because they were already established in the Kivu region before that period. However, this legislation was applied to all the Tutsi without exception. Consequently, they were denied the right to vote and to stand as candidates in the parliamentary elections that took place between 1982 and 1987 due to 'dubious nationality.'[33] Moreover, in April 1987, the Zaire/DRC government ordered a census of the Banyamulenge in the Vyura locality (in the districts of Moba and Kalemie of the current Tanganika province) in order to exile them to Rwanda. However, the Banyamulenge boycotted that census and consequently all their local chiefs and opinion leaders were arrested and imprisoned for a period of one year and six months in the central prison of Lubumbashi.[34] Furthermore, during the democratisation process of the 1990s in Zaire/the DRC, the Tutsi were excluded from participating in the National

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28 Francois Ngolet, *Crisis in the Congo: The Rise and the Fall of Laurent Desire Kabila* (Palgrave MacMillan Publishers 2011) 15.

29 Jason Stearns and others (n 21) 18.

30 Henning Tamm and Claire Lauterbach, *Dynamic of Conflict and forced Migration in the Democratic Republic of Congo* (Refugees Studies Center, University of Oxford, 2010) 3.

31 Mamdani (n 22) 7.

32 Henning Tamm and Claire Lauterbach (n 30).

33 FM Ndahinda, 'Bemba Banyamulenge Case Before the ICC: From Individual to Collective Criminal Responsibility' (2013) 7 The International Journal of Transitional Justice 476, 480.

34 Interview with some of the persons who were detained in Lubumbashi.

Sovereign Conference (NSC) that took place between 1991 and 1992, again due to dubious nationality. That conference was supposed to draft a new constitution and set new foundations for multiparty democracy.[35] The controversies over the Congolese citizenship of the Tutsi have greatly contributed to their discrimination in and exclusion from many aspects of life, including politics in the DRC.

Today, the issue of the citizenship of the Tutsi in the DRC seems to be legally settled because, during the Lusaka Peace Agreement which put to an end to the second war in the DRC, the parties agreed that 'all ethnic communities whose territories came to be the Congo at independence should qualify to have equal rights and protection in law as Congolese citizens.'[36] The same principle was also confirmed by the DRC's Constitution of 2006.[37] However, although the question of the Congolese identity of the Tutsi cannot be legally questioned, in practice they are still victims of xenophobic practices and ethnic violence in the DRC. Examples are the attacks that are directed against them in the South and in the North Kivu provinces. The members of this community are also obliged to be squeezed into their provinces of origin, notably the South and North Kivu provinces, because their security cannot be fully guaranteed in other parts of the country and they are still hardly accepted by their fellow Congolese in other regions. The non-acceptance of the Tutsi as true Congolese in the DRC has also nourished the campaigns of the killings of August 1998.

2.2 Other Major Events Marking Xenophobia Against the Tutsi in the DRC

2.2.1 Resolution on the Expulsion of the Tutsi from the DRC of April 1995

In April 1995, the Zairian/DRC Transitional Parliament passed a Resolution to expel all the Tutsi from the DRC, starting with the Banyamulenge in South Kivu.[38] Implementing this Resolution in October 1995, the administrator of the Uvira zone in South Kivu, Shweka Mutabazi*,* ordered the Banyamulenge to leave the high plateaus of Mulenge and go to Rwanda by qualifying them as 'an unknown ethnic group of Zaire/the DRC.'[39] That order was followed by many killings of Banyamulenge in the city of Uvira, Baraka, Bubembe and in the Plain of Ruzizi. Moreover, in September 1996, the former vice-governor of the South Kivu province, Lwabanji Lwassi Ngabo*,* also ordered the Banyamulenge to vacate South Kivu within six days, otherwise he would order them to be burnt.[40] Meanwhile, in the North Kivu province, multiple attacks against the Tutsi were being carried out by the Zairian/DRC security forces, in collaboration with Hutu militias from Rwanda recruited in the refugee camps.[41] Facing discrimination and ethnic violence in their own country, the majority of youths from the Tutsi community fled to neighbouring countries in the east, notably to Rwanda and Burundi where they returned in October 1996 with the AFDL. It is this movement that overthrew the dictatorship of

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35 Ndahinda (n 14) 157.

36 Inter-Congolese Political Negotiations, 'Final Act (Sun City Agreement)' (United Nations Peacemaker, 2 April 2003) <peacemaker.un.org/sites/peacemaker.un.org/files/CD_030402_SunCityAgreement.pdf> accessed 1 December 2019, 24.

37 The Constitution of the Democratic Republic of the Congo (2005) <constitutionnet.org/sites/default/files/DRC%20-%20Congo%20Constitution.pdf> accessed 1 December 2019, art 10.

38 Stearns and others (n 21) 19.

39 Manassé Ruhimbika, *Les Banyamulenge (Congo-Ex Zaïre) Entre Deux Guerres (préface de B. Jewsiewicki)* (L'Harmattan 2001) 299.

40 ibid.

41 Ndahinda (n 14) 159.

Mobutu in May 1997 and installed the late Kabila as President of the DRC. It is incontestable that authorities in the DRC tried and failed to expel the Tutsi from the DRC several times. Following the speeches of several DRC authority figures, including Yerodia and the late President Kabila, during the outbreak of the war in August 1998, the killing of the Tutsi was a way to remove them once and for all from the DRC's territory.

2.2.2 Influx of Hutu Refugees from Rwanda and Burundi to the DRC in 1993–1994

The massive arrival of the Hutu refugees from Burundi and Rwanda between 1993 and 1994 also increased the xenophobia against the Tutsi in the DRC. Those who came from Burundi had fled the inter-ethnic conflict that took place between 1993 and 1994 and those who came from Rwanda crossed into Zaire/the DRC after the 1994 genocide of the Tutsi.[42] During that period, relations between the Kinshasa leadership and the regimes in Kigali and Bujumbura were not good. Therefore, the late President Mobutu seized the opportunity to work closely with these refugees by providing them with military training, so that they could help him deal with any threat that might come from Eastern Zaire/the DRC. Combatants from the refugee camps also took advantage of the situation to destabilise their countries of origin.[43] Among these refugees were some who had participated in ethnic violence in their home countries, including those who participated in the 1994 genocide of the Tutsi in Rwanda. Hence, they have greatly contributed to spreading hate against the Tutsi in Zaire/the DRC. Testimonies from the survivors of the massacres of August 1998 have implicated some of the Hutu refugees in these heinous crimes. Illustratively, they are alleged to have participated in the killings which took place in the two Kivu provinces as well as in Vyura, Kalemie, Kamina and Lubumbashi in the former Katanga province.[44] This also explains that the international crimes in which Yerodia was involved in August 1998 in the DRC were nourished by a cross-border ideology against the Tutsi that prevailed in the countries of the Great Lakes Region.

2.3 Immediate Causes of the 1998 War and the Massacres of the Tutsi in the DRC

When the conflict broke out in August 1998, the DRC government quickly qualified it as a Tutsi-led rebellion supported by Rwanda and Uganda and therefore called for extermination of the Tutsi in the DRC. However, the international crimes committed during this period were at the origin of the dispute between the DRC and Belgium at the ICJ.[45] The examination of the immediate triggers of these massacres is essential in order to understand the context in which the crimes in question were committed.

2.3.1 The Struggle for Power

Some partially concurred with the DRC authorities that the 1998 war was initiated by Uganda and Rwanda in order to protect their security and economic interests in the region.[46] However, there is also disagreement. According to Francois Ngolet, shortly after

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[42] The United Nations Economic Commission for Africa, 'Conflict in the Democratic Republic of Congo: Causes, Impact and implications for the Great Lakes Region' (Economic Commission for Africa, 2015) 14.

[43] International Crisis Group (ICG), 'The Kivus: The Forgotten Crucible of the Congo Conflict' (African Report no 56, Nairobi/Brussels, 2003) 5.

[44] Testimonies from the survivors.

[45] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 6).

[46] Koen Vlassenroot and Timothy Raeymakers, 'New Political Order in the DR Congo? The Transformation of Regulation' (2008) 21 Afrika Focus 39, 43.

the takeover of powers in Kinshasa, President Kabila started to rule over the DRC along with the majority of people from his own tribe, namely the Lubakat from Katanga.[47] He began to appoint them to different key strategic positions in the government, army and police as well as in the intelligence service.[48] In particular, most of the people − mainly Tutsi − who had fought alongside him against Mobutu were excluded from the circle of power.[49] For example, his former Army Chief of Staff, General Masasu Nindaga, who was half Tutsi and half Mushi, was arbitrarily accused of conniving with foreign intelligence services and was later murdered. After his killing, the report of the International Crisis Group later revealed that General Masasu Nindaga was killed because he had discovered that the secret service of the late President Kabila weas recruiting and providing arms to the Hutu refugees from Rwanda and Burundi in Eastern DRC.[50]

It is true that many politicians and soldiers from the Tutsi community had joined the rebellion of August 1998. However, those whom I contacted during the writing of this paper attribute this to their discrimination and marginalisation by the regime of the late President Kabila.[51] Moreover, the fact that some Tutsi politicians and soldiers joined the rebellion should not have been a reason to call for the extermination of the entire Tutsi community in the DRC.

It is also important to mention that among the rebels who were fighting against the Kabila regime during that period were regrouped people from different backgrounds in the DRC: for example, the political leaders of the Congolese Rally for Democracy movement (RDC), notably Professor Arthur Zaid Ngoma (a Murega from the Maniema province), Professor Ernest Wamba dia Wamba (a Mukongo from the Bas-Congo province) and Jean Pierre Ondekane, the military commander of the movement (a Ngbaka from the Equateur province in North-East Congo).

Considering the nature of the conflict and those who were involved, it is clear that belligerents were fighting for power at a high level, which led to an armed conflict. In fact, the late President Kabila and members of his inner circle wanted to control power, while the rebels, who were mostly composed of those who fought alongside him against Mobutu, were against that style of governance. Considering their history of discrimination and marginalisation in the DRC, the Tutsi became collateral victims because some of the politicians and soldiers from their community were among those who had opposed the Kabila regime. In that context, yet again, these massacres constituted a sign that, according to the then leadership of the DRC, the Tutsi did not deserve the same right to oppose the government as other Congolese had, a fact which amounts to discrimination.

2.3.2 Insecurity in the Two Kivu Provinces

After the 1997 regime change in the DRC, the populations of the two Kivu provinces hoped to regain security. In particular, the Tutsi were expecting to see their rights guaranteed, like those of other Congolese in the DRC. However, after the takeover of power in Kinshasa, they realised that the regime change itself was not enough to guarantee their security and rights. This realisation was due to the fact that in the South Kivu province, the Mai Mai (local militias) started to attack the Banyamulenge and raid their

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47 Ngolet (n 28) 11–16.

48 ibid.

49 ibid.

50 International Crisis Group, 'How Kabila lost his way: The Performance of Laurent Désiré Kabila's Government' (*Relief Web*, 21 May 1999) <reliefweb.int/report/angola/how-kabila-lost-his-way-performance-laurent-d%C3%A9sir%C3%A9-kabilas-government> accessed 1 December 2019.

51 Interviews with two military officials from the Tutsi ethnic group who had joined the rebellion of the Rally for the Congolese Democracy (RDC) during the outbreak of the war in August 1998 in DRC.

cattle. In the North Kivu province, these local militias were working in collaboration with the Hutu militias from Rwanda to attack the Tutsi villages and to raid their properties.[52] Despite this, in February 1998, the military leadership in Kinshasa surprisingly ordered the removal of all soldiers from the Tutsi community in the two Kivu provinces. Unfortunately, that order was not implemented because the soldiers concerned mutinied and forced their leadership to revise that decision.[53]

During that period, it was clear that the army high command suspected the Tutsi who were in the national army of not respecting its orders, while the Tutsi soldiers suspected the soldiers from other ethnic groups of collaborating with the Mai Mai and Hutu militias from Rwanda and Burundi to attack their villages in the two Kivu provinces. In addition to the local insurrections, rebel groups from Uganda, Rwanda and Burundi were operating in the east of the country, where they were involved in many human rights abuses. That situation increased suspicions among communities in these two provinces and led to the outbreak of the war in eastern provinces in August 1998.

2.3.3 Conspiracy Theory on the Creation of a 'Tutsi-Hamites Empire' in Central Africa

The term 'conspiracy theory' is defined in this article as an explanatory belief regarding certain actors meeting in secret to agree and carry out a hidden agenda that is widely regarded as malicious.[54]

It is clear that many of the wars that occurred in the countries of the Great Lakes region of Africa (Eastern DRC, Rwanda, and Burundi) had an inter-ethnic character and, therefore, a conspiracy theory developed around the possible creation of a 'Tutsi-Hima' empire in the Central African region. The proponents of that theory argued that the various wars which occurred in this region were nourished by a hidden regional agenda of the Nilotics to establish an empire in the region, under which the Bantu populations would be dominated.[55] To them, the war against Mobutu of 1996 was not a liberation war but an ideological one for the Nilotics in which the late President Kabila was used to achieve their regional agenda.[56] As this conspiracy theory was already established in the DRC when Kabila came to power in 1997, his administration experienced many difficulties in dealing with the Tutsi who worked in different institutions and in the security forces. This was because some members of the population of the DRC did not consider the Tutsi as people who were serving their nation; rather, they were seen as having a hidden agenda. The Hutu extremists used the same theory in Rwanda during their sensitization campaigns to exterminate the Tutsi in 1994. The artisans of the theory considered the war that began in Rwanda in 1990 against the Habyarimana regime (that of the former Rwandan president) as a means of creating a 'Tutsi zone' comprising Uganda, Rwanda, Burundi, and the Kivu regions of Zaire/the DRC.[57] In the DRC, this conspiracy theory was mostly spread by politicians from the two Kivu provinces and was later fueled by the arrival of the Hutu refugees from Rwanda and Burundi following the inter-ethnic conflicts of the 1990s in these countries.

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52 International Crisis Group (n 50) 6.

53 Ngolet (n 28) 16.

54 Jan-Willem van Prooijen and Karen Douglas, 'Conspiracy Theories as Part of History: The Role of Societal Crisis Situations' (2017) 10 Memory Studies 323, 324.

55 Ndahinda (n 33) 480.

56 John Clark, *The African Stakes of the Congo War* (Palgrave Macmillan 2004) 147.

57 Tom Ndahiro, 'Genocide and Myth of the Hima-Tutsi-Empire in the Great Lakes Region of Africa' (2016) (*Umuvugizi,* 27 July 2016) <umuvugizi.wordpress.com/2016/07/27/genocide-and-myth-of-the-himatutsiempire/> accessed 1 December 2019.

When Yerodia was asked why he called for the extermination of the Tutsi during the outbreak of the second war in the DRC, his response was that he believed that the war had the purpose of exterminating the Bantu populations in the Central African region.[58] The former president of Zimbabwe, Robert Mugabe, gave almost the same answer when he was asked why he supported the Kinshasa regime during that war. He mentioned that his army went to prevent the expansion of the Tutsi-Hamites Empire in the center of Africa.[59] This conspiracy theory has been used to fuel inter-ethnic violence in the countries of the Great Lakes Region and has already resulted in many Tutsi victims, including those of August 1998 in the DRC. At present, this conspiracy theory still threatens the security of the Tutsi in the DRC and thus constitutes one of the obstacles to victims of the massacres of August 1998 in accessing justice in the domestic courts of the DRC.

3. The *Yerodia* Case at the ICJ: Whose Justice (Victims or Perpetrators of International Crimes)

In its judgment of February 2002, the ICJ confirmed that the arrest warrant issued by Belgium against Yerodia violated customary international law concerning the absolute inviolability and immunity from criminal proceedings for incumbent Foreign Ministers.[60] However, the international crimes of which Yerodia was accused were committed before he became Foreign Minister and the ICJ rendered its decision when he had ceased to hold such position. The thorny question remains as to whose justice this judgment serves.

3.1 The Chronology of Events in the *Yerodia* Case at the ICJ

The international crimes of which Yerodia was accused were committed in August 1998, when he was a Private Secretary and Chief of Cabinet of President Kabila. Belgium issued an arrest warrant against him on 11 April 2000, when he was Foreign Minister.[61] His case was brought before the ICJ on 17 October 2000, with the DRC accusing Belgium of having violated the diplomatic immunity of its Foreign Minister in office.[62] However, one month later, in November 2000, Yerodia was demoted from the position of Foreign Minister and appointed as Minister of Education, a post that he occupied until April 2001.[63] On 14 February 2002, the ICJ rendered its judgment, in which it confirmed the DRC's complaint and requested Belgium to cancel the arrest warrant because it violated the diplomatic immunity of an incumbent Foreign Minister, without considering the time when the relevant crimes took place and the changes that had occurred in Yerodia's position during the proceedings.

3.2 Immunity of Senior State Officials Under International Law

As a general rule, immunity is a privilege that is attached to certain positions or status of particular persons, entities, or properties and which is normally used to exclude the

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58 Gerard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of Continental Catastrophe* (Oxford University Press 2010) 419.

59 Eric Kashambuzi, 'Is the Creation of Tutsi Empire Real or Imaginary?' (*Kashambuzi,* 14 October 2012) <kashambuzi.com/is-creation-of-tutsi-empire-real-or-imaginary/> accessed 1 December 2019.

60 Malcolm Evans, *International law* (3rd ed, Oxford University Press 2010) 395.

61 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 6) [3].

62 Amanda Nelson, 'Democratic Republic of Congo v. Belgium: The International Court's Consideration of Immunity of Foreign Ministers from Criminal Prosecution in Foreign States' (2003) 19 New York Law School 859.

63 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 6) [9].

exercise of jurisdiction over them.[64] Several arguments have been advanced as to the reasons for the granting of immunity, though most of them are based on legal fiction. The first is the 'extraterritoriality theory', which assumes that heads of State and diplomats, when they are abroad on missions, are still considered as being in their own countries rather than in the host State.[65] The second is the personification or representative theory, which considers heads of State or diplomats as holders of the collective powers of their States within their host States when they are on missions abroad.[66] The third argument is that of 'functional necessity'. Under this theory, heads of State and diplomats need special protection during the tenure of their office or whilst abroad in the performance of their duties.[67] Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961 also provides that 'the purpose of diplomatic privileges and immunities is to ensure the efficient performance of the functions of diplomatic missions as representing States.'[68] According to Article 21, Paragraph 2 of the New York Convention on Special Missions of December 1969:

> The Heads of the Governments, the Foreign Ministers and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.[69]

This explains that the logic behind the functional immunity is to protect the persons mentioned above against any act of a foreign authority that would prevent him or her from conducting diplomatic activities freely. In other words, functional immunity serves to protect the activities that someone is carrying out and this is precisely what the DRC complained of when it instituted proceedings against Belgium before the ICJ.

3.3 Who Benefited from the ICJ's Judgment in the *Yerodia* Case?

At the time of the ICJ's judgment, Yerodia had not occupied the post of Foreign Minister of the DRC for a year and a half. Despite this, the ICJ based its conclusions on the functional need to protect his diplomatic activities abroad. The Court emphasised that 'the functions of a Foreign Minister are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.'

On one hand, the ICJ confirmed that the purpose of such immunity is to enable foreign ministers to freely conduct international relations on behalf of their countries. On the other hand, the Court's decision created a dilemma because it was rendered after Yerodia had ceased to carry out such activities on behalf of the DRC. In fact, Yerodia had ceased to occupy any ministerial position in the DRC; at that moment he was a Senator. Clearly, the diplomatic immunity of which the ICJ ruled in favour in this case had no real meaning because there was a disconnect between the motivation behind the judgment and the facts. Consequently, the immunity in question only served to protect a perpetrator of

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64 Dapo Akande and Shah Sangeeta, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 European Journal of International Law 815, 818.

65 Darryl Robinson, 'The impact of Human Rights Accountability Movement on the International Law of Immunities' (2016) 40 Canadian Yearbook of International Law 151, 157.

66 ibid.

67 Akande and Sangeeta (n 64) 18.

68 The Vienna Convention on Diplomatic Immunities and Privileges (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

69 Convention on Special Missions (adopted 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231.

international crimes from criminal responsibility, to the detriment of victims' right to access justice.

4. The Preventive Nature of Diplomatic Immunities v the ICJ's Decision in the *Yerodia* Case

In its decision, the ICJ confirmed that the arrest warrant which had been issued by Belgium against Yerodia violated the immunity that incumbent foreign ministers enjoy under international law in foreign domestic courts. This is a well-known rule in public international law.[70] However, considering the changes in Yerodia's position, specifically the fact that Yerodia was no longer the Foreign Minister of the DRC at the time of the judgment, Belgium objected to that decision.

4.1 Belgium Objects After Changes to Yerodia's Position during the Proceedings before the ICJ

After Yerodia's removal from the position of Foreign Minister during the proceedings, Belgium objected to the jurisdiction of the ICJ in his case. Belgium argued that, from the moment Yerodia had ceased to occupy the post of Foreign Minister, the dispute between it and the DRC before the ICJ had ceased to exist. Belgium also reminded the ICJ that if the Court wished to proceed with the case until the final decision, its nature had changed and it had become a diplomatic protection case in which Yerodia had not exhausted domestic remedies.[71]

However, all objections put forward by Belgium were rejected and the ICJ ruled that its jurisdiction would be determined at the time a case is filed with it. Moreover, the ICJ ruled that the changes which had occurred in relation to Yerodia's position during the proceedings did not put an end to the dispute between the parties and had no effect on its object.[72] Therefore, the ICJ concluded that the question of the lawfulness of the arrest warrant issued against Yerodia remained a pending issue as far as the case had not changed into one of diplomatic protection.[73] Considering these changes, the decision of the ICJ in this case was not pragmatic, but rather a mechanical application of immunity.

4.2 The Non-Pragmatic Character of the ICJ's Decision in the *Yerodia* Case

It is a mammoth task to challenge the judgment of an international court such as the ICJ, but the reason it made progress in the *Yerodia* case which obstructed its continuation in Belgium was not pragmatic. Some scholars even criticised it as contradicting the current trend and willingness of the international community to prosecute international crimes.[74] Others argued that it lacked the balance between the interests and values underlying this dispute, which were on one hand the fight against the most heinous crimes and on the other hand the maintenance of smooth collaboration between States.[75] In reality, the

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70 Neil Boister, 'The ICJ in the Arrest Warrant Case: Arresting the Development of International Criminal Law' (2002) 7 Journal of Conflict & Security Law 293.

71 Golden Gate University School of Law, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) International Court of Justice 14 February 2002' (2002) 8 Annual Survey of International & Comparative Law 151.

72 ibid.

73 ibid.

74 Andrew Coleman, 'The International Court of Justice and Highly Political Matters' (2003) 4 Melbourne Journal of International Law 29, 32.

75 Chrisoph Schreuer and Stephan Wittich, 'Immunity v. Accountability: The ICJ's Judgment in the Yerodia Case' (2004) 4 International Law Forum Du Droit International 117, 120.

decision completely disregarded the preventive nature of the DRC's application before the ICJ.

From the outset, the DRC persistently complained about violation of the immunity belonging to its acting Foreign Minister, as the arrest warrant would prevent him from conducting diplomatic relations freely abroad. The ICJ's decision in this case was also based on the functional immunity of an incumbent Foreign Minister, a position which requires substantial foreign travel, which would be deterred by the existence of an international arrest warrant.

In fact, when the ICJ rendered its judgment in this decision, Yerodia was not vested with the power to conduct such activities. Further, the ICJ did not provide any objective explanation in its judgment as to why its jurisdiction must be determined at the time a case is filed rather than when its decision is rendered or when the alleged violations (in the present case international crimes) took place. Hence, the objections that were advanced by Belgium to contest the jurisdiction of the ICJ after the change in the position of Yerodia were pragmatic, as during that period he was a former foreign minister who had no responsibility to conduct international relations on behalf of the DRC. In other words, in that decision, there is a contradiction between the ICJ's argumentation and the status of Yerodia at the time of the judgment.

In short, the arguments of the ICJ to reject Belgium's objections were not grounded in international law. The Court's decision makes it clear that, instead of adjudicating a practical case that was presented before it for ruling, the judges merely developed theories around the immunity of incumbent foreign ministers in general.

4.3 Mechanical Application of Immunity by the ICJ in the *Yerodia* Case

The ICJ is an interstate court created under the United Nations Charter of 1945, with a mandate to adjudicate interstate disputes submitted to it.[76] This Court can also receive disputes between States on behalf of their nationals who have suffered harm at the hands of another State and such a dispute remains between the States.[77] However, despite the fact that the *Yerodia* case was instituted by the DRC against Belgium, the judgment in this case only contributed to shielding Yerodia from criminal responsibility rather than preserving the smooth operation of the DRC's diplomatic activities abroad. In other words, the application of immunity in this case by the ICJ was purely mechanical. As a result, this decision was used to serve an interest that it was not intended to protect. Furthermore, it is unfortunate that from February 2002, when the ICJ rendered its decision in the *Yerodia* case, no case in relation to the international crimes in which he was involved has been initiated elsewhere. This proves that the judgment contributed to closing the doors to victims in their endeavor to access justice, either in the DRC or in other foreign forums. Hence, the beneficiary of this situation is the suspect of international crimes, to the detriment of victims' right to access justice.

5. Access to Justice for Victims of Yerodia's International Crimes

In order to access justice, victims must first find a judicial body that is willing to hear their case. Domestic jurisdictions always have the competence to address international crimes and under specific conditions, foreign jurisdictions also have this competence. When government authorities are alleged to be involved in the perpetration of such crimes,

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[76] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 34(1).

[77] ibid arts 36–38.

victims often face many difficulties in accessing justice in domestic courts and therefore lose confidence in their national justice system. It is precisely in this context that victims of Yerodia's international crimes brought their case in Belgium. Unfortunately, through the ICJ's judgment, the DRC's government obstructed the continuation of the case in Belgium. The remaining question is the impact of the decision on the victims of Yerodia's international crimes, regarding their access to justice in domestic and foreign courts.

5.1 The Impact of the ICJ's Decision on Access to Justice for Victims of Yerodia's Intentional Crimes in the DRC

Until the Second World War, international law considered the treatment of citizens by their States as an internal issue. However, after the horrific crimes which occurred during that War, States began to be aware of the limits of their sovereignty over the human rights of the persons under their control.[78] Consequently, many human rights instruments currently recognise the principle of *aut dedere aut judicare*: extradite or prosecute.[79] This principle obliges States either to prosecute suspects of international crimes or to extradite them to where they can be properly prosecuted. The idea behind this principle is to ensure that no suspect of international crimes can go unpunished.

The DRC is a State party to many international human rights instruments guaranteeing the respect for human rights and which contain the principle of *aut dedere aut judicare*, such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the crime of Genocide as well as the Convention against Torture and other Cruel Inhuman and Degrading Treatment and Punishment.[80] At the regional level, the DRC is also a State party to the African Charter on Human and Peoples' Rights as well as its Protocol on the Establishment of the African Court of Justice and Human Rights.[81] Moreover, the DRC's Constitution provides many rights, including the right to life and physical integrity, the right to non-discrimination, the right not to be subjected to cruel, inhuman, and degrading treatment and the right to access justice.[82]

Shortly after Yerodia's accusation in Belgium, he was appointed Minister of Education and later became a Senator, a position that had provided him with immunity from criminal prosecution before national courts. Therefore, the ICJ's decision in the *Yerodia* case has somehow confirmed the sovereignty of the DRC in dealing with his international crimes, thus leaving victims without any further recourse to national courts.

However, the non-prosecution of suspects of international crimes in the DRC, such as Yerodia, is a failure of the DRC's government to fulfill its international obligations and its own Constitution. This situation reinforces the reign of impunity in that country and encourages the reoccurrence of the same crimes. In addition, the efforts deployed by the DRC's government in the *Yerodia* case at the ICJ have also revealed to victims and their supporters its determination to prevent any trial regarding the international crimes of

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78 Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 451, 462.

79 ibid 463.

80 International Bar Association and Legal Assistance Consortium, 'Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo' (*International Security Sector Advisory Team*, August 2009) <issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Rebuilding-Courts-and-Trust-An-Assessment-of-the-Needs-of-the-Justice-System-in-the-Democratic-Republic-of-Congo> accessed 1 December 2019, 15.

81 ibid.

82 The Constitution of the Democratic Republic of the Congo (n 37) arts 13–14, 16, 19.

which Yerodia was accused. In other words, the ICJ's decision in this case has silenced victims in their quest for remedies in national jurisdictions.

5.2 The Impact of the ICJ's Decision on Access to Justice for Victims of Yerodia's Intentional Crimes in Foreign Domestic Courts

Although the ICJ's decision in the *Yerodia* case was in support of his immunity, at the same time it emphasised that this immunity is not synonymous with impunity. The ICJ identified four situations in which a Foreign Minister can generally be prosecuted by foreign jurisdictions. The first situation is where international law does not provide immunity for Foreign Ministers before national jurisdictions. The second situation is when such immunity has been revoked by one's own country. The third is when a Foreign Minister ceases to hold such a position. The fourth is that, before certain international criminal courts such as the ICC, when they have jurisdiction, a Foreign Minister cannot invoke his/her immunity.[83]

It is unfortunate that, at the time of the ICJ's judgment, it was already clear that Yerodia would not be affected by any of these situations. This is because, in the first and the second situations, the State concerned must be willing to prosecute or to revoke the immunity of its Foreign Minister.[84] In *Yerodia*'s case, although he was not covered by immunity under international law in domestic courts, the ICJ's judgment was handed down when he was covered by another immunity provided for under national law. At that particular moment he was a member of the Senate in the DRC and, as senators enjoy immunity in domestic courts, the possibility of prosecuting him in national courts or the willingness to revoke his immunity was already non-existent. Concerning the third situation, the ICJ was incorrect to rule in favour of Yerodia's immunity because, in fact, this immunity became inoperative when he was removed from his position as Foreign Minister. As is usual, after his removal from that position, the DRC appointed another Foreign Minister who oversaw its international relations and who enjoyed the same immunity that Yerodia enjoyed after the ICJ's decision in his case. In other words, by ordering Belgium to cancel the arrest warrant and claiming that Yerodia was still covered by immunity under international law while he was no longer Foreign Minister, the ICJ simply claimed the opposite regarding the third situation. Concerning the fourth situation, at the time of the ICJ's judgment there was not a special international tribunal for the DRC. The DRC ratified the Statute of the International Criminal Court in April 2002,[85] two months after the ICJ's decision in the *Yerodia* case. This Statute entered into force for the DRC on 1 July 2002 which means that it had no jurisdiction over the crimes of which Yerodia was accused, under the principle of non-retroactivity of its jurisdiction.[86]

As argued by Darryl Robinson, immunity is an exception to the general rule that gives States jurisdiction over all persons under their control. Any confirmation of such immunity must be dictated by an interest to serve important societal and international interests.[87] However, this was not the scenario in the *Yerodia* case at the ICJ, as its ruling

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83 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 6) [22].

84 Alain Winants, 'The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction' (2003) 16 Leiden Journal of International Law 491, 498.

85 The International Criminal Court (ICC), 'The Democratic Republic of Congo: Situation in the Democratic Republic of Congo' (*International Criminal Court*) <icc-cpi.int/drc> accessed 1 December 2019.

86 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July2002) 2187 UNTS 90 (Rome Statute) art 11(1).

87 Darryl Robinson, 'The Impact of the Human Rights Accountability Movement on the International Law of Immunities' (2002) 40 Canadian Yearbook of International Law 151, 155.

in favour of Yerodia's immunity only shielded him from prosecution by foreign courts and has jeopardised the victims' right to access to justice in foreign courts. Although the change in Yerodia's position of November 2000 was already a strategy by the DRC to protect him from being prosecuted abroad, the ICJ's decision reinforced that measure as it expressly ruled in favour of his immunity. It is also evident that after a decision by an institution like the ICJ, other countries will be reluctant to accept complaints from victims against Yerodia and other suspects in relation to similar international crimes.

6. Conclusion

Since its independence in 1960, the DRC has experienced several epochs of conflict in which thousands of people have lost their lives through inter-ethnic violence. Some were caused by members of different communities fighting amongst themselves and many others were the result of political manipulations orchestrated by certain politicians in order to achieve their political ambitions. Moreover, most of the crimes committed as a result of this violence remain unpunished, a situation which has, many times, led to their reoccurrence. The massacre of the Tutsi of August 1998 is one of these tragic events which was orchestrated by politicians, and in which victims were targeted because of their ethnicity, and its perpetrators remain unpunished. These massacres were triggered by Yerodia's and the late President Kabila's speeches advocating racial hatred during the outbreak of the war in August 1998 in the DRC. These high-ranking officials accused the Tutsi, as a community, of conniving with foreign countries, notably Uganda, Rwanda, and Burundi, to destabilise the DRC, and called members of other Congolese communities to exterminate them. In their messages, broadcast in international media, they described the Tutsi as 'Scum and vermin that must be methodically eliminated and with determination.' These speeches were followed by concrete acts in which thousands of Tutsis lost their lives.

However, although DRC officials used the outbreak of the war in August 1998 to justify these horrific crimes, it is evident that, for many years, the Tutsi have been victims of discrimination and other forms of injustices in the DRC because of their ethnicity. Since the colonial era, Tutsi in the DRC were denied the right to customary power and therefore excluded from governance. From the post-independence conflict until today, Tutsi in the DRC have also been frequently targeted because of their origin during the successive wars that occurred in the DRC. Moreover, their Congolese identity was repeatedly manipulated by different politicians for their political purposes. These facts and others were among the direct precursors to their massacres of August 1998.

As to the security context that prevailed in the DRC during that period, there were already three intertwined wars going on. First, there was a local conflict which resulted from intercommunity resentments inherited from the colonial period in the two Kivu provinces. The second was a national conflict resulting from general governance issues in the DRC. The third was a regional conflict resulting from the insecurity that was prevailing in all the countries of the Great Lakes region, due to the presence of a high number of refugees and uncontrolled combatants across the region. In particular, the conspiracy theory around the possible creation of the 'Tutsi-Hamites' empire in the Central African countries, which was propagated in the countries of that region, constituted an additional threat to the security of Tutsi in the DRC during this period.

The international crimes committed in August 1998 during the massacres of the Tutsi were at the origin of a dispute between the DRC and Belgium at the ICJ. The dispute arose from an international arrest warrant that an investigating judge of a First Instance Tribunal of Brussels had issued against Yerodia, who at the time of the issuance of this arrest warrant was Foreign Minister, for crimes against humanity and war crimes. However, the crimes in question were committed before Yerodia had become Foreign

Minister and the ICJ rendered its decision a year and a half after he left office. Despite this, the ICJ ruled in favour of his immunity from prosecution in foreign courts. As the reason for granting such immunity is to avoid any act of foreign authority that could hinder diplomats in the performance their duties abroad, the ICJ's decision in the *Yerodia* case completely disregarded the preventive nature of such immunity. Since it was issued when Yerodia was no longer a Foreign Minister, it contradicted the rationale behind such immunity under international law. In the same decision, the ICJ provided no objective justification under international law as to why its jurisdiction must be determined at the moment when a case is filed before it rather than at the moment it renders its decision.

Although the ICJ's judgment in this case did not directly address the issue of the international crimes of which Yerodia was accused, it contributed to shielding the suspect from being brought to justice, both in domestic and foreign courts. Moreover, the efforts deployed by the DRC to obstruct the continuation of this case in Belgium have also revealed to victims and their supporters its determination to prevent the commencement of any proceedings against the perpetrators of the above-mentioned crimes anywhere. Further, after the ICJ's decision in this case, no other case was brought elsewhere regarding Yerodia's international crimes. After a decision of such a highly regarded international institution, it is clear that countries will be reluctant to receive complaints from victims in relation to the same case.

Finally, the ICJ's decision in the *Yerodia* case has also left victims in the hands of those who have deployed enormous efforts to shield the perpetrators of their crimes from justice, a fact that has reduced them to silence in their quest for justice.

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Expanding Due Diligence: Human Rights Risk Assessments and Limits to State Interventions Aimed at Preventing Domestic Violence

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Keywords
HUMAN RIGHTS; DOMESTIC VIOLENCE; DUE DILIGENCE; RISK ASSESSMENT; INTIMATE PARTNER VIOLENCE

Abstract

Much has been discussed about the consolidating due diligence doctrine in the field of international human rights law and how it applies to intimate partner violence (IPV) and other forms of violence against women (VAW). Due diligence obligations to prevent IPV contain programmatic elements, guiding States to intervene and prevent human rights violations arising from IPV. This article demonstrates that in the case of IPV, human rights violations can be primary and secondary. The article then discusses due diligence in the context of IPV prevention, revealing two important State conducts: anticipative prevention and escalation mitigation. The article explains that States' due diligence obligations to prevent IPV contain obligations to address both primary and secondary human rights violations and introduce developments to the current prevention model. The article proposes that to prevent IPV and other forms of VAW, States should perform human rights risk assessments. However, deriving State interventions can be often limited by the right to private and family life, making it necessary to incorporate the victim's agency, needs and wishes within the risk-assessment process as well as following intervention.

1. Introduction

In international human rights law, due diligence appears in *Velasquez Rodriguez v Honduras*, where the Inter-American Court of Human Rights states that 'An illegal act which violates human rights […] can lead to international responsibility of the State not because of the act itself but because of the lack of due diligence to prevent the violation.'[1]

Due diligence reflects an ongoing development of the responsibility of States for private acts and omissions, as opposed to the classical conditioning of international law, establishing liability only for the public acts of States.[2] Due diligence implies that when States fail to intervene and prevent human rights violations between private actors, they are liable for negligence. However, due diligence obligations have only embraced certain

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1 *Velasquez Rodriguez v Honduras*, Judgement, Inter-American Court of Human Rights Series C No 4 (29 July 1988) [172].

2 ILA Study Group on Due Diligence in International Law, 'First Report' (ILA Study Group, 7 March 2014) <olympereseauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf> accessed 10 November 2019; ILA Study Group on Due Diligence in International Law, 'Second Report' (ILA Study Group, July 2016).

thematic areas, among which is gender-based violence.[3] The most recent document regulating due diligence is the Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, wherein it is stated that

> Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.[4]

From the point of view of international human rights law, IPV can represent a violation of the following rights:

- the right to life[5]
- prohibition of torture and ill-treatment[6]
- right to equality and non-discrimination[7]
- right to sexual and reproductive health[8]
- right to housing[9]

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3 UN Committee for the Elimination of All Forms of Discrimination against Women (UNCEDAW), 'General Recommendation No 19: Violence Against Women' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1; UN Committee for the Elimination of Discrimination Against Women, 'General Recommendation No 35 on Gender-based Violence Against Women, Updating General Recommendation No 19' (14 July 2017) UN Doc CEDAW/C/GC/35 para 34.

4 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No 210).

5 United Nations International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 6; UN Human Rights Committee 'General Comment 6' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1994) UN Doc HRI/GEN/1/Rev.1 para 5; UN Human Rights Committee 'Draft General Comment 36 of the United Nations Human Rights Committee' (14 July 2015) UN Doc CCPR/C/GC/R36/Rev2.

6 UN 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 art 1; United Nations Committee Against Torture (UNCAT) 'General Comment No 2: Implementation of Article 2 by States Parties' (24 January 2008) UN Doc CAT/C/GC/2 para. 18 'Where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.'; Rhonda Copelon, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1993–1994) 25(2) Columbia Human Rights Law Review 291, 296.

7 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; UNCEDAW (n 3).

8 UN Committee on Economic, Social and Cultural Rights 'General Comment No 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22; ICCPR (n 5) art 12; Shane M Trawick, 'Birth Control Sabotage as Domestic Violence: A Legal Response' (2012) 100 California Law Review 721, 733; C Shalev, 'Rights to Sexual and Reproductive Health: the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women' (International Conference on Reproductive Health, Mumbai, 15–19 March 1998).

9 UN Committee on Economic, Social and Cultural Rights 'General Comment No 7: The Right to Adequate Housing: Forced Evictions' (20 May 1997) UN Doc E/C.12/1997/4 para. 3; UN Office of the High Commissioner for Human Rights, *Women and the Right to Adequate Housing* (United Nations

- the right of people with disabilities to freedom from violence[10]
- the right to a fair trial and access to justice.[11]

The obligations of States to prevent human rights violations associated with IPV and VAW have been thoroughly examined in the literature.[12] Due diligence obligations to prevent IPV and other forms of VAW have also had significant recognition in international litigation and have been reinforced by a number of decisions of regional and international human rights bodies. These include, in the Inter-American system, the case of *Maria da Penha Maia Fernandes v Brazil*,[13] the case of *Jessica Lenahan v United States*[14] and the aforementioned *Velasquez Rodriguez v Honduras*.[15] The United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has also upheld the due diligence standard in the case of *AT v Hungary*,[16] *Yildirim v Austria*,[17] *Angela González Carreño v Spain*[18] and *X and Y v Georgia*.[19] The European Court of Human Rights (ECtHR) also had a significant impact on the development of due diligence obligations, stemming

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Publications 2012) 76; Helene Combrinck, 'Living in Security, Peace and Dignity: The Right to Have Access to Housing of Women Who Are Victims of Gender-based Violence' (Research Series 5, Socio-Economic Rights Project, University of the Western Cape Community Law Centre 2009).

10 UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3; Keran Howe, 'Violence Against Women with Disabilities - An Overview of the Literature' (1999) 7 Australian Feminist Journal 11; Dena Hassouneh-Phillips and Mary Ann Curry, 'Abuse of Women with Disabilities: State of the Science' (2002) 45(2) Rehabilitation Counseling Bulletin 96; Michelle McCarthy, '"What Kind of Abuse is Him Spitting in My Food?": Reflections on the Similarities Between Disability Hate Crime, So-called "Mate" Crime and Domestic Violence Against Women with Intellectual Disabilities' (2017) 32(4) Disability & Society 595, 599.

11 UN Human Rights Committee, 'General Comment 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (23 August 2007) UN Doc CCPR/C/GC/32; International Commission of Jurists, *Women's Access to Justice for Gender-Based Violence: Practitioners Guid*e (International Commission of Jurists 2016); see ICCPR (n 5) articles 2(1), 3, 14, 26; CEDAW (n 7) arts 2, 15; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) arts 6(1), 14; Protocol 12 to the European Convention on Human Rights art 1; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) arts 2, 3, 6, 7, 8, 26; Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol) art 8.

12 Zarizana Abdul Aziz and Janine Moussa, 'Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women' (*Due Diligence Project,* 2014) <duediligenceproject.org> accessed 10 November 2019; Paulina García-Del Moral and Megan Alexandra Dersnah, 'A Feminist Challenge to the Gendered Politics of the Public/Private Divide: On Due Diligence, Domestic Violence and Citizenship' (2014) 18(6–7) Citizenship Studies 661; Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40(1) Human Rights Quarterly 1.

13 *Maria da Penha Maia Fernandes v Brazil* Case 12.051 (Admissibility) Inter-American Court of Human Rights Report No 54/01 (16 April 2001).

14 *Lenahan (Gonzales) et al. v United State*s Case 12.626 (Merits) Inter-American Court of Human Rights Report No 80/11 (21 July 2011) paras 20–30.

15 *Velasquez Rodriguez v Honduras* (n 1).

16 *AT v Hungary* (26 January 2005) UN CEDAW Communication No 2/2003 UN Doc CEDAW/C/32/D/2/2003.

17 *Yildirim v Austria* (6 August 2007) UN CEDAW Communication No 6/2005 UN Doc CEDAW/C/39/D/6/2005.

18 *González Carreño v Spain* (16 July 2014) UN CEDAW Communication No 46/2012 UN Doc CEDAW/C/58/D/47/2012.

19 *X and Y v Georgia* (25 August 2015) UN CEDAW Communication No 24/2009 UN Doc CEDAW/C/61/D/24/2009.

from the cases of *Opuz v Turkey*,[20] *Kontrovà v Slovakia*,[21] *Balsan v Romania*,[22] *Valiulienė v Lithuania*[23] and *A v Croatia*,[24] among many others.

The main approach to the analysis of due diligence was to design frameworks known as the 5Ps or 7Ps.[25] These frameworks illustrate normative and policy guidelines to protect victims, prosecute gender-based violence, provide redress for human rights violations and generally prevent violence against women.[26] They deliver valuable guiding principles for public stakeholders in IPV. However, the current model of due diligence obligations to prevent IPV fails to pay adequate attention to the granularity of risk factors in IPV and the centrality of human rights risks in the design of State interventions. This article makes various contributions to the due diligence standard for preventing IPV. First, it underlines the relationship between risk factors for IPV and human rights, using a socio-ecological approach to IPV. Then, it illustrates how a risk-based approach to IPV requires anticipative prevention and escalation mitigation to prevent primary and secondary human rights violations in IPV. Finally, it analyses limitations to due diligence obligations, with a special focus on victim agency and the victim's right to private and family life. These developments are aimed at clarifying the adequate State conduct required to comply with human rights obligations to prevent and combat IPV and, implicitly, VAW. This article also demonstrates the importance of integrating human rights into the risk-assessment tools already utilised by State actors.

2. IPV as a Risk-based Phenomenon with Human Rights Implications

2.1 IPV and the Problem of Causation

IPV is any 'behaviour by an intimate partner (current and former) that causes physical, sexual or psychological harm, including acts of physical aggression, sexual coercion, psychological abuse and controlling behaviours.'[27] As a form of VAW, IPV has become increasingly publicised as authors in different scientific fields explored numerous accounts of IPV, ranging from socio-cultural accounts of violence against women and inter-personal accounts of family violence, to intra-personal interpretations of risk factors associated with violent behaviours.[28] The scholarship struggles to deliver a definitive answer regarding the causes of IPV which, in turn, influences laws and policies aimed at combating IPV. There

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[20] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009).

[21] *Kontrova v Slovakia* App no 7510/04 (ECHR, 31 May 2007).

[22] *Balsan v Romania* App no 49645/09 (EHCR, 23 August 2017).

[23] *Valiulienė v Lithuania* App no 33234/07 (EHCR, 26 June 2013).

[24] *A v Croatia* App no 5164/08 (ECHR, 14 January 2011).

[25] Aziz and Moussa (n 12); Sarkin (n 12).

[26] Prevent, Protect, Prosecute, Punish and Provision of Redress are known as the 5Ps, see Aziz and Moussa (n 12).

[27] World Health Organisation (WHO), 'Responding to Intimate Partner Violence and Sexual Violence Against Women: WHO Clinical and Policy Guidelines' (WHO 2013).

[28] Erica Woodin and Daniel K O'Leary, 'Theoretical Approaches to the Etiology of Partner Violence' in DJ Whitaker and JR Lutzker (eds), *Preventing Partner Violence: Research and Evidence-based Intervention Strategies* (American Psychological Association 2009) 41; Kathryn M Bell and Amy E Naugle, 'Intimate Partner Violence Theoretical Considerations: Moving Towards a Contextual Framework' (2008) 28(7) Clinical Psychology Review 1096; Sandra M Stith et al, 'Intimate Partner Physical Abuse Perpetration and Victimization Risk Factors: A Meta-analytic Review' (2004) 10(1) Aggression and Violent Behaviour 65; Louise Dixon and Nicola Graham-Kevan, 'Understanding the Nature and Etiology of Intimate Partner Violence and Implications for Practice and Policy' (2011) 31(7) Clinical Psychology Review 1145.

is no one-size-fits-all State response guaranteed to eradicate IPV; a limitation attributed, among other aspects, to the fact that motivation is a disputed element of IPV:

> Motivations are internal experiences that may be difficult for even the perpetrator to discern. Even when a perpetrator is able to accurately introspect about and subsequently identify their relevant motives, social desirability concerns may preclude admission of these motives.[29]

Moreover, IPV is a variable concept that fluctuates in different cultural settings and 'cultural justifications for violence usually follow from traditional notions of the proper roles of men and women.'[30] The way IPV and other forms of VAW are conceptualised is important because for States to prevent these phenomena, they must naturally understand how they arise, what defines perpetration and victimisation predispositions and how these tendencies can be combated through State interventions.

Feminists place patriarchy and gender roles at the centre of partner violence. Most feminist accounts adopt the position that men, supported by a historical and institutional dominance over women, have transferred that submissive quest into their relationships and that violence is a tool for maintaining power both in the public and private spheres.[31] This approach also influenced international human rights law: from the Nairobi World Conference to the most recent interpretations of the CEDAW Committee, international human rights law has strongly linked VAW to the elements of inequality, gender and patriarchy.[32]

However, as early as 1994, Dutton observed that 'patriarchy must interact with psychological variables in order to account for the great variation in power-violence data.'[33] Since then, a growing number of authors have agreed that IPV is complex and must be viewed holistically, maintaining that gender and patriarchal attitudes are deterministic factors but do not exclusively explain the occurrence of IPV.[34] In the past decade, the World Health Organisation (WHO) has adopted an ecological approach to IPV, maintaining that multiple elements such as gender, personality, stereotypes or socio-

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[29] Jennifer Langhinrichsen-Rohling, Adrianne McCullars and Tiffany Misra, 'Motivations for Men and Women's Intimate Partner Violence Perpetration: A Comprehensive Review' (2012) 3(4) Partner Abuse 429.

[30] WHO, 'World Report on Violence and Health' (WHO 2002) <who.int/violence_injury_prevention/violence/world_report/en/introduction.pdf> accessed 10 November 2019 Ch IV.

[31] R Emerson Dobash and Russel Dobash, *Violence Against Wives* (Free Press 1979); Michelle Bograd, 'Feminist Perspectives on Wife Abuse: An Introduction' in Kersti Yllö and Michelle Bograd (eds), *Feminist Perspectives on Wife Abuse* (Sage 1988); Claire Houston, 'How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases' (2014) 21(1) Michigan Journal of Gender & Law 217.

[32] UNCEDAW (n 3); United Nations Division for the Advancement of Women, 'United Nations Information Note: The United Nations Work on Violence Against Women' (Nairobi World Conference, 15–26 July 1985); the Committee considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated.

[33] Donald Dutton, 'Patriarchy and Wife Assault: The Ecological Fallacy' (1994) 9(2) Violence and Victims 82, 167.

[34] Lori Heise, 'What Works to Prevent Partner Violence? An Evidence Overview' (2011) Working Paper for the Policy Division of the UK Department for International Development, Version 2 <oecd.org/derec/49872444.pdf> accessed 10 November 2019; Parveen Azam Ali and Paul B Naylor, 'Intimate Partner Violence: A Narrative Review of the Feminist, Social and Ecological Explanations for its Causation' (2013) 18(6) Aggression and Violent Behaviour 611.

economic factors influence IPV.[35] A multi-dynamic risk-based approach to IPV and other forms of VAW could maximise the impact of State interventions to prevent human rights violations associated with the phenomena.

2.2 The Relationship Between Risk Factors and Human Rights

If States internalise the assumption that IPV or other forms of VAW are caused by a single factor or one single category of risk factors, preventative approaches run the risk of placing the narrative of an individual in backlog, disregarding an individual's agency, rights, needs or personal circumstances.[36] Considering IPV as a matter of mere gender discrimination leaves out the conditions that led an established vulnerability to be subjected to abuse, such as a lack of education, a socio-economic predisposition or mental health issues that only magnify in the presence of abuse.

As such, a constellation of human rights can be violated by private actors in interpersonal relationships if States fail to intervene or take all appropriate measures to combat violent societal climates. IPV or VAW are not just problems of equality but can represent violations of multiple human rights. It is clear that a holistic prevention model must consider all the possible risks that might influence IPV. An integrative explanation for IPV is the socio-ecological approach that allows for the transformation of gender dynamics at an individual, relational, community and societal levels.[37] The dynamic nature of this approach allows for the consideration of new and evolving factors that might influence a phenomenon.[38]

The WHO has identified various individual risk factors for IPV perpetration by men, for example: young age; heavy drinking; depression; personality disorders; low academic achievement; low income and witnessing or experiencing violence as a child.[39] Ten years later, the WHO includes factors for the victimisation of women: low levels of education; exposure to violence between parents; sexual abuse during childhood; acceptance of violence and exposure to other forms of prior abuse.[40]

Additional to individual risk factors, a person can experience exposure to a second category that will increase their chance of becoming a victim and perpetrator of IPV. The WHO mentions the following relational risk factors: marital conflict; marital instability; male dominance in the family; economic stress and poor family functioning, expanding the list in 2012 to include men having multiple partners and a disparity in educational attainment as relational risk factors.[41]

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35 WHO (n 30); WHO, 'Understanding and Addressing Violence Against Women; Intimate Partner Violence' (WHO 2012) <apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf> accessed 19 December 2019.

36 Heise (n 34); Rachel Jewkes, Jonathan Levin and Loveday Penn-Kekana, 'Risk Factors for Domestic Violence: Findings from a South African Cross-sectional Study' (2002) 55(9) Social Science & Medicine 1603; Lori Michau et al, 'Prevention of Violence Against Women and Girls: Lessons from Practice' (2015) 385(9978) The Lancet 1672; Miranda Sue Terry, 'Applying the Social Ecological Model to Violence against Women with Disabilities' (2014) 3(6) Journal of Women's Health Care.

37 Heise (n 34); Jewkes, Levin and Penn-Kekana (n 36); Michau et al (n 36); Terry (n 36); Tanya Abramsky et al, 'Ecological Pathways to Prevention: How does the SASA! Community Mobilisation Model Work to Prevent Physical Intimate Partner Violence Against Women?' (2016) 16(1) BMC Public Health 339.

38 Emma Fulu and Stephanie Miedema, 'Violence Against Women: Globalizing the Integrated Ecological Model' (2015) 21(2) Violence Against Women 1431; globalization should be a factor integrated into how VAW is theorised.

39 WHO (n 30).

40 WHO (n 35).

41 WHO (n 30); WHO (n 35).

The third layer of risk factors for IPV is represented by cultural and societal contexts and climates, equivalent to the social-ecology levels of exosystem and microsystem.[42] Social and cultural norms can be internalised by individuals in their pursuit of fitting in within their societies although at times they might conflict with their personal beliefs.[43] Globally, social and cultural factors are: weak community sanctions against domestic violence; poverty; low social capital; traditional gender norms and social norms supportive of violence.[44] Examples of social norms supportive of IPV are the belief that divorce is shameful, that a man has the right to exercise discipline over a woman and that a man is socially superior.[45]

An important observation surfaces if we bridge an ecological approach to IPV with the due diligence obligations of States to prevent IPV. What appear to be risk factors for IPV might, in fact, be unfulfilled human rights. The very occurrence of IPV might stem from primary human rights violations. For example, exposure to domestic violence in childhood can be viewed as violations of the right of the child.[46] Risk factors such as heavy drinking, personality disorders and depression can be considered under the right to health, including the dimension of mental health, put forward in Article 12 of the International Covenant on Economic, Social and Cultural Rights. States have international obligations 'to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health.'[47] At the same time, low academic achievement levels and low income could be regarded as contributing factors arising from unfulfilled cultural, social and economic rights such as the right to education and right to employment that affect men and women unequally.[48] In that sense, when economic dependency represents an obstacle for women to leave abusive relationships, this economic disparity could be traced back to unfulfilled women's rights.[49] This suggests a strong connection between risk and due diligence: individuals whose rights are not adequately protected and fulfilled are at risk of further and continuous human rights violations.

> Human rights and risk are different concepts, with different pedigrees, but they work well together in practice. […] Human rights risk can be understood as harm to people, or the potential for harm to people, where that harm constitutes a violation of internationally proclaimed human rights.[50]

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42 Heise (n 34).

43 WHO, 'Changing Cultural and Social Norms that Support Violence; Series of Briefings on Violence Prevention' (WHO 2009) <apps.who.int/iris/bitstream/handle/10665/44147/9789241598330_eng.pdf?sequence=1&isAllowed=y > accessed 10 November 2019.

44 WHO (n 30); WHO (n 35).

45 WHO (n 43).

46 United Nations Committee on the Rights of the Child, 'General Comment No 13: The Right of the Child to Freedom from All Forms of Violence' (11 April 2011) UN Doc CRC/C/GC/13; exposure to domestic violence is mentioned by the Committee on the Rights of the Child as a form of mental violence.

47 United Nations Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) E/C.12/2000/4.

48 CEDAW (n 7); UN International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3.

49 CEDAW (n 7) art 10 refers to education, art 11 to employment.

50 Mark B Taylor, Luc Zandvliet and Matra Forouhar, 'Due Diligence for Human Rights: A Risk-Based Approach' (2009) John F Kennedy School of Government Corporate Social Responsibility Initiative, Working Paper No 53 <hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_53_taylor_etal.pdf> accessed 10 November 2019.

Consequently, taking all appropriate measures to combat IPV means addressing the root causes of these primary human rights violations, as well as secondary violations, should these arise.

It is central to this discussion to reflect on the notion of State knowledge that a human rights violation has occurred. For any form of VAW and, implicitly, IPV, State actors can only intervene when they have discovered or intercepted a disclosure of violence. At the time of disclosure, in most cases, an individual's rights have already been jeopardised. This should be considered a primary human rights violation. It then follows that due diligence requires that States prevent *secondary* human rights violations. However, the due diligence standard, in the context of IPV and VAW, requires States to take all appropriate measures to prevent VAW,[51] including combating societal risks that might lead to primary human rights violations. Therefore, taking all appropriate measures means addressing both primary and secondary human rights violations. In the context of IPV, I have named these phases anticipative prevention and escalation mitigation and they will be used to illustrate the importance of assessing risks at different levels, to achieve double protection from IPV and other forms of VAW.

3. Due Diligence and IPV: Addressing Primary and Secondary Human Rights Risks

Anticipative prevention requires fulfilling the human rights at the root of IPV and preventing primary human rights violations. This type of prevention should be focused on protecting economic, social and cultural rights, ensuring that harmful gender stereotypes are combated and risk factors are systematically addressed. After all, 'strategies that look at the underlying causes of violence against women ease the burden and cost of the post-incidence intervention.'[52]

In some ways, anticipative prevention is equivalent to what Rashida Manjoo, former Special Rapporteur on Violence against Women, calls systemic due diligence.[53] Measures of anticipative prevention include publicising IPV, eliminating institutional victim-blaming and combating societal patterns that nurture a climate of violence by perpetuating gender stereotypes and inequalities.[54]

Another example of anticipative prevention is the elimination of gravity bias in State authorities and promoting legislation that sanctions new and non-physical forms of abuse, such as spiritual abuse and reproductive coercion, as well as forms of IPV perpetrated online.[55] One of the most important tools of anticipative prevention is

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51 CEDAW (n 7); UNCEDAW (n 3).

52 Aziz and Moussa (n 12).

53 Rashida Manjoo, 'State Responsibility to Act with Due Diligence in the Elimination of Violence Against Women' (2013) 2(2) International Human Rights Law Review 240.

54 Katherine Brickell, 'Clouding the Judgment of Domestic Violence Law: Victim Blaming by Institutional Stakeholders in Cambodia' (2017) 32(9) Journal of Interpersonal Violence 1358; Eryn O'Neal and Laura Beckman, 'Intersections of Race, Ethnicity, and Gender: Reframing Knowledge Surrounding Barriers to Social Services Among Latina Intimate Partner Violence Victims' (2017) 23(5) Violence Against Women 643.

55 NA John and J Edmeades, 'Reproductive Coercion and Contraceptive Use in Ethiopia' (2018) 32(1) Etude de la Population Africaine; HL McCauley, KL Falb, T Streich-Tilles, D Kpebo and J Gupta, 'Mental Health Impacts of Reproductive Coercion Among Women in Cote d'Ivoire' (2014) 127(1) International Journal of Gynecology & Obstetrics 55–59; J Park, SK Nordstrom, KM Weber and T Irwin, 'Reproductive Coercion: Uncloaking an Imbalance of Social Power' (2016) 214(1) American Journal of

education, as a mechanism to prevent inter-generational transmission of violence by addressing teen dating violence and children's exposure to parental IPV.[56] The most significant feature of anticipative prevention is related to the importance of social, economic and cultural rights and how these influence IPV, as well as the fact that it reinforces the indivisibility of human rights. As risk factors are dynamic and actively interact, so must State measures aimed at protecting human rights.

However, from a human rights point of view and drawing on human rights bodies' decisions, State liability occurs at the moment State actors acquire knowledge of an abusive situation and fail to take steps to prevent the escalation of violence and further negative impacts. In that sense, escalation mitigation refers to the conduct of institutions that have, or should have, knowledge of IPV to prevent its escalation or reoccurrence. It is at this moment that State authorities have an opportunity to, and should, assess human rights risks. To avoid international responsibility, States must react to ensure that IPV is interrupted and does not continue between partners and so avoid violations of the right to life and the prohibition of ill-treatment or violations of children's rights. This requires that authorities:

> (a) react pro-actively, assessing and addressing human rights risks,
> (b) take measures to ensure the immediate protection of victims and
> (c) ensure that protection is guaranteed without unnecessary delays and proceed to prosecute, punish and provide redress.[57]

In some cases, authorities must address a multitude of factors, make referrals to shelters, assist victims in getting a protection order, arrest the perpetrator and so on. This complexity makes it easy for authorities to provide uncoordinated and chaotic responses. For that reason, responses to IPV should be formalised as much as possible through protocols and statutes and laws should establish well-defined duties of State officials involved in IPV, including police forces, medical personnel, spiritual leaders, teachers or social workers. Amid growing concern that risk assessment tools used by police forces might miss certain abusive manifestations and be potentially unreliable, human rights risk assessments could facilitate new ways in which State institutions understand, discover and respond to IPV.[58]

Risk assessment for violations of the right to life and prohibition of ill-treatment must include not only the victim but also their children, as they can transition from witnesses of parental violence to becoming victims themselves. As risk calculations are difficult and 'judgments must consider the who, what, where, when, and how of violence', the literature cautions against the sole use of empirical factors and suggests finding a balance between those and professional consensus.[59] IPV literature underlines the existence

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Obstetrics and Gynecology 74–78; Zarizana Aziz, 'Due Diligence and Accountability for Online Violence against Women' (*Due Diligence Project,* 2017) <duediligenceproject.org> accessed 19 December 2019.

[56] DS Coffey, *Parenting After Violence: A Guide for Practitioners* (Institute for Safe Families 2009) 1–95; CA Franklin and GA Kercher, 'The Intergenerational Transmission of Intimate Partner Violence: Differentiating Correlates in a Random Community Sample' (2012) 27(3) Journal of Family Violence 187–199.

[57] *Rumor v Italy* App no 72964/10 (ECHR, 27 July 2014); Aziz and Moussa (n 12).

[58] Jose Medina Ariza, Amanda Robinson and Andy Myhill, 'Cheaper, Faster, Better: Expectations and Achievements in Police Risk Assessment of Domestic Abuse' (2016) 10(4) Policing: A Journal of Policy and Practice 341.

[59] PR Kropp, 'Intimate Partner Violence Risk Assessment and Management' (2008) 23(2) Violence and Victims 202.

of three major risk assessment models: unstructured clinical decision making, actuarial decision making and structured professional judgment.[60] The unstructured decision making model consists of risks being evaluated by professionals that come into contact with victims, relying on their experience, discretion and qualifications. This model is criticised for lacking 'reliability, validity and accountability.'[61] The unstructured decision model could leave excessive space for exercising stereotypical gender attitudes and should thus be complemented or replaced by additional empirical models, which may be better suited to assessing human rights impacts. States have the obligation, as per Article 5 of the UN Convention on the Elimination of Discrimination Against Women, to eliminate gender stereotypes and it is within these types of interventions that they can do so.[62]

The actuarial model is based on giving risk factors derived from empirical research a numerical value that generates a reflection of the possibility of re-offending.[63] The effectiveness of this method appears to depend on the reliability of the data collected to determine risk factors in a specific group or location and is likely suited to assess societal factors rather than relational or individual, which vary significantly. Finally, the structured professional judgement model represents a reconciling approach between the two aforementioned methods and 'does not impose any restrictions for the inclusion, weighting, or combining of risk factors.'[64] When using this method, professionals assess empirical evidence and use complementary discretion to gather additional nuanced elements to determine risks. The latter model appears to be most compatible with assessing human rights risks. Furthermore, participation is a vital principle of due diligence, of great importance to guaranteeing adequate human rights protection.[65] As mentioned by Taylor:

> Human rights risk assessments are not mechanical processes. It is very difficult to quantify human rights risk. Checklists or compliance questionnaires, while helpful… cannot capture the quality of the risk and, therefore, the range of potential mitigations. It seems likely that the single most effective way to identify, understand and manage risks are through dialogue processes….[66]

For IPV, Connon-Smith et al support this idea, arguing that victims possess intuitive and sensitive information otherwise not evident in criminal records and that they ought to be involved in the risk assessment process for IPV.[67]

Following existing due diligence models for assessing human rights risks in business, we can extrapolate that, for IPV, human rights risks can be identified by assessing

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60 ibid.

61 Kropp (n 59); Thomas Litwack, 'Actuarial Versus Clinical Assessments of Dangerousness' (2001) 7 Psychology, Public Policy and Law 409.

62 UN General Assembly, 'Declaration on the Elimination of Violence against Women' (20 December 1993) UN Doc A/RES/48/104.

63 State of Victoria, 'Royal Commission into Family Violence: Report and Recommendations' (2014–2016) Vol I, Parliamentary Paper No 132.

64 Kropp (n 59).

65 Danish Institute for Human Rights, 'Human rights Impact Assessment: Guidance and Toolbox' (*Danish Institute for Human Rights,* 2016) <humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/hria_toolbox/introduction/welcome_and_introduction_final_may2016.pdf_223791_1_1.pdf> accessed 19 December 2019.

66 Taylor (n 50).

67 Jennifer Connor-Smith et al, 'Risk Assessments by Female Victims of Intimate Partner Violence: Predictors of Risk Perceptions and Comparison to an Actuarial Measure' (2011) 26(12) Journal of Interpersonal Violence 2517.

a) the right holders;
b) the human rights context and
c) the potential for State involvement.[68]

Assessing the right holders should involve a key examination of the individual risk factors of the victim and children, as well as a thorough analysis of recidivism and risks of perpetration. Here, State actors must uncover whether the circumstances leading to violence originate from other human rights violations, if individuals are aware of their human rights and if violations to children's rights have occurred, as well as determining other potential right holders and assessing other harms and damage, for example to property or pets.

The human rights context should be analysed in an attempt to understand the degree of vulnerability of the victim, their socio-cultural makeup and the obstacles they face which make them susceptible to primary human rights violations. Here, it is important that State actors expose socioeconomic motivations for accepting or justifying the abuse and that they work with victims in finding viable and sustainable solutions to address those factors. Finally, and perhaps most importantly, acting diligently requires States to evaluate the available space for intervention and analyse what logistical, material and institutional support they can provide victims to ensure safety, access to justice, remedies and redress.[69] All these phases must be guided by the principles of participation: non-discrimination, empowerment, transparency, accountability and ensuring that the victim and children are involved.[70]

4. Limits to State Due Diligence for the Prevention of IPV

Any State *intervention* must thus be aimed at mitigating the intensification of violence and preventing primary and secondary human rights violations. However, States also have negative human rights obligations; that is, they must not *interfere* in the enjoyment of a particular right unless such interference is exceptional and such exception is rendered permissible by international law.[71] What is then the difference between a State intervention and State interference in the context of IPV and other forms of violence against women?

This analysis must be carried out within the precincts of the norms and jurisprudence developed by the European Court of Human Rights that have repeatedly examined the boundaries of the right to private life. State interference appears in Article 8 of the European Convention on Human Rights (ECHR):

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[72]

The ECHR thus allows State interferences prescribed by the law and necessary for public safety. If State measures aim to prevent crime, are prescribed by national law and are necessary, in the sense that they are proportional and respond to a pressing social need,

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68 Taylor (n 50); Danish Institute for Human Rights (n 65).

69 Taylor (n 50).

70 Danish Institute for Human Rights (n 65).

71 Ida Elizabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5(1) Human Rights Law Review 81–83.

72 ECHR (n 11) art 8.

they can be considered legitimate interferences. Addressing IPV is increasingly becoming a pressing social need, as demonstrated by the unshaking prevalence of IPV against women worldwide. However, it is clear that balancing the rights of individuals, their autonomy and freedom, with the need to combat IPV could, in some cases, become problematic from a human rights perspective.

The ECtHR has put forward that the positive obligation of States is binary: '…to give legal recognition to family ties; the second is to act to preserve family life.'[73] An important question resurfaces: aside from preventing IPV, should State interventions in IPV be aimed at preserving or terminating a violent relationship? Is the aim of preserving a relationship compatible with the prevention of future violence in IPV cases? Which State conduct, in terminating or preserving a relationship, is most compatible with human rights standards?

Regarding the preservation of family life, the ECtHR has not discussed this aspect in the context of IPV; instead, this issue was examined in cases concerning children's separation from their parents.[74] The inquiry on the role of the State in preserving family life is not novel in the sphere of sociology, although vastly ignored in the field of human rights. Zimmerman highlighted the relationship between social welfare support and the preservation of family in the United States and noted that 'family and social integration are two sides of the same coin, that family life is more stable in States that do more to support individuals and families in the face of destabilizing influences.'[75] Family preservation was also introduced in the context of children's welfare programmes and the model was regarded positively.[76]

Since then, others have agreed that the State must 'provide a certain level of material conditions in order to preserve family life.'[77] Most of the ideas in family preservation are centred around the role of the State in providing socio-economic support for families and exercising paternalism to protect children while strengthening the capabilities of parents to provide safe spaces for children. On one hand, State measures aimed at fulfilling economic, social and cultural rights could lower individual and relational risk factors associated with IPV and decrease marital conflicts and economic stress and dependency within couples. But family preservation in the sense of *relationship preservation* in IPV does not appear to have been largely discussed. One author signals the issue women face:

> Remedies for domestic violence too often protect a woman's right to safety only if she is willing to leave her partner, thereby sacrificing her right of autonomy as expressed through her decision to stay in an intimate relationship. […] The legal system must confront the tension between legal rules that assume that the only solution to domestic violence is to dissolve the relationship.[78]

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[73] European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights, Right to Respect for Private and Family Life' (Council of Europe, 31 August 2019) <echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 19 December 2019.

[74] ibid.

[75] Shirley Zimmerman, 'The Role of the State in Family Life: States' AFDC Payments and Divorce Rates in the United States' (1994) 14(1) International Journal of Sociology and Social Policy 4.

[76] S Kelly and BJ Blythe, 'Family Preservation: A Potential Not Yet Realized' (2000) 79(1) Child Welfare 29.

[77] Maribel Gonzalez Pascual and Aida Torres Pérez (eds), *The Right to Family Life in the European Union* (Taylor & Francis 2016) 7.

[78] Sally Goldfarb, 'Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship' (2007) 29 Cardozo Law Review 1487.

Therefore, perhaps the biggest challenge of due diligence compliance in IPV is reconciling two competing State interests:

> (a) the interest of the State in respecting an individual's right to autonomy and self-determination in their private life and
> (b) the interest of the State to protect an individual from the possible consequences of exercising that autonomy and consequently act in the name of public safety.

This conundrum is also reflected in the public-private divide that has characterised IPV for a long time, namely the reluctance of public authorities to intrude in what has been considered a private, family issue. However, due diligence obligations have put an end to this traditional divide, as recent developments, along with the work presented here, clearly suggest that IPV is a public issue. Nonetheless, the publicity of IPV does not exclude the possibility of some elements, related to romantic relationships, retaining a private character.

Goldfarb suggests that the law should provide for the possibility of various forms of protection orders: 'a protection order that authorizes an ongoing relationship between the parties but sets limits on the abuser's behaviour provides a valuable alternative.'[79] Indeed, State measures imposing flexible limitations would utilise the power of the law for 'improving relationships rather than ending them', empowering victims which might, in some cases, reflect higher compliance with human rights standards.[80]

5. Conclusion

This article has illustrated that IPV is a complex issue that involves primary and secondary human rights violations. The article has argued that to comply with due diligence obligations to prevent IPV, States must assess human rights risks and must design State interventions aimed at addressing individual, relational and societal risks associated with IPV. State interventions are not absolute, and they must consider an individual's agency, needs and desires. Central to effective State conduct is the participation of the victim of IPV in the risk assessment process. More research is needed, not only for IPV but for all forms of VAW, to exemplify how human rights violations arise from gender-based violence and to develop a human rights risks assessment framework to aid States in compliance with their obligations and, at the same time, protect victims of IPV. Human rights risk assessment tools, combined with human rights education for State actors involved in IPV, have the potential of uncovering intersectional vulnerabilities and addressing the root causes of gender-based violence, whilst concomitantly ensuring compliance with the right to private and family life. The relationship between risk, violence and human rights compliance exemplified here can analogously be applied to child abuse, elder abuse and other forms of inter-personal violence that require complex State interventions, often involving balancing the human rights of multiple individuals.

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[79] ibid.
[80] ibid.

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International Law, Western States, Third World States, and the Principles of Right to Economic Self-Determination

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INTERNATIONAL LAW; GLOBAL LAW; PRINCIPLES OF ECONOMIC SELF-DETERMINATION; HUMAN RIGHTS; WESTERN STATES; THIRD WORLD STATES; INTERNATIONAL (ECONOMIC) LAW AND DEVELOPMENT

Abstract

In practice, international law appears to have worked against those principles that accord the people of a State the right to economic self-determination, such as the principle of free choice in economic development. This paper argues that the exercise of the right to economic self-determination (particularly economic development freedom or free economic development) has been hampered, and has not been freely pursued in practice by developing countries, due to hegemonic control, economic exploitation and domination by the 'powers that be' within the international system. This research examines those principles of international law that accord the peoples of a State the right to free economic development, both in theory and practice; it also provides insights into legal policy implications and the prospects of international law in this area. This paper utilises the well-being and liberal-economic legal theoretical approaches, and interdisciplinary and critical-analytical perspectives, within the framework of international economic law and development.

1. Introduction

The right to economic self-determination (ES-D) is one of the international legal principles which suggests that the peoples in a sovereign State, within the realm of international law, are independent and free in pursuing their economic development.[1] The Western States, or

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[1] The author is critical of the (recent) polarised debate within international law and distinction among some scholars, practitioners and States of the global North, between economic self-determination as a right of peoples (as in the International Covenants on Human Rights) and economic sovereignty as a right of States (eg in the NIEO resolutions) and the distinction between the right to development as a human and peoples right versus a State right. The discussion in international law as conceived in this paper is fundamentally about sovereign States and the rights of economic self-determination as those rights 'supposed' to be exercised by people of sovereign States (thus, the people of a sovereign State cannot be separated from a sovereign State itself). The right is seen as affording a framework for the struggle of developing countries to attain the economic independence (as sovereign States and peoples of sovereign States, *not* struggle within the sovereign

countries of the global North, are more developed economically, politically, legally, and industrially than developing third world States of the global South.[2] The former were not only accorded the right to ES-D, but are free to exercise these rights in practice in order to pursue

States by their peoples) which has not followed automatically upon the attainment of political independence. Thus, any distinction or polarised debate is simply aimed at weakening the legal concept(s) as a useful analytical-critical tool in the context of developing countries. Just as Carthy argues, '[v]arious formulations of the right of peoples to pursue their economic development, whether they are found in the UN Human Rights Covenants, the 1970 Declaration on the Principles of Friendly Relations among States, or the Charter of Economic Rights and Duties of States, to mention only three, present a common theme; a virtually obsessive repetition of the right of economic self-determination. The right is seen as affording a framework for the struggle of developing countries to attain the economic independence which has not followed automatically upon the attainment of political independence. The survival of a legal concept must depend upon its usefulness as an analytical-critical instrument. Now it appears that, in practice, particularly at the United Nations, the claim States make to a right to economic self-determination serves primarily as an ideological representation. Alongside the opposing "Western" claims for the principle of acquired rights and for "pacta sunt servanda", it expresses a real economic contradiction and serves as a banner to mobilize developing countries in the context of a North-South confrontation. Yet such an ideological use of apparently legal concepts does not permit them to function as positive rules of law'. See Anthony Carthy, 'From the Right to Economic Self-Determination to the Rights to Development: A Crisis in Legal Theory' (1984) 3 Third World Legal Studies 73; this equally agrees with the position of Ibhawoh that '[t]he polarized debate amongst states, scholars, and practitioners over the right to development is underlined by salient paradoxes and contradictions. The rhetoric of the right to development has been deployed both as a language of resistance to oppose a hegemonic global economic system and as a language of power to assert national sovereignty and legitimize statist political and economic agendas. Apart from bedeviling the elaboration and implementation of the right to development, the insular political and ideological jockeying that has characterized the discourse raises pertinent questions about the normative objectivity of the international human rights movement'. See Bonny Ibhawoh, 'The Right to Development: The Politics of Polemics of Power and Resistance' (2011) 33 Human Rights Quarterly 77; also Aral suggests that notions like 'positive discrimination' and the 'right to development' still underlie much of the debate between the third world and the West in international forums, such as the UN and the WTO; see Berdal Aral, 'An Inquiry into the Turkish "School" of International Law' (2005) 16(4) European Journal of International Law 769; in order to highlight and critique these contradictions, the author, therefore, uses terms such as 'self-economic determination' and 'economic self-determination' interchangeably; also, terms such as 'free choice of economic development system', 'economic development freedom', 'free economic development', and 'independent economic development' as referring to the same principles (the right to development of peoples of sovereign States in developing countries). When people of an independent sovereign State, in particular developing countries (in the realm of international law), are demanding economic self-determination, what they are invariably asking for is the right of peoples to economic development freedom.

[2] For example, in legal trends, the USA and Britain still strongly influence undertakings in the international legal regime; see RP Anand, *International Law and Developing Countries: Confrontation or Cooperation* (Kluwer Academic Publishers 1987); in economic trends, significant developments since the 1980s show the virtual collapse of the market value of the natural resources extracted from the territories of developing countries and the continued triumph of Western owned multinational corporations (MNCs, which control processing); see Anthony Carthy, 'The Concept of International Development Law' (2008) 1 International Sustainable Development Law; under political trends, Western countries' occupation of most of the strategic positions in global organisations such as the UN (including wielding 'veto power') as well as in other international organisations or agencies; Westerners, particularly the US and Britain have been able 'to influence the political development of states around the world… In many of their colonies, conquests, and clients, they have propagated ideals and institutions conducive to democratization'; see Kevin Narizny, 'Anglo-American Primacy and the Global Spread of Democracy: An International Genealogy' (2012) 64(2) World Politics 341.

their economic development even at an international level.[3] This, in effect, allows Western States to pursue their goals of economic development, taking into consideration their domestic distinctiveness. This has therefore placed them in a better position to assert and project their domestic economic interests within the international community of nations in the current globalising world.[4] The West, for example, particularly the USA and Britain, have advanced economic systems and have been able to influence the economic development of States around the world, including through the use of such economic programmes as liberal economic policies and structural adjustment programmes (SAP).[5] This is not the case for developing countries of the global South where the principles of ES-D appear to have been recognised more in principle than in practice, as this paper will demonstrate.

The major thrust and argument of this paper is that the exercise of the right to ES-D has been hampered and has not been freely pursued in practice by poor developing countries due to hegemonic control, economic exploitation and domination by the 'powers that be' (particularly the USA and Britain) within the international system. The paper does not suggest that third world States have not benefitted from the international legal regime, but posits that these benefits have been minimal because they have not been permitted to exercise their rights to ES-D freely, due to the hegemonic control of Western States.

The lessons of economic history, in the West, the East and most recently the breakthroughs in the Far East (eg China, South Korea and Singapore), suggest that socioeconomic transformation in terms of rapid economic growth is a prerequisite for political participation and political development.[6] In effect, economic development goals in third world States, since their independence, have failed to take proper consideration of domestic interests and indigenous needs (eg customs and beliefs, traditional ways of life and artefacts) of the people in society. In agreement with this view, Chatterjee submits that colonial rulers regarded

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[3] The West has the right to economic development by nature of their superior and dominant position in both international legal regimes and global political economy (that is to say, they discriminately accorded this right onto themselves). For a good illustration, see Narizny (n 2).

[4] In this paper, the term 'developing countries' will be used interchangeably with other terms such as 'third world States' or 'global South'; similarly the term 'developed countries' will be used interchangeably with other terms such as 'Western States' or 'global North'. See Brian-Vincent Ikejiaku, 'International Law, International Development Legal Regime and Developing Countries' (2014) 7(1) Law & Development Review 131.

[5] Some may argue that SAP is the policy of the international financial institutions (IFIs such as IMF and the World Bank), but the question is, which countries control or dictate to the IMF. Following an ideology known as neoliberalism and spearheaded by these and other institutions known as the Washington Consensus (for being based in Washington DC and controlled by the West), SAPs have been imposed to ensure debt repayment and economic restructuring. But the way this has happened has received high criticism, as it required poor countries to reduce spending on matters such as health, education and development, while debt repayment and other economic policies have been made the priority. 'Debt is an efficient tool. It ensures access to other peoples' raw materials and infrastructure on the cheapest possible terms. Dozens of countries must compete for shrinking export markets and can export only a limited range of products of Northern protectionism and their lack of cash to invest in diversification. Market saturation ensues, reducing exporters' income to a bare minimum while the North enjoys huge saving. The IMF cannot seem to understand that investing in … [a] healthy, well-fed, literate population … is the most intelligent economic choice a country can make' Susan George, *Fate Worse Than Debt* (Grove Weidenfield 1990) 143, 167, 235.

[6] Brian-Vincent Ikejiaku, 'The Concept 'Development' Revisited towards Understanding: in the Context of Sub-Saharan Africa' (2009) 2(1) Journal of Politics and Law 31, 35.

native conditions as uncivilised and as requiring improvement, while forbidding citizenship and the attendant rights of self-improvement to colonial subjects.[7]

It can be suggested that certain fundamental principles of international law necessary to meet independent development or economic freedom, as well as political, social and cultural systems in developing countries, in accordance with the will and needs of their populations, have been interfered with since the 1960s. This was when the majority of the developing countries, particularly those in Africa, gained their political independence.[8] It is from this perspective that some authors see 'development' as a euphemism for Western penetration and domination of the world, involving great misery and exploitation, both past and present.[9] This position can be given credence with notable examples, such as Stanley Diamond's frontal attack on a concept associated with development and progress, ie 'civilisation'. Diamond argues that processes of civilisation have always involved conquest, violence, coercion and oppression with respect to so-called less civilised peoples.[10]

The aim of this paper is to examine the international legal principles of ES-D and how these principles have worked in practice within the international system. The right of a State to freely choose its economic system was introduced in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States as a component of sovereign equality.[11] The principles are devoted to the subject of free economic development, which is the right of every country to adopt the economic and social system that

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7 Partha Chatterjee, *The Nation and its Fragmentation* (Princeton 1993).

8 See for example the works of RP Anand, *International Law and Developing Countries: Confrontation or Cooperation* (Kluwer Publisher 1987); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004); BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) European Journal of International Law 1; Brian-Vincent Ikejiaku, 'International Law is Western Made Global Law: The Perception of Third World Category' (2014) 6(2–3) African Journal of Legal Studies 337; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003). TWAILERS are scholars, mostly from developing countries, who pursue the international scholarship 'Third World Approach to International Law (TWAIL)', in order to address the injustices against the third world due to the hijacking of international law by Western developed countries.

9 See Andre Gunder Frank, *Latin America: Underdevelopment or Revolution* (Monthly Review Press 1969).

10 See Stanley Diamond, *In Search of the Primitive: A Critique for Civilisation* (Transaction Publishers 1974). For instance, the Native Americans have been victims of Western penetration into North America, the slaves have been victims of Western penetration into Africa, and the Inuit have been victims of the spread of Western culture to Alaska. Yet, Diamond does not restrict himself to the results of Western expansion in the world. Wherever people try to spread their civilisation, the fire and the sword are always involved, whether it concerns the expansion of the Greek, the Roman, the Egyptian or the Islamic civilisations. Such criticism is valuable, though at times one-sided. First, it creates an awareness of the costs involved in development. Secondly – and perhaps most importantly – it brings to our attention the relation between the 'concept of development' and international power relations. What one understands by 'development' in a particular historical period is strongly influenced by the dominant cultures and powers of that period. See also Adam Szirimai, *The Dynamics of Socio-Economic Development: An Introduction* (Cambridge University Press 2005).

11 See Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey' (1971) 65(5) The American Journal of International Law 713. See also United Nations General Assembly Resolution 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/Res/2625(XXV).

it deems most appropriate for its own development. These are elaborated in several important international legal instruments, such as Article 1 of the Charter of Economic Rights and Duties of States.[12] Similarly, they are contained in the United Nations (UN) General Assembly Resolution 3201 and the Declaration on the Establishment of a New International Economic Order (NIEO).[13]

This paper argues that the exercise of the rights to ES-D has been hampered and has not been freely pursued in practice by poor, developing countries due to hegemonic control, economic exploitation and domination by the 'powers that be' within the international system.[14] In essence, international law in practice appears to have worked against those principles of international law that accord States the right to ES-D, such as the freedom of economic development. The trend of events in the international system suggests that the attempts of newly independent developing countries to reconstruct a NIEO in a manner that would benefit their economic development, from the 1960s until the present day, in accordance with these principles of ES-D, has been confronted with difficulties. This is due to actions of the 'powers that be' within the international system, ie the hegemonic activities of Western States and multinational corporations (MNCs); for example, their liberal economic internationalisation policies (a good example is the liberal economic policy of SAP in Africa)[15] and the immigration policies of developed countries (a good example is the UK's deportation policies that negatively impact the economic development of poor developing countries), as will be discussed in the course of this paper.

The manner through which developing countries have been prevented from exercising their rights accorded by the international legal principle of ES-D has been subtly manipulated in the international system. This is due to the extent to which developing countries have been perceived as not having international legal personality from the outset and their lack of willpower and capabilities for economic development. This submission is captured in Gathii's view: since the third world States were assumed not to have personality in international law, their interests *ab initio* have continued to suffer because they did not have a role to play in shaping the norms of the earlier international legal order.[16] This has, to a great extent, been influencing the present international legal order, particularly in the realm of the economic development freedom of third world States. This paper therefore attempts to examine those principles of international law that accord sovereign States the right to freedom of economic development and how these principles work in practice. The paper also intends to make insights into legal policy implications and the prospects of international law and economic development in this area.

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[12] Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) (adopted by 115 votes to 6; 10 abstentions) art 1.

[13] UNGA 'Declaration on the Establishment of a New International Economic Order' UN GAOR 6th Session Supp No 1 UN Doc A/RES/3201(S-VI) (1974).

[14] See for example notes 2 and 3 above.

[15] ibid; see also Brian-Vincent Ikejiaku, 'The Role of Law and the Rule of Law in Economic Development Process: Quest for New Direction and Approach in the International Development Law Regime' (2019) 47(1) Denver Journal of International Law and Policy.

[16] See James Thou Gathii, 'International Law and Eurocentricity' (1996) 9 European Journal of International Law 184; James Thou Gathii is the Wing-Tat Lee Chair in International Law and Professor of Law in the Loyola University Chicago. He is a founding member of the Third World Approaches to International Law network.

In terms of method, this paper uses the well-being and liberal legal theoretical approaches, interdisciplinary and critical-analytical perspectives within the framework of international economic law and development. It employs qualitative empirical evidence from both developed and developing countries for illustrative analysis. The structure of this paper is in five broad sections. Section 1 is a general introduction. Section 2 considers those principles of international law that accord States the right to freedom of economic development. Section 3 briefly looks at the well-being and liberal-economic legal theories used in the analysis. Section 4 considers how those principles work in practice within the context of the global South and global North (including the issues of SAP and immigration deportation policies). Section 5 covers the author's recommendations by making insights into implications of legal policy, the prospects of international law and the right to economic development freedom.

2. The Right to Economic Self-Determination

The international legal principles of ES-D primarily centre on the rights of all peoples of a State, under international law, to freely determine their political and legal status and pursue their own social, economic and cultural development.[17] This paper focuses on the right of peoples of a State to free economic development. This right, which was later introduced in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States as a component of sovereign equality, is elaborated in several important international legal instruments dating back to around 1945. References to a right to development were made as early as the process leading to the adoption of the 1948 Universal Declaration of Human Rights.[18] The first comprehensive discussion of the right to development as a human right is attributed to Keba M'Baye.[19] While, for many decades, this fundamental principle has been overshadowed by three other key forms of self-determination, international instruments have recognised and coherently pronounced peoples' right to ES-D.[20] However, the human rights movements as professed under these Covenants and Charter largely failed to exploit and make the most of this clear language.[21] This right of ES-D is also reiterated and embodied in more recent international instruments, such as the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX) 1974), which in Article 1 provides, *inter alia*:

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17 See Alice Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realisation in Resource-Rich Countries' (2007) 39 NYU Journal of International Law & Politics 417.

18 See Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16(2) Wisconsin International Law Journal 353, 374.

19 ibid 375.

20 See International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 99 UNTS 171 art 1(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 1(2) (featuring identical articles that state 'all peoples may, for their own ends, freely dispose of their natural wealth and resources…'); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 59 arts 20–21; Alice Farmer, 'Towards A Meaningful Rebirth of Economic Self-Determination: Human Rights Realisation in Resource-Rich Countries' (2006) 39 New York University Journal of International Law & Politics 417.

21 ibid.

> Every State has the sovereign and inalienable right to choose its economic system, as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.[22]

Similarly, UN General Assembly Resolution 3201, the Declaration on the Establishment of a New International Economic Order,[23] was devoted to the subject of free economic development, the right of every country to adopt the economic system that it deems most appropriate for its own development.

The developing countries made dogged attempts, with full commitment and determination, to have the NIEO embodied in international law, but this was subtly, yet vehemently, thwarted by Western States.[24] The concept of NIEO was coined in the mid-1960s by a group of French academic lawyers who promoted an 'international law for development'.[25] This was conceived not as a distinct ambit of international law but as a novel perspective within the whole body of law that centres on international development. However, it was the failed attempt to have the NIEO enshrined in international law that subsequently unfolded into a quest on the part of developing countries for recognition of a right to development as a fundamental human right. Western States have refused to accept such a collective right, which would seem to suggest corresponding duties on their part. In 1986, the UN General Assembly adopted the Declaration on the Right to Development.[26] The Declaration of the 1993 Vienna Human Rights Conference proclaimed the right to

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[22] Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) (adopted by 115 votes to 6; 10 abstentions) art 1; see also Mohammed Bedjaoui, *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 599.

[23] UNGA 'Declaration on the Establishment of a New International Economic Order' UN GAOR 6th Session Supp No 1 UN Doc A/RES/3201(S-VI) (1974).

[24] Shirley Scot, 'International Law and Developing Countries', *The International Studies Encyclopedia* (Blackwell Publishing 2010).

[25] The NIEO was announced by the G77 in the 1973 Algiers Declaration and was promoted within the United Nations Conference on Trade and Development and the UN General Assembly. UNGA 'Declaration on the Establishment of a New International Economic Order' UN GAOR 6th Session Supp No 1 UN Doc A/RES/3201(S-VI) (1974) and UNGA 'Programme of Action on the Establishment of a New International Economic Order' UN GAOR 6th Session Supp No 1 UN Doc A/RES/3202 (S-VI) (1974) were the products of a special session of the General Assembly devoted to the subject. As set out in the Declaration, changes to the international economic order were to be based on a set of principles including: sovereign equality of states, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other states; full and effective participation on the basis of the equality of all countries in the solving of world economic problems in the common interest of all countries; the right of every country to adopt the economic and social system that it deems most appropriate for its own development; full permanent sovereignty of every state over its natural resources and all economic activities; regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries; preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic cooperation whenever possible; giving developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of the developing countries. See Scot (n 24). See also Mohammed Bedjaoui, *Towards a New International Economic Order* (Homes & Meier Publishers 1979).

[26] UNGA Res 41/128 (4 December 1986) UN Doc A/RES/41/128.

development to be a 'universal and inalienable right and an integral part of fundamental human rights.'[27]

The difficulty is that Western States are no doubt aware that the right to development is, and should be seen as, one of the universal fundamental human rights. However, they were reluctant to allow poor, developing countries to practically exercise these rights, including the right to ES-D, or to assert it in any other form such as through a NIEO. Therefore, Western States decided to put aside the right to economic development as conceived by the poor countries of the global South and instead concentrate their works and efforts on developments within the field of international law and development that have actually taken place over the last half a century. While the name has been changed over time (by the West, particularly the USA and the UK), it remains the same in its initiatives and purposes. During the 1960s and 1970s, as we have seen, it was known as the 'law and development movement'.[28] In the 1980s, it was commonly referred to as the 'good governance programme'; it metamorphosed into the 'rule of law and development' in the 1990s and, at the end of the 20th and beginning of the 21st centuries, it had taken up the term 'sustainable development' which has become common parlance.[29] The concept of sustainable development was borne from the tension between the developed and developing countries.[30] The doctrine of sustainable development has become a convenient tool for the developed world to undermine the developing world's primary demand of the right to free development, as conceptualised by the principles of ES-D, NIEO and the UN Declaration on the Right to Development. By capturing the development concerns of the developing world within the concept of sustainable development, the agreement between the Western States and third world States has gained validity and justification without any legal devotion to the development efforts of the developing countries.[31] The Western countries have been using and working through the auspices of sustainable development to further hamper the developing countries' efforts towards achieving free economic development.[32] For

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27 Scot (n 24); see also FV Garcia-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (Oceana Publications 1990) 18.

28 See further David Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) Wisconsin Law Review 1062.

29 See Matthew Stephenson, 'A Trojan Horse Behind Chinese Walls?: Problems and Prospects of US Sponsored "Rule of Law" Reform Projects in the People's Republic of China' (2000) Harvard University Centre for International Law, Working Paper 5-12 no 47.

30 Inherent in the concept of sustainable development was the tension between the competing goals of environmental protection and economic development and, in an international community consisting of a disparate group of States, the tension between the goals of developed and developing states. See Najeeb Al-Nauimi and Richard Meese, *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff Publishers 1995). Furthermore, '…the earth is under a two-fold attack from human beings – the excessive demands and wasteful habits of affluent populations of developed countries, and billions of new mouths born in the developing world who (very naturally) aspire to increase their own consumption levels'; see Paul Kennedy, *Preparing for the Twenty-First Century* (Vintage 1994) 23.

31 Upendra Acharya, 'Is Development a Lost Paradise? Trade, Environment, and Development: A Triadic Dream of International Law' (2007) 45(2) Alberta Law Review 401.

32 In fact, one of the vexing issues regarding the Rio +20 was the concern of many developing countries that the high visibility that is given to SDGs might drive the 'original MDG targets and indicators into obscurity, and would like to see a better manifestation of how the MDGs and SDG will integrate' Francois Mancebo and Ignacy Sachs, *Transitions to Sustainability* (Springer 2015).

example, 2015 marked the target date for the realisation of the aim to eradicate poverty, improve people's lives (particularly in developing countries) and rapidly transition to a low-carbon, climate-resilient economy. Yet, 2015 has come and gone (even though there has been progress, this has been minimal)[33] and the quest for ES-D heightens. The UN, championed by Western States, has in 2015 set a new agenda, the 2030 Agenda for Sustainable Development.[34] Some scholars of international law have been critical of the role of developing countries in this process because sustainable development as a complete conception of the West did not capture the developing countries' ideas of ES-D or those professed by the NIEO.[35]

3. Legal Theoretical Approaches

At this juncture, it is helpful to consider relevant legal theoretical approaches that will assist in the examination and understanding of the principles of ES-D and how it applies in practice. This paper applies the well-being and liberal legal theories. On one hand, the liberal legal theory explains how the Western States construct and control development undertakings in developing countries; on the other hand, the well-being theory helps us to understand what would have been the true state of things if the Western States had allowed the rights and principles of ES-D to work for developing countries in practice.

3.1 Liberal Legal Theory

Liberalism (and realism) emerged from the distinct belief that is fundamental within the global plane;[36] this was based on their perceived expectations of the identity of major actors within

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[33] This is through the UN programme of Millennium Development Goals (MDGs). It has been argued that the MDGs have been a great success in many ways. The global extreme poverty rate has been halved and continues to decline. More children than ever are attending primary school. Child deaths have dropped dramatically. About 2.6 billion people gained access to improved sources of drinking water. Targeted investments in fighting malaria, HIV/AIDS and tuberculosis have saved millions. United Nations, 'Economic Growth and Sustainable Development' (UN, 2 July 2015)<www.un.org/en/sections/priorities/economic-growth-and-sustainabe-development/index.html>.

[34] UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.

[35] See Mancebo and Sachs (n 32).

[36] Most of the works that have been written on the broad subject of liberalism from an international perspective appear to identify three primary versions; see John Ikenberry, 'Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order' (2009) 7(1) Perspectives in Politics 71*;* Anne-Marie Slaughter*,* 'Liberal International Relations Theory and International Economic Law*'* (1995) 10(2) American University International Law Review 717; the first is attributed to the ideas of Woodrow Wilson and liberals of Anglo-American countries towards the post-World War international settlement and is more philosophically oriented. This is most importantly the philosophy of Wilson's progressivism, which is the hallmark of liberalism within this period; see Almon Way, 'The Progressive Conservative' (2005) 7 An Online Journal of Political Commentary & Analysis. The second is the Cold War liberal internationalism of the post-1945 decades. This version is more politically oriented because of the two divergent political ideological views that shaped it; the liberal internationalism of the post-1945 era was influenced by the political ideological wars between the West and the East; see Michael Doyle, 'Liberal Internationalism, Peace, War and Democracy' (*Nobelprize,* 22 June 2004) <nobelprize.org/nobel_prizes/themes/peace/doyle/> accessed 13 December 2019; the third version is a somewhat post-hegemonic liberal internationalism that has not completely manifested and whose full shape and logic remain uncertain; this version is more economically oriented in its approach due to the economic strategies it employs in order to achieve its hegemonic liberal control

the international system, the existing relations of those players to State institutions, and the interrelationships among States.[37] In the early 20th century, liberal order was viewed in the context of the independence of States and the building of an international legal order that strengthened the norms and regulations behind non-intervention and the sovereignty of States. In the early part of the 21st century, the perception of liberal order changed. It became an expanding order notable for its progressively extensive, intricate and complicated arrangements of international cooperation that deteriorated the existing sovereignty of States and redistributed on a global level the sources and basis of political authority.[38]

The primary distinctive aspect of liberal theory is that it allows for a somewhat unacceptable distinction between different types of States based on their existing domestic political set-up and ideological orientation. Evidence suggests a distinctive quality of relations among liberal democracies, including those which attempted to explain the established empirical phenomenon that liberal democracies rarely go to war with one another.[39] The US was the major champion of the liberal international project in the 21st century although, in different stages, their specific role within the order has differed. It is clear that the ways in which the United States' pre-eminent geographical position has simultaneously facilitated and impeded the operation of an open, rule-based liberal order is a critical aspect shaping the character and logic of liberal order itself.[40]

There is also an optimistic assumption by liberals that powerful States will act with restraint in the exercise of their power and find ways to credibly convey commitments to other States. Throughout decades, liberal internationalists have shared the view that trade and exchange have a modernising and civilising effect on States, undercutting illiberal tendencies and strengthening the fabric of the international community.[41] Liberal internationalists also share the view that democracies are – in contrast to autocratic and authoritarian States – particularly able and willing to operate within an open, rule-based international system and to cooperate for mutual gain. Likewise, liberal internationalists have shared the view that institutions and rules established between States facilitate and reinforce cooperation and collective problem solving.[42]

In an international legal context, liberal theory has been identified as the 'front-end' and the first, indispensable step in any analysis of international law focusing primarily on explaining the substantive content of international interaction. The starting point for explaining why an instrumental government would contract into binding international legal norms, and comply with them thereafter, is that it possesses a substantive interest in doing so.

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internationally. This could be seen in the economic strategies adopted to coerce or, rather, integrate, the developing countries into the liberal internationalism of this period. This third version, which has partly manifested as, and aligns with, liberal economic internationalism (LEI) is one of the theories upon which this paper is built.

37 Slaughter (n 36) 5.

38 Ikenberry (n 36).

39 David Schleicher 'Liberal International Law Theory and the United Nations Mission in Kosovo: Ideas and Practice' (2006) 13(2) Tulane Journal of International and Comparative Law; see also Ikenberry (n 36).

40 Ikenberry (n 36).

41 Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) 12 Philosophy and Public Affairs 205.

42 ibid.

From a liberal perspective, this means that a domestic coalition of social interests that benefits directly and indirectly from regulation of social interdependence is more powerfully represented in decision making than the countervailing coalition of losers from cooperation.[43]

On international economic interaction, liberal theory serves this purpose because it has been employed in legal research to analyse economic interactions and contradictions within the international system. This paper therefore uses liberal theory in analysing the relations between Western States and developing countries on the issue of the right to ES-D. The liberal legal theory explains how Western States construct, control and contradict development undertakings in developing countries.

3.2 Well-being Theory

The well-being theory[44] has extensively featured in, or rather dominated, the 'economic analysis of law' movement in legal scholarship.[45] The well-being theory generally propounds the idea that the enhancement of people's well-being is a worthy goal for the state to pursue. In order to achieve the enhancement of people's lives in any given society, the well-being theory need not be rigid or elitist and can be sufficiently flexible to respect people's autonomy and allow many paths to achieving a good life. It shows that objectivity cannot be avoided even in consideration of seemingly subjective preferences of well-being in any given society.[46]

The well-being theory further holds that our desires are always directed toward some future state of affairs. We may want our preferences to be fulfilled because we anticipate that their fulfilment will improve our lives, but the problem is that most people are not allowed to have preferences; when they show or have preferences, their autonomy is not respected by those claiming to promote or enhance people's lives.

Well-being as a legal theory is crucial both in theoretical analysis and practical implementation of the right to ES-D. This is because it uses legal requirements that are manifestly relevant for developmental reforms in society, such as the rule of law, substantive freedom of people, social justice, equality, human rights and empowerment. For example, Amartya Sen's call for understanding development not only in terms of gross national product but also 'in terms of the substantive freedoms of people', which marked an important reframing of the legal and policy discourse around economic development, has its ends centred largely on the well-being of people.[47] The well-being theory helps us to understand

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[43] Andrew Moravcsik, 'Liberal Theories of International Law' in Jeffrey Dunoff and Mark Pollacks (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2013).

[44] This paper does not intend to engage in a discussion of the divergent theories of well-being, including 'mental state/experimental theories', which state that well-being is wholly determined by individuals' experiences, consciousness or feelings; see Thomas Scanlon, *What We Owe to Each Other* (Harvard University Press 1998); 'Desire or preference theory' holds that a person's well-being is determined by the extent to which her preferences are fulfilled; see James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Claredon Press 1989).

[45] See Eyal Zamir and Doron Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press 2014).

[46] See Daphna Lewinsohn-Zamir, 'The Objectivity of Well-being and The Objectives of Property Law' (1998) 78 New York University Law Review 1669.

[47] Development as Freedom weaves the most important strands of recent thinking on economic development, social justice, and human rights into a coherent vision of a better world. According to Sen, expansion of

what would have been the true state of things if Western States had allowed the rights and principles of ES-D to work in practice in developing countries.

4. The Principle of Economic Self-Determination in Practice

The explosion of economic nationalism in the third world is due to the large economic gap between the former and the Western world, aided and abetted by the US's Wilsonian anti-imperialist moralism. It was this that also scuttled the ill-fated Suez adventure of the British and the French in 1956 to prevent Nasser's nationalisation of the Suez Canal.[48] The doctrine of sustainable development later became a convenient tool for the developed world to undermine the developing world's primary demand of the right to development. This is as conceptualised in ES-D, NIEO and the United Nations Declaration on the Right to Development (UNDRD). Yet, there was no way in which the new nation States in the third world could be thwarted in the assertion of their national sovereignty and/or ES-D against any purported international property rights.[49]

Indeed, what later emerged was the use of international financial institutions (IFIs) by Western States and economic policies which the IFIs proposed to penetrate the economies of developing countries and third world States. This was in the guise of leading them in effecting their right to ES-D and achieving development, by propagating doctrines such as good governance and sustainable development. The Western States and IFIs were guided by the principles of liberalism, particularly liberal economic internationalism. The rationale behind this is that these IFIs and their economic policies will help to reduce the resource gap in Less Developed Countries (LDCs) by improving the trade imbalance and encouraging a net capital inflow, eradicate poverty and improve the economic development of underdeveloped third world States. It is believed that this will subsequently reduce conflict and entrench peace.[50] It

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freedom is viewed, in this approach, both as the primary end and as the principal means of development. Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity to exercise their reasoned agency; see Amartya Sen, *Development as Freedom* (Oxford University Press 1999). In fact, the resulting MDGs focused much academic research in this area towards a more comprehensive understanding of development, one that would recognise economic growth as intrinsically tied to such areas as: environmental sustainability; food security; the reduction of extreme poverty, hunger, and child mortality; access to health and the promotion of education and gender equality; see Biennial Research Conference, *Reassessing International Economic Law & Development: New Challenges for Law and Policy* (College of Law Sutton, 2014).

48 Deepak Lal, 'The Threat to Economic Liberty from International Organisation' (2005) 25(3) Cato Journal 503.

49 With anti-imperialist moralism becoming a part of US foreign policy after Wilson, attempts to protect international property, like the ill-fated Suez adventure of the British and the French in 1956 to prevent Nasser's nationalisation of the Suez Canal, were scuttled by the United States. On 26 July 1956, Egyptian President Gamal Abdel Nasser (in spite of Western foreign policy to protect international property rights) was not deterred in asserting the national sovereignty and economic self-determination of Egypt when he announced the nationalisation of the Suez Canal Company, the joint British-French enterprise which had owned and operated the Suez Canal since its construction in 1869. This emphasizes the importance of economic self-determination to developing countries. See Deepak Lal, *Reviving the Invisible Hand: The Case for Classical Liberalism in the Twenty-First Century* (Princeton University Press 2010).

50 Thomas Biersteker, *Dealing with Debt: International Financial Negotiation and Adjustment Bargaining* (Westview Press 1993).

can be argued that these propositions, development patterns and actions are in line with liberal legal theory if, or insofar as, Western States are believed to be the channel through which the third world States will exercise their right to development in order to achieve economic development. However, most of these propositions and development actions have been criticised and many of the practical initiatives and efforts behind development in third world States, as professed by the Western States, have proved unfruitful.[51]

It has been argued that there must be some relevant fundamental principles or rules of international law connecting international development with its underlying assumptions and actions. For example, under international law, rules must have validity, legitimacy and efficacy. This is only possible if they are based on the common consent of virtually all States in the global community. However, sustainable development, as a conception of the Western States, particularly the USA and Britain, was framed in a manner that in reality will benefit Western States. This is because liberal internationalists are dedicated to promoting a liberal world through encouraging the global emergence of sustainable development and democracy.[52] In most cases, the preferences and development interests of third world States are not considered. Sustainable development thus lacks these rules, particularly the consent of the developing countries, and does not represent, but rather works against, these countries' ideas behind the principles of and rights to ES-D. It is also not in line with the NIEO, as conceived by the third world States. In order for third world States to exercise their rights to development, all the legal principles and rules affecting development should receive the consent or assent of the sovereign and equal States that make up the international legal order; but this is not the case.[53] This is in line with the well-being theoretical view that in order to achieve the enhancement of people's lives in any given society, there ought to be sufficient flexibility to respect their autonomy and allow many paths to achieving a good life.

Another criticism against the international legal principles of ES-D in practice relates to the types of law and development reforms assumed by the international development law movement championed by the Western States. Reform in this context is said to rest on three premises; first, that development requires a modern legal framework resembling that in the United States; second, that this framework or model establishes clear and predictable rules and third, that the framework can be easily transferred. This is because liberal internationalists aim to achieve global structure and the Western States are said to have the tools (an efficient legal system, mature political culture and economic strength) to achieve this. This criticism highlights the absence of any empirical data connecting law reform with development, as well as the consequent disagreement among reformers over priorities and strategy.[54] Another

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[51] For example, the failure of the law and development movement portrays that the norms of international law as packaged in rich Western countries are in most cases in disharmony with the interests of the third world, which mostly consists of poor developing countries. See also I Head, 'Contribution of International Law to Development' (1986) Paper presented at the Fifteenth Annual Conference of the Canadian Council on International Law.

[52] See Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law 503.

[53] Anthony Carthy, 'The Concept of International Development Law' (2008) 1 International Sustainable Development Law.

[54] Patrick McAuslan and others, 'Law, Governance and the Development of the Market: Practical Problems and Possible Solutions' in Julio Faundez (ed), *Good Government and Law: Legal and Institutional Reform in*

criticism is that a particular law and development initiative or reform in one place or State, introduced in or transferred to another State which has different legal, social, political, economic and other circumstances, can hardly work in consonance to produce positive legal and developmental reforms in the second State. This is because reforms targeted at the law will be impacted upon, affected by or surrounded by all the exigencies within the fabric of society, in many cases in unanticipated ways. This criticism reflects the broad recognition that efforts at building or reproducing Western capitalism, democracy and liberal systems in developing countries has met with 'little success'. This does not augur well with the rights of ES-D as conceived by the developing countries.[55]

Notwithstanding these philosophical principles and theoretical views underlining liberalism and the assumptions of liberal economic internationalists, there has never been a time when economic progress in third world States, through exercise of the right to ES-D under the popular international economic liberal movement and sustainable development projects, has been taken seriously.[56] Rather, the movement, including the liberal economic policies that influence the international economic law regime, are championed and controlled by the Western countries through the auspices of IFIs. They also initiate and implement liberal economic policies and actions that continue to work against the rights to ES-D and promote the underdevelopment of third world States.[57] As argued above, since third world States were assumed not to have international legal personality, their interests, including the right to development *ab initio*, have continued to suffer. This is because it is believed that third world States did not have a role to play in shaping the norms of the earlier international legal order. This, to a great extent, has influenced the present international legal order, particularly regarding the pursuit of the right to ES-D by third world States.[58] In this context, liberal economic internationalisation has been a key instrument used to manipulate the meaning of sovereign States, as well as their well-being. This has been done by reallocating the hitherto sovereign economic powers of developing States to IFIs. This, to a large extent, limits the possibilities of these States to pursue independent, meaningful and self-reliant economic development.[59] Just as Sornarajah argues, 'the espousal of economic liberalism by the World

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Developing Countries (Palgrave Macmillan 1997); Joseph R Thome, 'Land Rights and Agrarian Reform: Latin American and South American Perspectives' in Julio Faundez (ed), *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Palgrave Macmillan 1997); see also Trubek and Galanter (n 28).

55 See S Robert, *The State, Law, and Development* (St. Martin 1978); see also Ikejiaku (n 15).

56 Sustainable development has now become dynamic and is more about sustainable security, as can be seen in its current emphasis on security. For example, the amounts of resources and energy being devoted to the war against terrorism in the last ten years has been tremendous. In fact, scholars and practitioners argue that the resources, which were meant to be for development aid, were diverted from the war on poverty, and instead channelled towards the war on terrorism; see Shahrbanou Tadjbakhsh, 'Human Security Report: War and Peace in the 21st Century' (Human Security Centre, 2005) <www.peacecenter.sciences-po.fr/conflicts-ip-st.htm>, and SIPRI statistics in 2001.

57 See Brian-Vincent Ikejiaku, 'Africa Debt Crisis and the IMF with a Case of Nigeria: Towards Theoretical Explanations' (2008) 1(4) Canadian Journal of Politics and Law.

58 See James Gathii, 'International Law and Eurocentricity' (1996) 9 European Journal of International Law 184.

59 BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 3.

Bank (WB), the International Monetary Fund (IMF) and the World Trade Organization (WTO) ensure that these institutions will not favour collective rights such as the right to development'.[60]

Most major, powerful policies (eg democracy, the law and development movement, SAP economic policy and poverty reduction strategies) pursued by the West through the auspices of the IFIs, WB and MNCs, were rooted in liberalism, particularly liberal economic internationalisation. These policies diametrically work against the right to ES-D, in order to maintain hegemonic control over third world States.[61] As argued, the justification of Western States for their actions in third world States was based on their liberal perception that it will help to reduce the resource gap in LDCs, improve trade balance and encourage a net capital inflow,[62] to eradicate poverty and improve the economic development of underdeveloped States.[63] Thus, the growing importance of international organisations such as the G7, IMF and WB suggests that the Western emphasis on liberalism is more for their own benefit, rather than for the well-being of the people of the third world States. Such an approach is indicative of the influence of liberal internationalism in the post-Cold War period.[64] This suggests that the granting of aid and loans to poorer communities, as a means to eliminate hunger and disease in developing third world States, became the primary aim towards which these institutions directed their activities. However, it has been critically argued that these institutions – from the UN and its development agencies to the WB and the IMF – have resolutely placed their faith in the emancipatory qualities of Western modernity and progress. Moreover, they have displayed a distinctly liberal capitalist bias towards the role of the State in the economy: 'the third world States were not expected to intervene in the economy to the prejudice of first world economic interest'.[65] This is contrary to the well-being legal theoretical postulate that the enhancement of people's lives is a worthwhile goal, if their wishes and preferences are to be fulfilled. It is anticipated that the fulfilment of such wishes will improve their lives, however, most people are not permitted to exercise preferences, as can been seen in the exercise of the right to ES-D.

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60 Muthucumaraswamy Sornarajah, 'Power and Justice: Third World Resistance in International Law' (2006) 10 Singapore Yearbook of International Law 19.

61 See Brian-Vincent Ikejiaku, 'International Law is Western Made Global Law: The Perception of Third World Category' (2014) 6(2–3) African Journal of Legal Studies 337; see also Narizny (n 2).

62 Biersteker (n 50).

63 Sornarajah (n 60). Most of the Western Colonial States, including the UK, France and Germany, are very critical and practically prevent immigrants from poor developing countries from migrating to their countries in search of greener pastures and better lives; however, during the period of dislocation in the capitalist economic expansion in Europe, some European countries sought expansion externally by force through colonising most of the developing countries where, according to TWAIL scholars, they legitimised their illegal onslaught and acquired extensive wealth through 'exploitation of third world countries'; see R Anand, *International Law and Developing Countries: Confrontation or Cooperation* (Kluwer 1987); Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004); Chimni (n 8); Ikejiaku (n 61); Rajagopal (n 8); I maintain that Western States are expected to reciprocate this gesture by putting up immigration policies that favour poor developing countries.

64 Biersteker (n 50).

65 See Rajagopal (n 8) 35; see also John Renolds, 'International Law from Below: Development, Social Movements and Third World Resistance (Book Review)' (2009) 15 The Palestine Yearbook of International Law 434.

Arguments have also been put forward that events in third world developing States provide some critical reasons as to why attempts to redress the development problems caused by the denial of the right to ES-D in developing countries have been further compounded. There has been transparent inequality between the Western States and third world States as a result of exploitation and injustice by the former through the encouragement of increased foreign borrowing. This was encouraged by Western States and made possible with liberal economic international policies, which have contributed to the debt crisis in third world States by increasing the resource and development gaps even further.[66] The project of foreign borrowing was a subtle scheme made to entrap the third world States in what Cheryl Payer succinctly described as a 'debt trap';[67] it was not based on the preferences and free consent of the third world States, contrary to the well-being theoretical view. This assertion becomes clearer when it is understood that the project of foreign borrowing has strict conditions. One such conditional tie has been the insistence that the currencies of these countries be devalued.[68] The application of this condition, for example in Zambia in 1985, Ghana and Nigeria in 1986 and Ghana in 2015 with the issuing of Eurobond in 2007,[69] suggests that these economies are far from improving. Rather, they have worsened, and fundamental questions about the long-term utility of foreign borrowing are thereby raised. It has worked against the right to ES-D and contrary to the prescription of the well-being theory because it failed to respect peoples' autonomy and could not provide for the enhancement of their well-being and, therefore, was not a worthwhile goal to pursue in third world States. It was therefore another ploy that Western States used to cripple the third world project of ES-D in practice.

It is documented that the developed world contributed to Africa's capital flight. 'The poor countries are constantly de-capitalised and their economies remain largely dependent upon decisions made in New York, London, Paris and other metropolitan centres'.[70] For example, Zarian Mobutu, Abacha and Babangida in Nigeria have a record of embezzlement of more than USD 5 billion each and Kenyan Arap Moi USD 1 billion.[71] Most of these funds were lodged in foreign banks in Western States through sophisticated financial tools produced and controlled by the West. Therefore, the reason underdeveloped countries could not develop and were subsequently immersed in poverty is that they are subjected to the structure of the international political-economic system. They are further constrained by imbalanced relations dominated by advanced industrialised countries and their multinational cohorts which adopted liberal policies that have worked against the right to ES-D. In addition to the structure of the global political-economic system, there is an implication that corruption of African

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66 Ikejiaku (n 57).

67 Cheryl Payer, *The Debt Trap: The IMF and Third World* (Penguin Books Ltd 1974).

68 Bade Onimode, *The IMF, the World Bank and the African Debt* (Zed Books Publications Ltd 1989).

69 Ed Cropley, 'A Decade After Write-offs, Africa Sliding Back into Debt Trap' *Reuters* (Johannesburg, 16 September 2015) <reuters.com/article/us-africa-debt/a-decade-after-write-offs-africa-sliding-back-into-debt-trap-idUSKCN0RG24220150916> (accessed 13 December 2019).

70 Kalevi Holsti, *International Politics: A Framework for Analysis* (Prentice Hall International 1995) 11.

71 Razi Azani, 'Profligacy, Corruption and Debt' (*Prober International*, 10 February 2005) <journal.probeinternational.org/2005/02/10/profligacy-corruption-and-debt/> accessed 15 December 2019.

leaders who have been immersed into the liberal economic international prescriptions affects the economy of African States with serious implications on the well-being of the people.

However, these powerful transnational bodies, which embody free trade liberalism as their governing ideology, impose free market strictures on developing societies against their right to ES-D. Since they are the primary organisations which formalise and institutionalise market relationships, including the international economic legal norms guiding States, they tied and locked peripheral states into involuntary agreements which forced them to lower their protective barriers (eg the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA)). Therefore, developing countries of the global South were prevented from developing trade profiles which diverge from the model dictated by their supposed 'comparative advantage' and to that effect work against their ES-D.[72]

Supporting evidence can be found in the nature of the obligations accorded to the adoption of the agreements comprising the Final Act of the Uruguay Round of Trade Negotiations, which lacked transparency. There is a clear suggestion that third world States gained little or virtually nothing from the Uruguay Round agreements.[73] The IMF and the WB, being guided by liberal international economic ideas, made the provision of finance (or, more accurately, 'debt') to the developing societies conditional on their unilateral acceptance of free market rules for their economies, against their right to ES-D. The conditionality of the so-called structural adjustment programme (SAP) in many third world countries.[74] In Africa, SAP failed the majority of Nigeria, particularly by bringing mass unemployment.[75] Kenya also continues to express its displeasure at the IMF and the WB for forcing these policy changes upon it.[76] In the early 1980s, Uganda was shaken by weeks of demonstrations, as industrial workers and students took to the streets to denounce President Miton Obote's IMF-imposed economic programme. In 1990, Matthew Kerokou of the Benin Republic in West Africa was removed from power following a wave of anti-SAP riots.[77]

It is therefore unsurprising, even understandable, that notable scholars, such as Sachs, are critical about these financial institutions and lambaste the IMF and WB for imposing draconian budgets to support SAP, which had 'little scientific merit and produced even fewer results'.[78] It could rightly be argued that it is no coincidence that governments that continued to operate well (eg Botswana) never had to subject themselves to the painful cure of SAP.[79] The poor countries are therefore constantly de-capitalised and their economies remain largely dependent upon decisions made by Westerners in New York, London, Paris and other metropolitan centres and implemented through the international institutions that operate and

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72 B Scot et al, *Theories of International Relations* (Macmillan Press Ltd 1996).

73 Chimni (n 59).

74 See Onimode (n 68).

75 African Forum on Network and Development, *Nigeria: Foreign Debts Stolen Wealth, IFIs and The West, A Case Study* (AFRODAD 2007).

76 Peter Wayande, *State Driven Conflict in the Horn of Africa* (USAID 1997).

77 Sunday Dare, 'Continent in Crisis, Africa and Globalisation' (*Dollars and Sense Magazine,* July/August 2001) <thirdworldtraveler.com/Africa/Continent_Crisis.html> accessed 15 December 2019.

78 Jeffrey Sachs, *The End of Poverty: How Can We Make it Happen in Our Lifetime* (Penguin Books 2005) 198.

79 Goran Hyden, Dele Olowu and Hastings Okoth Ogendo (eds), *African Perspective on Governance* (Africa World Press 2000).

function under the philosophical tenets of liberalism.[80] As Chimni agrees, 'the economic and political independence of the third world is being undermined by policies and laws dictated by the first world and the international institutions it controls'.[81] Even the contemporary Poverty Reduction Strategy used by the WB and IMF, in line with the United Nations Sustainable Development Goals, suggests that poverty reduction in developing countries is all about statistics going upwards and downwards. The reality, contrary to the available statistics, is whether populations of developing countries have the resources and capabilities to live a better life with dignity and to participate normally in society.

The activities of these financial institutions, guided by the norms of liberal economic internationalisation, were more or less intended to control development activities in poor, developing societies and thereby deny the people of third world States their right to ES-D.[82] This view becomes apparent when it is understood that the IMF was initially a purely European establishment. During the first period of its existence, the IMF gave the impression of a certain efficiency, as it helped to re-establish the convertibility of European currencies (1948–1957); thereafter, it aided the adjustment of European economies (1958–1966). From 1967 onwards, however, the IMF failed to maintain stability despite the creation of Special Drawing Rights (SDRs). Parity adjustments were numerous after this date: devaluation of the British Pound and the Franc, revaluation of the German Mark and the Yen and the floating of the price of gold are all examples. The adoption of the general system of floating currencies in 1973 may be considered to mark the end of the Breton Woods mandate. At a point, the continued existence of the IMF was called into question. The institution survived by taking on new functions: management of unilateral structural adjustment in developing countries of the global South and, from the end of the 1980s, intervention in many developing countries with the goal of ensuring the re-incorporation of these countries into the international monetary system using the mechanism of liberal economic international policies, which was contrary to the principles of ES-D in practice.[83] It is also against the postulation of the well-being theory.

Imperatively, and drawing from the above revelations, one might be tempted to ask why an institution such as the IMF, which once failed to deliver in Europe, was drafted to take the lead in the economic recovery of Africa and other developing regions. Surprisingly, and as if oblivious to the question of incompetence on the part of the IMF, Western governments moved to implement the recommendations of the institution by granting loans/aid to any third world countries that followed the IMF's economic liberalisation policies, to the detriment of third world States. From this perspective, it can be pointedly contended that one of the biggest stumbling blocks to developing countries' development in modern times is the external debt crisis that existed as a result of the manipulation of the global economic system by the international financial institutions. This is clear in a foreword to Anighie's work:

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80 Holsti (n 70).

81 Chimni (n 59); Professor BS Chimni is an internationally renowned scholar in the area of international law and an erudite TWAIL Scholar. One of his most influential works is BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3.

82 Collins Okafor, *Neo-Democracy and Poverty Management in Africa* (Mercury Bright Press 2004).

83 S Amin, 'Fifty Years is Enough (Part 1)' (1994) 8(2) South African Political and Economic Monthly.

> The newly independent states… fought to develop new rules, even a new international economic order. But in the event the Bretton Woods Institutions triumphed, imposing their own view of development and a certain set of structures of governance on half the world's population and a majority of its governments. The outcome has been, on the whole, increased indebtedness and new forms of dependence.[84]

According to the International Development Forum, the annual expenditure on healthcare in the poorest countries averages less than USD 5 per person. In wealthier countries, such as the USA, France or Canada, health expenditure averages USD 400 per person.[85] This is because the poor are either entirely unemployed or underemployed. The situation is contrary to the decades before the liberal economic international movement reforms were introduced as part of the sustainable development programme, as the 1997 IMF Report has confirmed. According to that report, in the decade prior to 1985, many third world countries in East Asia, South Asia and sub-Saharan Africa experienced annual growth rates of employment in excess of 5%, with some as high as 10% per annum.[86] Again, the administration of loans and aid from developed States to underdeveloped third world States remains economically retrospective.

Other policies, such as various immigration policies in most developed Western States, are aggressive to immigrants from developing countries. For example, the current immigration policies in the UK, implemented by the Conservative government, are aimed at reducing the number of immigrants by all means possible.Most of these immigrants entered the UK legally and work hard in order to reduce the poverty levels in their home countries by sending hard-earned money home. The process of renewing their visas in order to remain legal residents is very cumbersome, the reason being to reduce the number of immigrants in the UK. Poverty cannot be reduced in developing countries with a policy of this nature and it works against the right to ES-D. During the period of dislocation in the capitalist economic expansion in Europe, some European countries sought external expansion by force, through colonising most developing countries where, according to TWAIL scholars, they acquired extensive wealth through the 'exploitation of third world countries'.[87] The West (especially the former colonisers) are expected to reciprocate this gesture by adopting policies that favour poor developing countries, in their bid to achieve economic development.

5. Recommendations

Despite the role international law has played in the unfair treatment of the people of third world States, the new States did not reject international law in its entirety. Rather, many third world States accepted the treaties and agreements made on their behalf by the former colonial powers, with the belief that they would be able to amend, modify, renegotiate or replace them with the consent of the other parties. However, this has not been possible; for example, third world States stressed sovereignty as a form of protection against military, economic, political or any other form of intervention and, particularly, the denial of their rights to ES-D.

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[84] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) foreword.

[85] Onimode (n 68).

[86] ibid.

[87] See (n 8).

Developing countries also attempted to develop international legal concepts, principles and organisations that they could use to improve their position in the international order; yet, these have met with little or no success due to opposition from the West.[88]

As resource discovery and exploitation is increasingly seen as a primary means of reinvigorating the economies of poor states, ES-D must be reincorporated into the mainstream human rights dialogue. ES-D gives peoples the ability to take control over their national resources and use those resources as a means for actualising their own ends, that is the improvement of peoples' lives. It is a fundamental norm upon which the realisation of broader rights is based; however, the concept has neither been incorporated nor integrated into advocacy strategies. It is high time for human rights advocates to put that language to use, by bringing ES-D out of the shadows and employing it as a powerful tool for human rights advocacy related to the distribution of wealth from mineral resources.[89]

Moreover, this paper suggests that the people of third world States should be permitted to determine their own destiny, particularly as related to their right to ES-D, in order to achieve the enhancement of their lives, in line with the well-being theory.

Relying on well-being theoretical postulations, the enhancement of people's well-being is a worthy goal for the state to pursue and people's desires are always directed toward some future state of affairs. The theory holds that peoples want their preferences to be fulfilled because they anticipate that their fulfilment will improve their lives, but the problem is that most people, such as those in third world States, are not permitted to have preferences. When they express preferences, their expected autonomy is not respected by those claiming to promote or enhance peoples' lives; that is, the 'powers that be' within the international system. The well-being theory is relevant and manifest for development reforms in society because it recognises vital ingredients that aid development, such as the rule of law, the substantive freedom of people, social justice, equality, human rights and empowerment.

Grounded on the well-being theory, it is the suggestion of this paper that international development projects should recognise and respect the wishes, preferences and freedoms of the peoples of third world States by involving them deeply in any development programmes that concern them. They are more acquainted with the development concerns, priority needs and cultures of their regions. Just as Sen rightly argues, development is 'in terms of the substantive freedoms of people'.[90] There should, however, still be support from richer Western countries; in UN General Assembly Resolution 2626 of 1970, the UN General Assembly had, after acknowledging that the primary responsibility for the development of developing countries rests upon the developing countries themselves, equally noted that, 'however great

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88 RP Anand, 'Attitude of the Asian-African States toward Certain Problems of International Law' (1966) 15 International and Comparative Law Quarterly 55, 70.

89 Scot (n 72).

90 Freedom, in Sen's perception, 'concentrates particularly on the roles and interconnections between certain crucial instrumental freedoms, including economic opportunities, political freedoms, social facilities, transparency guarantees, and protective security. Societal arrangements, involving many institutions (the state, the market, the legal system, political parties, the media, public interest groups and public discussion forums, among others) are investigated in terms of their contribution to enhancing and guaranteeing the substantive freedoms of individuals, seen as active agents of change, rather than as passive recipients of dispensed benefits' Amartya Sen, 'Development as Freedom' (*New York Times*, 1999) <nytimes.com/books/first/s/sen-development.html> accessed 13 December 2019); see also Sen (n 47).

their own efforts, these will not be sufficient to enable them to achieve the desired development goals as expeditiously as they must, unless they are assisted through increased financial resources and more favourable economic and commercial policies on the part of developed countries.'[91] To this effect, instead of working against the principles of ES-D, Western States should support the project in developing countries.

6. Conclusion

This paper sought to examine the international legal principles of ES-D and how those principles work practically within the international system. The argument of the paper is that the exercise of the right to ES-D has been hampered and has not been freely pursued in practice by poor developing countries due to hegemonic control, economic exploitation and domination by the 'powers that be' within the international system. That is due to the actions of Western States and financial institutions in controlling the development activities of developing countries.

The paper finds that the right to ES-D is recognised only in principle in third world States because the practical and free exercise of the right has been under the hegemonic control of the 'powers that be' in the international system. In effect, economic development goals in third world States, since their independence, have failed to take proper consideration of domestic interests, political and cultural distinctiveness and indigenous needs of peoples in society.

It further demonstrates that, since the 1960s, trends of events in the international system show that the attempts of the newly independent developing countries to pave the way for a NIEO in a way that would be beneficial to economic development in third world States, in accordance with the principles of ES-D, has faced many difficulties and challenges. This is due to the hegemonic actions of the West, IFIs and MNCs based on their liberal underlining.

The paper shows that sustainable development was borne from the tension between the global South and global North. Western States used the doctrine of sustainable development as a convenient tool to subvert third world States' rights to ES-D. By veiling the development concerns of the third world States under the umbrella of sustainable development, agreement between the two worlds was sanctioned without any legal commitment to the development efforts of the developing countries.

In conclusion, relying on the well-being theory as highlighted in this paper, efforts to assert the right to ES-D can only be realised when Western States remove their hegemonic control over third world States. This will allow third world States to make their own decisions that will take into consideration their indigenous needs and enable them to endeavour to recognise the various salient factors that aid development (such as the rule of law, the substantive freedom of people, empowerment, human rights, social justice and equality) and allow them to flourish.

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[91] UNGA Res 2626 (XXV) (24 October 1970) UN Doc A/RES/2626 (XXV) art 11.

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Self-Determination in Light of the International Court of Justice's Opinion in the Chagos Case

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KEYWORDS: CHAGOS ARCHIPELAGO; ICJ ADVISORY OPINION; SELF-DETERMINATION; THE CRYSTALLISATION OF THE RIGHT TO SELF-DETERMINATION; TERRITORIAL INTEGRITY; INTERNATIONAL RESPONSIBILITY

Abstract

In its Advisory Opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, delivered in 2019, the International Court of Justice (ICJ) was of the view that the decolonisation of Mauritius by the United Kingdom had not been lawfully completed when it achieved independence in 1968. This was due to the separation of the Chagos Archipelago in 1965. After dismissing various challenges to the exercise of its advisory jurisdiction, including the argument that the issue at stake was a territorial dispute between the States and that its jurisdiction was, therefore, being misused to circumvent the United Kingdom's lack of consent to contentious proceedings, the ICJ felt it necessary to explore the nature, scope and content of the right to self-determination and whether it had been validly exercised in this instance. The ICJ found that self-determination had become established as a legal right in the context of decolonisation by the time Mauritius was in the process of securing its independence in the 1960s and that a corollary of the right was that of the territorial integrity of a non-self governing territory, which had not been respected in the case of Mauritius. Accordingly, the United Kingdom's continued administration of the Chagos Archipelago constituted an ongoing internationally wrongful act, entailing international responsibility, which the United Kingdom was under an obligation to put an end to as soon as possible. While it was for the United Nations (UN) General Assembly to determine how the decolonisation of Mauritius was to be realised, in view of the fact that the right to self-determination has an *erga omnes* character, the ICJ called on all States to co-operate with the UN to that end.

1. Introduction

In its Advisory Opinion in the *Chagos* case delivered in February 2019, the International Court of Justice (ICJ) expressed the view by an overwhelming majority that, *inter alia*, the decolonisation of Mauritius by the United Kingdom (UK), the colonial power, had not been lawfully completed when it achieved independence in 1968 as a result of the detachment of the Chagos Archipelago from Mauritius by the UK. Consequently, the UK's continued administration of the Chagos Archipelago constituted an ongoing international wrongful act

which the UK was under an obligation to bring promptly to an end.[1] In the course of its judgement, the ICJ considered it necessary to explore the nature, scope and content of the right to self-determination and whether it had been validly exercised in this case. Of crucial significance was the determination as to when the right to self-determination had crystallised as a rule of customary international law. Its views on this and related issues relating to the territorial integrity of non-self-governing territories and the effect of duress on the validity of so-called devolution agreements between the colonial power and the non-self-governing territory will be considered contentious for those of a conservative disposition. The purpose of this paper is to reflect on these observations of the ICJ, particularly as regards self-determination.

2. Background

The status of certain islands in the Indian Ocean is disputed between Mauritius and the UK. The British Indian Ocean Territory (BIOT), a British Overseas Territory, is comprised of several island groups in the Chagos Archipelago dominated by Diego Garcia. The Chagos Archipelago had formed part of the British colony of Mauritius since 1814; however, in 1965, just a few years before Mauritius gained independence in 1968, the UK detached the Chagos Archipelago from Mauritius and Seychelles and established it as a separate overseas territory, the BIOT.[2] This event followed from the Lancaster House Agreement of 1965. This was the devolution agreement negotiating the independence of Mauritius according to which, in return for accepting the separation of the Chagos Archipelago, the UK would, *inter alia*, pay Mauritius GBP 3 million in compensation and relinquish sovereignty thereover when it was no longer required for military use. However, the Lancaster House Agreement proved to be a festering sore, as Mauritius considered that its independence was made conditional on its ceding the Chagos Archipelago and that it had no option but to agree. The UK then proceeded to remove the inhabitants of the Archipelago, the Chagos Islanders or Chagossians, who were effectively prohibited from returning, in order to lease Diego Garcia to the USA as a military base.[3] In 2016, it was announced that the US military base would continue until at least 2036.[4] Mauritius was of the view that its right of self-determination was not respected, considering the BIOT a residual colonial legacy, and latterly began to assert its claim to sovereignty over

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[1] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (*Chagos case*) (Advisory Opinion) [2019] ICJ General List No 169; Judge Donoghue was the sole dissent on the substantive questions. For a summary of the case see Anna Meijknecht, 'Hague Case Law: Latest Developments' (2019) 66 Netherlands International Law Review 185.

[2] For more detailed factual information on the historical background, see *Chagos case* (n 1) [94–131]; *Chagos Marine Protected Area Arbitration* (*Mauritius v United Kingdom*) (*Chagos Arbitration*) (2015) 31 RIAA 359.

[3] Jon Lunn, 'The Chagos Islanders' (House of Commons Library Briefing Paper No 4463, 2012) 18 <researchbriefings.files.parliament.uk/documents/SN04463/SN04463.pdf> accessed 1 December 2019; The Chagossians have been fighting unsuccessfully for a right to return for many years; in 2008, the House of Lords held that the British Government's prohibition on returning was lawful in *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* (*No.2*) [2009] 1 AC 453; The European Court of Human Rights declared a case brought by the Chagossians inadmissible because their claims had been settled in the domestic courts *Chagos Islanders v United Kingdom* App no 35622/04 (ECtHR, 20 December 2012).

[4] Jon Lunn, 'Disputes over the British Indian Ocean Territory: August 2018 Update' (House of Commons Library Briefing Paper No 6908, 2018) <researchbriefings.files.parliament.uk/documents/SN06908/SN06908.pdf> accessed 1 December 2019.

the Chagos Archipelago.[5] In 2010, Mauritius instituted arbitral proceedings contesting the legality of the British decision to create a Marine Protected Area (MPA) around the Chagos Archipelago under the United Nations Convention on the Law of the Sea.[6] In 2015, the arbitral tribunal delivered its award in the *Chagos Arbitration* and, although a majority dismissed Mauritius' claims on the basis that it lacked jurisdiction insofar as aspects of the dispute concerned sovereignty over the Chagos Archipelago, it did find unanimously that the UK's repeated pledges as to the eventual return of the Chagos Archipelago to Mauritius were binding under international law.[7] Failing progress between the two parties on the issue of sovereignty, and in light of the British reservation to the jurisdiction of the ICJ which excludes disputes with other Commonwealth States,[8] Mauritius won over the UN General Assembly which, in June 2017, referred to the ICJ a request for an Advisory Opinion on the questions whether: (i) the process of the decolonisation of Mauritius had been lawfully completed when it achieved independence, following the separation of the Chagos Archipelago, having regard to international law and (ii) what were the consequences under international law of the continued administration of the Chagos Archipelago by the UK, including the inability of Mauritius to resettle the Chagossians on the Chagos Archipelago.[9] The substance of the questions, therefore, related to the rights and obligations of States and were not about whether the Chagossians themselves had a right to self-determination, since that right was subsumed in the right to self-determination of Mauritius itself.[10]

3. Competence of the ICJ and Exercise of Judicial Propriety

The ICJ first had to dispose of several preliminary issues. The exercise of its advisory jurisdiction was challenged on a number of grounds, which will be considered briefly for the sake of completeness.

The ICJ first examined whether the questions put to it amounted to legal questions within the meaning of Article 96(1) of the Charter of the United Nations (UN Charter) and Article 65(1) of the Statute of the International Court of Justice (ICJ Statute). The ICJ had little difficulty in giving an affirmative and brisk answer, holding that the implications for international law regarding the process of the decolonisation of Mauritius and the continued

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[5] See *Chagos Arbitration* (n 2) [103–104], [442–444]; Malcolm Shaw, *Title to Territory in Africa* (OUP 1986) 130–134; TP Lynch, 'Diego Garcia: Competing Claims to a Strategic Isle' (1984) 16 Case Western Reserve Journal of International Law 101, 103.

[6] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[7] *Chagos Arbitration* (n 2) [417–448]; See Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of Part XV Courts and Tribunals' (2016) 65 International and Comparative Law Quarterly 927.

[8] 'Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2 of the Statute of the Court' (United Nations Treaty Collection, 15 October 1946) <treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#76> accessed 1 December 2019. In response to claims by Mauritius that it was prepared to leave the Commonwealth in order to circumvent this obstacle in 2004, the UK amended its acceptance of the ICJ's jurisdiction to exclude disputes with States which had been members of the Commonwealth; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the United Kingdom) 2018 <icj-cij.org/files/case-related/169/169-20180215-WRI-01-00-EN.pdf> accessed 1 December 2019 para 5.19(b).

[9] United Nations General Assembly (UNGA) Resolution 71/292 (23 June 2017) UN Doc A Res 71/292.

[10] Jan Klabbers, 'Shrinking Self-Determination: The *Chagos* Opinion of the International Court of Justice' (2019) 8(2) ESIL Reflections.

UK administration of the Chagos Archipelago were legal questions within the scope of these provisions.[11] This conclusion is consistent with the ICJ's prior jurisprudence in the *Western Sahara* case[12] and other cases where it had rejected similar objections.[13]

The ICJ also dismissed the argument that the questions put to it did not meet the requirements of Article 65(2) of the ICJ Statute and that the true object of the request related to a bilateral dispute. The contention was that ICJ should, therefore, reformulate the questions put to it in order to reflect the real issues at stake or interpret them restrictively to exclude any effect on interested States. The ICJ observed that it was part of its judicial function to provide any necessary clarification should any questions be unclear.[14] It went on to state that there was no need to reformulate the questions put to it, although it had that capacity, because in posing these questions based on international law, the General Assembly was broadly envisaging the likely outcome of the law on the international community as a whole.[15] The ICJ's role was to state the law applicable to the facts presented to it and thus provide guidance to the General Assembly.[16] It thus implicitly rejected the view that the request related to a territorial dispute. The ICJ has been consistent in its approach that it does not take a restrictive interpretation of the provisions in question.[17] Nevertheless, it is hard to escape the sense that if the ICJ had given a negative answer to the first question, it would prove damaging to the UK's continued title.[18]

Having found unanimously that it possessed jurisdiction, the ICJ addressed the question of whether it should nevertheless exercise its discretionary powers to decline jurisdiction in order to preserve the integrity of its judicial function. Here, there was disagreement on the Bench. Consistent with its previous jurisprudence, the ICJ stated that it should not 'in principle' refuse to answer a question because it thereby participates in the work of the UN unless 'compelling reasons' exist.[19] Were such 'compelling reasons' present in this case?

The first argument the ICJ addressed was that advisory proceedings were unsuited to determining disputed and complex facts. The ICJ observed that the critical issue was whether it was in possession of sufficient information in order to enable it to perform its judicial

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[11] *Chagos case* (n 1) [57–59].

[12] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 17–19; see Frank Wooldridge, 'The Advisory Opinion of the International Court of Justice in the Western Sahara Case' (1979) 8 Anglo-American Law Review 86, 98–103.

[13] *Legality of the Threat or Use by a State of Nuclear Weapons* (*Legality of Nuclear Weapons case*) (Advisory Opinion) [1996] ICJ Rep 226 [10–13]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Wall case*) (Advisory Opinion) [2004] ICJ Rep 136 [36].

[14] *Chagos case* (n 1) [60–61]; see also *Wall case* (n 13) [38].

[15] *Chagos case* (n 1) [135–136]; see also *Wall case* (n 13) [38]; Judge Donoghue would have limited the ICJ's reply to the first question only in order to avoid any impropriety, see *Chagos case* (n 1) Diss Op Judge Donoghue [22].

[16] *Chagos case* (n 1) [132–137]; *Wall case* (n 13) [38].

[17] See for example *Western Sahara case* (n 12) [39–47].

[18] See *Chagos case* (n 1) Diss Op Judge Donoghue [16–19].

[19] *Chagos case* (n 1) [65]; see *Interpretation of Peace Treaties* (Advisory Opinion) [1950] ICJ Rep 65, 72; *Legality of Nuclear Weapons case* (n 13) [14]; *Wall case* (n 13) [44].

function, which it concluded that it was.[20] It had been supplied with significant amounts of data and many States had submitted presentations to it. It cited with approval its dictum in the *Namibia* case,[21] that a court must be 'acquainted with, take into account and, if necessary, make findings as to the relevant factual issues.'[22] The ICJ has much experience of weighing up questions of fact and, as long as it has the necessary documentation, to suggest that such issues are beyond its comprehension seems like *lėse-majesté*.[23]

The next consideration was the argument that the ICJ's Opinion would not assist the General Assembly in its work. The ICJ stated that it was for the General Assembly, rather than the ICJ itself, to determine the usefulness of the Opinion.[24] The ICJ was, again, able to rely on previous pronouncements to this effect.[25]

The ICJ then had to consider the submission that the Advisory Opinion would reopen the decision in the *Chagos Arbitration* and would thus be contrary to the principle of *res judicata*. In dismissing this argument, the ICJ first indicated that its Opinion is given to the organ requesting it, not States.[26] It then stated that the principle of *res judicata* does not prevent the ICJ from giving an Advisory Opinion.[27] It finally made the obvious point that the issues decided in the *Chagos Arbitration* were different from those before the ICJ.[28]

The final objection the ICJ had to consider was that the Advisory Opinion would necessarily deal with issues of territorial sovereignty in dispute between the UK and Mauritius and would, therefore, circumvent the principle that no State can, without its consent, be compelled to submit a dispute to judicial settlement.[29] The ICJ's position was that the General

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[20] *Chagos case* (n 1) [71] [73]; the ICJ found that it had sufficient documentation and information in the *Western Sahara case* (n 12) [46–47]; and the *Wall case* (n 13) [55–58].

[21] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Res. 276 (1970) (Namibia case)* (Advisory Opinion) [1971] ICJ Rep 16, 74.

[22] *Chagos case* (n 1) [72].

[23] Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 157; however, the lack of adequate materials led to the Permanent Court of International Justice declining jurisdiction in *Case Concerning the Status of Eastern Carelia* (Advisory Opinion) 1923 PCIJ Rep Series B No 5, 28.

[24] *Chagos case* (n 1) [76–77].

[25] See for example *Legality of Nuclear Weapons case* (n 13); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo case*) (Advisory Opinion) [2010] ICJ Rep 403, 417.

[26] See *Interpretation of Peace Treaties case* (n 19) 71.

[27] *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion* [1999] ICJ Rep 62 [25]; *Interpretation of Peace Treaties case* (n 19) Sep Op Judge Azevedo [79–80]; *Res judicata* applies to judgments, per Manley O Hudson, *The Permanent Court of International Justice 1920-1942* (MacMillan 1943) 592; *Namibia case* (n 21) Sep Op Judge de Castro [4].

[28] *Chagos case* (n 1) [81]; see *Interpretation of Peace Treaties case* (n 19) [72]; Johannes Hendrick Fahner, '*Déjà Vu* in The Hague – The Relevance of the *Chagos* Arbitral Award to the Proceedings before the ICJ' (2018) 55 Questions of International Law 107.

[29] See for example Written Statement of the United Kingdom (n 8) para 7.5–7.9; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the French Republic) <icj-cij.org/files/case-related/169/169-20180227-WRI-03-00-EN.pdf> accessed 1 December 2019; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the United States of America) 2018 <icj-cij.org/files/case-related/169/169-20180301-WRI-01-00-EN.pdf> accessed 1 December 2019 Ch III; see also S Yee, 'Notes on the International Court of Justice (Part 7) – The Upcoming *Separation of the Chagos Archipelago* Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement' (2018) 16 Chinese Journal of International Law 623, 641; it is a fundamental principle that no State can, without its consent, be compelled to

Assembly's request was not an attempt to circumvent a State's opposition and bring an existing dispute between States to court, but related to the decolonisation of Mauritius. The General Assembly has a long record in seeking to bring about an end to colonialism and the Opinion would assist it in its decolonisation policy.[30] Essentially, the ICJ stressed the General Assembly's reliance on the ICJ in exercising its functions relating to decolonisation. The fact that the ICJ may have to pronounce on legal questions on which Mauritius and the UK had different views did not mean that it would be deciding a bilateral dispute.[31] The ICJ followed closely its approach in the *Western Sahara* case, where it had rejected Spain's objections to the exercise of advisory jurisdiction based on its lack of consent to the adjudication of what it claimed was in essence a bilateral dispute,[32] and the *Wall* case, which engaged the UN's powers and responsibilities concerning international peace and security.[33] However, Judge Tomka expressed his scepticism on this matter, pointing out that the issue of the Chagos Archipelago had not been on the UN's agenda for decades and that in the background lurked a dispute between the two States.[34] However, this underestimates the central and sustained role played by the General Assembly in facilitating decolonisation and its continued interest in the issue, as the ICJ observed.[35] Judge Donoghue was similarly of the view that the ICJ's advisory jurisdiction was being used to bypass a bilateral dispute and that that amounted to a sufficient reason to decline the request for an opinion.[36] In the present case, decolonisation and sovereignty could not be separated, whereas the *Western Sahara* case could be distinguished because there the ICJ had found that at stake were Morocco's rights at the time of colonisation in the 1880s and Spain's rights as administering power in the 1970s remained unaffected.[37] However, for Vice-President Xue, while accepting that Mauritius and the UK were in dispute over the Chagos Islands, this was not the material issue. The ICJ had frequently faced protestations that it was overriding a lack of consent from States for the adjudication of disputes, when the crux of the matter was the object and nature of the request.[38] The present request was to provide assistance to the General Assembly on the decolonisation of Mauritius, not on resolving a bilateral dispute.[39] The view has been expressed that the wording of the questions in Resolution 71/292 shrewdly minimised the possibility of a challenge on this ground succeeding.[40]

These preliminary issues have been raised before the ICJ on numerous occasions, albeit without much success. Unlike in those cases, the ICJ did not dwell at length on the intricacies

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submit its disputes to any kind of pacific settlement, see for example *Case Concerning the Status of Eastern Carelia* (n 23) [7]; *Western Sahara case* (n 12) [32–33]; *Wall case* (n 13) [47]; *Kosovo case* (n 25) [29].

[30] *Chagos case* (n 1) [86–90]; see also *Wall case* (n 13) [49].

[31] *Chagos case* (n 1) [89]; Judge Tomka was unable to agree with the ICJ on this point, *Chagos case* (n 1) Declaration Judge Tomka [6–7]; see also *Namibia case* (n 21) [34]; *Wall case* (n 13) [48].

[32] *Western Sahara case* (n 12) [39–43].

[33] *Wall case* (n 13) [48 –49]; see also *Namibia case* (n 21) [32].

[34] *Chagos case* (n 1) Declaration Judge Tomka [5–7].

[35] *Chagos case* (n 1) [87].

[36] *Chagos case* (n 1) Diss Op Judge Donoghue [3].

[37] *Chagos case* (n 1) Diss Op Judge Donoghue [16-17].

[38] *Chagos case* (n 1) Declaration Vice-President Xue [4].

[39] *Chagos case* (n 1) Declaration Vice-President Xue [2–5].

[40] Marko Milanovic, 'ICJ Advisory Opinion Request on the Chagos Islands' (*EJIL:TALK!,* 24 June 2017) <ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/> accessed 1 December 2019.

of these arguments but drew on a significant body of precedent to dispose of them succinctly. Its conclusions continue in the same vein as its previous jurisprudence and hence give little cause for surprise, although fears were expressed that, given the background of the affair, the question of lack of consent might pose a significant difficulty.[41] It seems evident that the ICJ will err on the side of jurisdiction when an issue is of 'particular concern' to the UN.[42] However, given the implications for existing claims to sovereignty, the ICJ's somewhat blasé approach may give cause for disquiet.

4. The Applicable Law of Self-Determination

In order to answer the first question put to it (whether the decolonisation of Mauritius been lawfully completed when it gained independence), the ICJ considered it necessary to initially determine the law on self-determination applicable at the relevant time, which was deemed to be the period between the detachment of the Chagos Archipelago in 1965 and the independence of Mauritius in 1968. This was the fundamental issue on which the whole course of the case depended. If self-determination had become established as a rule of customary international law by 1965, it would almost certainly follow that the UK would have been under an obligation to respect the territorial integrity of Mauritius and the separation of the Chagos Archipelago would be deemed illegal. If it had not, the UK could not be found to have acted contrary to international law. The ICJ applied the doctrine of intertemporal law, not as a snapshot in time but to take account of the evolution of the law, including later instruments reinforcing or interpreting existing rules.[43] In the circumstances of the case before it, the ICJ considered self-determination in the context of decolonisation,[44] that is, in its external manifestation.[45] It should be noted that the ICJ took it for granted, as it had done in the *Frontier Dispute* case, that self-determination was a binding norm of current international law in this field.[46] Indeed, all parties were in agreement on this point. Many judges regretted that the ICJ had failed to take the opportunity to emphasise that self-determination had become established as a *jus cogens* norm in contemporary international law,[47] although it did

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[41] Julia Wagner, 'The Chagos Request and the Role of the Consent Principle in the ICJ's Advisory Jurisdiction, or: What to do When Opportunity Knocks' (2018) 55 Questions of International Law 177.

[42] *Chagos case* (n 1) [88]; See also *Wall case* (n 13) [49]; see further Wagner (n 41) 183.

[43] *Chagos case* (n 1) [140–143]; the ICJ had previously taken this approach in the *Namibia case* (n 21) [53]; the modern doctrine of intertemporal law was set out in the *Island of Palmas case* [1928] 2 RIAA 829 [845]; see RL Bledsoe and BA Boczek, *International Law Dictionary* (ABC-Clio 1987) 15.

[44] *Chagos case* (n 1) [144]; the UK had argued that decolonisation was a political process and not a legal right or principle, Written Statement of the United Kingdom (n 8) para 8.9.

[45] See *Reference re Secession of Quebec* [1998] 2 SCR 217, 282.

[46] *Frontier Dispute (Mali/Burkina Faso)* [1986] ICJ Rep 568 (*Frontier Dispute case*); this is now universally accepted and the jurisprudence of the ICJ leaves no room for doubt, see *Namibia case* (n 21) [52]; *Western Sahara case* (n 12) [55]; *East Timor (Portugal v Australia*) [1995] ICJ Rep 90 [29]; *Wall case* (n 13) [87–88], [155–156]; see also, *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal* (1989) 20 RIAA119 [135]; Case C-104/16 P *Council v Front Polisario* [2016] EU:C:2016:973 [88]; *Secession of Quebec case* (n 30) [278]; see further: Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 109, 115; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 114–128; Robert Y Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law*, Vol 1 (9th ed, Longman 1992) 285; Ian Brownlie, *Principles of Public International Law* (7th ed, OUP 1990) 580–582; James R Crawford, *The Creation of States in International Law* (2nd ed, OUP 2007) 112–114.

[47] *Chagos case* (n 1) Sep Op Judge Cançado-Trindade [118–150]; Sep Op Judge Sebutinde [25]; Sep Op Judge Robinson [48–56].

describe it as 'a fundamental human right'.[48] This was an important consideration due to the possible consequences flowing from a finding of a breach thereof.

Secondly, the ICJ ascertained the content of the law. Considering the difference in opinion expressed by interested States, including the submission that self-determination did not form an accepted part of international law at that time,[49] the ICJ proceeded to explain how the law on self-determination had emerged and developed.

The starting point was the UN Charter, specifically Article 1(2) and Chapter XI thereof, which made the principle of self-determination one of the UN's purposes.[50] Whether it amounted to a legal right in 1945, as opposed to a political concept, is doubtful,[51] but the decolonisation policy that was pursued in the 1950s and 1960s by the UN itself as well as States led to a change in its status. However, the answer to the question that the ICJ wished to determine was exactly when self-determination had crystallised into a rule of customary law. This was an important undertaking, given that criticism of its previous jurisprudence on the subject has been regarding lacunae in the ICJ 's reasoning on this issue.[52]

The notable event for the ICJ was the adoption of the celebrated General Assembly Resolution 1514 (XV) 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, which had an immediate impact on, and gave impetus to, the decolonisation process.[53] The ICJ proceeded to attribute to Resolution 1514 (XV) a 'declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption.'[54] The ICJ considered the wording of the Resolution to have a normative character and observed that it had been adopted by a large

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[48] *Chagos case* (n 1) 144.

[49] Written Statement of the United Kingdom (n 8) para 8.64–8.77; Written Statement of the United States of America (n 29) para 4.30–4.72; see generally James Summers, 'Decolonisation Revisited and the Obligation not to Divide a Non-Self-Governing Territory' (2018) 55 Questions of International Law 147, 151–161.

[50] *Chagos case* (n 1) [146–148]; see also *Namibia case* (n 21) [52]; *Western Sahara case* (n 12) [54]; *East Timor case* (n 46) Sep Op Judge Weeramantry [139], [194–195]; see further, Thomas D Musgrave, *Self-Determination and National Minorities* (OUP 2000) 62–66; it needs to be recalled that when called upon to interpret the UN Charter as a constitutional text, the ICJ has adopted a teleological approach of treaty interpretation which allows the aims and purposes of the organisation to be achieved in the contemporary context even if they are not provided for expressly, *Reparation for Injuries case* [1949] ICJ Rep 174; *Certain Expenses of the United Nations case* [1962] ICJ Rep 151; indeed, the ICJ relied on the teleological rule of treaty interpretation in the *Namibia case* (n 21) [47–53] to support its view that the principle of self-determination was derived from the UN Charter.

[51] Cassese (n 46) 37–43; Crawford (n 46) 108–112; Higgins (n 46) 111–112; Wooldridge (n 12) 104; JP Grant and JC Barker, *Parry & Grant Encyclopaedic Dictionary of International Law* (3rd ed, OUP 2009) 550; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, Routledge 1997) 326; Malcolm Shaw *International Law* (6th ed, CUP 1997) 252; Daniel Thürer and Thomas Burri, 'Self-Determination' in *Max Planck Encyclopedia of Public International Law* <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=GK5vMM&result=3&prd=OPIL> accessed 1 December 2019.

[52] Wooldridge (n 12) 105; see also *Namibia case* (n 21) Sep Op Judge Ammoun, 74.

[53] *Chagos case* (n 1) [150]; see also *Namibia case* (n 21) [52]; *Western Sahara case* (n 12) [56]; Cassese (n 46) 70; Shaw (n 50) 252–253.

[54] *Chagos case* (n 1) [152]; the main judgement's conclusion was supported by a number of judges; see *Chagos case* (n 1) separate opinion of judge Cançado-Trindade; *Chagos case* (n 1) separate opinion of judge Robinson; *Chagos case* (n 1) separate opinion of judge Sebutinde.

majority with no State questioning the existence of this right.[55] The ICJ was thus satisfied that the constituent elements of custom, *opinio juris* and State practice, were met in this instance.[56] 1960 would thus appear to be the latest possible date at which self-determination had hardened into a right. According to some individual judges, self-determination had already achieved the status of *jus cogens.*[57] The African Union also took this position,[58] as did South Africa.[59]

The ICJ's conclusion is bound to be highly controversial on several grounds. Without delving into the debate on the normative effect of General Assembly Resolutions and accepting for present purposes, as the ICJ observed, that General Assembly Resolutions may provide evidence of *opinio juris*,[60] the crucial question is whether this is true of Resolution 1514 (XV) as regards the critical period between 1965 and 1968. The interpretation of the developments in question by the UK and US were diametrically opposed to that of the ICJ. Both States considered that Resolution 1514 (XV) neither reflected nor generated customary law in 1960, nor in its immediate aftermath, taking the position that it was not couched in legal terminology and that the requisite *opinio juris* was lacking as a result of the differing attitudes of States.[61] By way of contrast, the African Union in its Written Statement argued that the sources of international law, beginning with a series of General Assembly Resolutions adopted in the 1950s, in association with widespread State practice, confirmed that a right to self-determination existed in customary law by the time Resolution 1514 (XV) was adopted.[62]

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[55] *Chagos case* (n 1) [152–153]; accordingly, one jurist writes that 'the resolution represents a consensus as to what the concept of self-determination means under the UN Charter', Vaughan Lowe, *International Law* (OUP 2007) 91.

[56] The ICJ stated that the adoption of UNGA Res 2625 (24 October 1970) UN Doc A/Res/2625, Declaration on Principles of International Law, merely confirmed the normative character of self-determination under customary law, *Chagos case* (n 1) [155]; Judge Salam would also have invoked relevant Security Council Resolutions, *Chagos case* (n 1) Declaration Judge Salam [3].

[57] *Chagos case* (n 1) Sep Op Judge Cançado-Trindade [122–128]; *Chagos case* (n 1) Sep Op Judge Robinson [71–73]; *Chagos case* (n 1) Sep Op Judge Sebutinde [13].

[58] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the African Union) 2018 <icj-cij.org/files/case-related/169/169-20180301-WRI-07-00-EN.pdf> accessed 1 December 2019 Part III, II.G.

[59] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the Republic of South Africa) <icj-cij.org/files/case-related/169/169-20180301-WRI-12-00-EN.pdf> accessed 1 December 2019 para 63; it is interesting to note that in 1975, both Spain and Algeria had argued before the ICJ in the *Western Sahara case* that self-determination acquired the status of a norm *jus cogens*, *Western Sahara* ICJ Pleadings Vol I 206–208, Vol IV 497–500, Vol V 318–20.

[60] *Chagos case* (n 1) [151]; see *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (*Nicaragua case*) [1986] ICJ Rep 14 [99–100]; *Legality of Nuclear Weapons case* (n 13) [70].

[61] Written Statement of the United Kingdom (n 8) para 8.32–8.48; Written Statement of the United States of America (n 29) para 4.27–4.29, 4.42–4.72; see Brownlie (n 46) 580, who writes that the 'generality and political aspect of the principle do not deprive it of its legal content'.

[62] Written Statement of the African Union (n 58) paras 77–93, 96–97.

This stance was shared by Cyprus,[63] the Netherlands,[64] Serbia[65] and South Africa,[66] among others. Since evidence of *opinio juris* requires meticulous evaluation, the ICJ's approach seems somewhat cursory, particularly when compared to the thorough study made by the US and other participants. This is glaringly evident when contrasted with the ICJ's consideration of the subject in cases such as the *North Sea Continental Shelf* [67] or the *Nicaragua* case,[68] among others. Although the ICJ invoked the UN Charter, Resolution 1514(XV) and developments in international society over a number of years, including the decolonisation policy of States,[69] it did not consider it necessary to recapitulate in full the authorities supportive of the emergence of the right. The ICJ could have presented a more considered and persuasive case on this issue, as judges in their individual opinions did,[70] to rebut convincingly the UK and US' arguments.

Certainly, insofar as the ICJ's case-law is concerned, by the time of its Advisory Opinion in the *Namibia* case in 1971, the ICJ was of the view that self-determination had hardened into a legal right, acknowledging the significance of Resolution 1514(XV),[71] although it failed to provide a detailed and reasoned justification as to how this had come about.[72] The ICJ had previously iterated this contention in 1975 in the *Western Sahara* case, stating that the 'principle of self-determination as a right of peoples, and its application for the purpose of bringing all colonial situations to a speedy end, were enunciated' in Resolution 1514 (XV), describing it as the 'basis for the process of decolonization which has resulted since 1960 in the creation of many States'.[73] Judge Dillard expressed the view that 'a norm of international law has emerged applicable to …decolonisation'.[74] In the *East Timor* case, Judge Weeramantry drew attention to the pivotal role self-determination had been allocated in the

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[63] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement Commenting on other Written Statements submitted by Cyprus) 2018 <icj-cij.org/files/case-related/169/169-20180511-WRI-01-00-EN.pdf> accessed 1 December 2019 paras 17–18.

[64] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the Netherlands) <www.icj-cij.org/files/case-related/169/169-20180227-WRI-01-00-EN.pdf> accessed 1 December 2019 paras 3.4–3.8.

[65] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Observations by Serbia) 2018 <icj-cij.org/files/case-related/169/169-20180515-WRI-06-00-EN.pdf> accessed 1 December 2019 paras 30, 33.

[66] Written Statement of the Republic of South Africa (n 58) para 63.

[67] *North Sea Continental Shelf* [1969] ICJ Rep 3 [70-81].

[68] *Nicaragua case* (n 60) [176–178], [183–207].

[69] On the United Kingdom's practice in decolonisation see Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-determination' (1995) 66 British Yearbook of International Law 283. France granted independence to the overwhelming majority of its colonial possessions by 1960, Crawford (n 46) Appendix 1.

[70] See n 57.

[71] *Namibia case* (n 21) [52]; Judge Ammoun relied on the widespread practice of States in decolonisation, further endorsed by the UN Charter and numerous UN declarations and resolutions, *Namibia case* (n 21) Sep Op Judge Ammoun, 55, 73–75.

[72] Wooldridge (n 12) 105–106.

[73] *Western Sahara case* (n 12) [55], 57].

[74] *Western Sahara case* (n 12) Sep Op Judge Dillard, 121–122.

structure of the UN Charter, establishing it as one of its fundamental principles. He described Resolution 1514(XV) as a landmark declaration.[75] In the *Kosovo* case*,* the ICJ referred to the 'second half of the twentieth century' as the crucial period,[76] whereas in the *Chagos Arbitration* Judge Kateka and Judge Wolfrum were of the view that self-determination had become established as a principle before 1970.[77] However, no indication as to precise dates was given in these cases, although the ICJ's statements in the *Western Sahara* case are capable of being interpreted as identifying 1960 as the decisive date. This is only to be expected, as there is an inherent element of uncertainty as to the length of time involved in the formation of a customary law.[78]

There is also some academic support for the notion that the principle of self-determination had emerged sooner rather than later.[79] Judge Cançado-Trindade's interpretation of the evidence in his Separate Opinion is illuminating, reflecting in part the approach of the African Union. He relied similarly on a number of General Assembly Resolutions prior to and post-1960, supported by the work of international organisations such as the Organisation of African Unity, and the stance of blocs such as the Latin American States, to recount the evolution of the right to self-determination at this time.[80] Judge Robinson emphasised the importance of Resolution 1514(XV), which he described as a 'watershed'.[81] Resolution 1514(XV) was the culmination of a series of Resolutions adopted in the 1950s which, unlike the earlier Resolutions, clarified the details of the right to self-determination.[82] He was of the opinion that self-determination had crystallised into a rule of customary law by 1960 at the latest.[83]

However, others suggest that the right to self-determination may not have become established earlier than 1970, with the adoption of UN General Assembly Resolution 2625(XXV).[84] This was the position of the UK[85] and the USA.[86]

Although the ICJ did not provide a fully articulated argument to support its finding that self-determination had crystallised into a norm of customary law by the 1960s, a considerable body of evidence was submitted by participants and addressed by individual judges to make that conclusion plausible.

The ICJ turned its attention to the relationship between the rights of self-determination and territorial integrity, which form essential components of the norms on decolonisation of non-self-governing territories. It observed that the latter aspect of self-determination finds

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[75] *East Timor case* (n 46) Sep Op Judge Weeramantry, 196.
[76] *Kosovo case* (n 25) [79].
[77] *Chagos Arbitration* (n 2) Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum 585, 601.
[78] Antonio Cassese, *International Law* (2nd ed, OUP 2005) 157–158.
[79] Brownlie (n 46) 580–581; Cassese (n 46) 69–72; Crawford (n 46) 604; Shaw (n 50) 253; M Lachs, 'The law in and of the United Nations' (1960–61) 1 Indian Journal of International Law 429.
[80] *Chagos case* (n 1) Sep Op Judge Cançado-Trindade [45-55].
[81] *Chagos case* (n 1) Sep Op Judge Robinson [39].
[82] *Chagos case* (n 1) Sep Op Judge Robinson [40–41].
[83] *Chagos case* (n 1) Sep Op Judge Robinson [42].
[84] Higgins (n 46) 113; Malanczuk (n 51) 327, 331; in the Western Sahara case, Judge Petrén appeared to suggest that the law on self-determination was *de lege ferenda, Western Sahara case* (n 12) 110.
[85] Written Statement of the United Kingdom (n 8) para 8.75.
[86] Written Statement of the United States of America (n 29) para 4.61.

expression in paragraph six of Resolution 1514(XV),[87] which seeks to prevent the dismemberment of a non-self-governing territory.[88] With regard to Mauritius, the General Assembly had, in its Resolution 2066(XX) 1965 specifically requested the UK to not take any action which might dismember the territory of Mauritius.[89] Moreover, the ICJ found that the Chagos Archipelago had formed part of Mauritius at the time of detachment by the UK.[90] Contrary to the arguments advanced by the UK in particular,[91] the ICJ drew attention to the fact that self-determination as a right of peoples pertains to the entirety of the territory. Moreover, the right to territorial integrity was recognised in pre-existing customary law as a 'corollary' of self-determination.[92] This conclusion of the ICJ appears correct.[93] If there had heretofore been uncertainty as to its status as a customary rule, the ICJ's pronouncement has removed that doubt.[94] However, there were indications that this right may not be absolute, as the ICJ went on to state that any detachment 'unless based on the freely expressed and genuine will of the people of the territory concerned' would be contrary to the right of self-determination.[95] This would appear to allow for a partition to be permissible under international law if legitimately approved by a majority of the entirety of the non-self-governing territory in question.[96]

The application of the right of self-determination necessitated that the inhabitants of non-self-governing territories freely determine their political status. The ICJ noted that Resolution 1541(XV) contemplates the possibilities of independence, free association and integration but the choice must be the result of the free and genuine expression of the will of

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[87] 'Any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the [UN] Charter'; See further UNGA Res 2625 (1970) (n 56).

[88] *Chagos case* (n 1) [153].

[89] *Chagos case* (n 1) [165]; the ICJ observed that the General Assembly had on many occasions called for the territorial integrity of non-self-governing territories to be respected, *Chagos case* (n 1) [68].

[90] *Chagos case* (n 1) [170].

[91] Written Statement of the United Kingdom (n 8) paras 8.27–8.31.

[92] *Chagos case* (n 1) [160]; Judge Sebutinde went further and described it as a non-derogable rule, *Chagos case* (n 1) Sep Op Judge Sebutinde [40].

[93] *Chagos Case* (n 1) Sep Op Judge Robinson [33]; Cassese (n 46) 72–73; see also *Chagos Arbitration* (n 2) Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum 585, 601. Mauritius had pointed out that upon the independence of the Seychelles in 1976, the UK had returned to the Seychelles various islands which the UK had separated from the Seychelles in 1965, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Chagos case)* (Written Statement of the Republic of Mauritius) 2018 <icj-cij.org/files/case-related/169/169-20180301-WRI-05-00-EN.pdf> accessed 1 December 2019 paras 3.95, 3.110; a successful example of incorporation assisted by the UN is that of Walvis Bay into Namibia, see Musgrave (n 50) 253; Gino J Naldi, *Constitutional Rights in Namibia* (Juta 1995) 26–27.

[94] It has been observed that the UN's position has hardly been consistent, Summers (n 49) 161–167; Crawford gives a guarded assessment: 'It is an established part of United Nations' practice and may be treated as a presumption as to the operation of self-determination in particular cases; thus, the division of a self-determination unit into fragments for purpose of avoiding the principle of self-determination would be unlawful' Crawford (n 46) 336.

[95] *Chagos case* (n 1) [160], [172]; see also *Chagos case* (n 1) Declaration of Judge Iwasawa.

[96] See also *Chagos case* (n 1) Declaration Judge Abraham; *Chagos case* (n 1) Sep Op Judge Gaja [1]; Summers (n 49) 172–173; an example of a sanctioned separation is that of Gilbert and Ellice Islands as the independent States of Kiribati and Tuvalu, Crawford (n 46) 336 at note 26; by way of contrast, the separation of Mayotte from Comoros to remain under French administration is rejected by the UN notwithstanding that it is supported by the local population, Crawford (n 46) 645–646; Musgrave (n 50) 184–185.

the people.[97] The General Assembly had a measure of discretion with respect to the form and procedure by which self-determination is to be realised and, while international law does not impose any particular method by which the inhabitants of non-self-governing territories must exercise their right to self-determination, whichever mode employed must reflect the freely expressed will of the people.[98] This was the outcome of the process. The indispensable feature remains the basic need to consider the wishes of the people concerned through informed and democratic processes. Clearly, no such consultation had taken place as Mauritius advanced towards independence. The ICJ closely followed its previous pronouncements in the *Western Sahara* case, where it set the fundamental requirements for the exercise of the right to self-determination in some detail.[99]

In light of the fact that the first question posed to the ICJ in Resolution 71/292 made reference to obligations contained in a number of General Assembly Resolutions, including Resolution 1514(XV) and Resolution 2066(XX), the ICJ observed that the General Assembly had played a central role in the UN's work on decolonisation.[100] With specific reference to the decolonisation of Mauritius, the General Assembly had acted within the framework of the UN Charter and within the scope of the functions allocated to it to watch over the application of the right to self-determination and to supervise the implementation of the obligations of administering powers.[101] Those who might be inclined to depict the General Assembly as acting *ultra vires* on the basis that some of these powers had not originally or explicitly been assigned to it must bear in mind that the UN is not a static organisation but is constantly evolving, and many of its policies have either a basis in the principles and purposes of the UN Charter or have developed as a result of subsequently accepted practice and/or interpretation.[102] In any case, the member States must be taken to have acquiesced in the General Assembly's assumption of these functions; it is far too late to raise objections seventy years after the fact.

The ICJ proceeded to apply the law to the circumstances of the case and made another pronouncement bound to raise controversy, namely that Mauritius was not in a position to give free consent to the detachment of the Chagos Archipelago. The circumstances surrounding the Lancaster House Agreement called for 'heightened scrutiny'. The ICJ noted that, at the time of the Lancaster House Agreement, Mauritius was still a British colony and consequently 'it is not possible to talk of an international agreement' when one party is under the authority of another.[103] This appears to be an allusion to the concept of unequal treaties which characterises treaties imposed as a result of unequal bargaining power as null and

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[97] *Chagos case* (n 1) [156–157].

[98] *Chagos case* (n 1) [158].

[99] Described as 'the very *sine qua non* of all decolonisation', *Western Sahara case* (n 12) Declaration Judge Nagendra Singh, 81.

[100] *Chagos case* (n 1) [163]; Cassese describes it as its most successful area, Cassese (n 46) 328–329.

[101] *Chagos case* (n 1) [167].

[102] *Wall case* (n 13) [28]; Simon Chesterman, Thomas M Franck and David M Malone, *Law and Practice of the United Nations: Documents and Commentary* (OUP 2008) 20.

[103] *Chagos case* (n 1) [172]; see further, Urša Demšar et al, 'The Concept of Duress in the World of Decolonization' (2018) 55 Questions of International Law 119 who argue that the standard of duress in the context of decolonisation is lower than that that would apply between States.

void.[104] Certainly, this was the view of Judge Kateka and Judge Wolfrum in the *Chagos Arbitration* who stated that 'there was a clear situation of inequality between the two sides'.[105] They were even more forthright in their condemnation, describing the situation as one of 'duress', 'intimidation' and 'coercion', and considered the UK to have used unacceptable pressure.[106] These are damning denunciations of the colonial policies of a State that likes to portray itself as law-abiding.

There is also a body of opinion that considers devolution agreements that are coercive, restrictive or contrary to the right of self-determination to be invalid.[107] While the *Chagos Arbitration* and the present case brought to light the unpalatable facts of the Premier of Mauritius being subjected to bullying, threats and duress during the Lancaster House process,[108] no judge raised the possibility of the ensuing Agreement being incompatible with the rule enshrined in Article 51 of the Vienna Convention on the Law of Treaties (VCLT) on coercion of a State's representative.[109] On the other hand, it could be a reference to the fact that colonies are not subjects of international law,[110] or at best have limited personality,[111] and accordingly the Lancaster House Agreement could not meet the definition of a treaty as understood by Article 2(1)(a) VCLT.[112] There is also a third alternative explanation. If colonial self-determination is a *jus cogens* norm, and there is ample evidence to that effect,[113] it follows

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[104] The concept of unequal treaties is denied by Western authorities, Bledsoe and Boczek (n 43) 274–275; Grant and Barker (n 51) 631; Anthony Aust, *Handbook of International Law* (CUP 2005) 108–109; a variation of the concept was raised unsuccessfully by Libya in *Territorial Dispute (Libya/Chad)* [1995] ICJ Rep 6; see Gino J Naldi, 'Case Concerning the Territorial Dispute (*Libyan Arab Jamahiriya/Chad*)' (1995) 44 International and Comparative Law Quarterly 683, 689–690.

[105] *Chagos Arbitration* (n 2) Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum 602.

[106] *Chagos Arbitration* (n 2) Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum, 602; see further S Allen, *The Chagos Islanders and International Law* (Hart 2014) Ch 4; it may be unlikely that such political pressure would satisfy the standard for coercion as traditionally understood in the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 52. However, there was a suggestion by the Arbitral Tribunal in *Kuwait v American Independent Oil Co* (1982) 21 ILM 976 [43], that economic coercion could nullify consent; see further, Demšar (n 102) 128.

[107] See for example ILC, 'Yearbook of the International Law Commission' (1976) vol II, part two, 147; Grant and Barker (n 51) 631; the point has been made that an administering power is under an obligation to act in the best interests of a non-self-governing territory and the Lancaster House Agreement failed to meet this standard, Summers (n 49) 175; see also *Chagos Arbitration* (n 2) Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum [75].

[108] See the account in *Chagos Arbitration* (n 2) Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum [77].

[109] This argument was raised and dismissed by the UK, Written Statement of the United Kingdom (n 8) para 8.17.a.

[110] DW Greig, *International Law* (2nd ed, Butterworths 1976) 178.

[111] Aust (n 104) 30; Crawford (n 46) 634.

[112] See further, Allen (n 106) 122–123; this proposition may be less defensible in contemporary times as non-self-governing territories have assumed a limited capacity to enter into international arrangements, Crawford (n 45) 634–635; it is interesting to note that certain colonies could apply for membership of the League of Nations: Covenant of the League of Nations (adopted 28 June 1919, entered into force 1 October 1920) art 1(2) in Malcolm Evans (ed), *International Law Documents* (9th ed, OUP 2009) 1.

[113] See n 57, n 58, n 59; see also *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal* (n 45); *Arafat and Salah Case* (Italian Court of Cassation) (1986–87) 7 Italian Yearbook of International Law 295; 'Commentary on Article 40 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)' in DJ

that any treaty incompatible with that norm becomes void in accordance with Articles 53 and/or 64 VCLT. This was the conclusion drawn by a number of the judges.[114] Whatever the underlying reasons, and regrettably the ICJ did not provide a detailed and reasoned justification for this bold assertion, the ICJ reached the conclusion that the detachment was not based on the free will of the people.[115]

The ICJ stated that the UK, as the administering power, was under an obligation to respect the territorial integrity of Mauritius. Consequently, the detachment of the Chagos Archipelago and the creation of the BIOT meant that the process of the decolonisation of Mauritius was not lawfully completed when Mauritius achieved independence.[116]

5. State Responsibility

Having reached the above conclusions, the ICJ turned its attention to the second question: the consequences under international law of the UK's continued administration of the Chagos Archipelago. It concluded that the UK was persisting in a wrongful act of a continuing nature entailing its international responsibility.[117]

The fact that the ICJ described the UK's administration as 'an unlawful act of a continuing character'[118] is significant in relation to any possible reparation.[119] However, the only specific remedy the ICJ called for was for a prompt end to the UK's administration of the Chagos Archipelago, leaving it to the General Assembly to decide the modalities for completing the decolonisation of Mauritius.[120] For Judge Gaja, the ICJ's careful approach was justified by judicial propriety, since to have raised the issue of reparations would have meant intruding on a bilateral dispute.[121]

Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 452 (ILC Draft Articles on State Responsibility); distinguished scholars supporting this view include Brownlie (n 46) 513; Cassese (n 46) 133–140; John Dugard, *International Law: A South African Perspective* (Juta 1994) 76; see further, Grant and Barker (n 51) 323.

[114] *Chagos case* (n 1) Sep Op Judge Sebutinde [28]; *Chagos case* (n 1) Sep Op Judge Robinson [88], [94]; *Chagos case* (n 1) Sep Op Judge Cançado-Trindade [124].

[115] *Chagos case* (n 1) [172]. Judge Sebutinde described the British behaviour as a '*de facto* annexation that subverted the right of the people of Mauritius to self-determination by denying them any opportunity to express their will as to the fate of the Chagos Archipelago' *Chagos case* (n 1) Sep Op Judge Sebutinde [44].

[116] *Chagos case* (n 1) [173–174].

[117] Judge Sebutinde was of the view that the UK had committed a serious breach, *Chagos case* (n 1) Sep Op Judge Sebutinde [44–46]; whereas Judge Robinson described the UK as being guilty of a 'gross failure', *Chagos case* (n 1) Sep Op Judge Robinson [89].

[118] *Chagos case* (n 1) [177].

[119] *Rainbow Warrior (New Zealand v France)* (1990) 20 RIAA 217 [264].

[120] Article 30(a) ILC Draft Articles on State Responsibility, in Harris (n 113) 442; Judge Salam raised the possibility of compensation for the Chagossians, *Chagos case* (n 1) Declaration Judge Salam [7]; Judge Cançado-Trindade felt the ICJ should have considered all forms of reparations, *Chagos case* (n 1) Sep Op Judge Cançado-Trindade [257].

[121] *Chagos case* (n 1) Sep Op Judge Gaja [7].

Nevertheless, given that respect for the right to self-determination was an obligation *erga omnes*,[122] the ICJ pointed out that all States had a legal interest in protecting that right, including co-operating with the General Assembly to that end, as set out in Resolution 2625(XXV).[123] It follows that States are under a duty to not act in a manner that denies that right or impairs its exercise.[124]

The use of the phrase 'obligation *erga omnes*' rather than 'right *erga omnes*'[125] has been welcomed as providing clarification between the two situations in that the former entails a duty owed to the international community, whereas the latter is something of a legal tautology.[126] The ICJ has used both phrases, as well as '*erga omnes* character',[127] in its jurisprudence without seeming to draw any distinction between them. However, it should be borne in mind that a right *erga omnes* describes a right '(o)pposable to, valid against, "all the world", ie all other legal persons, irrespective of consent on the part of those thus affected', as opposed to rights that may be bilateral in nature or from which States can contract out.[128]

Unlike after the more egregious violations of international law in the cases of Namibia and Palestine, the ICJ did not call for the non-recognition of the British administration, although this option may be open to the General Assembly if the UK becomes intractable, as seems likely.[129] If that scenario plays out, the UK could be deemed to be willfully in serious breach of a peremptory norm, as envisaged by Article 40 of the ILC Draft Articles on State Responsibility, amounting to 'aggravated responsibility'.[130] In such a circumstance, the 'bill' the UK will be compelled to settle will only increase.[131]

Some judges considered that the ICJ should have refrained from making any statement on responsibility. In Judge Tomka's view, the ICJ should have limited itself to holding that the process of decolonisation had yet to be completed in line with the UK's obligations as an administering power.[132] Judge Gevorgian felt that the issue of responsibility blurred the

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[122] *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3 [33]; *Wall case* (n 13) [155]; see also *Council v Front Polisario* (n 46) [88].
[123] *Chagos case* (n 1) [180]; see further, *Chagos case* (n 1) Sep Op Judge Sebutinde [29]; note Article 41(1) ILC Draft Articles on State Responsibility, in Harris (n 113) 452.
[124] *East Timor case* (n 46) Diss Op Judge Weeramantry, 204, 221.
[125] *East Timor case* (n 46) [29]; *Wall Case* (n 13) [88]; see also, *Council v Front Polisario* (n 46) [88].
[126] Craig Eggett and Sarah Thin, 'Clarification and Conflation: Obligations *Erga Omnes* in the Chagos Opinion' (*EJIL:TALK!,* 21 May 2019) <ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/> accessed 25 November 2019.
[127] *East Timor Case* (n 46) [29];*Wall case* (n 13) [156].
[128] Brownlie (n 46) xlix; Grant and Barker (n 51) 188.
[129] Article 41(2) ILC Draft Articles on State Responsibility, in Harris (n 113) 452.
[130] Cassese (n 78) 262.
[131] Article 34 ILC Draft Articles on State Responsibility, in Harris (n 113) 445; in the Commentary on this provision it was stated that in cases involving peremptory norms 'restitution may be required as an aspect of compliance with the primary obligation', Harris (n 113) 446.
[132] *Chagos case* (n 1) Declaration Judge Tomka [9].

distinction between the ICJ's advisory and contentious jurisdiction. The ICJ's similar determinations in the *Namibia* case and the *Wall* case were distinguishable from the present case on the basis that the UN Security Council had previously resolved that the South African and Israeli presence were illegal.[133] Given the question before it, and once it had decided to respond to it, the minimum the ICJ could do was to give precisely the answer it did.

As against other aspects of the Opinion, the criticism could be made that the ICJ should have elaborated on its reasoning and made clear in greater detail, as it did in the *Wall* case, the consequences for the violation of international law for all concerned.[134] Reliance could perhaps have been placed on the ILC Draft Articles on State Responsibility.[135] However, this may have necessitated the ICJ stating explicitly that self-determination had the status of a peremptory norm of international law, because the concepts of obligations *erga omnes* and *jus cogens* are not identical.[136] This is something the ICJ has abstained from doing, despite urging from some judges, although its description of the right to self-determination as an 'essential' principle of international law is open to the interpretation that it constitutes an implicit acknowledgement of its elevation to that rank.[137]

Concerning the resettlement of the Chagossians, the ICJ decided that this matter should be addressed by the General Assembly as it concerned the protection of human rights.[138] No doubt, this brief statement will have disappointed those who might have hoped that the ICJ would declare that the Chagossians had a right of return or resettlement. In the *Wall* case, the ICJ considered the relevance of human rights at some length.[139] In opting for a pragmatic path, there is no guarantee that at the end of the day any agreement will allow the Chagossians to return, although a resettlement programme seems to be Mauritian government policy.[140] The General Assembly has since called on both parties to address as a matter of urgency the resettlement of the Chagossians in the decolonisation process and to facilitate their resettlement in the Chagos Archipelago.[141]

6. Further Developments

The immediate response of the UK Government to the ICJ's Opinion has been one of defiance. On 30 April 2019, the Foreign Office Minister Alan Duncan stated in Parliament

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[133] Chagos *c*ase (n 1) Declaration Judge Gevorgian [5–6].
[134] *Wall case* (n 13) [197–200].
[135] A similar criticism was made of the ICJ's Opinion in the *Wall case* in Susan Breau, 'Legal Consequences of the Construction of a Wall in the Palestinian Territory: Advisory Opinion, 9 July 2004' (2005) 54 International and Comparative Law Quarterly 1003, 1012–1013.
[136] Cassese (n 46) 173; Vera Gowland-Debbas, 'Judicial Insights into Fundamental Values and Interests of the International Community' in AS Muller and others (eds), *The International Court of Justice* (Brill 1997) 327, 330.
[137] See Gino J Naldi, 'The East Timor Case and the Role of the International Court of Justice in the Evolution of the Rights of Peoples to Self-Determination' (1999) 5 Australian Journal of Human Rights 106, 118–122.
[138] *Chagos case* (n 1) [181].
[139] Breau (n 135) 1010–1011.
[140] UNGA, 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization' (22 May 2019) Press Release GA/12146.
[141] UNGA Res 73/295 (22 May 2019) UN Doc A/Res/73/265 paras 2(f), 4.

that, 'We have no doubt about our sovereignty over the Chagos archipelago, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the archipelago and we do not recognise its claim.'[142] This particular line was reiterated at the UN.[143] The first problem with this assertion is that it is extremely doubtful that contemporary international law acknowledges an administering power's claims to sovereignty over a non-self-governing territory.[144] This stance seems to be implicit in Article 73 of the UN Charter and finds further support in Principle V of General Assembly Resolution 2625 (XXV), which states, *inter alia*, that

> 'The territory of a colony or other non-self-governing territory has, under the [UN Charter], a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination'.[145]

Secondly, whether Mauritius itself held sovereignty over the Chagos Archipelago is irrelevant, since Mauritius had never enjoyed independent status prior to 1968. What is material is that, during the colonial era, the Chagos Archipelago was administered as a dependency of Mauritius.[146] As a result, the principle of *uti possidetis* was applicable to Mauritius as it achieved independence, so as to preserve its territorial integrity.[147]

Thirdly, British non-recognition of the Mauritian claim is immaterial. The important point is that the Mauritian claim has gained the support of the ICJ and the UN General Assembly and it is the British claim that in fact will henceforth go unrecognised.[148]

The UK Government has also belittled the importance of the case by dismissing it as non-binding.[149] Technically, this is correct, but this attitude underestimates the legal authority of such judgments as authoritative expositions on points of law and their influence on the conduct of the UN. This observation is so self-evident that it requires no further elucidation. Its immediate impact has been the adoption of Resolution 73/295, wherein the UN General Assembly welcomes the Advisory Opinion, affirms its dispositif, demands that the UK withdraw its colonial administration from the Chagos Archipelago unconditionally within six months, calls upon all member States to cooperate with the UN to secure the speedy decolonisation of Mauritius and to refrain from any action which could hinder this objective and calls upon the UN, its specialised agencies, and other international, regional and intergovernmental organisations to recognise that the Chagos Archipelago forms an integral

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[142] O Bowcott, 'Corbyn condemns May's defiance of Chagos Islands Ruling' (*The Guardian*, 1 May 2019) <theguardian.com/world/2019/may/01/corbyn-condemns-mays-defiance-of-chagos-islands-ruling> accessed 1 December 2019.
[143] UNGA (n 140).
[144] ILC (n 107) 202; Crawford (n 46) 613–615.
[145] UNGA Res 2625 (XXV) (1970) (n 56).
[146] *Chagos case* (n 1) [28–29].
[147] *Frontier Dispute case* (n 45) [23–24].
[148] UNGA Res 73/295 (22 May 2019) UN Doc Res A/RES/73/295 para 6–7; P Sands, 'At Last, the Chagossians Have a Real Chance of Going Back Home' (*The Guardian*, 24 May 2019) <theguardian.com/commentisfree/2019/may/24/chagossians-britain-colony-shameful-un-resolution> accessed 1 December 2019.
[149] Bowcott (n 142); UNGA (n 140).

part of Mauritius, to support the prompt decolonisation of Mauritius, and to refrain from recognising or giving effect to any measure taken by the BIOT.[150]

7. Conclusion

The *Chagos* case is important on many levels. It may have been thought that the issue of colonial self-determination was passing into history, except for some stubborn leftovers such as the Falklands and Gibraltar. However, this case reveals that it is still of contemporary relevance.

In a narrow legal sense, the Opinion dealt with several important topics, all of which are contentious to a greater or lesser degree. The ICJ's previous jurisprudence has described the transition of self-determination from a general principle of international law as a broad and ill-defined norm, requiring the prompt demise of colonialism, to a legal right of peoples, establishing principles governing the process of decolonisation.

The *Chagos* case brings greater clarity and certainty to the law on self-determination, possibly at the expense of provoking further controversy. It found the right to self-determination to have crystallised as a rule of customary international law by the mid-1960s at the latest, contrary to the established view of conservative Western States. It upheld the principle of the territorial integrity of non-self-governing territories. It reiterated that respect for the right to self-determination was an obligation *erga omnes*. It accepted duress as undermining the validity of devolution agreements. At the same time, the ICJ did not always provide fully reasoned arguments to support these bold assertions, leaving itself vulnerable to counterattacks. The Opinion will be hotly debated for some time to come.[151]

The *Chagos* case has a wider impact on the British body politic. It has proven a diplomatic embarrassment for the UK, exposing publicly and putting under the spotlight shameful episodes of British policy, which has manoeuvred into defending the indefensible.[152] That the UK should feel the need to defend colonialism in the twenty-first century is discomforting. Wiser counsel and a more astute strategy should have prevailed. However, this is symptomatic of the hubris that is infecting the UK as it contemplates a post-brexit future. British MPs may indulge in delusional fantasies about resurrecting the Empire, but they overlook the fact their jingoism is toxic to much of the international community. They refuse to acknowledge the reality that such tomfoolery is accelerating or causing a decline in the UK's international standing and influence.[153] Colonialism belongs in the history books.

The *Chagos* case has broader implications for active colonial disputes. In particular, it raises questions about France's hold over Mayotte, and Cyprus has already indicated that it

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[150] UNGA Res 73/295 (n 148).

[151] For a positive review of the case see Diane M Amann, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113 American Journal of International Law 784.

[152] 'The Guardian view on Britain and the Chagos Islands: A Wake-up Call from the World' (*The Guardian*, 23 May 2019) <theguardian.com/commentisfree/2019/may/23/the-guardian-view-on-britain-and-the-chagos-islands-a-wake-up-call-from-the-world> accessed 1 December 2019.

[153] House of Commons Foreign Affairs Committee, '2017 Elections to the International Court of Justice' (HC 2017–2019, 860); Nahal Toosi, 'Little Britain? The UK Loses its Mojo in Washington: Close Observers Say Britain's influence in Washington is at a Low Point' (*Politico*, 31 May 2019) <politico.eu/article/little-britain-the-uk-loses-its-mojo-in-washington-donald-trump-theresa-may-brexit-special-relationship/> accessed 1 December 2019.

strengthens its hand as it seeks to renegotiate the status of the British bases there.[154] It underlines the necessity of finding an acceptable solution to the on-going neo-colonial occupation of the Western Sahara.

The General Assembly has set a six-month deadline for the UK to withdraw unconditionally from the Chagos Archipelago. That deadline has now passed and it is not yet clear what the next steps may be.[155] Robust action by the UN Security Council can be discounted in light of the UK veto. The Prime Minister of Mauritius has publicly stated his willingness to enter into a long-term understanding with the UK and the USA over the Archipelago.[156] Various possibilities could be canvassed which need not disturb the status quo, including the possibility of a lease, such as Kowloon or the Panama Canal Zone,[157] a condominium, such as the New Hebrides,[158] or an outright purchase.[159] All of these options would be legally acceptable if freely negotiated and accepted by Mauritius, the lawful sovereign.

The UK is holding a weak hand; bluster and defiance of the ICJ and the UN will serve little purpose. Acknowledging reality with grace and negotiating a sensible solution is the way forward.

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[154] Constantinos Yiallourides, 'Cyprus Gains Legal Tool in ICJ Ruling on Chagos Islands' (*Law 360*, 15 March 2019) <papers.ssrn.com/sol3/papers.cfm?abstract_id=3351969> accessed 1 December 2019.

[155] BBC News, 'Chagos Islands dispute: UK misses deadline to return control' (22 November 2019) <https://www.bbc.co.uk/news/uk-50511847> accessed 2 January 2020.

[156] Michelle Nichols 'U.N. deals diplomatic blow to Britain and U.S. over Indian Ocean islands' (Reuters, 22 May 2019) <https://www.reuters.com/article/us-britain-mauritius-un/u-n-deals-diplomatic-blow-to-britain-and-u-s-over-indian-ocean-islands-idUSKCN1SS2CR> accessed 2 January 2020.

[157] Aust (n 104) 39.

[158] Aust (n 104) 31.

[159] Bledsoe and Boczek (n 43) 144–145.

Revisiting the 'Recognition' of the Palestinians' Right to Self-Determination: Peoples as Territories

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Abstract

'[B]ehind every Palestinian there is a great general fact: that he once – and not so long ago – lived in a land of his own called Palestine, which is now no longer his homeland.'[1]

The question of whether the Palestinian people, as a people, are entitled to exercise the right to external self-determination has been highly controversial over the years. Divided scholarly research, particularly regarding the attitude of the State of Israel which, at time of writing, has not yet explicitly recognized the Palestinian peoples' right to emerge as an independent State, serves as evidence to this claim. In 2004, the ICJ in the *Wall* Advisory Opinion observed that the Palestinians' right to self-determination is *no longer in issue*. This observation serves as the benchmark for this paper to revisit the identification of a people under international law. This paper critically examines whether constitutive and declaratory theories of recognition in statehood can assist in understanding the concept of a people in the law of self-determination. While concluding that neither theory of recognition is satisfactory, this paper argues that application of the right to self-determination, within and beyond the colonial context, is inevitably linked to the territory peoples inhabit. Although the relationship between peoples and territories should come as no surprise, the key element in determining a people is not based on the people but on the status of the territory they inhabit.

1. Introduction

The issue of the statehood of Palestine is remarkably entrenched in the scope of the right to self-determination.[2] The question of whether the Palestinian people, as a people, are entitled to exercise the right to external self-determination has been highly controversial

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1 Edward W Said, *The Question of Palestine* (Times Books 1979) 115.

2 The Palestinian claim to statehood is primarily based on the right to self-determination. See United Nations, 'Agenda Item 37: Question of Palestine' (18 November 1988) UN Doc A/43/827-S/20278 Annex III, Political Communiqué and Declaration of Independence <unispal.un.org/DPA/DPR/unispal.nsf/0/6EB54A389E2DA6C6852560DE0070E392> accessed November 2019.

over the past years. Divided scholarly research,[3] particularly regarding the attitude of the State of Israel which, at time of writing, has not yet recognized the Palestinians' right to emerge as an independent and sovereign State in the land of Palestine,[4] serves as evidence to this claim. On 9 July 2004, the International Court of Justice (ICJ) in its Advisory Opinion concerning the *Legal Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem* (*Wall* Opinion)[5] explicitly reaffirmed this right of the Palestinian people, as a collective people. The Court observed the following:

> As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is *no longer in issue*. Such existence *has moreover been recognized by Israel* in the exchange of letters of 9 September 1993 between Mr Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized 'the right of the State of Israel to exist in peace and security' and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people'. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its 'legitimate rights' (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly *has moreover recognized on a number of occasions* (see, for example, resolution 58/163 of 22 December 2003).[6]

Prudent reading of the foregoing observation reveals that the Court wanted to secure that 'everyone' had recognized and agreed on the idea that the Palestinian people are a people legally entitled to self-determination under international law. The designation 'everyone'

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[3] For those who observe that Palestinians are entitled to the right to self-determination, see John A Collins, 'Self-Determination in International Law: The Palestinians' (1980) 12(1) Case Western Reserve Journal of International Law 137; Omar M Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period' (1997) 26(1) Denver Journal of International Law and Policy 33; John Quigley, 'Palestine Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood' (1989) 7 Boston University International Law Journal 1; for the contrary observation, see Marilyn J Berliner, 'Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality Under International Law' (1986) 8(3) Loyola of Los Angeles International and Comparative Law Review 551; Ilan Dunsky, 'Israel, The Arabs, and International Law: Whose Palestine Is It, Anyway?' (1993) 2 Dalhousie Journal of Legal Studies 163; Tal Becker, 'Self-Determination in Perspective: Palestinian Claims to Statehood and the Reality of the Right to Self-Determination' (1998) 32(2) Israel Law Review 301.

[4] For the position of the Israeli government see eg Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures 1995) 235; Henry Siegman, 'The Ultimate Deal: Henry Siegman on the Two-State Solution' (*London Review of Books*, 30 March 2017) <lrb.co.uk/v39/n07/henry-siegman/the-ultimate-deal> accessed 23 December 2019; according to Siegman, Netanyahu's government (2009 until present) 'has never recognised the Palestinian right to national self-determination and statehood in any part of Palestine'; see also E Fiedman, 'Israel has yet to recognize the Palestinian People' (*972 Magazine*, 14 November 2016) <972mag.com/israel-has-yet-to-recognize-the-palestinian-people/123152/> accessed 23 December 2019.

[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Wall* Opinion) (Advisory Opinion) 2004 <icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> accessed 23 December 2019; The General Assembly of the United Nations (UNGA) requested the International Court of Justice (ICJ) to give an Advisory Opinion on the following question: 'What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions' UN General Assembly Resolution ES-10/14 (8 December 2013) UN Doc A/RES/10/14.

[6] *Wall* Opinion (n 5) [118] (emphasis added).

in this context seems to include both the international community (UN)[7] and the State of Israel. At first, this observation may appear to be clear with no further complications; however, it raises a fundamental question in the law of self-determination: why did the Court seek Israeli recognition in order to settle the issue of the Palestinian peoplehood? A plausible explanation for this is that the existence of a people within the framework of international law, especially within the context of self-determination, is a matter of recognition. If this is the case, the observation of the Court leads this paper to engage with the popular debate on the two traditional theories of recognition in statehood (the constitutive and declaratory theories) regarding the application of the right to self-determination. In this vein, there are two contiguous principle questions that must be raised: is identifying a people in the legal sense for the purpose of self-determination considered a matter of recognition (the constitutive theory of recognition)? If the answer to the first question is in the negative, how should international law determine that a certain group becomes a people? Are there any *de facto* criteria for peoplehood (the declaratory theory of recognition)?

While concluding that neither the constitutive theory of recognition nor the declaratory theory are satisfactory when it comes to identifying a people in international law, this paper argues that the issue of identifying a people, for the purposes of according them the right to self-determination within and beyond the colonial context, is inevitably linked to the territories which peoples inhabit. Although the relationship between peoples and territories should come as no surprise, the key element in identifying a people is not based on the people but based on the status of the territory. Hence, people must inhabit a territory, in the legal sense, which falls under one of the territorial units entitled to exercise the right to self-determination. In this respect, it is important to examine which territorial units are entitled under international law to exercise this right and whether the Palestinian territory fits into one of them. This paper will then highlight a possible interpretation of the observation of the Court regarding the application of the right to self-determination and its significant consequences in legal scholarship.

A preliminary caveat is warranted regarding this article's approach to the application of the right to self-determination through the lens of the great debate of recognition in statehood. In general, recognition of a State is a term of art in international law and has certain legal consequences regarding the creation of States. One can strongly argue that, although international law does not face the great debate of recognition whenever the textual word is used in other contexts, it is nevertheless essential to demonstrate and explain the basic presumption behind these theories and the role they play in statehood in order to better understand the concept of a people in the law of self-determination. After all, one cannot easily deny that the entitlement of a people to the right to self-determination did not play a crucial role in the creation of States, particularly in decolonization area.[8]

2. The Role of Recognition in Self-Determination

In order to determine whether the existence of a people is a matter of recognition in international law, this section will provide an examination of the popular debate on the constitutive and declaratory theories of recognition in the creation of States, with regard to

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[7] See UNGA Resolution 58/163 (22 December 2003) UN Doc A/RES/58/163 in which the UNGA 'Reaffirms the right of the Palestinian people to self-determination; including the right to their independent State of Palestine.'.

[8] David Raič, *Statehood and the Law of Self-Determination* (Martinus Nijhoff 2002) 437.

the existence of a people in the law of self-determination.

1. The Constitutive Theory of Recognition in Self-Determination

In a 2013 Remark published by the American Society of International Law, Marcelo Kohen observes that 'recognition with regard to peoples plays a constitutive role, contrary to the situation with regard to the creation of states.'[9] This assessment implies that people can become a people for the purpose of self-determination exclusively through recognition.[10] If the State of Israel has not recognized the Palestinian people as a people, which today is a highly controversial position,[11] does that circumscribe the Palestinian people from becoming the holders of the right to self-determination in international law?

For the time being, the constitutive theory of recognition is not the favored theory in statehood.[12] The acute problems with invoking it in regard to self-determination are identical to the old problems with invoking it in statehood which, *inter alia*, are concerned with 'how many and whose recognitions are necessary to create the objective legal fact that a new State exists?'[13] Hersch Lauterpacht, in support of the constitutive theory of recognition in the law of statehood, has suggested a reasonable solution:

> [International] personality cannot be automatic and that as its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by State already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.[14]

Therefore, in the view of Lauterpacht, the existence of 'an impartial international organ' is the preferable solution for the task of States' recognition. If international law is required to bestow such a title to *someone*, so that someone can thereby recognize a people in the legal sense, that someone should be by its nature objective, or at least possess external qualifications.[15] According to Kohen, the United Nations General Assembly (UNGA) is preferred for this task.[16] Following this line of thought, the UNGA's recognition would be sufficient for the recognition of peoplehood. Why then did the Court even consider the Israeli position, which holds a political character, when the peoplehood of Palestinians has indeed been recognized by the UNGA in an enormous set of Resolutions beginning in 1969?[17] Unfortunately, the text of the *Wall* Opinion did not offer any definitive answer.

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9 Marcelo G Kohen, 'Remarks by Marcelo G. Kohen' (2013) 107 Proceedings of the Annual Meeting American Society of International Law 216, 218.

10 See explanation on the constitutive theory of recognition in James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 4.

11 See note 4.

12 For a better understanding of the criticisms directed toward the constitutive theory of recognition in statehood, see William Thomas Worster, 'Law, Politics, and the Concept of the State in State Recognition Theory' (2009) 27(1) Boston University International Law Journal 121.

13 Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2012) 44(4) The George Washington International Law Review 107.

14 Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 55.

15 Kohen (n 9) 218.

16 ibid.

17 The UNGA has recognized that the Palestinians are entitled to the right of self-determination under international law. See UNGA Resolution 2535(XXIV) (10 December 1969) UN Doc A/RES/2535(XXIV); UNGA Resolution 2649(XXV) (30 November 1970) UN Doc A/RES/2649(XXV); UNGA Resolution 2672(XXV) (8 December 1970) UN Doc A/RES/2672(XXV);

However, this may be a hint that the recognition of the UNGA is not sufficient in certain cases and that the Court requires recognition by other States, ie Israel, in the case of Palestine. This assessment brings us back to the problems of the constitutive theory, which the scholar Lauterpacht tried arduously to settle, through 'imposing' an obligation or duty on existing States to confirm the existence of the newly emerging State by granting recognition.[18] However, the problem with Lauterpacht's solution, in Crawford's view, is that 'State practice demonstrates neither acceptance of a duty to recognize, nor a consistent constitutive view of recognition.'[19] In other words, granting recognition is not a mandatory obligation regarding statehood nor, apparently, regarding peoplehood. On the basis of these arguments, it will therefore be difficult to accept the notion that in particular cases (namely the Palestinian case) the entitlement of a people in international law is a matter of recognition. This is especially so when recognition of the right to self-determination is not mandatory in practice and the recognition of the State oppressing and preventing the people in question from exercising the right to self-determination is required.

2. The Declaratory Theory of Recognition in Self-Determination

If the identification of a people in the law of self-determination is not a matter of recognition, then how should international law determine that a certain group of people becomes the holder of the right to self-determination? Are there any *de facto* criteria for peoplehood? Unlike the constitutive theory, the declaratory theory defines an entity as a State only when the factual criteria of statehood are met.[20] The declaratory theory of recognition can be easily grasped from the text of Lauterpacht:

> A State exists as a subject of international law -i.e. as a subject of international rights and duties- as soon as it 'exists' as a fact, i.e. as soon as it fulfills the condition of statehood as laid down in international law. Recognition merely declares the existence of that fact … granting the premises, seems to be most logical and which is often given is that recognition is a political rather than a legal act. Others maintain that its sole legal effect is to establish ordinary diplomatic relations between the recognizing and the recognized State.[21]

The most accepted criteria of statehood are set out in the Montevideo Convention, which was concluded at the Seventh International Conference of American States in Uruguay in 1933.[22] Article I of the Montevideo Convention defines a State as a person of international law that should possess the following requirements:

a) a permanent population;
b) a defined territory;
c) government; and

UNGA Resolution 2787(XXVI) (6 December 1971) UN Doc A/RES/2787(XXVI); UNGA Resolution 2949(XXVII) (8 December 1972) UN Doc A/RES/8/2949(XXVII); UNGA Resolution 3236 (22 November 1974) UN Doc A/RES/3236; UNGA Resolution 3375 (11 November 1975) UN Doc A/RES/3375; UNGA Resolution 31/20 (24 November 1976) UN Doc A/RES/31/20.

18 Lauterpacht (n 14) 78.

19 Crawford (n 10) 22; see also Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 1949) 223.

20 John O'Brien, *International Law* (Routledge-Cavendish 2011) 172; most writers of contemporary international law consider the declaratory theory as the most accepted theory in State recognition.

21 Lauterpacht (n 14) 41.

22 The Montevideo Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

d) capacity to enter into relations with other States.[23]

Therefore, based on the declaratory theory, an entity will be a State only after fulfilling the traditional criteria of statehood. In the same manner, to become a people, the people in question must fulfil the factual criteria of peoplehood. What, then, are the criteria of peoplehood in international law? There is no definitive answer to this question and no indication of generally accepted criteria. This turns the quest of providing factual criteria for peoplehood into a matter of art. Jan-Francois Gareau, for example, has tried to address this puzzling inquiry through adopting the first three criteria of the Montevideo Convention. Gareau's explanation behind his approach is as follows:

> …the entity aspiring to the status of 'people' must already be configured in such a manner as to allow international law to apprehend it as a potential state. Consequently, the group must exhibit at least an elementary rendition of the three requisite factual conditions that define a state, interlocked (as is the case of the state), to form an entity de facto.[24]

The factual criteria of peoplehood in the view of Gareau are:

(1) a coherent population;
(2) a representative authority; and
(3) a territorial base.[25]

While Gareau's suggestion is reasonable, the limitation of external self-determination is a convincing reason for not considering the declaratory theory of recognition in peoplehood. If people exist as soon as they exist then this will open a dangerous door, which international law has thus far avoided through neutrality regarding the right to secession.[26] It is not negotiable that both Article 1 of the 1966 International Covenant on Civil and Political Rights[27] and paragraph 2 of UNGA Resolution 1514(XV)[28] have explicitly recognized that 'All peoples have the right of self-determination'. However, the practice of self-determination in the era of decolonization shows that those who had enjoyed the right to self-determination were basically 'people as a whole' who were granted this right from the beginning, ie through being a colonial people under colonial régimes.[29] This practice strongly illustrates that peoplehood is not self-evident.

3. Territories as the Subjects of the Right to Self-Determination

While the Court's observation in the *Wall* Opinion supports the view that the identification

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[23] Montevideo Convention (n 22) art 1.

[24] JF Gareau, 'Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2005) 18(3) Leiden Journal of International Law 507.

[25] ibid.

[26] Theodore Christakis, 'Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea' (2015) 75 Heidelberg Journal of International Law 84 in which it is stated that 'analysis of state practice and *opinio juris* shows that customary international law does not authorize secession'; Vidmar (n 13) 113 in which it is observed that 'International law has adopted a position of neutrality in regard to unilateral secession, an entity is neither prohibited from, nor entitled to.'.

[27] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 1(1).

[28] UNGA Resolution 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 2 (emphasis added); there were 89 votes in favor, 0 against, and 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, United Kingdom and the United States).

[29] This issue will be discussed in Section 3.1.

of peoples is a matter of recognition, the debate on the theories of recognition indicates that both theories carry pros and cons. Thus, one can plausibly conclude that neither theory of recognition is sufficient to identify peoples in international law. This leads to the question of how the Court in the *Wall* Opinion determined that the Palestinian people are a people for the purposes of self-determination. As will be deliberated in this section, determining the subjects of the right to self-determination depends on the factual and legal status of the territory which they inhabit, both within and beyond the colonial context. This section will further examine the possible interpretation of the observation of the Court regarding the existence of the Palestinians' right to self-determination.

3.1 Territories of Self-Determination in the Colonial Context

The concept of self-determination formulated in the UN Charter was a laconic designation. Therefore, it was extremely hard, if not impossible, to assess or speculate on the meaning of self-determination as it appeared in the UN Charter without any further explanation.[30] The popular scholarly debate on whether self-determination had emerged as a principle or right in its early stages is not so relevant at the present time,[31] due to the development of customary law in the years following the establishment of the UN Charter, especially in the decolonization era, which consequently confirmed its context.[32]

As previously mentioned, the UN Charter and subsequent UNGA Resolutions neither differed nor provided for which category of peoples are entitled to the right of self-determination. As it appears in the UN Charter, self-determination is attached to peoples without preclusions.[33] In addition, paragraph 2 of Resolution 1514(XV) states that '*All peoples* have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[34] Thus, it can be speculated that the right to self-determination applies to all peoples without any particular provisions. Nevertheless, while the right to self-determination appears explicitly in Articles 1(2) and 55 of the UN Charter,[35] the prevalent view is that it is also implicit in Chapter XI (Declaration Regarding Non-Self-Governing Territories) and Chapter XII (International Trusteeship System) of the UN Charter.[36]

Hence, determining which peoples are entitled to self-determination seems to be

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30 Raič (n 8) 201.

31 For those who consider self-determination as a right see Cassese (n 4) 43; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The Lawbook Exchange Ltd 2000) 51; according to Kelsen, the interpretation of the principle of 'equal rights and self-determination of peoples' can be assumed to indicate 'sovereign equality' among States and not with reference to peoples, since States are the sole, legitimate holders of rights in international law; in contrast, see Quigley (n 3) 9; Quigley stresses that self-determination is a legal right. The UN Charter was legislated in five different languages: Chinese, French, Russian, English and Spanish. While the Chinese, Russian, English and Spanish texts refer to self-determination in Article 1(2) as a 'principle', the French text, *droit des peuples à disposer d'eux-mêmes*, refers to it as a 'right'; by virtue of Article 33(3) of the Vienna Convention on the Law of Treaties, when a multilateral treaty is conducted in two or more languages: '[t]he terms of the treaty are presumed to have the same meaning in each authentic text.' Within this context, '[s]ince principle is the ambiguous term, it must be read to mean "right".'.

32 Raič (n 8) 199.

33 See Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI arts 1(2) and 55.

34 UNGA Resolution 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 2 (emphasis added).

35 UN Charter (n 33) arts 1(2), 55.

36 Raič (n 8) 200; Crawford (n 10) 114.

inevitably linked to the territories which peoples inhabit.[37] Within this context, there are various methods of explanation by different authors. For example, Gareau views 'peoples as territories.'[38] In general, only the population of a State was considered as a people in the legal sense. This population was embodied in national institutional terms. However, this established consensus dramatically changed in the era of decolonization, especially in light of the obligations of 'sacred trust', which the UN inherited from the League of Nations. As explained by Gareau:

> In labelling territories as non-self-governing, the UN effectively withdrew the legitimacy of the sovereign title thereon from the metropolitan power… Contrary to the power it held upon the territories placed under its trusteeship, the UN did not enjoy direct control over the mandates, and even less upon non-self-governing parts of colonial empires. Accordingly, the UN could not claim the authority to apportion territory according to its own determination of the demographic or ethnic composition of the lands, and it did not have the legal capacity to single out which groups could be construed as peoples for purposes of self-determination. On the other hand, neither did the colonial power: a partition of the territory effected either before or after the exercise of self-determination would not be condoned … As a result, there evolved through the history of decolonization a second type of group regarded as 'peoples' by international law: the population of a non-self-governing territory is presumed to contain one people for the purposes of its self-determination. In the terms inherited from the decolonization era, a "people" was, and to a great extent still is, a territory.[39]

Remarkably, the practice of self-determination in the era of decolonization shows in an unequivocal manner that it was mainly colonial régimes (territories) that had enjoyed the right to self-determination,[40] either by emerging as an independent State or in association or integration with another State.[41] As observed by James Falkowski, '[i]n the overwhelming majority of cases, the United Nations has not applied the international trust provisions to "peoples," but has applied it to "colonial units".'[42] This practice was also in complete harmony with the theory of salt-water.[43] The theory of salt-water requires the non-self-governing territory to be 'geographically separate and… distinct ethnically and/or culturally from the country administering it.'[44] Commentators have argued that this narrow interpretation of the right of self-determination did not only exclude and protect strong States such as China and the Soviet Union, but also excluded 'ethnic groups within a colonial territory who regarded "the majority rule" as alien or oppressive.'[45]

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37 UNGA Resolution 1514(XV) (15 December 1960) UN Doc A/RES/1541(XV) principle I; for the first time this Resolution categorizes which peoples are entitled to self determination: 'Chapter XI should be applicable to territories which were then known to be of the colonial type.'.

38 Gareau (n 24) 508.

39 ibid 509.

40 See generally United Nations, 'International Trusteeship System' <un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories> accessed 28 January 2020; United Nations, 'List of former Trust and Non-Self-Governing Territories' <un.org/dppa/decolonization/history/former-trust-and-nsgts> accessed 28 January 2020.

41 ibid; by virtue of principle VI of GA Resolution 1541(XV), self-determination can be implemented in three ways: (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State.

42 James E Falkowski, 'Secessionary Self-Determination: A Jeffersonian Perspective' (1991) 9(2) Boston University International Law Journal 226.

43 Raič (n 8) 206.

44 See UNGA Res 1541 (15 December 1960) UN Doc A/RES/1541(XV) principle VI, which defines the criteria of a non-self-governing territory.

45 Gerry J Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32(2) Stanford Journal of International Law 273; Rosalyn Higgins, *The Development of International Law*

However, the right to self-determination was not limited to non-self-governing territories and trust territories. The ICJ on 2 June 1971, in its Advisory Opinion concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*Namibia* Opinion), has confirmed that the right to self-determination is also applicable to mandate territories. The Court stated that:

> …the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government' (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously, the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence'. Nor is it possible to leave out of account the political history of mandated territories in general.[46]

From a similar standpoint, David Raič argues that 'interpretation of the right of self-determination in the light of the principle of territorial integrity was that a "people" as the holder of the right of self-determination was primarily *territorially* defined.'[47] The principle of territorial integrity is rooted within the core of the sovereignty of a State. Territorial integrity 'refers to the material elements of the State, namely the physical and demographic resources that lie within its territory (land, sea and airspace) and delimited by the State's frontiers.'[48]

Broadly speaking, the establishment of territorial integrity was within the context of the use of force between States. The rationale behind it is, *inter alia*, 'to maintain status quo in the world order.'[49] The legal framework which protects the territorial integrity of a State can be traced back to Article 10 of the Covenant of the League of Nations, which stresses '[t]he Members of the League undertake to respect and preserve as against external aggression the *territorial integrity* and existing political independence of all Members of the League.'[50] Likewise, Article 4(2) of the UN Charter reads 'All Members shall refrain in their international relations from the threat or use of force against the *territorial integrity* or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'[51] Clearly, both the UN Charter and the Covenant of League of Nations draw a distinct link between the use of force and the territorial integrity of a State. In that sense, States have the right to protect their own territorial integrity from an act of aggression commenced by other States. Furthermore, the right to territorial integrity is

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through the Political Organs of the United Nations (Oxford University Press 1963) 104 wherein Higgins argues that 'self-determination practice refers to the right of the majority within a generally accepted political unit to the exercise of power'; see also Christakis (n 26) 84.

46 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Reports 16.

47 Raič (n 8) 208 (emphasis added).

48 Christos L Rozakis, 'Territorial Integrity and Political Independence', *Encyclopaedia of Public International Law* (vol IV, 1987) 481.

49 Edita Gzoyan and Lily Banduryan, 'Territorial Integrity and Self-Determination: Contradiction or Equality' (2011) 2(10) 21 Century 97.

50 Covenant of the League of Nations (adopted 28 June 1919, entered into force 1 October 1920) art 10 (emphasis added).

51 UN Charter (n 33) art 2(4) (emphasis added).

mentioned frequently in UN General Assembly Resolutions[52] and in various international instruments such as the Helsinki Final Act[53] and the Charter of the Organization of American States.[54]

While most of the documents on the principle of territorial integrity focus on the scope of the use of force between existing States, the development of the right to external self-determination in the context of decolonization made the principle applicable regarding the territory of the colony. Paragraph 6 of UNGA Resolution 1514(XV) states that: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'[55] According to Raič, the principle of territorial integrity protected:

> (1) the integrity of the colonial territory from aggressions by other States before independence (or other mode of implementation of the right to self-determination), and simultaneously
> (2) the territorial integrity of the colony after its independence, by prohibiting secessionist groups of peoples inside the State from invoking the right to self-determination as they wished (since secession was and is not authorized under international law).[56]

The foregoing views greatly support the argument that peoples were not seen as the subjects of the right to self-determination; rather, the subjects were the territories which the peoples inhabit. It is widely accepted that the relevant territorial units for the purposes of self-determination are non-self-governing territories, trust territories and mandate territories. The question of whether additional territories exist beyond the colonial type is open to debate. Before addressing this issue, it is necessary to examine whether the Palestinian territory falls into one of these categories.

3.2 The Palestinian Territory's Status Within Self-Determination Units

3.2.1 Non-Self-Governing Territory

The principle of the non-self-governing territory is regulated in Chapter XI of the UN Charter. Article 73 defines this as a territory whose 'people has not yet attained a full measure of self-government.'[57] There are two main arguments supporting the idea that the Palestinian territory is not a non-self-governing territory. Formally, according to the official webpage of the UN, there are currently seventeen territories with non-self-

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[52] See UNGA Resolution 2525(XXV) (24 October 1970) UN Doc A/RES/25/2525(XXV) principle (a); UNGA Resolution 3314(XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX) art 1.

[53] Organisation for Security and Cooperation in Europe (OSCE), Final Act of Helsinki (1 August 1975) arts I, II, IV.

[54] Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 1609 art 1, which stipulates: 'The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence. Within the United Nations, the Organization of American States is a regional agency.'.

[55] UNGA Resolution 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV) para 6 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'.

[56] Raič (n 8) 206; see also SKN Blay, 'Self-Determination Versus Territorial Integrity in Decolonization' (1986) 18(2) International Law and Politics 443.

[57] UN Charter (n 33) art 73.

governing status and the Palestinian territory is not labeled as one of these.[58] Substantively, ascertaining that the Palestinian territory is non-self-governing would present it as a territory without a governor. This evaluation contradicts the presence of the Palestinian National Authority (PNA) as the formal government since 1994. The question of whether the PNA possesses effective and stable control over the Palestinian territory is not relevant within this context. Yet, there are some scholars who argue that even though the PNA is the formal government of the Palestinian territory, the territory acquires the 'requisite characteristics' of a non-self-governing unit mainly because the Israeli government continues to demonstrate a general degree of control over it.[59]

3.2.2 Trust Territory and Mandate Territory

The Trusteeship system, which is embodied in Article 76 of the UN Charter, holds an identical purpose to Article 22 of the Mandate system of the League of Nations.[60] The purpose of these systems is to 'promote the political, economic, social, and educational advancement of the inhabitants… towards self-government or independence as may be appropriate to the particular circumstances.'[61] The trust territories, according to the UN, ceased to exist in 1994. The last trust territorial unit was Palau of the Pacific Islands, which exercised the right of self-determination by associating with the United States in 1994.[62] With regard to the Palestinian territory, Allan Gerson argues that Israel holds the status of 'trustee-occupant' over the West Bank.[63] According to Omar Dajani's assessment, bestowing upon Israel the title of trustee-occupant would be 'naïve, if not cynical,'[64] as Israel's interests in the Palestinian territory would contradict the obligations of the sacred trust that were set out in Article 73 of the UN Charter, which requires the trustee 'to promote to the utmost… the well-being of the inhabitants of these territories.'[65]

As for the mandate territories, it is well known that Historical Palestine was under the administration of the British from 1922, classified as type A in the Mandate for Palestine. However, the territories of the Historical Palestine ceased to be so after Britain relinquished any title for the land and conveyed Palestine to the UN in 1947.[66] Although the Partition Plan, which was recommended by the UN in 1947, failed to secure the establishment of two neighboring States (a Jewish State and an Arab State), the Palestinian territory cannot hold the title of a mandate territory.

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58 For further information regarding the non-self-governing territories, see United Nations, 'Non-self-governing Territories' <un.org/dppa/decolonization/en/nsgt> accessed 28 January 2020; these territories are: Western Sahara, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, Saint Helena, Turks and Caicos Islands, United States Virgin Islands, Gibraltar, American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn and Tokelau.

59 Dajani (n 3) 47.

60 Raič (n 8) 200.

61 UN Charter (n 33) art 76(b).

62 For the list of Trust Territories that have achieved self-determination, see United Nations, 'International Trusteeship System' <un.org/dppa/decolonization/en/history/international-trusteeship-system-and-trust-territories> accessed 28 January 2020.

63 Allan Gerson, 'Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank' (1973) 14(1) Harvard International Law Journal 45.

64 Dajani (n 3) 48; see also comment by A Roberts, 'What is a Military Occupation?' in Marcelo G Kohen (ed), *Territoriality and International Law* (Elgar 2016) 620.

65 UN Charter (n 33) art 73.

66 Gareau (n 24) 510.

3. The Existence of Self-Determination Units Outside the Colonial Context

3.1. Alien Subjugation, Domination and Exploitation: Occupation

Although the right to self-determination was primarily granted within the context of decolonization, State practice and UN Resolutions in the early 1970s extended it to include peoples that are subjected to alien domination or foreign occupation.[67] UN General Assembly Resolution 2625(XXV) stated 'that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [self-determination], as well as a denial of fundamental human rights, and is contrary to the [UN] Charter.'[68] Notably, this Resolution has opened the door to other putative situations where external self-determination exists beyond the colonial context.[69]

Several authors have pointed out, however, that the concept of 'alien domination/subjection' is laconic and left undefined within this context.[70] James Summers, in the second edition of his book, *Peoples and International Law*,[71] has attempted to identify the meaning of this concept by referring to several international human rights instruments such as the African Charter on Human and Peoples' Rights (Article 20)[72] and the Arab Charter on Human Rights 2004 (Article 2(3)).[73] According to Summers's assessment, the 'clearest reference' that can assist in understanding this concept emerged in 1974 after the adoption of UN General Assembly Resolution 3314(XXIX) on the 'Definition of Aggression'. Accordingly, acts of aggression, particularly the acts mentioned in Article 3 of Resolution 3314(XXIX), 'could in any way prejudice the right to self-determination, freedom and independence' of peoples that are: (1) under colonial régimes (2) under racist régimes or (3) under other forms of alien domination.[74]

For the first type, there is no legal issue or ambiguity. The second and third types seem to be engaged with Article 1(4) of Additional Protocol I of 1977 to the 1949 Geneva Conventions, in which it is stipulated that:

> The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[75]

Here, again, the text of Article 1(4), focusing on 'situations' and 'régimes' further verifies

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67 See UNGA Resolution 2625(XXV) (24 October 1970) UN Doc A/RES/2625(XXV); this Resolution was the first to refer to different peoples who were entitled to the right to self-determination, beyond the colonial context.

68 ibid.

69 Cassese (n 4) 90; Cassese views that UNGA Resolution 2625(XXV) 'makes it clear that "alien subjugation, domination and exploitation" may exist outside a colonial system.'.

70 ibid 92.

71 James Summers, *Peoples and International Law* (Brill Nijhoff 2014) 533.

72 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 art 20: '2. Colonized or *oppressed peoples* shall have the *right to free themselves from the bonds of domination* by resorting to any means recognized by the international community. 3. *All peoples* shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural' (emphasis added).

73 League of Arab States, Arab Charter on Human Rights (adopted 15 September 1994, entered into force 16 March 2008) 12 IHRR 893 art 2(3).

74 UNGA Res 3314(XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX) art 3.

75 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 1(4).

that the right to self-determination is determined by the status of territories. These territories are primarily involved with armed conflicts, where the inhabitants are circumscribed from exercising the right to self-determination. As Andres Sureda wrote: 'Thus "colonial occupation" is put on the same level as occupation resulting from the use of armed force. In both cases, the determining factor is that the present status of the territories is being maintained against the will of the inhabitants.'[76]

In a 1980 UN report concerning the 'Implementation of United Nations Resolutions', Hector Gros Espiell, Special Rapporteur to the UN, delivered an explanation on the expression 'alien domination':

> …the right of peoples to self-determination exists as such in modern international law, with all the consequences that flow therefrom, where a people is subject to any form or type of colonial and alien domination of any nature whatsoever. In keeping with what is stated in the foregoing paragraph, the notion of colonial and alien domination is broader than - though it includes - the notion of foreign occupation, and hence the right of peoples to self-determination may arise and be typified in other situations in addition to those where there is merely foreign occupation. Clearly, however, the foreign occupation of a territory - an act condemned by modern international law and incapable of producing valid legal effects or of affecting the right to self-determination of the people whose territory has been occupied - constitutes an absolute violation of the right to self-determination. Every people subject to any form or type of colonial or alien domination possesses the right to self-determination, and no distinction can be drawn between one people and another for the purpose of recognizing the existence of this right if there is the necessary evidence of colonial or alien domination of the people or peoples in question.[77]

Notwithstanding the foregoing explanations, in practice the notion of self-determination in a situation where peoples are under alien domination is far more complicated.[78] According to Antonio Cassese, a scholar who supports the argument that external self-determination applies to territories whose peoples are subjected to foreign domination, argues that practice in this field faces difficulties, in relation to both State practice and UN practice. First, State practice in this field is not sufficient because (1) there are limited sources and records of this practice and (2) even after finding records of State practice, 'this practice normally does not consist of actual State behavior in international dealings, but rather of declarations setting out the State's views on the matter.'[79] Secondly, UN practice regarding situations of alien domination and foreign occupation is 'ineffective'.[80] UN practice is centered around the adoption of Resolutions requesting the occupying powers to cease from their actions and to respect the peoples' inherent right to self-determination. However, in most cases, occupying powers developed a habit of ignoring these Resolutions without further explanation. Cassese presents two reasons for the failure of UN practice in situations of alien domination:

> First, in all these cases, one of the permanent members of the Security Council was either directly involved in or had a strong interest in the outcome of the conflict; this destroyed all hopes of effective multilateral action. Second, for practical reasons, it proved difficult to enforce the resolutions that had been passed.[81]

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76 A Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (Sijthoff 1973) 261.

77 See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report by Special Rapporteur Hector Gros Espiell on The Right to Self-Determination: Implementation of United Nations Resolutions' (1980) UN Doc/CN.4/Sub.2/405/Rev.1 para 43.

78 Cassese (n 4) 92.

79 ibid 94; Cassese presents situations such as Afghanistan, Cambodia, the territories occupied by Israel, Grenada, East Timor, Kuwait and Namibia.

80 ibid 98.

81 ibid.

In sum, various international instruments and UN Resolutions demonstrate that the right to self-determination exists outside the colonial context. Although the methods of enforcement within UN Resolutions and State practice are not so successful, this should not cast doubt as to the existence of the right.[82] As in the colonial context, the key element in determining which peoples are entitled to exercise the right of self-determination is based on the territory they inhabit (here, territories under alien occupation and racist régimes). However, while territories in the colonial context are easily defined (non-self-governing territory, trust territory and mandate territory), it is difficult to ascertain which territorial units are relevant in the context of the right to self-determination outside the colonial context and what criteria apply to their establishment.

3.3.2 Possible Interpretation of the *Wall* Advisory Opinion

The principle of territorial identification indicates that, in order to convey legal rights to peoples in international law, these peoples must inhabit a territory in the legal sense, which falls under one of the territorial units entitled to exercise the right to self-determination. From this angle, one could assume that the ICJ had settled that the right to self-determination in the case of Palestine is 'no longer in issue' because the Palestinian territory constitutes a legal unit of self-determination. In this vein, from reading paragraphs 70 to 78 of the *Wall* Opinion, some scholars speculate that the modification of the Palestinian territory from colonial territory to occupied territory did not prevent the Court, which holds a similar viewpoint to the UNGA, from seeing the Palestinian territory as a colonial-type that is plainly entitled to self-determination.[83] Although this view is reasonable in terms of the historical facts and predicaments of that territory, it remains difficult to accept the observation that the Palestinian territory can be classified as an unadulterated colonial territory.[84]

From the viewpoint of the present study, it is not clear whether the Court presented the case of Palestine as a case which falls within the colonial context; however, what is clear is that, according to the Court, the Palestinian territory constitutes an occupied territorial unit under customary law:

> The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.[85]

As previously mentioned, the defining element for the application of self-determination within and beyond the colonial context is territory. A possible interpretation is that the occupation of the Palestinian territory settled the issue of applying the right to external self-determination to the Palestinian people. Hence, the Palestinian territory as an occupied territory constitutes a unit entitled to exercise the right to self-determination. This

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[82] ibid.

[83] Gareau (n 24) 509; see also Gentian Zyberi, 'Self-Determination Through the Lens of the International Court of Justice' (2009) 56(3) Netherlands International Law Review 440; Zyberi assesses that '[t]he Palestinian case can be seen as an interrupted case of decolonization, where the armed conflict and occupation by Israel and subsequent events have resulted in a denial of the right to self-determination to the Palestinian people.'.

[84] See Section 3.1.

[85] *Wall* Opinion (n 5) [136], [78].

argument can also find support in the Separate Opinion of Judge Higgins, wherein she stated that the case of Palestine was the first case in which the Court adopted the perspective that self-determination applies to post-colonial situations.[86] This assessment is highly significant in the law of self-determination, not only because viewing the issue from this perspective means the Court has recognized the existence of external self-determination outside the colonial context for the first time, but also because it included the occupied territory as a unit of self-determination in international law. Whether other territories besides colonial territories and occupied territories constitute a self-determination unit is open to question. For the time being, the Court has been silent and nothing further can be said in the abstract.

4. Conclusion

The entitlement of the Palestinian people to invoke the right to self-determination was not unquestionable, as evidenced by various scholarly research and with regard to the attitude of the State of Israel which, at time of writing, has not yet recognized the Palestinians' right to emerge as an independent State in the land of Palestine. However, the ICJ in the *Wall* Opinion has reaffirmed that the Palestinians' right to self-determination is *no longer in issue*. This observation raises a few interesting questions regarding the identification of a people for the application of the right to self-determination in general and particularly regarding the entitlement of the Palestinian people and the territory they inhabit.

The first question is whether the Court views the existence of self-determination as a matter of recognition. This observation leads to the question of whether the traditional theories of recognition (constitutive and declaratory) can assist in identifying a people for the purpose of self-determination. Neither theory of recognition is satisfactory in identifying peoples in international law. The constitutive theory requires the State oppressing the people in question to recognize them as a people. This requirement is puzzling because State practice does not demonstrate an obligation for existing States to grant recognition in international law. While the declaratory theory is the more accepted theory in terms of statehood, in relation to peoplehood it is not satisfactory, mainly because (1) there are no accepted, factual criteria of peoplehood and (2) the practice of self-determination in the decolonization era shows to a large extent that peoplehood is not a mere fact.

Articulation of the theories of recognition leads to the second question: how does international law determine a people for the purposes of the application of the right to self-determination? The examination of UN practice and State practice demonstrates that the key element in identifying peoples is inevitably linked to the territories they inhabit. This assessment helps to interpret the observation of the ICJ regarding the existence of the Palestinian people. From this angle, one could assume that the Court had settled the Palestinians' right to self-determination because the Palestinian territory constitutes a legal unit of self-determination. In this regard, there are those who argue that the modification of the Palestinian territory from a colonial territory to occupied territory did not prevent the Court from seeing the Palestinian territory as a colonial territory in its nature. However, the Palestinian territory cannot be labeled as one of the units of self-determination because it is not a colonial territory. This paper suggests that a possible interpretation is that the occupation of the Palestinian territory is the primary reason which has settled the issue of applying the right to external self-determination to the Palestinian people. Hence, occupied territories serve as self-determination units. This interpretation of the observation of the

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[86] See *Wall* Opinion (n 5) separate opinion Judge Higgins [29]–[30].

Court is not only significant because it applied self-determination outside the colonial context for the first time, but also because it included the occupied territory as a territorial unit entitled to exercise the right to self-determination outside the colonial context.

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