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## PRESIDENT'S NOTE

Dear reader,

Hereby I would like to proudly introduce 1st Issue of the 8th 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 8(1) presents you with several articles on the various topics of International Law. Importantly, this issue contains articles written by some of the Editorial Board members, which are covering various topics of International Law. The editorial team worked very hard on them and thus our Publishing Director Jochelle Greaves has created an overview of the articles and the basic concepts they are discussing.

In the opening contribution, Christian Plamenov Delev discusses the interpretative methodology used within the WTO dispute settlement system. Through reflecting on institutional changes within the system, analysing GATT and WTO jurisprudence, scrutinizing the rules of treaty interpretation and considering the fragmentation of international law, he concludes that there has been a shift from a power-based towards a rule-based system of dispute settlement. When it comes to treaty interpretation, the VCLT and rules and principles of customary international law have been placed at the centre of the WTO system, creating judicial dialogue, conflict resolution and harmonisation.

Jochelle Greaves Siew examines whether the current framework of international human rights law grants the right to a healthy environment to future generations. After defining and discussing key terminology, she establishes a link between intergenerational equity and sustainable development, concluding that while State practice is sufficient to establish a customary right to a healthy environment for future generates, *opinio juris* is lacking.

Next, Alexandra Prus critically analyses international humanitarian law regarding the protection of the environment during non-international armed conflict. She assesses the meaning of the term 'natural environment' before applying her conclusions to the damage that has occurred to water systems in Syria as a result of the internal conflict. The author argues that armed attacks can have diverse and damaging effects on the environment, which current international humanitarian law does not adequately protect against.

In the 4th article, Kirill Ryabtsev explores the issue of online political micro-targeting. Through a comparison of presidential election campaigns in France, Italy and the United Kingdom, he illustrates current political micro-targeting practices in these legal systems and analyses the interference this can have on the voting rights of the electorate. He concludes that, although online political micro-targeting may bring benefits to society, such as increased voter turnout and closer ties between politicians and the electorate, it is necessary to design a

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legal framework that will safeguard the practice against abuse and protect the rights of the electorate.

Sam Thyroff-Kohl analyses the impact of terrorism on the freedoms guaranteed by the European Convention on Human Rights, through examining case law from the European Court of Human Rights and studying the UK's controversial counterterrorism methods. He concludes that, although the ECtHR provides limits to the discretion of Member States when it comes to dealing with national security concerns, serious privacy infringements are permitted to an unsettling extent in response to the threat of terrorism.

Parimal Kashyap and Ayushi Tiwari address the history and changing nature of the UN's role in defining and countering terrorism, highlighting new challenges posed by modern terrorism and discussing the legitimacy of the UN's response. The authors argue that, as Member States prefer to retain control over their counterterrorism agendas, and given the evolving nature of terrorism itself, multilateral dialogue and consensus are essential when it comes to dealing with this global threat.

Sean Morris explores the dichotomy between human rights violations and national security concerns, which often conflict at the domestic level, and considers the role of international law in finding a balance between these. He advances that international human rights law provides limited protection in this context, as States define the reach and scope of international law within their domestic legislation.

In the 8th article, Lara Mullins discusses the legal ramifications of reservations to multilateral human rights treaties, comparing the approaches of the International Court of Justice and the European Court of Human Rights. She underscores the importance of State sovereignty in relation to reservations, as binding a State to a treaty despite a reservation can serve to alienate key States and discourage participation in the treaty regime.

Lastly, Vijaya Singh and Vijay Mishra address lacunae in the legal framework relating to private military and security contractors in the maritime sector. The authors discuss the necessity and role of these contractors, their legal status and the law governing their actions at sea, arguing that specific laws and standards must be adopted to regulate their conduct, with human rights and humanitarian law at the forefront.

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, due to COVID-19 pandemic, all the events and other physical activities which have been planed for this period had to be canceled. Nonetheless, we are planing to design various activities which will be held online. GroJil will be closely

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monitoring Dutch COVID-19 measures and will act according to the law and rules prescribed by the Dutch government.

Moreover, Volume 8, Issue 1 is the last issue published under the direction of the current Editorial Board. As President and Editor-in-Chief, I would like to thank each and every fellow Board Member who I had pleasure and honour to work with. The past two years were challenging, but at the same time fruitful. I am certain that nothing what has been done so far could be achieved without my fellow Board Members. I wish the old Board the best of luck with their future endeavours and I am looking forward to start working with the new Editorial Board during these strange and unpredictable times.

Happy reading, stay safe and healthy!

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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## Board Contributions



## Open Submissions

# Beyond Powder Kegs and Crystal Balls: Finding Meaning in the Appellate Body's Interpretation of WTO Law

Christian Plamenov Delev*
https://doi.org/10.21827/GroJIL.8.1.1-29

**Keywords**
LAW OF TREATIES; WTO LAW; FRAGMENTATION OF INTERNATIONAL LAW

**Abstract**

This article seeks to establish the interpretative methodology used by the WTO Appellate Body and panels in deciding cases. The modern WTO dispute settlement system has been the subject of great criticism, including allegations of judicial activism and use of judicial precedent. These perspectives are founded upon a false theoretical dichotomy, whereby the WTO system is viewed either as a global constitutional system or, alternatively, that its rules are subsidiary to a host of other values and norms, including environmental protection, human rights and national regulatory choice. First, the modifications in institutional architecture under the dispute settlement system are traced and discussed. This includes an analysis of treaty changes, the organisation and structure of panels and the adoption of reports. Subsequently, an analysis of WTO/GATT jurisprudence is made to ascertain the various legal sources used, the normative hierarchy established, the application of VCLT provisions and other rules of treaty interpretation, the use of evolutionary interpretation and the significance of special rules. This Section relies on case law and academic literature. Finally, the question of the fragmentation of international law is addressed with respect to treaty interpretation. This Section analyses legal pluralist arguments, particularly by Weiler, Fischer-Lescano and Teubner and establishes legitimate responses to their arguments. Moreover, certain similarities are established with other international courts and tribunals.

## I. Introduction

For over half a century, international trade law existed on the purlieus of international law as a system characterised by its strive to achieve trade liberalisation. While it may be acknowledged that the General Agreement on Tariffs and Trade (GATT) and, thereafter, the World Trade Organization (WTO) agreement are regarded as branches of international law in the traditional sense,[1] their interpretation and application by the Appellate Body (AB) and panels have at varying moments come under severe scrutiny for their alleged preference for trade liberalisation over other societal values,[2] contribution towards global

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1 Vienna Convention on the Law of Treaties (signed 24 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Article 2(1)(a): a treaty is defined as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'.

2 See, for instance, D Mayer and D Hoch, 'International Environmental Protection and the GATT: The Tuna/Dolphin Controversy' (1993) 31 American Business Law Journal 187, 215–218.

distributive injustice,[3] and judicial activism.[4] Moreover, the present crisis regarding the appointment of AB members has been galvanised by the perception of 'disregard for the rules as set by WTO Members', a sentiment that has largely rested on the interpretation of the covered agreements.[5]

The many concerns voiced around establishing Members' commitments has as one of their sources the AB's interpretation of the covered agreements, which is noteworthy since the rules give significant leeway for 'reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world'.[6] Indeed, the applicable rules are largely founded upon the discovery of a balance between the flexibility and rigidity of WTO rules that would heed to the restriction against 'add[ing] to or diminish[ing]' rights and obligations.[7] The key to finding the Members' common intent thus depends on the rules of interpretation employed within the context of the dispute settlement system. Accordingly, there is a reliance on a developmental meaning of terms in light of the relevant customary international law (CIL) rule,[8] which finds its chief expression in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[9]

The conclusion that WTO law is a self-contained system possessing constitutional significance within the international legal order has been a heartstring for both academic and political criticism of the AB.[10] This has largely been expressed in the theory that the WTO broadly constitutes an independent form of global governance through its 'institutional architecture', the establishment of 'normative commitments' and a gradual adjudicative process of constitutional norm creation.[11] While these points have themselves been met with criticism for their wild extrapolations and implications,[12] the main alternative proposed is equally unsatisfactory. Indeed, the notion that the WTO system relies on 'subsidiarity', namely 'deference to non-WTO international institutions and norms' as well as to 'substantive domestic regulatory choices', is equally incorrect in

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3 M Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5(1) JIEL 17.

4 J Bhagwati, 'After Seattle: Free Trade and the WTO' in RB Porter et al (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press 2001) 60–61.

5 United States Trade Representative, 'The President's Trade Policy Agenda' (March 2018) <ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf> accessed 8 February 2019, 22–24.

6 *Japan – Taxes on Alcoholic Beverages* (*Japan – Alcoholic Beverages II*) (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 122–123.

7 Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (1994) 1869 UNTS 401 (DSU) Article 3.2.

8 ibid.

9 See, for instance, *United States – Standards for Reformulated and Conventional Gasoline - Status Report by the United States* (*US – Gasoline*) (29 April 1996) WT/DS2/AB/R, 17; and *Japan – Alcoholic Beverages II* (n 6) 5 concerning Article 31 VCLT; *EC – Customs Classification of Certain Computer Equipment* (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R concerning Article 32 VCLT; for the CIL status of the VCLT, see *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045 [18]. One must note that CIL rules may develop independently of treaty provisions giving them expression, per *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (*Military and Paramilitary Activities*) (Merits) [1986] ICJ Rep 14 [176]–[178].

10 See, for instance, GR Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44 Duke Law Journal 829; JP Trachtman, 'The Constitutions of the WTO' (2006) 17(3) EJIL 623.

11 JL Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) 17(3) EJIL 648, 651–656.

12 ibid 648–650, 657–661; R Howse and K Nicolaidis, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16(1) Governance 73, 74–86.

understating the significance of trade liberalisation provisions and leading to a fundamental misreading of WTO/GATT jurisprudence.[13] Moreover, both perspectives have helped shape a dangerous bifurcation that the WTO legal order is either a constitutionally distinct legal order somewhat akin to the European Union or, alternatively, deferential to other international institutions and national regulations, even to the extent that its rules are 'not simply "binding" in the traditional sense'.[14] This would logically result in WTO rules and, by implication, their judicial interpretations themselves becoming the subject of such a false dichotomy: either exerting some configuration of supremacy, or otherwise existing in a constant state of irregular fluctuation relative to national and international norms and rules.

This article attempts to answer the question: What are the key characteristics of the AB's approach to interpreting WTO law? The consequent analysis relies on an evaluation of the dispute settlement system and WTO/GATT jurisprudence. Moreover, by applying the international community theoretical model, which holds that the international community has become ever more integrated, enabling the creation of 'a set of overarching and hierarchically ordered principles and rules',[15] it contributes to the debate on the fragmentation of international treaty interpretation by presenting the case for the congruence of the AB's approach with those of other international courts and tribunals, *contra* hermeneutic legal pluralism.[16]

The first Section analyses developments in the dispute settlement system, from the informal GATT structure to the present, highly institutionalised, dispute settlement system. Subsequently, the second Section takes two considerations into account – the types of sources of WTO law and the particular interpretative methodology established by the AB and panels. First, a clear dichotomy of the different sources is established. Secondly, the AB's hermeneutic methodology is described, with a focus on the following factors: the use of the general rule on treaty interpretation and other VCLT provisions; establishing Members' common intentions; the use of evolutionary treaty interpretation; the role of special rules on treaty interpretation; and the normative hierarchy established by the AB and panels. The final Section considers the broader discussion on the fragmentation of

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[13] See, for instance, BJ Condon, 'Climate Change and Unresolved Issues in WTO Law' (2009) 12(4) JIEL 895, 907–908.

[14] J Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90 AJIL 416, 416; for a description of the Bello-Jackson debate, see J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 26–28.

[15] A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 49; this perspective was classically identified and developed in the works of Bruno Simma, whose main conclusion has been that the international community has performed and experienced significant developments since the once prominent focus on bilateralism and State-centred consent. Consequently, the present international legal regime has experienced a degree of 'verticalization' and seen 'the emergence of an international community, perceived as a legal community', inter alia, thus contributing to the birth of 'a true *public* international law'. Nonetheless, this universalist view does not necessarily extend towards the notion of international legal 'constitutionalization'. See B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20(2) EJIL 265, 268; See also B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours 217.

[16] Bianchi (n 15) ch 11; E McWhinney, 'The New Pluralism in International Law and Law-Making' (Audiovisual Library of International Law Lecture Series, 10 November 2009) <webtv.un.org/meetings-events/human-rights-treaty-bodies/committee-on-economic-social-and-cultural-rights/watch/edward-mcwhinney-on-the-new-pluralism-and-international-law/2623213860001/?term=?lanarabic&sort=date> accessed 4 January 2019; International Law Commission (ILC), 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (1 May–9 June and 3 July–11 August 2006) UN Doc A/CN4/L682.

international law with respect to treaty interpretation. Initially, the chief contentions developed by international legal pluralists are outlined. Subsequently, legitimate normative counterarguments in favour of the international community theory are established. Finally, following discussion on the drafting of the present rules on treaty interpretation, a series of similarities between international courts and tribunals is drawn, based on comparative literature and judicial decisions.

## II. The Evolution of Dispute Settlement

### A. GATT Dispute Settlement

Interpretation under the GATT system had largely relied on, and been informed by, the relevant institutional architecture of the dispute settlement system. With the creation of the GATT after the failed International Trade Organization project, the GATT dispute settlement system was tasked with ensuring the sustained integrity of both the negotiated concessions and general rules.[17] These duties were closely linked to the Contracting Parties' own obligations to publish all relevant '[l]aws, regulations, judicial decisions and administrative rulings of general application' and enforce international treaties 'affecting international trade policy'[18] to the utmost extent.[19] This system operated on the basis of requests for consultations under Article XII or, alternatively, resolution under Article XIII GATT that led to recommendations and even the suspension of concessions.

Unlike later institutional developments, the primary obligation for organising dispute settlement rested with the Contracting Parties themselves. As Pescatore notes, 'everything [...] had to be created *ex nihilo* by necessity and by experience' since no structure had been laid out in the GATT itself.[20] Initially, either the Contracting Parties issued resolutions or the Chairman was tasked with answering questions directed to him.[21] Subsequently, a working party model was established, whereby disputants and interested parties met, in a process akin to conciliation, to discuss issues and establish findings that were then issued in a report to the Contracting Parties.[22] This approach had been maintained up until 1952, when panels were first introduced in the *Germany – Sardines* dispute.[23]

The introduction of panels had nonetheless been consistent with the nature of Article XIII GATT, since they were established by the Contracting Parties and, subsequently, their reports gained binding force only following adoption by the

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17 C Thomas, 'Litigation Process under the GATT Dispute Settlement System: Lessons for the World Trade Organization?' (1996) 30(2) JWT 53, 54.

18 General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 1950 UNTS 188, Article X.

19 Thomas (n 17) 55; Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (28 November 1979**)** BISD 26S/210, para 3.

20 P Pescatore, 'The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects' (1993) 10(1) Journal of International Arbitration 5, 5.

21 ibid.

22 ibid 6; Hudec has described this process as having 'almost always assured a divided report over contested issues' - see R Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT System* (Butterworths 1993) 30.

23 *Treatment by Germany of Imports of Sardines* (1952) BISD 1S/53; Hudec explains this by referring to the fact that this early arbitration-like procedure made sense as most GATT members were 'not large enough to resort to power as an alternative.' - see Hudec (n 22) 30.

Contracting Parties based on the positive consensus rule.[24] However, formal rules were laid down only during the 1979 Tokyo Round, with the adoption of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.[25] According to the Understanding, panels were established to issue a report 'to assist' the Contracting Parties in resolving a matter.[26] Prior to its adoption, this merely held the status of an 'advisory opinion'.[27] Moreover, a degree of clarity had been reached concerning treaty-based remedies available to the Contracting Parties.[28]

The relationship between the dispute settlement system's institutional architecture and its approach to handling cases is a widely known and widely discussed phenomenon.[29] Primarily, the positive consensus rule served as an incentive for modifying panels' approaches in interpreting relevant rules. This resulted in the panels trying to solicit for the Contracting Parties' approval by interpreting the rules in a manner that would be convenient for resolving a particular dispute without otherwise risking express discontent from the losing party. Hudec is forthright on this:[30]

> Legal rulings were drafted with an elusive diplomatic vagueness. They often expressed an intuitive sort of law based on shared experiences and unspoken assumptions. Because of policy cohesion within this community, the rate of compliance with these rather vague rulings was rather high.

While the question of blockage has gained considerable focus, arguments have been presented to illustrate why this may, within limits, misreport the underlying reasons for the system. *Vis-à-vis* the determination of cases of violation, panels did not represent all the Contracting Parties and, since reports could have unconsciously constituted new obligations, any decision required explicit consent for it to become binding.[31] By acknowledging that no real mechanism existed to alleviate the problem of new obligations being read into the GATT, and the contemporaneous support for a negotiation-based system as found in early GATT dispute settlement, one could understand why the panels

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[24] The positive consensus rule signifies that panel reports only gain legitimacy after being accepted by all the Contracting Parties on the basis of a one-State-one-vote principle. However, this incipient model faced heavy difficulties during the 1960s that resulted in high profile cases, first by Uruguay against developed countries and, subsequently, by the United States against the European Community in the so-called 'Chicken Wars', which resulted in both the European Community and the United States becoming proponents of 'the new doctrine of anti-legalism' during the late 1960's. It was only later that, preceding the Tokyo Round, the faults of the system were exposed in a number of high-profile cases, particularly between the United States and European Community; Hudec (n 22) 31–34, 38–40.

[25] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (28 November 1979) L/4907 (Understanding).

[26] ibid para 10.

[27] ibid Annex, para 6(i).

[28] Should a report have been adopted by the Contracting Parties, then, in the event of the losing party's non-compliance with the recommendations 'within a reasonable period of time', the 'contracting party bringing the case' could have requested an 'appropriate remedy', including suspending concessions - ibid para 22.

[29] See, for instance, Thomas (n 17) 57; WJ Davey, 'Dispute Settlement in GATT' (1987) 11(1) Fordham International Law Journal 51, 94–98; I Van Bael, 'The GATT Dispute Settlement Procedure' (1988) 22(4) JWT 67, 69; R Hudec (n 22) ch 1; L Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2004) 53(4) ICLQ 86, *passim*.

[30] Hudec (n 22) 12.

[31] Davey (n 29) 96.

favoured loose and permissive interpretations of the rules.[32] Moreover, following a behavioural analysis, since the panel membership was chiefly composed of diplomats, the reports issued likely mirrored and reflected the Contracting Parties' shared sentiments and concerns.[33]

A final factor that features in GATT dispute settlement is the apparent shift from a legalistic to a pragmatic approach to interpretation. The period preceding the formalisation of panel procedures had been characterised by continued 'anti-legalism' up until the Tokyo Round.[34] This reflected the tension regarding the development of the dispute settlement system and how it potentially diminished the relevance of negotiations. The marked shift which followed in the 1980s showed greater favour for settlement proceedings and, in turn, the panel reports became 'more structured in their reasoning and evidenced more awareness about how the particular dispute under consideration related to the larger corpus of GATT jurisprudence'.[35] In particular, the failed *Spain – Soyabean Oil* report brought into focus that 'panels were increasingly expected to present legally sound reasons for their conclusions'.[36] This trend extended into the Uruguay Round and the birth of the WTO dispute settlement system.

### B. WTO Dispute Settlement

The Uruguay Round fostered the most significant judicial architectonics project since the inception of the international trade system. The Marrakesh Agreement brought about a revision of the basic processes and institutions of dispute settlement while retaining influence from GATT-era panels. This is reflected in both the WTO Agreement and the Dispute Settlement Understanding (DSU). The most significant changes are highlighted *infra*.

The first major development in WTO dispute settlement was the establishment of the AB. Unlike the GATT panel model, the AB was introduced as the final instance court responsible for reviewing panel reports.[37] Firstly, its creation served as a resolution to the early concerns of the GATT Contracting Parties regarding the threat of new obligations unwittingly being established through the approval of panel reports, since the AB could review disputes and address disputing Members' concerns. Secondly, since the AB consists of permanently appointed members, its interpretation could reflect upon previous reports

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[32] According to Jackson, the conflict between so-called 'power oriented' and 'rule oriented' diplomacy shapes international policy and Jackson argues in favour of the latter since it presents the greatest support for individuals' interests through an independent arbiter when compared with the continuous exertion of influence by stronger States to weaker States - see JH Jackson, 'The Crumbling Institutions of the Liberal Trade System' (1978) 28 JWTL 93, 98–101.

[33] R Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: the Early Years of WTO Jurisprudence' in JHH Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (OUP 2001) 38.

[34] Thomas (n 17) 59.

[35] ibid.

[36] *Spain – Soyabean Oil* (1981) L/5142*,* unadopted*;* according to Roessler, this panel's 'legally unsustainable' reasoning over how the national treatment provision ought to be interpreted in light of its subsequent effects showed the failure of the previous 'management approach' and served to illustrate how sentiments had changed over the precise duty of panels - see F Roessler, 'The Role of Law in International Trade Relations and the Establishment of the Legal Affairs Division of the GATT' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (CUP 2015) 165.

[37] DSU (n 7) Article 17, especially 17.1, 17.6 and 17.13; as can be established from the early negotiations, the terms of its foundation considered that it would not have a prominent role - see M Cossy, 'Drafting and Applying the DSU' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (CUP 2015) 303.

and it could also interpret Members' obligations consistently, thereby establishing greater legal certainty. This is partially embodied in the overall objectives of the dispute settlement system: to provide 'security and predictability to the multilateral trade system' and to interpret Members' 'rights and obligations'.[38] Early discussions between Members indicated their minimalist sentiments towards the AB's functioning being restricted to correcting 'fundamentally flawed decisions' or restricting itself to reviewing only 'extraordinary cases',[39] and these have partially materialised in the limitation of solely reviewing 'issues of law'.[40] In practice, however, 'almost seven out of ten' panel reports have been referred to the AB.[41]

The DSU further introduced key procedural changes to the dispute settlement system, including the establishment of a clear-cut model for resolving disputes by reaching mutually agreed solutions or, alternatively, the application of substantive rules to restore the situation to its previous order and prevent further violations.[42] Similarly, alternative dispute settlement procedures have been made available.[43] However, by far the most drastic change to the dispute settlement procedure concerns the adoption of reports. Whereas in the GATT system, all Contracting Parties were required to explicitly approve a panel report in order for it to gain binding force, the modernised system presented a paradigm shift to the negative consensus rule.[44] As there is now mounting pressure on Members not to vote against panel reports, this serves as an institutional guarantee that allows the AB and panels to freely interpret the substantive rules without being subjected to an equal degree of pressure to adjust or otherwise alter their final legal rulings.

Finally, alongside the creation of the AB and other procedural reforms, the introduction of authoritative interpretations, which require 'a three-fourths majority of the Members',[45] has provided Members with the power to further clarify substantive law, contrary to approaches already taken by the dispute settlement system. Unlike the role of the AB, this entitles Members to have a direct say in the interpretation of the covered agreements and provides an opportunity to correct any perceived misinterpretations without the risk of leaving disputes unresolved. Its particular role and function are further discussed *infra*.

Although many changes were adopted during the Uruguay Round, a number of hallmarks of GATT dispute settlement survived the 1994 restructuring process. Resulting from the previous 'uneasy compromise',[46] one of the legacies of the earlier GATT system

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38 DSU (n 7) Article 3.2.

39 T Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992), Volume II* (Kluwer 1993) 2767–2768.

40 DSU (n 7) Article 17.6.

41 P Van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, CUP 2017) 278.

42 DSU (n 7) Articles 3.6, 3.7; for an overview of the procedural roadmap, see WTO, 'The Process – Stages in a typical WTO dispute settlement case' < www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm> accessed 6 January 2019.

43 Alternative opportunities under the DSU (n 7) include conciliation, good offices, mediation (Article 5), and arbitration (Article 25).

44 According to the negative consensus rule, it is assumed that there is a consensus in the DSB unless a consensus forms *against* a report.

45 Marrakesh Agreement establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement), Article IX:2 in light of Article 3.9 DSU (n 7).

46 JH Jackson, *World Trade and the Law of the GATT* (Bobbs-Merrill Company 1969) 755.

is that the dispute settlement system seeks negotiations and a 'mutually agreed solution' to be established before a case is resolved in front of a panel.[47] Secondly, although the procedures in place have been altered, as described above, the legal force of a report stems from its approval by the Members through the Dispute Settlement Body (DSB).[48] Thus, Members retain a highly reduced say on reports and may voice their dissent in the approval process. Thirdly, the dispute settlement system allows only for the interpretation of rights and obligations and not for their extension.[49] Similarly, the composition of panels and the AB remains largely unchanged.[50] Finally, the place of former GATT rulings in the interpretation of the covered agreements creates a bridge between the WTO dispute settlement system and its GATT precursor.[51]

In conclusion, the institutional framework of the dispute settlement reform has instigated a shift towards greater dispute settlement independence, interpretative cogence and coherence, including the resolution of some of the Members' earlier trepidations. This self-redefinition has nonetheless brought into focus the almost indecipherable precariousness of the dispute settlement system and its overall theoretical footing.[52] Even so, the provided instrumental clues hint at how the AB and panels have been vastly guided to embolden their interpretation of substantive WTO law and, moreover, to do so in light of Members' broader rights and obligations. This task cannot be done *eo ipso* and, in interpreting provisions, the institutions must heed GATT jurisprudence and respect the leading role of the Members themselves, especially in attaining mutual satisfaction in dispute resolution. This thus forms the broad institutional cornerstone for any further investigation into judicial interpretation.

## III. A Question of Interpretation

The interpretation of the covered agreements is the product of diplomatic craftsmanship and the subsequent interlacing of case law. The initial assessment of the dispute settlement process and its progression highlights a number of key episodes that define the variegated interpretation of the covered agreements and have brought about the characterisation of the system of international trade law as an 'abstruse admixture of law and economics'.[53] The final transition that took place in the Uruguay Round marked the greatest departure from the previously self-sustaining dispute settlement system of interpretation to one that has formed broad ties to the law of treaties as applied by other international courts and tribunals. As stated in *US – Gasoline*, the GATT (and, accordingly, the covered agreements as a whole) are 'not to be read in clinical isolation from public international law'.[54]

### A. Sources of WTO Law

First and foremost, the range of sources of WTO law and their effects on Members' rights and obligations must be established. Unlike in Article 38(1) of the Statute of the

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47 DSU (n 7) Arts 3.6, 3.7.

48 DSU (n 7) Arts 16.4, 17.14.

49 DSU (n 7) Arts 3.4, 19.2; compare with Understanding (n 25) paras 16–18.

50 JHH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35(2) JWT 191, 202.

51 DSU (n 7) Article 3.11.

52 See, for specific discussion, Weiler (n 50) 194–207; Trachtman (n 10); G Abi-Saab, 'The Appellate Body and Treaty Interpretation' in M Fitzmaurice, O Elias and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 100–102.

53 A Cassese, *International Law in a Divided World* (Clarendon 1986) 316.

54 *US – Gasoline* (n 9) 17.

International Court of Justice (ICJ Statute),[55] there exists no clear categorisation of legal sources that may be relied upon. A starting point would be to understand that a large subset of sources as identified in the Dispute Settlement Understanding (DSU) and relevant WTO/GATT jurisprudence exists under the present system. The sources may be separated into two distinct functional categories: application and use.[56]

Predominantly, the covered agreements, namely the multilateral agreements annexed to the WTO Agreement and plurilateral agreements, remain the primary source of rights and obligations under WTO law.[57] An additional source of individual Member's WTO-plus obligations would be the Accession Protocols which, following a prolonged four-staged process under Article XXII WTO Agreement, become binding on the Member concerned.[58] The covered agreements are applicable sources of law, ie they serve as the only grounds for positive rights to be brought before the dispute settlement system, and panels are encumbered with reviewing whether individual requests comply 'with both the letter and the spirit of Article 6.2 of the DSU'.[59] Another important point is the precise relevance of broader international treaties, as references thereto are made in several provisions of the covered agreements and, thus, under a systemic interpretation, these form part of the overarching WTO acquis.[60]

International agreements serve to amplify or confine the scope of WTO law. Regarding references to other international agreements in the covered agreements, certain rights and obligations may be established as long as one takes into account the specific provisions within (and the version of) the mentioned treaty.[61] As Merkouris argues, by virtue of references to these precise provisions within the covered agreements, they become 'part of the *corpus* of the treaty being interpreted' through the principle of incorporation,

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55 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, Article 38(1).

56 The dichotomy between sources of application and use is a critical tool in understanding the nature of rights and obligations under WTO law. The term 'application' must be understood as referring to sources that provide direct rights and obligation to Members. In this sense, applicable sources perform a clear-cut constitutive function and, as such, any rights originating from said sources could be defended before a panel or the AB. By contrast, the term 'use' holds a much more restricted meaning and refers to sources that fulfil a hermeneutic function, ie those sources that express or clarify the intention of the Members or otherwise provide an interpretative context within which applicable WTO law must be read. Notably, both categories may coinhere *vis-à-vis* certain sources.

57 DSU (n 7) Article 7.2; while the former refers to treaties that are binding on all Members, including the GATT, GATS and TRIPS Agreements, amongst others, the latter category concerns additional agreements that Members may opt to adopt; there are currently two plurilateral agreements in force, namely the Agreement on Trade in Civil Aircraft (15 April 1994) LT/UR/A-4/PLURI/1, which at the time of writing has 32 signatories, and the Agreement on Government Procurement (15 April 1994) LT/UR/A-4/PLURI/2, which has 19 parties comprising 47 WTO members and 32 more Members as observers.

58 WTO Agreement (n 45) article XXII; for details on the accession process, see WTO, 'Accession to the World Trade Organization: Procedures for Negotiations under Article XII (Note by the Secretariat)' (24 March 1995) WT/ACC/1; concerning binding force, see, for instance, *China – Measures Related to the Exportation of Various Raw Materials* (*China–Raw Materials*) (30 January 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, para 303 on the potential scope thereof.

59 *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC–Bananas III*) (9 September 1997) WT/DS27/AB/R, para 145.

60 See, *inter alia*, General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/1/GATT/1 (GATT), Article XXIV; Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1 (TRIPS), Articles 1.3, 2, 3.1, 9 and 30.

61 For discussion, see D Palmeter and PC Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 AJIL 398, 409–410.

thus being applicable in the same manner as the covered agreements.[62] Likewise, other international agreements between the Members themselves should be recognised and utilised. Given the recognition of the VCLT as the relevant CIL on treaty interpretation, multilateral agreements,[63] similar to the treatment of Ministerial Declarations,[64] have been read in light of Article 31(3) VCLT as 'subsequent agreements'.[65] The relevance attached to such determinations could indicate 'proximity' between provisions of WTO law and other international agreements, whether on a linguistic, temporal, subject-matter or shared actors/parties basis.[66]

CIL has provided the bedrock for significant modification to the interpretation and application of substantive law. While Article 3.2 DSU provides for substantive law to be interpreted 'in accordance with customary rules of interpretation of public international law',[67] the standard practice established has expanded the scope of applicable CIL 'to the extent that the WTO treaty agreements do not "contract out" from it'.[68] While some authors have suggested that new rights may be generated by CIL,[69] in part echoing the concerns of some Members,[70] it has been affirmed that customs are incapable of overriding treaty provisions and no explicit provision is made for customs to potentially constitute new rights.[71] Contrary to the DSU's approach to international agreements, in *EC – Biotech* it was clarified that CIL must be binding on all Members, and not just the disputing parties, for it to be used in a case.[72] This assessment is influential, especially in illustrating a desire to form cohesion between the law applicable to all Members and, moreover, to bridge WTO law and international law in a broader sense. This has also influenced the AB's own tendency to avoid making determinations on the status of CIL, as demonstrated in its deliberations on the precautionary principle in *EC – Hormones*.[73] Examples of situations

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62 P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Martinus Nijhoff/Brill 2015) 69.

63 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US–Shrimp*) (12 October 1998) WT/DS58/AB/R, paras 130–133.

64 *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (*US–Clove Cigarettes*) (4 April 2012) WT/DS406/AB/R, paras 267–268; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (*Australia–Plain Packaging*) (28 June 2018) WT/DS465/23, paras 7.2409–7.2411; unlike multilateral agreements, Ministerial Declarations are chiefly regarded as falling within the scope of Article 31(3)(a) VCLT.

65 VCLT (n 1) Article 31(3)(c).

66 Merkouris (n 62) 83–95.

67 Notably, Article 17.6(ii) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (15 April 1994) LT/UR/A-1A/3 (Anti-Dumping Agreement) provides additional guidance that serves as a *lex specialis* derogation from the general rule on interpretation - see, for discussion, I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21(3) EJIL 605, 608–610.

68 *Korea – Measures Affecting Government Procurement* (*Korea–Procurement*) (1 May 2000) WT/DS163/R, para 7.96.

69 A Davies, '*Korea – Measures Affecting Government Procurement*: Some Critical Observations' (2001) 4 Public Procurement Law Review 229, 236.

70 Minutes of Meeting (19 June 2000) WT/DSB/M/84, para 64.

71 See, for example, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (18 August 1997) WT/DS26/R/USA, paras 8.157 and 8.160.

72 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (26 September 2006) WT/DS291/R, WT/DS292/R and WT/DS293/R, para 7.68.

73 See *European Community – Measures Concerning Meat and Meat Products (Hormones)* (*EC–Hormones*) (16 January 1998) WT/DS26/AB/R and WT/DS28/AB/R, para 123 - the AB ultimately concluded by stating: 'We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question.'.

where CIL has been applied in WTO dispute settlement include questions of standing[74] and the role of municipal law in dispute settlement.[75]

Dispute settlement reports are of material importance to the correct interpretation of Members' obligations. While GATT panel reports are made pertinent under Article 3.1 DSU for establishing continuity between GATT and WTO dispute settlement practice,[76] one must acknowledge that this only concerns adopted panel reports.[77] Moreover, with respect to the significance of WTO/GATT jurisprudence, the AB acknowledged the role played by reports in creating 'legitimate expectations among WTO Members',[78] especially since panels are expected to follow existing AB precedent.[79] There is strong evidence of the continued practice of the AB of cross-referencing previously adopted reports.[80] This interpretative synchrony between panels and the AB mainly concerns the reasoning employed by panels, which some commentators have regarded as the foundation of a *de facto* doctrine of precedent.[81]

In finding fault with the panel's interpretation of Articles VI:2 GATT and 9.3 Anti-Dumping Agreement regarding 'simple zeroing in periodic reviews', the AB argued in *US – Stainless Steel (Mexico)* for panels to ensure 'security and predictability' by resolving similar cases the same way as the AB, 'absent cogent reasons'.[82] In *US – Continued Zeroing*, the AB went as far as to definitively interpret 'dumping', despite the raging debate over the exact meaning of the term. This statement, although relating to a debate that is consigned to a special interpretative framework,[83] discussed above, clearly illustrates the AB's restrictive reading of the 'absent cogent reasons' exception. Still, the only enunciation of what 'cogent reasons' entails had been set out in the *US – Countervailing and Anti-Dumping Measures (China)* panel report.[84]

A number of other subsidiary sources have been recognised as contributing to the interpretation of primary WTO law. The great plurality of sources recognised, either

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74 *EC – Bananas III* (n 59) para 133.

75 *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (*India–Patents*) (19 December 1997) WT/DS50/AB/R, para 65.

76 See Section 2.2 for details.

77 With respect to the shift in interpretation of Article XX(g) GATT expressed in *US – Shrimp* (n 63) para 121, Bhagwati, (n 4) 60–61, holds that this 'reversed long-standing jurisprudence on process and production methods'. As rightly argued by Howse, this argument could have been sound had the panel report been adopted by the Contracting Parties. Rather, the failure to adopt may be read as signifying disapproval of the former decision. However, as previously mentioned, the role of reports is merely hermeneutic and does not expand into application as herein understood - see R Howse, *The WTO System: Law, Politics & Legitimacy* (Cameron 2007) 180–182.

78 *Japan – Alcoholic Beverages II* (n 6) 108.

79 *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (29 November 2004) WT/DS68/AB/R, para 188.

80 J Pauwelyn, 'Minority Rules: Precedent and Participation Before the WTO Appellate Body' in J Jemielniak, L Nielsen and HP Olsen (eds), *Establishing Judicial Authority in International Economic Law* (CUP 2015) 142–144.

81 See, for instance, JH Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) 151; Palmeter and Mavroidis (n 61) 401.

82 *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (*US – Stainless Steel (Mexico)*) (30 April 2008) WT/DS344/AB/R, paras 146, 154–162.

83 *United States – Continued Existence and Application of Zeroing Methodology* (*US – Continued Zeroing*) (4 February 2009) WT/DS350/AB/R; see also comments on Anti-Dumping Agreement in footnote 70.

84 *United States – Countervailing and Anti-Dumping Measures on Certain Products from China* (*US – Countervailing and Anti-Dumping Measures (China)*) (27 March 2014) WT/DS449/R, para 7.317.

directly or indirectly, has contributed to a hermeneutic change of heart, especially since some sources, such as teachings of the most highly qualified publicists, had only rarely been recognised by GATT-era panels, contrary to their present, rising, use.[85] Other sources that have been used or alluded to in applying the relevant rules include Ministerial Decisions and Declarations,[86] acts of the WTO bodies,[87] general principles of law,[88] negotiating history,[89] and 'concordant, common and consistent' subsequent practice.[90] This web of sources has significantly contributed to a broader and more detailed analysis of the covered agreements, especially in forming a harmonious interpretation that is consistent with Members' common intentions.

### B. Method of Interpretation

The obligation to interpret WTO law raises questions regarding which principles underpin the interpretative method established by WTO/GATT jurisprudence. The AB's approach to interpreting the covered agreements has been noted for breaking off with the 'GATT panels' ignorance of the general rules of international law'.[91] Reliance on the VCLT has served as the chief interpretative rule, despite not all Members being signatories to the treaty,[92] and there has also been reliance on other rules.[93] This sub-section describes and evaluates the use of relevant VCLT provisions, as well as some hermeneutic features that have gained particular consideration within WTO jurisprudence as potential outgrowths from the VCLT general rule of interpretation.

#### i. Articles 31–33 VCLT

Regarding the interpretation of treaty provisions, the first broadly distinguishable trend is prominent use of and reliance on the VCLT. Whereas the AB, in *EC – Computer Equipment*, stated that 'the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention',[94] in practice, other principles have also been applied, such as the principle of effective interpretation, discussed above.[95] One possible justification for this approach is that, since not all WTO

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85 Palmeter and Mavroidis (n 61) 408, particularly footnote 62.

86 See van den Bossche and Zdouc (n 41) 54 for general discussion.

87 *US – Clove Cigarettes* (n 64) para 260.

88 See, for instance, *US – Shrimp* (n 63) para 166 for good faith; *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (8 October 2001) WT/DS192/AB/R, para 120 for the principle of proportionality; *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (*China – Publications and Audiovisual Products*) (21 December 2009) WT/DS363/AB/R, para 411 for *in dubio mitius*, amongst others.

89 *US – Countervailing and Anti-Dumping Measures (China)* (n 84) para 7.286–7.290.

90 *Japan – Alcoholic Beverages II* (n 6) 106–107.

91 PJ Kuyper, 'The Law of the GATT as a Special Field of International Law: Ignorance, further refinement or self-contained system of international law?' (1994) 25 Netherlands Yearbook of International Law 227, 228.

92 As noted by the ICJ, a rule can subsist in the form of both a treaty provision and CIL, thus allowing for independent existence and development - see *Military and Paramilitary Activities* (n 9) [176]–[178].

93 See Section 3.1 for examples and an explanation based on general principles of international law and CIL.

94 *EC–Computer Equipment* (n 9) para 84.

95 *US – Gasoline* (n 9) 23; *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (24 July 2001) WT/DS184/AB/R, para 101; for a detailed exploration of principles and their application, see HR Fabri and J Trachtman, 'Preliminary Report on the Jurisprudence of the WTO DSB' (ILA Study Group on Interpretation) <.ila-hq.org/index.php/study-groups?study-groupsID=75> accessed 16

Members are parties to the VCLT, 'customary rules of interpretation' would serve as the general grounds for any further exploration. Consequently, whilst the VCLT presents the normative substratum for interpretation, other norms could be inferred or applied as long as agreement over their substance is established.[96]

In applying the VCLT general rule on interpretation, focus is placed on interpreting provisions 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'.[97] This methodology serves as the collective application of three approaches, namely the textual approach, which focuses on 'the text of the treaty as the authentic expression of the intentions of the parties', the founding fathers approach, which emphasises the parties' intentions as 'a subjective element distinct from the text', and, finally, the teleological approach, which stresses '[the] declared or apparent objects and purposes of the treaty'.[98] In heeding the 'expressed intention', the VCLT thus prohibits an overemphasis on individual States' expectations and seeks to strike a balance between hermeneutic consistency and flexibility.[99]

The approach adopted under the WTO dispute settlement system was described as 'holistic' in the *US – Trade Act* report,[100] which signifies that there is no reliance on a singular method in establishing the correct reading of a provision, while noting that panels must first begin with a textual analysis and only subsequently refer to object and purpose.[101] For instance, in determining the 'ordinary meaning' of a term, the panels or AB may use a dictionary as a starting point,[102] which carries some interpretative weight;[103] however, sole reliance on a dictionary definition by a panel has been criticised since they are 'not necessarily capable of resolving complex questions of interpretation' and broader reference to the context of a particular term is thus required.[104] Recourse to 'object and purpose' may

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January 2019, 4–9; while Article 31(1) VCLT does incorporate the principle of effectiveness, noting the already mentioned distinct development of CIL norms from treaty provisions, the provision gives explicit 'precedence' to a textual interpretation - see A Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 209.

96 See *China–Publications and Audiovisual Products* (n 88) para 411, on the discussion over *in dubio mitius*.

97 VCLT (n 1) Article 31(1).

98 ILC, 'Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session' (1966) *Yearbook of the International Law Commission* v II 218.

99 M Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5(1) JIEL 17, 22.

100 *United States – Sections 301–310 of the Trade Act of 1974* (27 January 2000) WT/DS152/R, para 7.22.

101 M Fitzmaurice and P Merkouris, 'Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' in M Fitzmaurice, O Elias and P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff) 174; indeed, Abi-Saab has even gone as far as to label the approach 'strict constructionism' - see G Abi-Saab, 'The Appellate Body and Treaty Interpretation' in G Sacerdoti, A Yanovitch and J Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (CUP 2006) 461.

102 *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* (*US – Softwood Lumber from Canada*) (19 January 2004) WT/DS257/AB/R, para 58.

103 *European Communities – Trade Description of Sardines* (26 September 2002) WT/DS231/AB/R, para 300.

104 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US Gambling*) (7 April 2005) WT/DS285/AB/R, para 164; see, for critical appraisal of the use of dictionaries, D Pavot, 'The Use of Dictionary by the WTO Appellate Body: Beyond the Search of Ordinary Meaning' (2014) 4(1) Journal of International Dispute Settlement 29.

be made when the treaty terms are 'equivocal or inconclusive' since 'light from the object and purpose of the treaty as a whole may usefully be sought'.[105]

In determining 'context', there is a general reliance on several sources. Taking into account the wording of Article 31(2) VCLT and relevant jurisprudence, there are three broad contextual categories: other treaty provisions, agreements made in connection thereto, and instruments accepted as related. The AB specified in *Korea – Dairy Products* that 'a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole',[106] which could be taken as an intrinsic, textual application of the principle of harmonious interpretation in establishing the context of a term.[107] With respect to the second and third categories, they have respectively been interpreted by the *US – Copyright Act* panel as 'an agreement or instrument [...] related to' a covered agreement, 'concerned with' its substance, which can 'clarify certain concepts in the treaty or limit its field of application', and which 'must [...] be drawn up on the occasion of the conclusion of the treaty'.[108]

Lennard has questioned the reference to 'uncontested interpretations given at a conference' as falling under Article 31(2) VCLT.[109] The AB subsequently narrowed the interpretation of 'context' in *US – Gambling* by categorising an Explanatory Note and Classification List dating to the Uruguay Round as preparatory work.[110] A key consideration of what falls under Article 31(2)(a) VCLT was provided in *EC – Chicken Cuts* concerning the Harmonized System Convention.[111] Concerning the final category, no exact clarity has been provided by the panels or AB. Nonetheless, as Lennard makes clear, there exists an explicit requirement that 'all' Members were involved and, consequently, Working Party Reports that have been considered, but not explicitly integrated into the agreements, would likely satisfy the requirements.[112]

Article 31(3) VCLT provides for certain additional aspects 'to be taken into account', namely subsequent agreements, subsequent practice, and 'any other rules of international law in the relations between the parties', which have the purpose of 'strengthening [a court or tribunal's] conclusion as to the common intention of the parties

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[105] *US – Shrimp* (n 63) para 114; however, note that object and purpose may first be found in the provision itself, per *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (17 June 2011) WT/DS371/AB/R, para 202; moreover, in *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (*US – Tuna II*) (16 May 2012) WT/DS381/AB/R, paras 353–379, recourse was made to the preamble of the Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 to establish object and purpose - see, for commentary, Y Zhang, 'Contribution of the WTO to Treaty Interpretation' in G Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (CUP 2015) 578–579.

[106] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (12 January 2000) WT/DS98/AB/R, para 81.

[107] Fabri and Trachtman (n 95) 12.

[108] *United States – Section 110(5) of US Copyright Act* (15 June 2000) WT/DS160/R, para 6.45.

[109] Lennard (n 110) 25.

[110] *US – Gambling* (n 104) para 205.

[111] In *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (*EC–Chicken Cuts*) (12 September 2005) WT/DS269/AB/R and WT/DS286/AB/R, paras 194–199, the AB argued that the International Convention on the Harmonized Commodity Description and Coding System (adopted 14 June 1983, entered into force 1 January 1988) 1503 UNTS 167 (Harmonized System Convention) fell under Article 31(2)(a) VCLT because there had been reliance on it during the Uruguay Round negotiations, a decision regarding accession had been established, some of the covered agreements make direct reference to it, eg the Agreement on Agriculture, and it had been considered by the GATT Contracting Parties - for detailed discussion, see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 254–257.

[112] Lennard (n 110) 26–27.

or the meaning of the treaty at the time of its conclusion.'[113] Subsequent agreements, which entail a *consensus in idem* being reached between treaty parties as to a treaty's interpretation and application, were initially determined as encompassing Ministerial Declarations,[114] and similar reasoning has also been applied to committee decisions.[115] Concerning Article 31(3)(b) VCLT, there are two requirements for a source to be classified as 'subsequent practice': 'a common, consistent, discernible pattern of acts or pronouncements' and that 'those acts or pronouncements must imply agreement on the interpretation of the relevant provision'.[116] In *EC – Chicken Cuts*, the AB further clarified that for practice to be 'common, consistent, discernible', it did not need to involve all Members and, more to the point, the Ministerial Conference and the General Council should not be inferred as the 'exclusive authority' for such determinations.[117] The bar for such determinations, however, has since been pushed higher to require 'overt acts'.[118] Finally, with respect to Article 31(3)(c) VCLT, the panel in *EC – Biotech* offered the first measure of clarity by accepting that the provision 'mandates' other rules to be considered 'in good faith' so as 'to settle for that interpretation which is more in accord with other applicable rules of international law' and, consequently, to avoid 'conflicts between the relevant rules'.[119] Notably, this provision does not make non-WTO norms '*directly applicable*', but merely allows one to 'give a proper meaning to the treaty terms at issue'.[120] The AB has subsequently advised 'caution' on the issue of whether the rule must be espoused by all Members, noting that Article 31(3)(c) VCLT 'is considered an expression of the "principle of systemic integration"'.[121]

Articles 32 and 33 VCLT refer to the use of 'supplementary means of interpretation' and different language versions, respectively.[122] The former is seen as a reliance on the founding fathers approach, with little clarity provided as to the scope of what 'preparatory work' or 'circumstances of conclusion' might mean, except that a broader range of sources

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[113] VCLT (n 1) Article 31(3); G Schwarzenberger, *International Law, Volume I: International law as Applied by International Courts and Tribunals* (3rd edn, Stevens & Sons 1957) 532.

[114] *US – Clove Cigarettes* (n 64) para 267.

[115] *US –Tuna II (Mexico)* (n 105) paras 366–372.

[116] ibid para 192.

[117] *EC – Chicken Cuts* (n 111) para 273; as Feldman has pointed out, the AB has been rather conservative in approving or establishing subsequent practice in its jurisdiction, potentially as a result of lacking political consensus - see AM Feldman, 'Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement' (2008) 41(3) NYUJILP 655, 676.

[118] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (3 May 2002) WT/DS207/R, paras 7.79 and 7.100.

[119] *EC – Biotech* (n 72) paras 7.69–7.70.

[120] S Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements*, *vol 1* (Nijhoff 2010) 69–70.

[121] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (*EC – Large Civil Aircraft*) (1 June 2011) WT/DS316/AB/R, para 845; the principle of systemic integration is based on the fact that treaties are 'creatures of international law', which results in their existence, operation, and scope being limited and defined accordingly since they are 'part of the international law system.' - see C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) ICLQ 279, 280; in identifying the scope of the rule, Merkouris concludes that the questions of intertemporal law (ie recourse to contemporary law) and what is meant by the use of terms, such as 'parties' are the most contentious. He further identifies four considerations on the grounds of existing case law in determining whether a 'rule' may be applicable: 1) 'terminological identity or similitude', 2) 'identity or relevance of the subject-matter of regulation', 3) 'complete or partial overlap of the parties to the treaty with the parties to the dispute' and 4) 'temporal proximity'. For further discussion, see Merkouris (n 64) 18–41, 69 *et seq*; see also Aust (n 95) 216–217.

[122] VCLT (n 1) Articles 32 and 33.

may be read (particularly concerning practice), the sources must precede the treaty's conclusion, and that they may only serve an auxiliary function.[123] Moreover, recourse may be had to these sources only where interpretation under Article 31 leaves 'the meaning ambiguous or obscure' or causes 'manifestly absurd or unreasonable' results.[124] In light of this, the WTO system has recognised that modalities papers made in the context of concessions negotiations could qualify as preparatory work.[125] Similarly, regarding circumstances, pre-treaty practice, which may hold greater value as long as it reflects Members' common intentions, and even historical background, may constitute preparatory works.[126] The AB has generally summarised its stance in *EC – Chicken Cuts* by arguing that '[a]n "event, act or instrument" may be relevant as supplementary means of interpretation […] when it helps to discern what the common intentions of the parties were at the time of conclusion with respect to the treaty or specific provision.'.[127]

Concerning Article 33 VCLT, the AB has, on several occasions, had recourse to different language versions of the WTO Agreement, especially since all the agreements are available in English, Spanish and French.[128] Indeed, the AB has even criticised panels for not respecting the linguistic differences in the different treaty versions.[129] In summarising its technique, the AB stipulated: 'the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language'.[130] This may well be interpreted as a reflection of the linguistic expression of 'common intent' by the Members, especially as a collective reading of the different texts and their wording could serve to establish collective meaning as etched into the WTO Agreement.[131]

One potential divergence from the VCLT general rule concerns authoritative interpretations. The Ministerial Conference and General Council are not bound by panel reports and may override DSB conclusions by adopting formal interpretations. In *US – FSC*, the AB confirmed that authoritative interpretations can affect Members' rights and obligations.[132] However, it remains a disputed question whether authoritative

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[123] MM Mbengue, 'Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)' (2016) 31(2) ICSID Review 388, 388–399; I Buga, *The Modification of Treaties by Subsequent Practice* (OUP 2018) 75–76.

[124] VCLT (n 1) Article 32.

[125] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (11 December 2008) WT/DS27/AB/RW2/ECU and Corr.1; *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* (22 December 2008) WT/DS27/AB/RW/USA and Corr.1, para 442.

[126] *EC – Computer Equipment* (n 9) para 9293.

[127] *EC – Chicken Cuts* (n 114) para 289.

[128] WTO Agreement (n 45) Article XVI:6; for examples of cases, see *European Communities – Antidumping Duties on Imports of Cotton Type Bed Linen from India* (12 March 2001) WT/DS141/AB/R; *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (*Chile–Price Band*) (23 October 2002) WT/DS207/AB/R; *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* (*EC–Asbestos*) (12 March 2001) WT/DS135/AB/R, para 91.

[129] *Chile–Price Band* (n 118) para 271.

[130] *US – Softwood Lumber from Canada* (n 102) para 59; see, for commentary, Fabri and Trachtman (n 95) 18.

[131] While this point is ultimately true and confirmed by case law, care should still be had for how negotiations have indeed taken place, especially since different linguistic factors could contribute to the versions not necessarily 'carry[ing] the same weight' in practice - see Aust (n 95) 226.

[132] *United States – Tax Treatment for "Foreign Sales Corporations"* (*US – FSC*) (24 February 2000) WT/DS108/AB/R, paras 112–113 - in footnote 127 to the report, the AB described the exact distinction between authoritative interpretations and DSB reports and recommendations since the latter can only

interpretations, in being both applied and used, could be overridden should they contravene Article 31 VCLT or established CIL. As Abbott suggests, the AB and panels could potentially argue that an authoritative interpretation exceeds the confines of their binding 'interpretative power'.[133] While a restrictive reading of what an 'authoritative interpretation' means could result in Article IX:2 WTO Agreement no longer effectively fulfilling its role of pre-empting or correcting perceived hermeneutic errors in reports, it is necessary to understand both the dichotomy between authoritative interpretations and amendments[134] and the controversial nature of an *ultra vires* determination.[135] Since authoritative interpretations maintain important open questions, they could, depending on their nature, constitute a 'subsequent agreement' or even attribute a 'special meaning [...] to a term'.[136]

### ii. Common Intentions

In discussing hermeneutic outgrowths of the VCLT provisions, a prevailing consideration that is repeated in the dispute settlement reports is the discovery of Members' common intentions.[137] As such, taking into account how words have been interpreted within the WTO context, it is safe to stipulate that their own developed meaning has largely been reflective of the *lex specialis* nature of the covered agreements. This can be described as a congruous Wittgensteinian language game, which could be categorised as a dialect within the broader international law language.[138] For instance, in the AB's interpretation of

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clarify Members' rights and obligations without 'add[ing] to or diminish[ing]' them per Article 3.2 DSU. Reasoning *a contrario*, Members' rights could thus be changed through the adoption of authoritative interpretations.

133 FM Abbott, 'The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO' (2002) 5 JIEL 469, 492–493 and footnote 83 - according to Abbott, the adoption of an authoritative interpretation must be restricted by the 'text, context, object and purpose' of the treaty being interpreted in the light of the VCLT general rule and other relevant CIL.

134 WTO Agreement (n 45) Article X; Ehlermann and Ehring have argued that authoritative interpretations must only be prevented from 'revising trade rules' - see, for discussion, CD Ehlermann and L Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements' (2005) 8(4) JIEL 803, 810–811; another perspective has been taken by Qureshi, namely that changes to obligations derived from authoritative interpretations can only 'alter' rights and obligations, as opposed to adding or diminishing rights. This latter perspective seems to make more sense as it respects the clear division between the alteration and amendment of rights and obligations - see AH Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (1st edn, CUP 2006) 37–38.

135 While a determination of *ultra vires* would be beneficial for maintaining the difference between Articles IX:2 and X WTO Agreement, it is practically difficult for the dispute settlement system to potentially reach such a conclusion given that only Members are able to introduce disputes. Should such a determination be made in a case, then the question of interpreting Members' common intention would become problematic. As such, even an *ultra vires* authoritative interpretation could hold interpretative significance, however reduced - see Ehlermann and Ehring (n 134) 809.

136 In accepting that authoritative interpretations are bound in their force to merely altering rights and obligations, their role as 'context' in light of Article 31(3) VCLT could lead to their binding status as subsequent agreements and, thus, show changes in the Members' common intentions. Moreover, should clarifications be provided as to the interpretation of certain terms within the covered agreements, then it is possible for a 'special meaning' to be established as long as this does not go against the text of the covered agreement itself.

137 See, *inter alia*, *EC–Computer Equipment* (n 9) para 90 and *EC–Chicken Cuts* (n 114) paras 262–269.

138 Indeed, this may be reaffirmed as the AB's approach is generally confined to the idea that 'the meaning of a word is its use in the language' - see L Wittgenstein, GEM Anscombe (trans), *Philosophical*

schedules in *EC – Computer Equipment*, it noted that although Members' schedules are individually binding, they ought to be interpreted to reflect the Members' 'common intentions', especially as they are products of negotiations and are integral to the GATT.[139] Moreover, since legitimate expectations are produced by adopted rulings, the arguably precedential, but admittedly significant, status of the AB's reasoning 'absent cogent reasons' reaffirms the importance of finding a sole, common intention in light of its hermeneutic approach.[140]

One key criticism that has been levied concerns the relationship between common intentions and the interpretation of Accession Protocols. In arguing against the hermeneutic approach, Guan claims that it embodies an 'inherent judicial activism' and certain 'theoretical deficits', assertions which are based on a fundamental misunderstanding of the AB's justification.[141] He establishes two chief contentions, namely that 'common intentions' are 'elusive or even unattainable', as discussed below, and that there is an apparent failure by the AB to acknowledge 'the somewhat distinctive nature of WTO commitments and the incomplete nature of the WTO treaty framework'.[142] The latter point essentially concerns the need for interpretative flexibility, since the WTO system is a constantly growing legal order. This is supposedly exemplified by the failure to acknowledge the applicability of Article XX GATT to China's Accession Protocol as a whole.[143] However, even if a broad interpretation of the phrase 'integral part' had been adopted, the lack of other references such as 'consistent with the WTO Agreement' could result in those provisions not being read in light of Article XX GATT, either on the basis of the VCLT's preferred textual approach,[144] or, alternatively, by employing the *expressio unius* principle.[145] A converse decision in *China – Raw Materials* would result in the AB disregarding its obligation not to create new rights or obligations.[146]

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*Investigations* (2nd edn, Blackwell 1958) 21 §43; this sentiment has indeed been reflected in the fact that the applicable scope of interpretation is reflective of textual evolution (see Section 3.2.iv) and, *inter alia*, generally prohibits unilateral meanings.

[139] *EC – Computer Equipment* (n 9) paras 84 *et seq*.

[140] *US–Stainless Steel (Mexico)* (n 81) para 160.

[141] W Guan, 'How General Should the GATT General Exceptions Be?: A Critique of the 'Common Intention' Approach of Treaty Interpretation' (2014) 48(2) JWT 219, 222, 231–243 - some of the points that Guan makes and that have already been touched upon herein or elsewhere include that the VCLT does not adequately reflect the law of treaties, that the AB has established a stare decisis principle and that the AB and panels exceed their interpretative competences.

[142] ibid 247–248.

[143] ibid 249.

[144] Aust (n 94) 209.

[145] Guan (n 140) 225–227; *China – Raw Material* (n 58) para 293.

[146] On this point, the AB's reasoning has been described as following a so-called 'incorporation theory', in that only through references and cross-references could Article XX GATT be extended to the relevant provision in the Chinese Accession Protocol. In making this case, de Hoogh argues, first, that the chapeau of Article XX GATT limits the effects of the GATT provision to the agreement itself; consequently, any extension would require direct reference, which may reap troubling consequences regarding the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Secondly, the AB and panel appeared to adopt *'a contrario* reasoning' to a silence in the text, not an exception - see A de Hoogh, 'The Relationship between China's Protocol of Accession and the GATT 1994: China – Rare Earths and the Incorporation Theory — Off with its Head! (Part 1)' (*International Economic Law and Policy Blog*, 2 June 2014) <worldtradelaw.typepad.com/ielpblog/2014/06/the-relationship-between-chinas-protocol-of-accession-and-the-gatt-1994-china-rare-earths-and-the-in.html> accessed 20 May 2019; however, while accepting this criticism to an extent, two considerations must be noted: first, the SPS Agreement provisions have clearly been inspired by the text of Article XX GATT; second, while the SPS

However, a particularly worrying development concerns the use of subsequent agreements. In *US – Shrimp*, the AB, in interpreting Article XX GATT, stipulated that the provision should be read in view of 'contemporary concerns of the community of nations about the protection of the and conservation of the environment' and had recourse to treaties that are not binding on all Members.[147] While this may be possible under a broad reading of Article 31(3)(c) VCLT, it is 'not enough' for a rule to be merely binding on disputants, nor is it necessary for it to be binding on all Members; rather, 'it suffices that the rule reflects their common intentions'.[148] In defending this view, Pauwelyn notes that the dispute settlement system ought first to resort to 'rules explicitly agreed to by all WTO Members', since other rules would require greater explanation in light of the issue of 'formal legitimacy'.[149] In accepting this admonition, the AB relied mainly on these treaties to explain the meaning of 'exhaustible natural resources' as evidence of the Members' intentions and, consequently, illustrated how the Agreement must be read as part of a broader expression by all Members of their common intentions, leading to evolutionary meanings. This therefore reaffirms that WTO law should not be deemed a separate language with its own independent expression of common intentions but is rather a dialect of the broader language of international law.[150]

### iii. Evolutionary Approach

There are few, if any, examples of a more contentious development in WTO law than the introduction of the so-called evolutionary approach to interpretation, which lies at the heart of the ongoing judicial crisis in the AB.[151] The question over what sources ought to be employed, discussed above, finds at its heart the 'intertemporal knot', which concerns whether the intention of the parties is restricted to the period of treaty-making or, rather, must be viewed as constantly evolving.[152] While the former approach had gained the favour of scholars like Fitzmaurice and Brownlie, and was taken in the *Palmas* case,[153] the latter approach has found invariable support in the ICJ and European Court of Human Rights

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Agreement and GATT are materially proximate, paragraph 11.3 of the Accession Protocol is distinct in that it covers exportation tariffs, a WTO-plus obligation and not importation or domestic treatment, which are the chief areas covered by the GATT. Consequently, the silence in both the text and *travaux préparatoires* cannot be read as extending the scope of Article XX GATT, since this would be *ultra vires* for the AB and panels to create such rights and obligations.

147 *US – Shrimp* (n 63) 926.

148 J Pauwelyn, 'Reply to Joshua Meltzer' (2004) 25 Mich J Int'l L 924, 924.

149 ibid 926–927; J Meltzer, 'Interpreting the WTO Agreements – A Commentary on Professor Pauwelyn's Approach' (2004) 25 Mich J Int'l L 917, 922; for a summary of the relevant discussion from the Pauwelyn-Meltzer debate, see Fitzmaurice and Merkouris (n 101) 236–237.

150 On this point, Wittgenstein held that having the same terminology would indicate linguistic similarity. Had it been otherwise, then, as Wittgenstein puts it: 'If a lion could talk, we could not understand him.' Wittgenstein (n 144) 224; see also, L Wittgenstein, 'Remarks on Frazer's Golden Bough' in JC Klagge and A Nordmann (eds), *Philosophical Occasions* (Hackett Publishing 1993) 133.

151 LT Lee, 'The Legal Basis of "Evolutionary Interpretation" in the WTO Dispute Settlement' (2013) 110 통상 법률 167, 168; United States Trade Representative (n 5) 22–24.

152 C Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016) 172.

153 G Fitzmaurice, *The Law and Procedure of the International Court of Justice, volume 1* (Grotius 1986) 346; I Brownlie, *Principles of Public International Law* (OUP 2008) 633; *Island of Palmas Case (Netherlands v USA)* (1928) II RIAA 829, 845.

(ECtHR) respectively.[154] Moreover, as Djeffal has suggested, a further bifurcation may be established in how evolutionary interpretation is interpreted, namely into 'referential' and 'contential' categories, which respectively mean either that 'changing referents' impact on 'whether the meaning is tied to one certain point in time or whether it follows the course of things', or that although 'a word means something at one point in time, later the meaning is changed'.[155] This must consequently be applied in the context of the AB's reports.

Evolutionary interpretation was first applied by the AB in the *US – Shrimp* case and much of the basic structure of reasoning has since fallen in line with this approach. The AB, following a textual analysis of Article XX(g) GATT, widened its scope to discover the 'object and purpose' of the 'treaty as a whole', as discussed above.[156] Moreover, within its reasoning, the AB relied heavily upon the 'common intentions' of the parties. In tackling the issue of whether only non-living resources would fall under 'exhaustible natural resources', following an analysis of the inconclusiveness of negotiating history and noting the changes introduced during the Uruguay Round,[157] the AB determined that 'the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary"'.[158] Thus, the AB had recourse to extensive non-WTO law in ascertaining a definition.[159] Similar evaluations can be seen in other cases, such as *China – Publications and Audiovisual Products* and *EC – Large Civil Aircraft*.[160]

There are a number of points that must be taken into account with respect to this judgment and subsequent case law. Firstly, in the course of its examination of legislative history, the AB appears to have followed the criteria previously established in the ICJ's *Namibia* Opinion and, consequently, – as Lee argues – met them.[161] Moreover, given the highly cautious and calculated process undertaken by the AB in coming to the conclusion that the 'generic term' must be defined in an 'evolutionary' manner, it is evident that such an approach is 'referential', per Djeffal's dichotomy, and, consequently, only certain broad terms that convey an intention may be interpreted in an evolutionary manner, so long as no singular, continuous meaning can be established. A third consideration concerns the broad expansiveness of when the evolutionary interpretation approach may be applied, with case law pointing to Members' schedules of commitments,[162] the Subsidies and

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[154] Djeffal (n 152) 20; for a classic statement of this view, see I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 140; for the ICJ, see *Aegean Sea Continental Shelf Case (Greece v Turkey)* [1978] ICJ Rep 3 [69–80]; for the ECtHR, see *Matthew v UK* (1999) 28 EHRR 361, para 39.

[155] Djeffal (n 152) 20–21.

[156] *US – Shrimp* (n 63) para 114.

[157] ibid paras 114, 128, 129.

[158] ibid para 130.

[159] For an overview of the discussion over this determination, see the previous sub-section on 'Common Intentions'. It must be noted that while evolutionary interpretations generally require a more expansive view of public international law, this need not be so.

[160] *China – Publications and Audiovisual Products* (n 88) paras 396–397 concerning the terms 'sound recording' and 'distribution' and *EC – Large Civil Aircraft* (n 121) paras 844–855 concerning the term 'the parties'; for a further analysis of case law, see G Marceau, 'Evolutive Interpretation by the WTO Adjudicator' (2018) 21(4) JIEL 791, 803–810.

[161] See Lee (n 155) 190–195.

[162] *China – Publications and Audiovisual Products* (n 88) para 396; see I Willemyns, 'GATS Classification of Digital Services – Does 'The Cloud' Have a Silver Lining?' (2019) 53(1) JWT 59, 69.

Countervailing Measures Agreement,[163] and GATT provisions,[164] as subjects of evolutionary interpretation. Hence, the defining characteristic of which provisions may or may not be defined through an evolutionary interpretation depends on the terms under consideration, rather than their source.

### iv. Special Rules

In considering the peculiar outgrowths of WTO law, Article 17.6(ii) Anti-Dumping Agreement provides further guidance for panels and the AB in interpreting provisions within the Anti-Dumping Agreement itself.[165] Supplementing Article 3.2 DSU, the interpretation of the Anti-Dumping Agreement consists of two prongs: firstly, provisions must be interpreted 'in accordance with customary rules of interpretation of public international law'; thereafter, should the panel discover 'more than one permissible interpretation', then the national measure must be viewed in light of those interpretations.[166] The AB has thus far placed this provision within the interpretative framework of Articles 31 and 32 VCLT, meaning namely that any interpretation must be 'holistic' and the treaty term 'effective' for the interpretation to be within the 'permissible' 'interpretative range'.[167]

While this provision establishes the *prima facie* trappings of essential interpretative pluralism, Fitzmaurice and Merkouris have incisively argued that the principle of effectiveness and the VCLT rules already restrict available interpretations at the first stage.[168] Indeed, given the textual tension that exists between both sentences, panels have remarkably failed to tailor their respective interpretations per this provision.[169] In practice, the experienced tone-deafness on the part of panels has provoked academic dissonance and criticism.[170]

### v. Normative Reshuffling

The final identifiable principle of treaty interpretation relates to the general dominance of WTO treaty provisions over other legal rules, particularly CIL and general principles of law, while acknowledging the balanced relationship with other international law agreements. While WTO law must be, per *Peru – Agricultural Products*, 'interpret[ed] and appl[ied] [...] in its relationship to its normative environment' *viz.* '"other" international

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[163] *United States — Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU by the European Communities* (14 January 2002) WT/DS108/AB/RW, paras 142–145.

[164] See *EC – Asbestos* (n 128) paras 114 and 135.

[165] Anti-Dumping Agreement (n 67) Article 17.6(ii).

[166] ibid.

[167] *US – Continued Zeroing* (n 83) paras 268 and 272.

[168] Fitzmaurice and Merkouris (n 101) 182–190 - while noting this interpretative hurdle for greater independence, the authors still note that the reason for this interpretation rests within the second sentence. Thus, they suggest three possible approaches: the 'non-rigorous approach', which entails a less intense application of treaty interpretation rules; the 'negative approach', which excludes certain interpretations from the definition; and the 'generic approach', which entails a single, generic definition that allows for regulatory flexibility; see also M Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003) 94.

[169] H Spamann, 'Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis' (2004) 38(3) JWT 509, 540 at footnote 144.

[170] For summary of this discussion, see J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation?' (2003) JIEL 113, 115–123 - as Greenwald notes, 'in the hands of the panels and the Appellate Body, Article 17.6 has quickly become a dead letter'. However, he has agreed with some of the AB's reasoning, especially on the definition of 'zeroing'.

law',[171] and international law provisions may 'prevail over the general provisions of the Vienna Convention' when this is made possible under 'specific provisions addressing amendments, waivers, or exceptions for regional trade agreements',[172] no specific provision addresses this matter with respect to other sources of international law. As such, the implications of this normative reshuffling must be given critical hermeneutic consideration in terms of the weight given to sources of law and the established role of general international law within the WTO legal system.

Concerning available remedies, Simma and Pulkowski contend that panels would first examine treaty provisions and, only subsequently, 'if this (*sic*) special regime proves insufficient to resolve a case', apply other rules to interpret the law.[173] This has been generally justified on the grounds of WTO law, like other international legal systems, having established a *lex specialis* that would prevent other international legal rules, especially general principles of law and CIL, from prevailing should their provisions be excluded either explicitly or implicitly. While the argument on the grounds of *lex specialis* has generated some degree of criticism and the AB has previously referred to CIL rules on state responsibility,[174] one need not readily accept Simma and Pulkowski's argument, especially in light of the principle of effective interpretation. According to Schreuer, this interpretative rule may either mean that provisions must be interpreted in a way that makes them 'meaningful' or, otherwise, in a way that provides 'maximum effect'.[175] Under the former, more widely and classically accepted definition,[176] only *in extremis* would it be possible for CIL to prevent the exclusive application of already available remedies, as by giving force to the protection of substantive rights, the exclusive nature of the DSU provisions on remedies would be lessened. Under the latter meaning, it would potentially be even more difficult to argue for the DSU provisions to lose their ingrained and intended exclusivity in the name of protecting the substantive provisions.[177]

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[171] ILC (n 16) para 423.

[172] *Peru – Additional Duty on Imports of Certain Agricultural Products* (*Peru–Agricultural Products*) (20 July 2015) WT/DS457/AB/R, para 5.111; Bossche and Zdouc (n 41) 68 make reference to the issue of whether this could also expand to other non-WTO law.

[173] B Simma and D Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17(3) EJIL 483, 488.

[174] ibid 488–490; with respect to CIL on State responsibility, the AB made direct reference to ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) A/56/10, article 51 in its reasoning in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (15 February 2002) WT/DS202/AB/R, para 259 - this could be a potential future reference point in determining the applicability of broader CIL, particularly on State responsibility, in WTO law, in particular since the DSU provisions may be seen as having 'contract[ed] out' the Members from relying upon remedies outside of the confines of the DSU per the panel's reasoning in *Korea – Procurement* (n 68) para 7.96.

[175] CH Schreuer, 'International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?' in R Hofmann and CJ Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (Nomos 2011) 2.

[176] H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1947) 26 BYIL 48.

[177] ibid 53 - while still a disputed topic, and noting the restrictions of general rules of law as potentially 'not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means', the *expressio unius est exclusio alterius* rule would likely establish that the Members all knowingly consented to restrict the available gamut of remedies available to themselves.

While these intrinsic secondary rules seem to be a topic of great discord within both WTO law and broader international law,[178] one possible solution could well be found in the use of the principle of harmonious interpretation. The extrinsic application of this principle holds that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation',[179] which could be taken to mean that, while other international law norms do not *per se* supersede WTO law unless otherwise provided, they clearly constitute vital ingredients in the normative pool in which WTO law finds itself and could serve as either defences or interpretative considerations under, for instance, Articles 31(2) or 31(3) VCLT. However, this remains to be further addressed in WTO jurisprudence as a long-term focal point.

## IV. Humpty-Dumpty in International Law

Any discussion on the coherence of the AB and its approach to treaty interpretation begs an assessment of general international law and its condition. This inevitably turns the discussion towards the fragmentation of international law, a question which prompted a 2006 ILC report.[180] The significance attached to this question relates to the putative creation of 'self-contained regimes', prompting 'the loss of an overall perspective on the law', even the distinct application of identical rules, and consequent international legal incoherence.[181] This Section seeks to address a more restricted reading of fragmentation than the ILC report, which is understood as a conflict between general and aberrant interpretations of provisions owing to a divergence in international courts' or tribunals' perceptions, methodology and suppositions, particularly on treaty interpretation, but not resulting from *express* treaty deviation.[182] Following the *quaestio disputata* model, the principal arguments for legal pluralism are first set out. Subsequently, international community theory responses, defined *supra*, are laid out.

### A. The Case for Hermeneutic Pluralism

In endorsing differentiation in treaty interpretation, Weiler first argues that, externally, treaty interpretation is more 'indeterminate' than domestic interpretation, with a largescale culture of extrajudicial settlement and rarer contestation of judicial decisions.[183] Secondly, with respect to treaty differentiation, the emergence of new treaties and treaty rules and the ever-growing range of norms and actors leads to the development of 'equally binding' and 'conflicting' legal systems with 'little horizontal coordination'.[184] These factors jointly result in the emergence of two conflicting 'themes': global governance and fragmentation. These lead, *inter alia*, to international courts having to respect States' intentions and

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[178] Even Pauwelyn, who advances the theory that since all WTO provisions are reciprocal they may not prevail over a WTO panel, acknowledges that they 'cannot form part of the basis of legal claims' but only serve as a 'valid legal defence': see Pauwelyn (n 14) 476.

[179] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Resolution* [1971] ICJ Rep 276 para 53; A McNair, *The Law of Treaties* (Clarendon Press 1961) 466–467.

[180] ILC (n 16).

[181] ibid para 516.

[182] Unlike the report, this Section only relates to conflicts in how different provisions are interpreted and, consequently, relates to relevant general international legal rules.

[183] JHH Weiler, 'Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century (draft article)' (International Legal Theory Colloquium, New York University School of Law, Institute for International Law and Justice, 2006) 7–12.

[184] ibid 12–19.

develop their own systems and existing inter-systemic differences when differentiating their own methods.[185] Consequently, the AB and panels would maintain a seemingly distinct interpretative approach from other international courts and tribunals in light of their jurisdictional restrictions and the nature of their self-contained regime.

Other significant arguments have been presented. Fischer-Lescano and Teubner contend that international law faces 'polycentric globalization', which fosters 'global villages' that have themselves become 'anything but [...] harmonious'.[186] Consequently, the proliferation of international law into myriad areas brings to mind, to expand Abi-Saab's metaphor, 'a parasitic plant [...] seizing on all opportunities and latching onto anything that gives it the possibility of moving upwards towards the light'.[187] The race to expand has forced the system to 'no longer [be] structure-based', but rather become 'process-based'.[188] This implies that each of the separate regimes thus becomes governed by its own legal rules that could, concerning treaty interpretation, form separate norms applicable to their specific subject-matter, especially in relation to questions of treaty conflict.

Taking these points as the chief justifications for a legal pluralist viewpoint, its normative implications require some explanation. Legal pluralism cannot be equated with the recognition that a plurality of legal sources, norms and institutions exist; on the contrary, while acknowledging that a welter of institutions and sources exist is its *conditio sine qua non*, legal pluralism goes beyond by challenging 'legal authority', claiming an absence of certainty over where power rests.[189] Of course, the logical question that follows such a supposition is how to properly rank or order these sources and, thus, prevent conflict. No convincing answer has yet been advanced.[190] Unlike Griffith's seminal observations, international law does not have as wide a variety of *recognised* sources comparable to national law.[191] What must further be recognised, however, is that international law is a decentralised system that finds amongst its roots State voluntarism and a narrow reading of restrictions on sovereignty.[192] Consequently, this position must be understood as entailing regime self-sufficiency that is, at best, only rudimentarily

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[185] ibid 19–23; the other conclusions drawn by Weiler are that treaty interpretation is gaining prominence and so, consequently, is scrutiny over its legitimacy; the principles of treaty interpretation 'need to be more sharply and above all explicitly defined so as to increased predictability and hermeneutic legitimacy'.

[186] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) Mich J Int'l L 999, 1005–1006.

[187] G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31(4) NYUJILP 919, 931 with reference to CIL.

[188] Fischer-Lescano and Teubner (n 186) 1007 - accordingly, international law is seen as deriving its uniformity from processes that 'transfer binding legality between even highly heterogeneous legal orders'- however, pursuant to the authors' claims, this is not enough to inform or connect the different regimes that have formed.

[189] BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) SLR 375, 375.

[190] ibid 387–390 for a description of the various themes and trajectories observed by distinct commentators.

[191] J Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism and Unofficial Law 1, 34–35 with respect to national law; a key criticism of such internationalist implications is made in M Koskenniemi, *The Politics of International Law* (Hart 2011) 354: 'The wider the laws grasp, the weaker their normative force. Until, finally, one becomes unable to distinguish between the gunman and the policeman, the regime of corruption from the regime of contract.'.

[192] To this effect, see *The Case of the SS "Lotus" (France v Turkey)* (1927) PCIJ Rep Series A No 10, 18 and *Case of the SS "Wimbledon" (UK and others v Germany)* (1923) PCIJ Rep Series A No 1, 25 respectively.

connected to other systems and involves general international law only upon institutional collapse.[193]

## B. Hermeneutics as Rift-Stitching

### i. Responses to Legal Pluralism

In answer to the arguments regarding the external issues of hermeneutics, three points can be made. Firstly, rules on treaty interpretation stemming from the VCLT and CIL have generally been espoused by most international tribunals.[194] While some evident differences have come to exist, discussed below, these are generally aspects of substantive conflict that could and should be resolved through judicial dialogue based on the principle of harmonious interpretation. Consequently, international courts would be able to take the interpretative pool surrounding treaties into account when reaching their decisions. Second, *contra* Weiler, the mere fact that there is indeterminacy does not warrant differentiation. Rather, it could be explained by difficulty in establishing jurisdiction, the costs of litigation, or purely political concerns.[195] While these two factors may be firmly interconnected, the latter does not necessarily follow from the former. Finally, there is, notably in the WTO system, certain evident hermeneutic predictability that defies Weiler's own pronouncements.[196]

The issue of institutional inter-relations brings to prominence the role of treaty interpretation.[197] Recognising the natural limitations of recourse to general international law, it must be noted that 'self-contained regimes'[198] possess unique laws that expand into specialised areas. As Higgins points out, however, this can be compared to past events including the 1970's petroleum concessions and it would be a 'flaw in logic' to expect any

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[193] To this effect, see A Marschik, *Subsysteme im Völkerrecht: Ist Die Europäische Union Ein 'Self-Contained Regime'?* (Duncker & Humblot 1994) 162, as cited and explained in Fischer-Lescano and Teubner (n 185) 1030.

[194] For an assessment of contentions over the practical value of the rules of treaty interpretation and their utility, see F Zarbiyev, 'The "Cash Value" of the Rules of Treaty Interpretation' (2018) LJIL 1; for arguments to the effect that the VCLT rules are widely accepted in international law, see *Kasikili/Sedudu Island* (n 9) for the ICJ; see Section 3.2 for AB and panels; for the ICC, see D Akande, 'Sources of International Criminal Law' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 44–45; for the ECtHR, as a summary explanation, see LE Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools* (Springer 2018) ch 5.

[195] To note the particular difficulty in distinguishing international law from international relations, see Koskenniemi (n 191) ch 15; for discussion of the practical difficulties of enforcement, see D Kritsiotis, 'International Law and the Relativities of Enforcement' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 248–266.

[196] To this effect, Weiler (n 183) 12 claims that if a 'strict' interpretative approach does exist, it 'should, in theory, lead to "the correct" result independently of lawyering skills'. However, as he argues, the system has provided for a 'rule of lawyers'. However, firstly, the ILC report argues against this conclusion (see ILC (n 16) para 492). Moreover, as Abi-Saab argues in light of WTO law, a practical overview of its case law would lead one to believe that the AB's approach is one of 'strict constructionism', Abi-Saab (n 101) 461 and the AB has itself amply argued for and largely achieved hermeneutic 'security and predictability' (see *supra*, particularly Section 3.2). This point is especially poignant as a counterargument, as Weiler has more recently made this very point with respect to WTO law - see Weiler (n 52) 199 *et seq*.

[197] Notably, as Koskenniemi affirms, the question of fragmentation is potently felt when there is a search for 'institutional hegemony' and rules conflict - see M Koskenniemi, *The Politics of International Law* (Hart 2011) 334–339; see also ILC (n 16) paras 10–15.

[198] The ILC report advises against using this term since it does not accurately reflect the state of international law - see ILC (n 16) para 492.

complete snag from general international law.[199] Through treaty interpretation, international law serves to undergird many of these treaty regimes.

**ii. Seeds and Sprouts of Consistency**

The need for a systematic approach to treaty interpretation ultimately boils down to the guarantee of legal certainty. This may best be understood with reference to the period preceding the adoption of the VCLT provisions. During this timeframe, the level of perceived hermeneutic ambiguity had been characterised in the following bleak terms: 'a mere application of one [rule of interpretation], or a shrewd combination of two of them, may yield almost whatever conclusion the interpreter desires'.[200] In light of the decentralised nature of international law, the numerous actors and rules in play, and the uneven judicialisation across sub-fields,[201] the urgent need for clarity in how a consistent understanding of the 'objectivized intention of the parties' is to be reached grew immensely.[202] This comprehensive obscurity had been most bluntly expressed in Lord McNair's infamous assertion: '[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation'.[203]

With this backdrop, both the *Institut de Droit International* (IDI) and the ILC's early discussions were centralised in achieving just this: a general approach that distributed interpretative emphasis between the textual, teleological and intention-based approaches.[204] Sir Hersch Lauterpacht's critical involvement in the IDI discussion involved drawing and modifying a report on the law of treaties during the IDI's Bath and Sienna sessions that included focus on treaty parties' common intentions, regarded the treaty text as one source of discovering these intentions, and placed particular emphasis on *travaux préparatoires*.[205] This initial emphasis was changed and, in the course of the fiery debates that took place during the Bath, Sienna, and Grenada sessions, which saw a dramatic shift when sir Gerald Fitzmaurice replaced Lauterpacht as Rapporteur, focus moved towards textualism. More attention was placed, at least in the discussions, on general rules of international law, and a significant reduction in the adopted Articles occurred, cutting their

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[199] R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55(4) ICLQ 791, 803.

[200] T-C Yü, *The Interpretation of Treaties* (Columbia University Press 1927) 72, as cited and explained in J Stone, 'Fictional Elements in Treaty Interpretation – A Study in the International Judicial Process' (1954) 1(3) SLR 344, 344.

[201] See DB Hollis, 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (CUP 2015) 80 *et seq*.

[202] The conditions that characterised early 20th century dispute settlement had led to interpretations 'contra legem' and a substantial decrease in legal certainty. Hence, the object of harmoniously crystallising treaty interpretation into cogent rules arose - see E Björge, 'The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (CUP 2015) 191, 195.

[203] McNair (n 179) 364.

[204] This simplification draws on the principles drawn by Fitzmaurice and *de facto* served to frame the debate within the IDI and ILC - see G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 BYIL 203, 204–209.

[205] Hersch Lauterpacht's role was critical in the early IDI discussion stages, particularly in favouring the importance of reference to *travaux préparatoires*. This can be seen in his initial report on treaty interpretation and draft resolution, at H Lauterpacht, 'De l'Interprétation des Traités' (1950) 43(1) Annuaire de l' Institut de Droit International, Session de Bath 366–432 and 433–434 respectively; for Lauterpacht's second report, issued during the Sienna session, see H Lauterpacht, 'De l'Interprétation des Traités' (1952) 44(1) Annuaire de l'Institut de Droit International, Session de Sienne 197–221.

total number from six to two.[206] As such, a concise set of principles and factors indicating common intentions had been accepted that would serve to establish a balanced, unitary approach to treaty interpretation. Nonetheless, while the resolution did confirm the necessary valuation in treaty interpretation, the scepticism of many IDI members in systematising all technical rules appears evident in the many principles that had been left outside the text of the resolution.

The later discussions that took place at the ILC regarding the framing and construction of the VCLT rules drew heavily on the IDI discussions, with Waldock's draft general rule 'correspond[ing] to Article 1 of the Institute's resolution'.[207] In doing so, the key focus of establishing a general rule of treaty interpretation developed from the earlier discussions and conclusions on treaty interpretation codification.[208] By enabling the general rule to serve as a 'crucible', it thus provided legal certainty by consistently setting down what factors must be taken into account, and in what manner, when establishing the objectivised intention of the parties.[209] As such, the very purpose of the general rule of interpretation has served to break with the legal uncertainty that preceded it and to lay the ground for consistent interpretation, legitimate expectations and the hermeneutic synchrony between international courts and tribunals.

Having sprouted from the early attempts to systematise treaty interpretation, the VCLT general rule of interpretation has gained prominence for its status in customary law, discussed above. Consequently, in practice, most courts respect the role of this principle with respect to their own systems, some having illustrated this in the period before VCLT's entry into force,[210] except where this is called for by the normative character of their subject-matter, when justified as *lex specialis*.[211] However, noting this limitation regarding mere intrinsic hermeneutics, several points are relevant concerning the integration of other legal sources. WTO law demonstrates how it discovered the meaning of 'evolutionary interpretation' using extrinsic sources based on Article 31(3)(c) VCLT.[212] Parallels may

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[206] For the final resolution, see IDI, 'Résolutions adoptées par l'Institut à la Session de Grenade, 11-20 avril 1956' (1956) 43(1) Annuaire de l'Institut de Droit International, Session de Grenade 358–359 ; for brief discussion on the sequence of events and their significance, see A Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (CUP 2015) 47; concerning the role of general international law, see, for instance, P Merkouris, 'Debating the *Ouroboros* of International Law: The Drafting History of Article 31(3)(c)' (2007) 9(1) International Community Law Review 1, 6–11; it is further noteworthy that, whilst Lauterpacht had already noted the uselessness and potential danger of systematising technical interpretation, the final resolution went further in its reduction of the broad principles it embodies.

[207] H Waldock, 'Third report on the Law of Treaties' (3 March, 9 June, 12 June and 7 July 1964) A/CN.4/167 and Add.1-356.

[208] ILC (n 98) 219 para 8.

[209] ibid.

[210] *Golder v UK* (1975) 1 EHRR 524.

[211] For historical backing, this has been a point made by Fitzmaurice - see, for instance, G Fitzmaurice, 'Third Report on the Law of Treaties' (1958) A/CN.4/115 and Corr.1, 40 para 76; it is particularly relevant with respect to the ECHR and ICC, see footnote 189 for details; moreover, see Popa (n 194) 362 for further similarities in what she describes as 'overbuilding' and 'holistic' reading.

[212] VCLT (n 1) Article 31(3)(c) has provided for greater integration to become possible, especially given that it represents the principle of systemic integration, which has been variously regarded as grounds for the reference by international courts and tribunals to other treaty systems; however, the potential for this norm to bridging different treaty systems remains to be seen; see discussion in Section 3.2 for more detail.

also be made with other courts.[213] Rules on treaty interpretation have also prompted other similarities, particularly regarding 'supplementary means'.[214]

Finally, interpretation could be seen as a method of resolving inter-tribunal disputes over interpretation, particularly as means of judicial dialogue and balancing.[215] Singular interpretation could potentially serve as a resolution for presently conflicting interpretations, especially since, following the increase in the number of international courts and tribunals, the need for balance between different jurisdictions and norms becomes more prominent.[216] By enhancing the significance of the normative environment surrounding treaty regimes, international courts may both respond to the 'insufficiencies or the perceived lack of flexibility of the general system' while accepting and relying on other regimes and employing the core hermeneutic crucible that characterises them.[217]

Absent great normative differentiation, and recognising treaty interpretation as an art in all but name,[218] one may conclude that the AB and panels follow a general hermeneutic approach, particularly comparable to the ECtHR and ICJ in the highlighted ways. Moreover, the binding effect of hermeneutics extends the force of general international law, beyond serving as a court's final refuge, to an art integral to sustaining *leges speciales*.

## V. Conclusion

This article has been written with the objective of describing the key characteristics of the AB's approach to interpreting WTO law. In referring to modifications to the dispute settlement system and AB and panel case law, as well as general international legal theory and practice, the following conclusions may be reached.

The institutional changes to the dispute settlement system have illustrated a shift from the previous tension between rule-based and power-based dispute settlement, with the former ultimately gaining favour during the Tokyo and Uruguay Rounds. The resultant WTO dispute settlement system contains certain institutional guarantees that allow for

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[213] For the ECtHR, see *Tyrer v UK* (1980) 2 EHRR 1, para 31; for the ICJ see *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding SC Resolution* [1971] ICJ Rep 276; see *Roger Judge v Canada* (13 August 2003) CCPR/C/78/D/829/1998 8 paras 10.3–10.4 for a comprehensive overview of tribunals citing WTO judgments until 2013; see G Marceau, A Izaguerri and V Lanovoy, 'The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation' (2013) 47(3) JWT 481.

[214] The ICJ does tend to develop a more restrictive reading of Article 32 VCLT, while the ECtHR and AB and panels employ this to establish greater evolutionary examinations - see Popa (n 194) 363.

[215] With respect to WTO–MERCOSUR relations, see *Brazil – Measures Affecting Imports of Retreaded Tyres* (3 December 2007) WT/DS332/AB/R, paras 226 *et seq*; for the relations between the now defunct NAFTA 1.0 and WTO, see *NAFTA Arbitral Panel Established Pursuant to Chapter Twenty – In the Matter of Cross-Border Trucking Services* (6 February 2001) Final Panel Report, Sec File No USA-MEX-98-20080-01, para 238.

[216] *US–Gasoline* (n 9) 22; for discussion, see van den Bossche and Zdouc (n 41) 547–548.

[217] Simma and Pulkowski (n 173) 529.

[218] To this effect, see U Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26(1) EJIL 169, especially 171–175; however, taking into account the indeterminacy of science, especially given the half-life of facts, and, according to Hacking's dynamic nominalism, its potential construction of the world, see I Hacking, 'Making Up People' in T Heller et al (eds), *Reconstructing Individualism* (Stanford University Press 1986). One may go further and describe hermeneutics, noting the potential theoretical existence of 'pure' interpretation, as a sobering art of progressive and systemic creative moderation - see H Kelsen, *Pure Theory of Law* (2nd edn, University of California Press 1970) 35; however, see also R Kolb, Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public (Bruylant 2006) 3 *et seq*.

prior concerns to be addressed, such as the introduction of authoritative interpretations. The key enhancements affecting the liberty and congruence of dispute settlement are the negative consensus rule for report adoption and the AB's establishment. However, the DSU entails that decisions must align with previous GATT reports.

With respect to treaty interpretation, the AB and panels have recognised an array of sources in previous jurisprudence, which serve the functions of application, use, or both. Alongside the adoption of a VCLT-centric approach to treaty interpretation, this has undergirded the close-knit relationship between WTO law and general international law. Indeed, in answer to the central question, the defining characteristics of WTO interpretation are its deep reliance on the VCLT as an expression of CIL alongside other rules, including the principle of effectiveness, deeply ingrained holism, textualism and reliance on external sources to establish intention, especially in establishing Members' common intentions, and the use of referential evolutionary interpretation where strict intentions cannot be established.

Finally, the question of the state of international law is important, at the very least for establishing customary rules of interpretation. In assessing the issue of the fragmentation of international law, the arguments for legal pluralism are first considered, particularly regarding the issue of indeterminacy and the lack of coordination between institutions, and the supposedly expansive spread of international law into many fields. Considering this, these assessments are disputed. Given the very nature of the VCLT's project in systematising interpretation and accepting the common hermeneutic practices shared across tribunals, the VCLT and CIL rules and principles of treaty interpretation are shown to function as means for judicial dialogue, conflict resolution and harmonisation.

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# Facing the Future: The Case for A Right to a Healthy Environment for Future Generations under International Law

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**Keywords**
INTERGENERATIONAL EQUITY; RIGHT TO A HEALTHY ENVIRONMENT; INTERNATIONAL HUMAN RIGHTS LAW; INTERNATIONAL ENVIRONMENTAL LAW

**Abstract**

This paper seeks to examine whether the current framework of international human rights law formally grants the right to a healthy environment to future generations. There has been much debate regarding the effectiveness of international human rights law in guaranteeing environmental sustainability in particular without the consideration of future generations. The right to a healthy environment was specifically chosen both as a means of narrowing the scope of this research and given that future generations are a fundamental concept of international law relating to environmental sustainability. In Section II, all relevant concepts, including 'future generations', 'intergenerational justice and 'environmental sustainability' will be defined and explored. In addition, a link will be established between intergenerational equity and sustainable development in light of current literature and scholarly discussion. The following section discusses how the link drawn between environmental protection, human rights protection and environmental sustainability provides for a common approach to fully handling current environmental issues. Subsequently, a positive analysis of present day international legal instruments, customary international law and case law will be conducted, to determine the current status of future generations regarding the right to a healthy environment. Use will also be made of academic literature on the subject, including extensive research carried out by scholars such as Edith Brown Weiss and Bridgit Lewis. To conclude, the findings of each section will be summarised, and a final conclusion will be drawn as to the state of future generations in international law and the potential for the right to a healthy environment to be accorded to them.

## I. Introduction

### A. Introductory Remarks

Global environmental change affects our capacity to achieve environmental sustainability, and its implications are inherently long-term. As a result, our future generations are increasingly vulnerable to the consequences of the present generation's actions. For instance, their ability to enjoy fundamental human rights will be impacted by the way we enjoy our own.

This paper seeks to examine whether the current framework of international human rights law formally grants the right to a healthy environment to future generations and how

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such an extension of the right can assist in effectuating environmental sustainability.

Despite the recognition of its growing importance, there has been much debate regarding the effectiveness of international law in guaranteeing environmental sustainability, in particular, without the consideration of future generations. The current imperative is that the Intergovernmental Panel on Climate Change has recently predicted that the global community now has less than 12 years to put measures in place to address climate change in order to avoid conditions that are no longer capable of sustaining human life on Earth.[1] However, current environmental and human rights laws remain focused on past breaches of such laws and require that breach to have occurred before any redress is given. The lack of action on the part of governments and corporations in the present may have little impact on current generations but has the potential to have a catastrophic impact on the lives of generations to come, impact for which we will be ultimately responsible. Therefore, the importance of this topic is in leveraging the international community to act on environmental protection measures in the present in order to provide the right to a healthy environment for the future. The right to a healthy environment was specifically chosen since future generations are a fundamental concept of international law in relation to environmental sustainability. It becomes clear that current international human rights law does not provide the right to a healthy environment, neither in its terms nor scope.[2] However, while key United Nations (UN) human rights documents do not include this right, nor explicitly express intergenerational equity as a legal rule or principle, both concepts are found in the regional human rights treaties of Africa and South America, among other legal documents.[3]

## B. Why Focus on International Law?

In order to understand the current status held by future generations in international law and the importance of assigning an international right to a healthy environment to them, it is first necessary to explain why rights must be accorded to future generations on an international level. State sovereignty still lies at the heart of international law and, as a result, some argue that international law does not have the necessary structural capacity to address the rights of future generations in relation to a healthy environment or environmental sustainability.[4] However, the importance of creating such a right for future generations at the international level revolves around the fact that no single country or group of countries has the ability to guarantee a healthy environment for the future.[5]

Only by relying on international law is it possible to encourage cooperation between countries and among communities to fulfill obligations to future generations, or even to elaborate on and codify the relevant norms of intergenerational equity. Indeed, a binding

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1 IPCC, 'Special Report: Global Warming of 1.5 °C' (*IPCC*, 2018) <ipcc.ch/sr15/> accessed 5 March 2019.

2 Peter Lawrence, 'An atmospheric trust to protect the environment for future generations' in Marcus Düwell and Gerhard Bos (eds), *Human Rights and Sustainability: Moral Responsibilities for the Future* (Routledge 2016) 34.

3 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 December 1986) 1520 UNTS 218, art 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988) 28 ILM 156 (Protocol of San Salvador), art 2.

4 Lawrence (n 2) 24.

5 Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1990) 84 American University International Law Review 19, 22.

multilateral treaty is chiefly capable of addressing relevant concerns regarding 'trade competitiveness'[6] and of delivering the necessary commitments in the future, which is essential for intergenerational justice.[7] This is because codification reduces ambiguities around expected behaviour and distinguishes cooperative behaviour from uncooperative behaviour.

Within international law, some of the available legal instruments will be binding, while some may be non-binding, or may become binding over time. To the extent that norms represent customary international law, they will become binding upon all countries, whether or not they are party to the relevant agreement. We must encourage both general legal instruments, articulating intergenerational rights and obligations in relation to our planet, and binding agreements directed to conserving specific aspects of the environment.

### C. Structure and Methodology

This paper, and therefore its discussion, is divided into 5 sections. Firstly, Section II will begin by defining the concepts of 'future generations', 'intergenerational justice' and 'environmental sustainability' as herein understood. A closer look will then be taken at the underlying principles of intergenerational equity as outlined by Edith Weiss Brown, as well as Passmore's 'chain of love' theory as it relates to future generations. This paper does not purport to deal with questions surrounding the non-sentience issue, the conceptualisation of future generations in human rights discourse, or how current generations can expressly owe obligations to future ones, given that these issues are particularly abstract, and their theoretic nature goes beyond the scope of this paper. Secondly, a link will be established between intergenerational equity and sustainable development in light of current literature and scholarly discussion.

Section III discusses in full how the link drawn between environmental protection, human rights protection and environmental sustainability provides for a common approach to fully handling current environmental issues. By developing an argument based on the right to a healthy environment for future generations, this section recognises and describes the ways in which sustainability requires placement within a human rights framework and how this could potentially impact on State rights and obligations.

In Section IV, a positive analysis of current international legal instruments, customary international law and case law will be conducted in order to determine whether or not a right to a healthy environment exists for future generations. Use will also be made of academic literature on the subject, including extensive research carried out by scholars such as Edith Brown Weiss and Bridgit Lewis. The development and current status of future generations and the right to a healthy environment within international will be traced – acknowledging their context within the notion of sustainability – through an analysis of international conventions, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement and the Declaration of the UN Stockholm Conference on the Human Environment (Stockholm Declaration), as well as case law. Particularly, the approach of international courts, such as the Inter-American Court of Human Rights and the International Court of Justice (ICJ) towards intergenerational equity, and whether intergenerational equity can be perceived as a part of customary international law, will be

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6 Lawrence (n 2) 24.

7 ibid.

examined, with the conclusion that no such legal right is yet assigned to future generations, but noting the potential for advancement.

To conclude, in Section V, the findings of each section will be summarised, and a final conclusion will be drawn as to the state of future generations in international law and the potential for the right to a healthy environment to be accorded to them.

## II. Understanding the Context

### A. Key Concepts

Before discussing the significance of future generations and intergenerational equity to environmental sustainability, we must establish a secure understanding of what each concept individually entails.

Most importantly, as an explanation for why a right to a healthy environment should be granted to future generations, environmental sustainability must first be considered. Although there is no single, universally accepted definition, the idea of environmental sustainability is to 'create and maintain conditions under which humans and nature can exist in productive harmony', which allows for the environmental requirements of the present and future generations to be fulfilled.[8] Immediately, we see that environmental sustainability depends upon future generations having certain entitlements to a habitable environment. In this regard, there are two different ways to ensure that the needs of future generations can be met.[9] The first approach is through 'weak sustainability', by which future generations are compensated for any environmental loss through the creation of alternative sources of wealth.[10] On the other hand, 'strong sustainability' views the environment as 'offering more than just economic potential' and argues that, regardless of wealth, future generations should not inherit a degraded environment.[11]

The term 'generation' is unclear and holds several references, including but not limited to: 1) people sharing the same familial lineage; 2) a group of people with shared beliefs, ie societal generations; 3) a certain age group in society alive at the same time, such as the elderly; or 4) everyone alive today.[12] In this paper, 'future generations' will be defined as referring to generations where 'its members are not yet alive' at the time of reference.[13] This understanding of future generations excludes presently existing younger generations, such as children, since their interests can be considered to be short- or medium-term and would therefore pose restrictions on the effective long-term guarantee of environmental sustainability.[14] As developed from Passmore's conceptual 'chain of love', the remoteness between generations has temporal implications since our concerns differ between generations and, while present

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8 Cynthia Stahl and Todd S Bridges, '"Fully baked" sustainability using decision analytic principles and ecosystem services' (2013) 9 Integrated Environmental Assessment and Management 551; James Kevin Summers and Lisa M Smith, 'The Role of Social and Intergenerational Equity in Making Changes in Human Wellbeing Sustainable (2014) 43 Ambio 718, 721.

9 Summers and Smith (n 8) 725.

10 ibid.

11 ibid.

12 Joerg Chet Tremmel, *A Theory of Intergenerational Justice* (Earthscan 2009) 19–20; Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar 2014) 15.

13 Lawrence (n 12).

14 Hendrik PH Visser 't Hooft, *Justice to Future Generations and the Environment* (Kluwer 1999) 47.

generations' concerns affect us 'in an immediate way', future generations' interests are allegedly 'hidden in a complete autonomy'.[15] Since young children are already born, they are generally treated in a distinct manner by international, regional and local legal regimes.[16] Consequently, given this differentiation, it would be problematic to consider both groups as constituting 'future generations' in light of the legal connotations of the term.

Further, the terms 'intergenerational justice' and 'intergenerational equity' will be used interchangeably to mean the 'concept of fairness among generations in the use and conservation of the environment'.[17] Intergenerational equity views the human race as a partnership between all generations, in which each has the right to inherit an environment which is suitable for maintaining life and equitable access to its resources.[18] As a result, the present generation is seen as the custodian of the planet for future generations. In this case, intergenerational equity extends the scope of social justice in the future.[19] The basis of intergenerational equity is formed by three principles – the principle of conservation of options, the principle of conservation of quality and the principle of conservation of access.[20] Conservation of options requires each generation to conserve the diversity of natural and cultural resources. Conservation of quality requires each generation to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received and enjoyed. Conservation of access requires equitable access to use and benefit of the planet's resources.[21] In sum, each generation must conserve the environment in order to allow future generations to access and enjoy the same resources being presently enjoyed and to receive the planet in 'no worse condition' than that in which it was received by the present generation.[22]

### B. The Common Thread: Intergenerational Equity within Sustainability

Over time, it has become evident that environmental sustainability is somewhat premised on, and relies on, a commitment to intergenerational justice,[23] as this is an essential component of sustainability. Since intergenerational equity is established on the basis of maintaining available resources whilst simultaneously ensuring there is no degradation of the environment, there is a need for a proper balance to be struck between the current use of the environment and its conservation for future use.[24] Concern over environmental externalities focuses on the

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15 ibid.

16 Laura Westra, *Environmental Justice and the Rights of Unborn and Future Generations: Law, Environmental Harm and the Right to Health* (Rutledge 2006) 3 et seq.

17 Edith Brown Weiss, 'Intergenerational Equity', *The Max Planck Encyclopedia of Public International Law* (February 2013) <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421> accessed 25 April 2019; Summers and Smith (n 8) 719.

18 Summers and Smith (n 8) 719.

19 ibid.

20 ibid 725.

21 ibid.

22 ibid.

23 Edith Brown Weiss et al, *International Law for the Environment* (West Academic Publishing 2016) 52; Edith Brown Weiss, *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press 1992) ch 12.

24 Rajendra Ramlogan et al, *Sustainable Development: Towards a Judicial Interpretation* (Brill 2011) 213; Mélanne Civic, 'Prospects for the Respect and Promotion of Internationally Recognized Sustainable Development Practices: A Case Study of the World Bank Environmental Guidelines and Procedures' (1998) 9 Fordham Environmental Law Review 231, 237.

costs that must be faced by both current and future generations due to the pollution of the air, water and soil. Such concern ensures that environmentally damaging action is contemplated before being taken and that the benefits of that contemplated action exceed its costs. However, in reality, this is not effective, as the costs and benefits of these actions are assessed solely from the perspective of the present generation.[25] Sustainability requires that the environment is looked at not only as an 'investment opportunity' but as a 'trust' that is continually passed on to each new generation by their ancestors, for their benefit and use. This, therefore, demonstrates the existence of both rights and responsibilities and, even more importantly, that future generations can also have rights.[26] However, those rights require the present generation to respect them.[27] Consequently, each generation should use the 'natural system' to improve the human condition.[28] When one generation degrades the environment, the obligation to care for this natural system is violated.[29] In this case, other generations may have the obligation to restore the system, though not entirely and not bearing all the costs. Rather, such costs should be distributed across generations, which can be difficult to implement. However, there are measures by which this is possible, such as long-term bonds. This would ensure that each generation leaves the planet in no worse condition than it was received and grants subsequent generations equitable access to its resources and benefits.[30]

One need not look further than one of the major achievements of the international community in reaching a consensus on the path towards sustainability, namely the Brundtland Report of the World Commission on Environment and Development (WCED).[31] The WCED was established in 1983 by the UN in order to address concerns over the 'accelerating deterioration of the human environment and natural resources' and to 'propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond'.[32] In doing so, the UN recognised that environmental issues are globally relevant and therefore that it was necessary for all States to establish policies on sustainable development. This definition of sustainable development entails 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs', [33] and clearly shows that the discussion on sustainability is one of our responsibilities and duties to future generations. Since its creation, the Brundtland Report has served as the basis for discussions on both future generations and sustainability.

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25 Weiss et al (n 23) 52; Weiss (n 23) ch 12.

26 Weiss et al (n 23) 20.

27 Weiss et al (n 23) 52; Weiss (n 23) ch 12.

28 ibid 21.

29 ibid 21.

30 ibid.

31 Gro Harlem Brundtland, 'Report of the World Commission on Environment and Development: Our Common Future' (1987) UN Doc A/42/427; Lothar Gündling, 'Our Responsibility to Future Generations' (1990) 84(1) AJIL 207, 208; The report aimed to emulate the spirit of the Stockholm Conference, which had introduced environmental concerns into the international political sphere, and discussed the environment and development as a single issue.

32 United Nations, 'Report of the World Commission on Environment and Development – Our Common Future' (United Nations, 2000) available at <sustainabledevelopment.un.org/milestones/wced> accessed 1 June 2019; IDRC, 'Brundtland Commission/ Commission Brundtland (WCED)' (IDRC Digital Library, 2015) available at <idl-bnc-idrc.dspacedirect.org/handle/10625/53401> accessed 1 June 2019.

33 Brundtland (n 31).

As aforementioned, intergenerational equity provides for the recognition of the interests of future generations and can be seen as an extension of interest theory and the expression of the specific rights owed to future generations by present generations, namely that future generations must receive the planet in no worse condition than it was previously received and have equitable access to its resources. There are clear parallels to the notion of sustainability as explained above, with both notions holding similar objectives and being intrinsically linked to each other and to human rights. With this, and the implications of the principles of intergenerational equity, such as the conservation of access, in mind, it becomes clear that intergenerational equity is incompatible with 'weak sustainability', given its inequitable redistribution.[34] The Brundtland definition, combined with the notion of equity, points in the direction of strong sustainability.[35]

Equity provides that each generation has the obligation to conserve and protect the environment for the use and benefit of both present and future generations.[36] Therefore, when contemplating environmental sustainability, we must recall that the central tenet behind it is that while the needs of the present are being met, with the use of environmental factors, it must also be ensured that the ability of future generations to benefit from a healthy, resourceful environment is not being conceded. Accordingly, the WCED outlined a list of legal principles, including the right to a healthy environment as a fundamental right, which involved the obligation to conserve the environment for present and future generations.[37]

However, the idea of preserving the environment for the use of present and future generations existed long before the Brundtland Report was published. For instance, following the Stockholm Declaration, the need to protect the environment in the interests of present and future generations was mentioned several times in Resolutions of the UN General Assembly.[38] Moreover, the significance of future generations within the notion of sustainability was considered in the Human Development Report 1994.[39] Later, in 1995, the Copenhagen Declaration on Social Development reminded the international community of its 'responsibility to ensure intergenerational environmental equity by sustainable use of environment.'[40] Further, through the inclusion of sustainability as a guiding principle of the Paris Agreement, future generations can be seen as beneficiaries of sustainability.[41] While the Paris Agreement does not explicitly mention future generations, it includes language which

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34 Summers and Smith (n 8) 725.

35 Peter Lawrence (n 2) 29.

36 See, in general, Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations Press 1989).

37 ibid; Expert Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Graham & Trotman/Martinus Nijhoff 1987) 25–33.

38 Historical responsibility of States for the preservation of nature for present and future generations: UNGA Res 38/5 (30 October 1980) UN Doc A/RES/35/8; and Resolutions: UNGA Res 42/186 (11 December 1987) UN Doc A/RES/42/186; UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53; UNGA Res 44/207 (22 December 1989) UN Doc A/RES/44/207.

39 United Nations Development Programme, *Human Development Report 1994* (OUP 1994).

40 UNGA, 'Copenhagen Declaration on Social Development' (14 March 1995) UN Doc A/CONF.166/9, principle 26(b).

41 Bridgit Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7 Transnational Environmental Law 69, 83; Paris Agreement (n 7) Preamble paras 8, 16, Arts 2, 4, 5, 6, 7, 8, 10.

could be interpreted as 'bringing the rights of future generations within the scope of States' obligations'.[42] States are indirectly required to consider the future impacts of their policies, potentially having the ultimate effect of promoting and protecting the rights of future generations, if even just implicitly.[43] Nonetheless, while this is a progressive step, it still falls short of what is truly required in order to adequately protect the rights and interests of future generations. A greater discussion of the implications of certain wording and inclusions within the Paris Agreement's preamble will be covered in Section V.

## III. An International Right to a Healthy Environment for Future Generations as an Engine of Environmental Sustainability

As the implications of global environmental change and sustainability are inherently long-term, we are required to address these issues alongside intergenerational justice, given that they span several generations. The idea of a right to a healthy environment is developed from the interrelation between environmental protection, human rights protection and sustainability. We can go one step further with the idea of sustainability at the forefront, leading to the idea that since 'all' human beings are entitled to such rights and protection, there is no true reason for future human beings to be excluded from this mechanism or system. For instance, the Rio Declaration on Environment and Development (Rio Declaration) reaffirmed the principles of the Stockholm Conference. While it did not expressly provide for the right to a healthy environment, it expresses an evolution of the concept of the right to a healthy environment, translated into the principle of sustainable development composing the rights of future generations.[44] Moreover, the impact of environmental harms will be mostly felt by unborn generations, which will face irreversible harm to their environment:

> Environmental conditions help determine whether people are healthy or not, and how long they live. They can affect reproductive health and choices, and they can help determine prospects for social cohesion and economic growth, with further effects on health. Changes in the environment – pollution and degradation, climate change, extremes of weather – also change prospects for health and development.[45]

In addition, it can be posited that the concept of sustainability incorporates the notion of a right to a healthy environment, as it is undeniable that basic environmental health is necessary for the enjoyment and exercise of already recognised human rights, the overall functioning of the biosphere and all aspects of human survival.[46] Therefore, environmental degradation will interfere with fundamental human rights to the extent that those rights become violated.[47] As

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42 Lewis (n 41) 72.

43 ibid 83.

44 UNGA 'Report of the United Nations Conference on Environment and Development' (28 September 1992) UN Doc A/CONF.151/26, principle 1.

45 Alex Marshall et al (eds), *Footprints and Milestones: Population and Environmental Change* (UNFPA 2001).

46 Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law 103, 112.

47 ibid - according to Shelton, 'the human rights directly threatened by environmental deterioration include the right to life, the right to health, the right to privacy, the right to suitable working conditions, the right to an adequate standard of living, and rights to political participation and information.'.

a consequence, rights and obligations have been progressively formulated in order to address such environmental impact, leading to new concepts and principles emerging. It is evident, then, that in order to prevent environmental damage, it becomes necessary to establish a right to a 'healthy' environment to human beings, including those of future generations, in a legally binding international instrument.

Traditionally, international human rights law and international environmental law are separate, and international human rights law has not included the environment as a distinct right, despite evidence that a degraded environment threatens traditional human rights.[48] Rather, it involves other rights which may be violated by environmentally harmful action, such as the rights to life and health,[49] and those which depend upon a healthy and stable environment in terms of 'water, food and shelter'.[50] Therefore, a logical conclusion is the creation of an international right to a 'healthy' environment for future generations as an attempt to reinforce environmental sustainability and protect the rights of people through a right which encompasses both environmental and human aspects. It is possible to argue that the right to a healthy environment can be viewed as an 'interpreted' right, ie stemming from existing rights, since it allows for new problems to be addressed without altering the 'status quo' of the international human rights system.[51] However, this does not carry the necessary weight or binding legal status needed for such a right to be effectively enforced and implemented, given the pace at which the right to life and other human rights is being threatened by environmental changes. The independent recognition of this right in an international instrument significantly affects its binding status and potential for legal recourse.[52]

As discussed in Section II(b), a legally binding international instrument would be the most effective tool in delivering the necessary international commitment required for intergenerational justice. This would ensure that States are able to explicitly focus on meeting the preconditions for sustainability and fully capture the threats posed by these developments, while also ensuring that States do, in fact, maintain sovereignty in some regard; after all, for the State to be bound to obligations under a multilateral treaty, it must sign and ratify said provisions. It would also guarantee that States are held accountable for their environmental actions – with possible consequences to be faced if environmental degradation is caused to an alarming extent which would undermine the preservation of the environment for future generations – and for tackling environmental sustainability issues, such as concerns over trade competitiveness. If the structural challenges of the international legal sphere can be resolved, there is no plausible reason for the creation and extension of such a right to be problematic, as it has already been conceived on both national and regional levels.[53]

One might also argue that the meaning of a 'healthy' environment would differ by State, which would not be incorrect. This is expressed by the European Court of Human Rights (ECtHR):

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48 Lawrence (n 2) 27–29.

49 Simon Caney, 'Climate Change, Human Rights and Moral Threshold' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009) 167; Lawrence (n 2) 27–29.

50 Richard P Hiskes, *The Human Rights to a Green Future* (CUP 2009) 39; Lawrence (n 2).

51 Jennifer A Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1993) 3 Duke Journal of Comparative and International Law 351, 378.

52 ibid.

53 *Minors Oposa v Secretary of the Department of Environment and Natural Resources* (1994) 33 ILM 173.

> National authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore, in reaching its judgments, the Court affords the national authorities in principle a wide discretion.[54]

This discussion leaves several policy choices to be made by States, such as the weight to be given to the exploitation of natural resources over the protection of nature. These choices would likely result in wide diversities of policy and interpretation among States, since each State would pursue its own priorities, which would be moderated only to some extent by specific international treaties.[55]

Some may also question why it is necessary for there to be a right to a 'healthy environment'. Several scholars argue that a 'decent environment' is too anthropocentric and uncertain as a concept, and that its explanation is, in fact, unnecessary given the extent to which international law has already addressed environmental problems.[56] Further, there is little international consensus on the most appropriate terminology to employ in legal documents. For instance, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities used varying terms, referring to the right to a 'healthy and flourishing environment' (Introduction) or to a 'satisfactory environment' (Chapters I, IV, VI) in its report, and to the right to a 'secure, healthy and ecologically sound environment' in the draft principles.[57] Similarly, Principle 1 of the Stockholm Declaration mentions an 'environment of a quality that permits a life of dignity and well-being',[58] while Article 24 of the African Charter on Human and Peoples' Rights (African Charter) refers to a 'general satisfactory environment favorable to their development'.[59] Notably, the African Charter is the first international treaty to recognise a right to a healthy environment.[60] This provision was included to acknowledge that a 'satisfactory' environment is important for the development and realisation of other human rights in Africa.[61] Later, the Revised African Convention on the Conservation of Nature and Natural Resources outlined various State obligations, including that of creating 'preventive measures and the application of the precautionary principle, and with due regard

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54 Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) EJIL 613, 627.

55 ibid.

56 Alan Boyle, 'The Role of International Human Rights Law and the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998).

57 Fatma Zohra Ksentini, 'Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment' (UNHRC, 6 July 1994) UN Doc E/CN.4/1994/9, Annex I (the Draft Declaration).

58 UN Conference on the Human Environment, 'Stockholm Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev 1, principle 1.

59 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 218 (African Charter), art 24.

60 ibid.

61 Lilian Chenwi, 'The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018); Emeka Polycarp Amechi, 'Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights' (2009) 5(1) Law, Environment and Development Journal 58, 62.

… in the interest of present and future generations.'[62] However, generally speaking, exact terminology is not necessary in order to accomplish a set goal once a right, mindful of intergenerational equity, which allows for the protection of the environment for future generations is established. The right to a healthy environment could be merely understood to mean a 'right to an ecologically balanced, sustainable, healthy, clean, or satisfactory environment that permits healthy living' for human beings on Earth.[63] By considering the impact of environmentally harmful activities on other human rights, such as the right to life, the international community will focus on what matters most – the prevention of environmental harm and the protection of certain values. This approach to creating a right avoids the need for explicit terminology, such as a 'satisfactory' or 'decent' environment. Instead, it allows a court to balance States' right to development and the respect for conventional rights.[64]

## IV. The Development and Current Status of Future Generations and a Right to a Healthy Environment in International Environmental Law

Having established the relevance of international law as regards the existence of the right of future generations to a healthy environment, it is now time to delve into the development and current status of future generations and a healthy environment within international law and determine whether such a right currently exists.

### A. International Instruments

Since the mid-1940s, States have held concern for future generations within both national and international legal documents, often including provisions within conventions and declarations which share the intention to protect future generations.[65] For instance, the 1945 United

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[62] African Convention on the Conservation of Nature and Natural Resources (adopted 7 March 2017) <au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf> accessed 1 June 2019, art 4.

[63] Louis J Kotzé, 'In Search of a Right to a Healthy Environment in International Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 136.

[64] Boyle (n 56) 627.

[65] Weiss (n 23); Edith Brown Weiss (ed), *Environmental change and international law: New challenges and dimensions* (United Nations University Press 1992) ch 12; the United Nations Charter, the Preamble to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the American Declaration on the Rights and Duties of Man, the Declaration on the Elimination of Discrimination against Women, the Declaration on the Rights of the Child, and many other human rights documents contain provisions concerning the dignity of all members of human society in an equality of rights that extends in time as well as space; other international agreements and declarations that make reference to future generations are the International Convention for the Regulation of Whaling (1946), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1975), African Convention on the Conservation of Nature and Natural Resources (1968), Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (1976), Bonn Convention on the Conservation of Migratory Species of Wild Animals (1979), Berne 24 A/68/x.. Convention on the Conservation of European Wildlife and Natural Habitats (1979), Council of Europe Convention for the Protection of the Architectural Heritage of Europe (1985), ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (1992), Convention on the Transboundary Effects of Industrial Accidents (1992), UNECE Convention on the Protection and Use of

Nations Charter's Preamble states: 'we the peoples of the United Nations, determined to save succeeding generations from the scourge of war'.[66] In addition, States have also shown explicit concern for future generations, specifically with regards to the environment, for instance in the 1982 World Charter for Nature, and, more pertinently, the Preamble of the Stockholm Declaration which states that 'to defend and improve the human environment for present and future generations has become an imperative goal for mankind'[67] and that 'the natural resources of the Earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations'.[68] There is, therefore, a link drawn by the Stockholm Declaration between environmental protection and human rights.[69]

It is notable that, while several environmental treaties refer to both present and future generations, this reference is only found within their respective preambles.[70] For instance, the Paris Agreement provides only one preambular reference to human rights and intergenerational equity.[71] Earlier drafts of the negotiating text involved much more emotive language, as it concerned the interests of future generations; however, these references were removed prior to the adoption of the final agreement.[72] For example, the draft text of Article 2, which set out the objective, initially included obligations that States should address climate change 'for the benefit of present and future generations'.[73] Now, as it is located in the Preamble, this passage does not have the same binding nature as if it were in the operative section.[74] However, these preambles can provide assistance in understanding the object and purpose of a treaty in the process of its interpretation.[75] They are part of the text of their

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Transboundary, Watercourses and International Lakes (1992), North American Agreement on Environmental Cooperation (1993), UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998), Charter of Fundamental Rights of the European Union (2000), Stockholm Convention on Persistent Organic Pollutants (2001), WHO Framework Convention on Tobacco Control (2003), Vienna Declaration and Programme of Action, World Conference on Human Rights (1993), UNESCO Universal Declaration on Bioethics and Human Rights (2005), Antarctic Treaty (1959), Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979), United Nations Convention on the Law of the Sea (1982), UNESCO Universal Declaration on the Human Genome and Human Rights (1997).

66 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, preamble.

67 UN Conference on the Human Environment, 'Stockholm Declaration of the United Nations Conference on the Human Environment' (16 June 1972) UN Doc A/CONF.48/14/Rev 1 (Stockholm Declaration), preamble, para 6.

68 ibid principle 2.

69 Dinah Shelton, 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35 Denver Journal of International Law and Policy 129, 130–34.

70 Catherine Redgwell C, *Intergenerational trusts and environmental protection* (Manchester University Press 1999) 115.

71 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add1, preamble.

72 Lewis (n 41) 7–15.

73 ibid.

74 ibid; Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) 6 Climate Law, at 113.

75 Lewis (n 41) 7–15.

respective treaties, defining its context and influencing the reading of the text.[76] Preambles are meant as part of the primary text, not merely to be 'supplementary means of interpretation.'.[77] While preambles may not create rights and obligations, they assist in the interpretation of the precise terms of treaties, identify what the treaty aims to accomplish or set out and reflect current attitudes towards a certain state of affairs.[78]

Moreover, the UNFCCC contains a reference to intergenerational equity, stating that the 'Parties should protect the climate system for the benefit of present and future generations of human kind…'.[79] While it also provides the principles by which States should be guided, these principles are inherently vague. For instance, 'equity' is meant to be applied in order for there to be balance between the needs of the present and future generations; however, what remains unclear is whether the reference to 'intergenerational equity' reflects the idea that each person's interests have equal weight regardless of when they happen to be born.[80]

Despite States being somewhat willing to make international commitments for the sake of future generations, the legal recognition of this right, or any similar one, has been hindered by the inexplicit wording of international legal instruments, the non-binding nature of some of these legal instruments, a lack of enforcement procedures and limits in scope and practice. Further, the principal of explicit legal recognition of this intergenerational right, with a healthy environment at its core, is found mainly at national and regional levels, in Constitutions, statutes, and judicial decisions.[81]

However, recent pioneering efforts in Latin America and the Caribbean have led to the establishment of The Escazú Agreement in 2018. The Agreement aims to:

> guarantee the full and effective implementation … of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters … contributing to the protection of the right … of present and future generations to live in a healthy environment.[82]

Still, two years after its creation, only nine of the necessary eleven ratifications by Latin American and Caribbean States have been attained at the time of writing – the most recent being Ecuador, in May 2020. 18 States in total have signed the agreement. This current non-event can be explained by various reasons, discussed below, regarding the hesitancy of States on an even wider international scale to recognise the issue and be publicly accountable, along with the current measures in place as a result of the Covid-19 crisis slowing the pace of political and legal action.

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[76] Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164(5) University of Pennsylvania Law Review 1281, 1297–1299.

[77] ibid.

[78] Jan Klabbers 'Treaties and Their Preambles' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 182–195.

[79] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), art 3; Lawrence (n 12) 110.

[80] Lawrence (n 12) 110–111.

[81] ibid 29.

[82] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Carribean (adopted 4 March 2018) (The Escazú Agreement <treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf> (accessed 4 August 2020).

## B. Customary International Law

There is no single formulation of intergenerational equity within the treaties, mentioned and unmentioned, concerning various areas of the environment. Therefore, it is very difficult to posit that the notion of intergenerational equity has a 'sufficiently consistent' meaning in international law, which can allow for an interpretation of Article 3 UNFCCC. In fact, in the eyes of some, the references to intergenerational equity are simply 'hortatory' and without weight as a principle, let alone as a rule of international law.[83]

Article 3 UNFCCC links intergenerational equity to the right of sustainable development. The question that then becomes relevant is whether intergenerational equity can be considered part of customary international law due to its falling under the umbrella of sustainable development. In order to establish a rule of customary international law, it is first necessary to establish consistent State practice and *opinio iuris*. An additional requirement is that a rule is of a 'fundamentally norm creating character', meaning that a rule must be sufficiently clear.[84]

There can be said to be extensive State practice, given the growing number of States that include sustainable development, including intergenerational equity, in their national laws and Constitutions.[85] Moreover, the right to a healthy environment, often times extended to future generations, is enshrined within the Constitutions of over 92 States. Such widespread adoption raises the idea that the right may be evolving as a 'general principle of law recognized by civilized Nations' and, thus, a source of international law under Article 38 of the ICJ Statute.[86] However, there is insufficient *opinio iuris* which demonstrates that States have implemented sustainable development with the belief that there was an international legal obligation to do so, as opposed to a mere political commitment.[87] This is evidenced by the failure of States to agree on an international legal norm of a healthy environment due to a lack of consensus on protection standards for natural resources and human rights.[88] Moreover, intergenerational equity fails to meet the test of being of a 'norm creating character', as it is too vague in that it does not explain or indicate what weight is to be given to future generations and their interests, as opposed to those of the present generation.[89] Nonetheless, the very fact that world leaders convened to discuss environmental responsibilities and human rights demonstrated the readiness of the international community to consider a new right.[90]

## C. International Case Law

The mention of future generations in relation to the environment can also be seen in international case law, particularly that of the ICJ. What is worth mentioning, before delving

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83 ibid.

84 ibid 114–115; *North Sea Continental Shelf case (Germany v Denmark/Netherlands)* [1969] ICJ Rep 3 [41–42].

85 Lawrence (n 12) 115; see *Taralga Lanscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59; see South African National Environmental Management Act 1998.

86 Jennifer A Downs, 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1993) 3 Duke Journal of Comparative and International Law 351, 375.

87 Lawrence (n 12) 115–116.

88 Downs (n 85) 375.

89 Lawrence (n 12) 115–116.

90 Downs (n 85) 376.

into the pith of the ICJ's perspective, is the far-sighted argument put forth by the United States in *Bering Sea Fur Seals Arbitration*[91] in defense of intergenerational environmental rights, which expressed the ideal of intergenerational justice:

> The earth was designed as the permanent abode of man through ceaseless generations. Each generation, as it appears upon the scene, is entitled only to use the fair inheritance. It is against the law of nature that any waste should be committed to the disadvantage of the succeeding tenants. The title of each generation may be described in a term familiar to English lawyers as limited to an estate for life; or it may with equal propriety be said to be coupled with a trust to transmit the inheritance to those who succeed in at least as good a condition as it was found, reasonable use only excepted. That one generation may not only consume or destroy the annual increase of the products of the earth, but the stock also, thus leaving an inadequate provision for the multitude of successors which it brings into life, is a notion so repugnant to reason as scarcely to need formal refutation.

This visionary argument has not been recalled in most modern-day case law; despite the considerable number of international instruments expressing concern over the environment which is being left for future generations, there are several limitations to effective action which will be mentioned later in this section, such as a lack of enforceability or, if considered to be binding, the lack of enforcement procedures.[92]

Turning now to the case law of the ICJ, the Court has made reference to intergenerational issues in its *Advisory Opinion on the Legality of the Use of Nuclear Weapons*,[93] in which it considered a request from the UN General Assembly on the question of whether the threat or use of nuclear weapons in any circumstances was allowed under international law. The (majority) judgment, having considered the relevance of international environmental agreements, stated that 'The Court recognizes that the environment… represents the living space, quality of life and the very health of human beings, including generations unborn.'[94] However, the Court did not rely directly on the impact of the use of nuclear weapons on future generations in its judgment, nor is the purpose of its use of the notion of intergenerational equity immediately clear.[95]

In his dissenting opinion, Judge Weeramantry noted that the ICJ, in applying international law, must 'pay due recognition to the rights of future generations', adding that 'if there is any tribunal that can recognize and protect their interests… it is this court.'.[96] He goes on to mention that 'the rights of future generations … have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.'.[97] Whilst he makes excellent arguments for the consideration of intergenerational equity in future cases before international courts, he fails to clarify common issues that arise in this regard, such as explaining the basis upon which

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91 IX Fur Seal Arbitration 2-8 (Washington: Government Printing Office 1895).

92 Luis E. Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 Colorado Journal of International Environmental Law and Policy 1, 28.

93 *Advisory Opinion on the Legality of the Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226.

94 ibid [29].

95 Lawrence (n 12) 116.

96 ibid.

97 ibid.

future generations can be rights-bearers, how intergenerational equity can be based on 'general principles of law', and how treaties which include the notion of intergenerational equity can create obligations on all States.[98]

In another dissenting Opinion, Judge Weeramantry shared the novel notion of the ICJ being a trustee of the rights of future generations;[99] an idea which is not commonly shared by other ICJ judges. This should not really be surprising as, in order for the Court to be a trustee in this regard, it would require that this role be outlined in the Court's Statute or specified in the treaties which the Court applies. Such reluctance can also be explained by the fact that international courts and dispute resolution bodies rely on the consent of States and would therefore be hesitant to develop international law beyond certain limits already established.[100]

Notably, however, in late 2017, the IACHR released a significant and precedent-setting Opinion in which it recognised that the right to a healthy environment is both an individual and collective right which protects not only the current generation but also future generations.[101] In reaching this conclusion, the Court linked the right to a healthy environment to the concept of sustainable development. However, it maintained the distinction between an independent right to a healthy environment and the environmental obligations which stem from other human rights, such as the right to life.[102] It also recognised that governments have a duty to protect human rights from environmental damage caused by activities both under the jurisdiction of the State and outside the control or territory of the State.[103] The Court observed that environmental degradation can cause irreparable damage to the quality of life of human beings and, therefore, a healthy environment is a 'fundamental right for the existence of humankind'[104] – an argument which was extensively made in Section IV of this paper. Another unique feature of the Opinion is the link between international human rights law and international environmental law. Similarly, the ECtHR has developed jurisprudence which links human rights to environmental degradation.[105] However, no other international court has made a decision asserting an autonomous right to a clean environment.

The importance of this Opinion is underlined by the fact that decisions of the IACHR have advanced jurisprudence at international courts. This Opinion, therefore, may be the necessary change to get the wheels turning towards not only a more globally focused recognition of the right to a healthy environment but also the extension of this right to future generations. Therefore, the Opinion has the potential to shape the practice of other international and regional courts. Further, the Advisory Opinion reflects the evolving

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98 ibid.

99 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December in the Nuclear Tests (New Zealand v France) Case*, Order of 22 September 1995 (Dissenting Opinion of Judge Weeramantry) [1995] ICJ Rep 317, 341.

100 Lawrence (n 12) 122.

101 *The Environment and Human Rights*, Advisory Opinion Right to A Healthy Environment, Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

102 Harlan Cohen, 'International Decisions' (2018) 112(3) AJIL 460.

103 ibid.

104 Monica Feria-Tinta and Simon C Milnes, 'The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights' (2016) 27 Yearbook of International Environmental Law 64.

105 Cohen (n 101).

interplay between binding and non-binding legal instruments and the importance of soft law in establishing legally binding rules, drawing heavily on the principles within the Stockholm and Rio Declarations, such as the precautionary principle, as bases for binding obligations under the IACHR framework.[106] Despite this, the Court did not assess State practice and *opinio iuris* nor did it recognise the right to a healthy environment as customary international law. However, this is not entirely surprising, as it would have been outside the scope of Colombia's requests. Nonetheless, the affirmation made by the Court can still be seen as a step toward the future recognition of the right as part of customary international law.

## V. Conclusion

In examining the current framework of international law in order to determine whether a right to a healthy environment that extends to future generations exists, or could possibly be established, a number of conclusions have been drawn.

Firstly, through the explanation of 'future generations' as those persons not yet born, and 'intergenerational justice' as far-sighted conservation of the environment for the benefit and use of all generations, it is accepted that environmental rights and sustainability closely relate to future conditions and concern for future generations. This is even more evident when the principles underlying intergenerational equity – conservation of options, conservation of quality and conservation of access – are examined alongside the notions of strong and weak sustainability. Similarly, Passmore's 'chain of love' theory allows us to understand the implications of the temporal remoteness of unborn generations as compared to younger generations already existing, but who face similar circumstances of lesser representation.

When considering the broader discussion on environmental sustainability, it is critical to understand the prominent role given to future generations as rights holders, due to the extent to which they are affected by current actions. While the Brundtland Report effectively tied the notion of sustainability to the enabling of future generations to enjoy a healthy environment, similar notions (though not binding to the necessary degree) may be found in preceding international instruments, such as the Stockholm Declaration, the Human Development Report and the Copenhagen Declaration on Social Development. Furthermore, the importance of sustaining a healthy environment for future generations is highlighted by the fact that long-term considerations must be taken into account in decision-making. Indeed, taking future generations into account inevitably leads to greater focus on environmental sustainability when compared with other workable alternatives. However, given the nature of current environmental concerns, and the limits of State sovereignty and accountability on the national level, it is recognised that the only viable solution to the issue of creating a right to a healthy environment remains at the international level, namely the adoption of a multilateral treaty.

Further, upon examining existing international legal instruments, it is evident that the international community has been mindful of the environment and the impact of its development and/or degradation on the future generations since the 1940s. While present international environmental instruments generally restrict reference to future generations to their preambles, these nonetheless function as key considerations for the purposes of interpretation. Similarly, deductions may be made from broader references to 'the interests of mankind', which allude to the interests of future generations. That said, it is fairly obvious

[106] ibid.

that States appear hesitant to adopt such a right at the international level, the reasons for which may involve transboundary issues and increasing public accountability to the international community as a whole. This is especially strange when one notes that most States' Constitutions comprise a right to a 'healthy' environment for both present and future generations.

In light of the link between sustainable development and intergenerational equity, it is imperative to determine whether the right to a healthy environment extends to future generations as part of customary international law. While there is sufficient State practice, in both regional and national laws and jurisprudence, there is insufficient *opinio iuris* demonstrating a shared belief that this is an international legal obligation. As regards international case law, the concepts of future generations and intergenerational equity have been referred to within the case law of the ICJ, though its reluctance to formally acknowledge the importance of extending rights to future generations is partly owed to its dependence on State consent. In addition, there are varying approaches by international courts concerning the development or acknowledgement of rights relating to the environment and future generations. Distinct practice, however, is seen within the case law of other tribunals, such as national and regional courts, including the IACHR, where the right to a healthy environment has been accepted and is further granted to future generations. As such, the right of future generations does not presently exist within a binding legal instrument or as a custom of international law.

Conclusively, there is still much progress to be made before the international community fully accepts and implements a right to a healthy environment, not only for future generations, but for all persons.

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# Protection of the Environment through the Lens of Syria: Scrutinizing the Loopholes in the Prevailing Legislative Framework

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INTERNATIONAL HUMANITARIAN LAW; PROTECTION OF THE ENVIRONMENT; ARMED CONFLICTS

**Abstract**

This paper critically analyzes selected aspects of the current legal framework regarding the protection of the environment during the non-international armed conflict in Syria. The water damage that is occurring in Syria is particularly scrutinized. Preserving the environment is essential for safeguarding the planet for future generations. The potentiality of any armed conflict not only poses a threat to the peace and safety of the environment but can have exhaustive repercussions. Therefore, this topic is of the utmost importance and the objective of my research is to examine the relevant law, or the lack thereof. International humanitarian law will be placed at the forefront, along with customary international law which will provide an alternative approach. Where necessary, secondary sources will supplement the research in order to broaden its scope. The meaning of the 'natural environment' as opposed to the 'environment' will be assessed and applied to the water damage in order to establish whether or not it can be considered damage to the natural environment. A comparative approach will be taken for the purpose of analyzing all pertinent sources, with the intention of providing a conclusion that showcases the environment as the silent victim of armed conflicts.

## I. Introduction

The advance of technology over the years has empowered weapons to be more destructive than ever, making the environment a silent victim of armed conflicts worldwide.[1] Armed conflict can have bounteous and unforgiving repercussions for the environment, resulting in the eradication of infrastructure, pollution of the water supply, contamination of terrain and soil, demolition of crops and forests, and over-exploitation of natural resources.[2] Although, in terms of warfare, the environment is acknowledged, it has never been a top priority, despite being invariably present during military operations.[3] Therefore, although protection is

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1 United Nations Environment Programme, 'Rooting for the environment in times of conflict and war' (*United Nations Environment Programme*, 6 November 2019) <unenvironment.org/news-and-stories/story/rooting-environment-times-conflict-and-war> accessed 9 July 2020.

2 Rafael Huseynov, 'Armed conflicts and the environment' (Doc. 12774, Committee on the Environment, Agriculture and Local and Regional Affairs, Parliamentary Assembly of the Council of Europe, 17 October 2011) <reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2660.pdf> accessed 9 July 2020.

3 Gareth Edwards-Jones, 'Agricultural Policy and Environment in Syria: The Cases of Rangeland Grazing and Soil Management' in Ciro Fiorillo and Jacques Vercueil (eds), *FAO Agricultural Policy and Economic Development Series No 8: Syrian agriculture at crossroads* (FAO 2003).

provided by several legal instruments to a certain extent, the potential of an armed conflict poses a threat to the safety of the environment. Moreover, it is not solely the environment that is ubiquitous, but also environmental considerations within the international legal sphere.[4]

Nowadays, various internal conflicts are being fought which are resulting in environmental damage. Unfortunately, Syria's fragile environment has become a victim due to the relentless internal conflict.[5] The conflict commenced in 2011, as what at first appeared to be scattered protests suddenly turned into an uprising, questioning the position of President Assad.[6] The internal conflict erupted essentially between two main actors: President Assad, with support of the national Syrian Arab Army (SAA), and non-governmental armed groups.[7] Notice will be made of the difference between non-international armed conflict (NIAC) and international armed conflict (IAC), and focus will be placed on the internal conflict evolving in Syria as opposed to the international conflicts that are also present.[8] The unfolding of the attacks has caused significant damage to the already fragile state of the environment.[9] There are multiple environmental areas that are experiencing noticeable damage as a result of the attacks, such as infrastructure. However, focus will be placed on the water system and how the effects of its destruction continue to pose a threat to the health and safety of the environment and the well-being of citizens.[10]

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4 ILC, 'Protection of the environment in relation to armed conflicts' (28 May 2013) UN Doc A/70/10.

5 Wim Zwijnenburg, 'The Human Cost of War's Environmental Impact' (*Syria Untold,* 11 October 2016) <syriauntold.com/2016/10/11/the-human-cost-of-wars-environmental-impact/> accessed 9 July 2020.

6 Wim Zwijnenburg and Kristine te Pas, *Amidst the debris… A desktop study on the environmental and public health of Syria's conflict* (Pax 2015) 11.

7 Amichai Cohen, 'Syria - International Use of Force and Humanitarian Intervention' (2019) <papers.ssrn.com/sol3/papers.cfm?abstract_id=3380220> accessed 5 April 2020, 11; see further Tom Gal, 'Legal Classification of the Conflict(s) in Syria' in Hilly Khen, Nir Boms, and Sareta Ashraph (eds), *The Syrian War: Between Justice and Political Reality* (Cambridge University Press 2019), 43 - Gal states: 'besides the conflict between President Assad and non-governmental armed groups, even smaller internal conflicts are taking place such as between various armed groups'. Note, a conflict between one or more non-State armed groups can also fall under the scope of non-international armed conflict. However, this will not be the primary focal point.

8 Bart De Schutter and Christine Van De Wyngaert, 'Coping with Non-International Armed Conflicts: The Borderline between National and International Law' (1983) 13 Georgia Journal of International and Comparative Law 279; Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) 93 International Review of the Red Cross 189; ICRC, 'Non-international armed conflict' (*International Committee of the Red Cross*, 2020) <casebook.icrc.org/law/non-international-armed-conflict> accessed 9 July 2020; Non-international armed conflict will be the primary focus, as opposed to international armed conflicts, because after the Second World War there has been a shift towards predominantly internal conflicts. Hence, over the years, there have been various internal conflicts emerging as opposed to international armed conflict. This is not to exclude the fact that in Syria both types of conflict are taking place. This will be further explained and acknowledged in the relevant sections of this thesis; see Gal (n 7) 34–43 for further explanation of the involvement of States such as the United States, Iran and Turkey resulting in international conflicts within Syria.

9 Zwijnenburg and te Pas (n 6); see The World Bank, 'The Toll of War: The Economic and Social Consequences of the Conflict in Syria (*The World Bank Group*, 10 July 2017) <worldbank.org/en/country/syria/publication/the-toll-of-war-the-economic-and-social-consequences-of-the-conflict-in-syria> accessed 9 July 2020.

10 Zwijnenburg and te Pas (n 6) 7, 11, 18, 19; it must be acknowledged that there are several other forms of damage to the environment occurring as a result of the conflict, namely: direct and indirect damage in relation to oil refineries; damage to industrial sites; damage to the electricity network and the weakening of the waste

The main aim of this thesis is to investigate this legal problem: does the international legal framework effectively protect the environment, more specifically the water system, in the case of the Syrian armed conflict? It must be remembered that in international humanitarian law (IHL) there are three stages: *jus ad bellum, jus in bello and jus post bellum.* The focal point of this thesis will be the specific *jus in bello* that is applicable to non-international armed conflict, with the case study of Syria.[11] Thus, the analysis will firstly introduce the Syrian conflict and provide some background information as to the nature of the environmental damage. The Geneva Conventions of 1949, specifically Common Article 3, Articles 35(3) and 55(1) of Additional Protocol I (API), and Articles 14 and 15 of Additional Protocol II (APII), will be examined.[12] These provisions will be applied to the Syrian conflict in the last section to assess whether IHL may offer protection to the environment and terminate the damage caused to the water system by the armed attacks.

To further enhance the research into the question of the damage occurring, it is crucial to explain the meaning of 'natural environment' and consider whether the harm caused to the water system qualifies as damage to the natural environment. The natural environment is not clearly defined in legislation. It is generally protected through IHL as opposed to international environmental law, because the *jus in bello* covers the law of armed conflict. Hence, it is considered that environmental damage is a humanitarian issue.[13]

A variety of propositions of definitions will be examined, from the International Court of Justice (ICJ), the International Law Commission (ILC), and the Stockholm Declaration.[14] The next problems assessed will be what the natural environment consists of and whether it is different from simply the 'environment'. This analysis of the definition of 'natural environment' will aim to show that the legislative framework does not sufficiently address the importance and scope of the natural environment.[15]

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management system. Weapons-related contamination caused by both the government and armed groups has also resulted in damage such as toxic remnants, explosive substances and the making of unsafe weapons. The reason water-related damage, as opposed to the forms listed above, will be analyzed is its multipurpose and complex nature. The analysis will aim to display how serious a non-international armed conflict can be and to what extent resources can be exploited for the benefit of a given party.

[11] Zeyad Mohammad Jaffal and Waleed Fouad Mahameed, Prevent Environmental Damage During Armed Conflict (2018) 5 BRICS Law Journal 72, 74.

[12] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, common art 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) arts 35(3), 55(1); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to Protection of the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) arts 14, 15 - note, Articles 35(3) and 55(1) apply to international armed conflicts and will be examined as pertinent customary international law.

[13] Carl Bruch, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (United Nations Environment Programme 2009) 10; see ILC (n 4) and note Principle 1 which concludes that 'the natural environment shall be protected by applicable international law and in particular, international humanitarian law'.

[14] Doug Weir, 'We need to define "the environment" to protect it from armed conflict' (*The Toxic Remnants of War Project,* 11 February 2016) <toxicremnantsofwar.info/we-need-to-define-the-environment-to-protect-it-from-armed-conflict/#_ednref1> accessed 9 July 2020.

[15] Carsten Stahn, Jens Iverson, Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford Scholarship Online 2017).

Overall, the purpose is to explore the critical elements of the legal framework that are applicable in times of a non-international armed conflict, specifically the internal conflict in Syria, to come to an analytical conclusion with the idea that, on one hand, the complexity surrounding the protection of the environment is due to a lack of precise legislation, and on the other hand the lack of explicit implementation on the part of States.[16]

## II. Preface to the Case Study: Syria Antecedent to the Internal Battle

Currently, all over the world, numerous internal conflicts are taking place. Syria is just one of them. The aim of this Section is to present the situation as it was in Syria before the conflict erupted, with special attention placed on the environment.

The Syrian conflict began in 2011 as a series of protests known as 'the Arab Spring', which in Syria originally began in opposition to President Assad's regime.[17] In May 2012, Human Rights Watch concluded that, in some areas of Syria, the fighting had achieved the level of an armed conflict.[18] President Assad announced on 26 June 2012 that Syria was indeed in a state of war.[19] Furthermore, the International Committee of the Red Cross (ICRC) officially confirmed in July 2012 that the situation in Syria had reached the status of a non-international armed conflict.[20] It is important to note that there have been a range of disputes taking place in Syria. These include, among others, international armed conflicts involving the United States, Turkey, Israel and Iran.[21] However, in this thesis, attention will be placed

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16 Michelle Mack, Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts' (*International Committee of the Red Cross*, 2008) <icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf> accessed 9 July 2020; see Richard Desgagné, The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures' (2000) 3 Yearbook of International Humanitarian Law 109.

17 Council on Foreign Relations, 'Global Conflict Tracker' (*Council on Foreign Relations*, 11 August 2020) <cfr.org/interactive/global-conflict-tracker/conflict/civil-war-syria> accessed 11 August 2020.

18 Ole Solvang and Anna Neistat, *Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians* (Human Rights Watch 2013) 12.

19 Louise Arimatsu and Mohbuba Choudhury, 'The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya' (International Law PP 2014/01, Chatman House 2014) <chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf> accessed 9 July 2020; the type of conflict was not specified by the President but it can be implied that he meant civil war.

20 ibid.

21 See Gal (n 7) 34; see also David Wallace, Amy McCarthy and Shane Reeves, 'Trying the Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict' (2017) 25 Michigan State International Law Review 556, 589, 591 - firstly, it must be noted that the Syrian conflict is extremely complicated and involves various actors. Note that the authors specifically state '(…) it is clear that a non-international armed conflict currently exists in Syria'. They further go on to acknowledge that 'The ICRC agrees, confirming that the situation in Syria with respect to the U.S. constitutes an international armed conflict'. This presents the argument that both types of attack are taking place in Syria. See Stephanie Nebehay, 'Exclusive: Situation in Syria constitutes international armed conflict - Red Cross' (*Reuters,* 7 April 2017) <reuters.com/article/us-mideast-crisis-syria-redcross-idUSKBN17924T> accessed 9 July 2020; an Israeli air strike occurred on Syrian territory in Damascus in January 2013 and caused controversy as to whether or not this could qualify as a separate international armed conflict. This accentuates the argument that the conflict in Syria is indeed complicated. See Arimatsu and Choudhury (n 19).

on examining whether the Geneva Conventions, as the appropriate *jus in bello*, can be applied to the non-international armed conflicts involving the Syrian government and rebel groups.[22]

The internal fighting in Syria is between, on the one hand, President Assad and the Syrian Army, and on the other, non-governmental armed groups supported by external non-State actors such as FSA and ISIS.[23] The lack of a coherent Syrian army and the rise of armed opposition groups organizing anti-regime protests fueled the development of the civil war and led to the national Syrian Arab Army (SAA) resorting to the use of explosive weapons and cluster munitions in populated areas.[24] As a result, the citizens and natural environment experienced horrendous destruction of, among other things, infrastructure and the water system. This quickly resulted in a humanitarian crisis with seemingly no end.[25] This unfortunate battle left countless civilians scarred and having to evacuate their hometowns due to the devastation to the infrastructure. Furthermore, the environment was at a greater risk than ever, as the Syrian government and armed opposition groups showed no mercy.[26]

Attention will be placed solely on non-international armed conflicts involving the Syrian government against the rebel groups and how their conduct and the continuation of the conflict has contributed to the detriment and fragile state of the environment. The damage caused to the water system as a result of the attacks will be analyzed, specifically harm caused to the effective supply of safe water.[27] The water system is an important aspect of every healthy, functioning society and environment. Hence, failure to protect it can lead to undesirable human suffering.[28] Focus on this aspect will show that the environmental circumstances in Syria are broad and complex.

It is helpful to recap the environmental situation and issues in pre-conflict Syria to better understand the extent of the harm the internal conflict may cause. A few reports regarding the pre-conflict situation have been released. In 2009, the Delegation of the European Commission to Syria released a report on the Country Environmental Profile of the Syrian Arab Republic, which includes comments and assessments on various matters concerning the state of the environment shortly before the war.[29] What is evident from the report is that, prior to the start of the internal armed conflict, Syria experienced numerous

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[22] Gal (n 7) 43.

[23] See Cohen (n 7) 11; the challenging aspect is assessing whether or not these armed groups satisfy the organizational criteria laid out by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case. This organizational aspect is vital as it excludes acts which are not organized and therefore do not fall within the framework of international humanitarian law. It is without doubt that the government forces meet this criterion. It can be argued that both FSA and ISIS also do, as they control large amounts of territory, have an organized command structure and are able to carry out organized attacks - see Wallace, McCarthy and Reeves (n 21) 587, 588; see also Arimatsu and Choudhury (n 19).

[24] Zwijnenburg and te Pas (n 6) 11.

[25] Zwijnenburg and te Pas (n 6) 11.

[26] Josef Kraus, 'The Internalization of Conflicts: Theoretical Background, Conceptualization, and Contemporary Middle-East Region' (2017) 26(5) Vojenské rozhledy 23, 29.

[27] Zwijnenburg and te Pas (n 6).

[28] Peter Gleick, 'Water as a Weapon and Casualty of Conflict: Freshwater and International Humanitarian Law' (2019) 33 Water Resources Management 1737, 1738, 1742, 1743; an example of human suffering as a result of the failure to protect water systems occurred in 1991 during a civil war in Somalia. The destruction of the water system led to a cholera outbreak which in turn affected around 55,000 civilians. An interesting observation by Gleick in this text is that the shift from multi-State conflicts to intra-State civil conflicts has also resulted in an increase in attacks on water systems.

[29] Max Kasparek and Marwan Dimashki, 'Country Environmental Profile for the Syrian Arab Republic' (No 2008/171432, Delegation of the European Commission to Syria, April 2009).

environmental problems,[30] namely water pollution, water scarcity, air pollution, waste management issues, mining industry pollution, and environmental policy and governance issues.[31] As of 2009, when the Report was released, it was claimed that almost all of Syria's renewable water resources were fully exploited.[32] Hence, water transfer to more rural areas was conducted, but with difficulty. The Report notes that some effects of water shortage are visible, for example the declining aquifer water levels resulting in an increase in the salinity of groundwater.[33] A shortage of drinking water and drought were very probable, and even experienced in cities near Damascus and Yarmouk, close to the Jordan border.[34]

An interesting argument examined by scholars is the thought that the Syrian drought between 2007–2010 was a possible contribution to the escalation of the internal conflict. Femia and Werrel both state that it was the 'worst long-term drought … since agricultural civilizations began in the Fertile Cresent'.[35] Evidence further claims that it was one of the worst recorded droughts in Syria, which resulted in widespread crop failure and migration to urban cities.[36] This argument was supported by former President of the United States, Barack Obama, who claimed that the drought 'helped fuel the early unrest in Syria, which descended into civil war'.[37] It can be argued that the drought, to a certain extent, might have provoked migration, which also contributed to the internal unrest and resulted in conflict.[38] However, it would be unconvincing to argue that the drought, and the state of the environment as a result thereof, was the sole cause for the Syrian internal conflict.[39]

A desktop study report released by PAX in 2015 on 'The Environmental and Public Health of the Syrian Conflict' covers the state of the environment prior to the start of the conflict and makes similar claims to the 2009 report by the Delegation of the European Commission to Syria. The PAX report mentions that 'Syria experienced numerous consecutive droughts which affected water and resulted in scarcity with around 1.3 million civilians being affected.' [40]

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30 ibid.

31 Zwijnenburg and te Pas (n 6) 18–21; see also Ghaleb Faour and Abbas Fayad, 'Water Environment in the Coastal Basins of Syria - Assessing the Impacts of the War' (2014) Springer International Publishing Switzerland 533–552.

32 Kasparek and Dimashki (n 29) 17.

33 Kasparek and Dimashki (n 29) 18.

34 ibid.

35 Jan Shelby, Omar Dahi, Christiane Fröhlich and Mike Hulme, 'Climate change and the Syrian war revisited' (2017) 60 Political Geography 232, 233; see Francesco Femia and Caitlin Werrell, 'Syria: Climate Change, Drought and Social Unrest' (*The Center for Climate and Security*, 29 February 2012).

36 Colin Kelley and others, 'Climate change in the Fertile Crescent and implications of the recent Syrian drought' (2015) 112(11) PNAS 3241.

37 Shelby, Dahi, Fröhlich and Hulme (n 35); see Barack Obama, 'Remarks by the President at the United States Coast Guard Academy Commencement' (*Office of the Press Secretary*, 20 May 2015) <obamawhitehouse.archives.gov/the-press-office/2015/05/20/remarks-president-united-states-coast-guard-academy-commencement> accessed 3 April 2020.

38 Shelby, Dahi, Fröhlich and Hulme (n 35).

39 ibid.

40 Zwijnenburg and te Pas (n 6) 19.

Furthermore, the water quality was poor, but this mainly affected areas with a high rate of economic activity.[41] Another issue brought forward is the failure of an effective wastewater management system.[42]

What must be acknowledged is that Syria's attempt to combat these issues was recognized and addressed in the 10th Five-Year Plan (2006–2010).[43] The goal set in this Plan was to set up 200 water treatment plants which would extend to around 50 percent of the population.[44] From this, it can be deduced that the Syrian government was well aware of the environmental problems and set out an initiative to approach and fix them. It can also be noted that Syria had a number of environmental problems regarding the distribution of safe water and the water system prior to the spiraling of the conflict. A few of the effects on the water system during the Syrian internal conflict will be further discussed below.

### A. The Syrian Water Conflict: Furtive Environmental Damage in Disguise

The water crisis in Syria has progressed and worsened along with the conflict, as attacks damaged pipelines and other water infrastructure. Thus, this Section will showcase how, during the internal armed conflict, multiple military attacks have targeted the water system. The water supply system is being damaged as a result of attacks by both the rebel forces and President Assad's regime.[45] Due to this severe and continuous damage, water is becoming more scarce.[46] Among other media outlets, this has caught the attention of the International Committee of the Red Cross. They are aware and concerned about the limited access to water, as possible contaminations can have serious repercussions. An insightful claim made by the ICRC was that water, as a scarce resource, should not be used as a weapon of war. This captures the intensity of the conflict and the depth of its impact.[47]

A few examples of attacks on the water system will be presented. However, due to the controversial and highly sensitive nature of the internal conflict, the coverage of the damage being caused by both sides has potential loopholes. The problem first became highlighted in 2014, when the Aleppo and Deir ez-Zor governorates cut off the water supply.[48] In 2014, The Syrian Arab News Agency also covered a terrorist attack that took place targeting two water wells in the Sweida area.[49] Another attack by an armed terrorist group happened at the border of the Daraa province, in which an electrical transformer at a drinking water well was

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41 ibid.

42 ibid.

43 United Nations Development Programme, 'Technical Support for the Implementation of the Tenth Five Year Plan' (Project No SYR/08/004, United Nations Development Programme, 5 February 2008) <info.undp.org/docs/pdc/Documents/SYR/00049469_implementing%20FYP.pdf> accessed 9 July 2020.

44 United Nations Development Programme (n 43); Zwijnenburg and te Pas (n 6) 19.

45 Zwijnenburg and te Pas (n 6) 29.

46 UNICEF, 'Severe water shortages compound the misery of millions in war-torn Syria - says UNICEF' (*UNICEF*, 25 August 2015) <unicef.org/media/media_82980.html> accessed 9 July 2020.

47 ICRC, 'Environment and international humanitarian law' (*International Committee of the Red Cross*, 29 October 2010) <icrc.org/en/doc/war-and-law/conduct-hostilities/environment-warfare/overview-environment-and-warfare.htm> accessed 9 July 2020.

48 Zwijnenburg and te Pas (n 6) 29; see inter alia, Office for the Coordination of Humanitarian Affairs, 'Syrian Arab Republic: Governorates Profile' (*United Nations*, 14 July 2014) <reliefweb.int/sites/reliefweb.int/files/resources/Syria%20governorate%20profiles%206%20August%202014.pdf> accessed 9 July 2020 explaining the different governorates in Syria. The report also states which governorates have limited access to water.

49 Zwijnenburg and te Pas (n 6) 29; H Zain, 'Terrorists attack drinking water wells in Syria' (*SANA*, 10 August 2014) <sana.sy/en/?p=9610> accessed 9 July 2020.

detonated.[50] In 2015, UNICEF released a document estimating that 'around 5 million people are suffering as a result of water shortages: around 2.3 million in Aleppo, about 2.5 million in Damascus, with the remainder being in Dera'a.'[51] This is quite alarming, as in 2015 the population of Syria was just under 18 million inhabitants, which would insinuate that a little under 30% of the whole population was enduring water shortage.[52] Furthermore, the World Health Organization has taken notice of the water damage, alerting and reiterating that in 2014 the availability of safe water within Syria was a third of what it was before the conflict.[53] Damage has also been done to other water infrastructure which ultimately has led to an increased risk of waterborne diseases: cholera, shigella, typhoid, and hepatitis A.[54] What is more, the provinces of Hama and Homs experienced a loss of water due to attacks on the water infrastructure and thereby also risked the spread of waterborne diseases.[55] Evidently, the damage is causing serious side effects which affect not only civilians but also the environment.

### B. An Introduction to the *Jus in Bello:* NIAC and IAC

*Jus in bello*, alternatively known as the 'law of armed conflict' or international humanitarian law, seeks to control the conduct of parties during an armed conflict.[56] Firstly, scrutinizing this area of law is indispensable, because it will provide the basis for an analysis of whether or not it is applicable to the Syrian internal conflict. It is important to note that there are multiple provisions available within the international legal framework, and reference will be made to those regarding armed conflicts. Once the applicable provisions have been explained, the next aspect that must be discussed is the differentiation between IAC and NIAC, followed by a commentary on the conflict in Syria. Hence, whether or not there is any distinction between NIAC and IAC will determine whether the provisions could be utilized to protect the environment from further damage.[57] Firstly, the pertinent law relating to armed conflict will be introduced.

A widely recognized source of law that is relevant to the protection of the environment in the case of non-international armed conflict is the 1949 Geneva Conventions. Within the Conventions, the following provisions will be observed: Common Article 3, Articles 35(3) and 55(1) of Additional Protocol I, and Articles 14 and 15 of Additional Protocol II.[58] Notably,

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50 ibid.

51 UNICEF (n 46); in Aleppo, for example, damage was caused to the sewage system and this caused pollution of the drinking water; see Zwijnenburg and te Pas (n 6) 29.

52 Worldometer, 'Syria Population' (*Worldometer*) <worldometers.info/world-population/syria-population/> accessed 9 July 2020.

53 Regional Office for the Eastern Mediterranean Syrian Arab Republic, WHO Response to the Conflict in Syria Situation Report #4' (*WHO*, 15 June 2014) <emro.who.int/images/stories/syria/SituationReport_20140615.pdf> accessed 9 July 2020.

54 ibid.

55 Zwijnenburg and te Pas (n 6) 29.

56 ICRC, 'What are jus ad bellum and jus in bello?' (*International Committee of the Red Cross*, 22 January 2015) <icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> accessed 9 July 2020 - note, jus in bello and international humanitarian law mean the same thing and will therefore be used interchangeably throughout this thesis.

57 NIAC stands for 'non-international armed conflict' and IAC stand for 'international armed conflict'. From here, these terms will be used interchangeably in this thesis.

58 Note, although Articles 35(3) and 55(1) of Additional Protocol I are applicable to international armed conflict, they will be assessed as provisions of customary international law that is applicable in non-international armed conflict.

the Geneva Conventions render only Common Article 3 and Additional Protocol II pertinent to a NIAC, thereby excluding the applicability of Articles 35(3) and 55(1).[59] Since the focal point of this thesis is on the Syrian internal conflict, the Articles relevant to IAC will not be elaborated on in the same manner as the Articles relating to NIAC. However, they will be examined from the viewpoint of customary international law in addition to the Martens Clause.

**C. Addressing Common Article 3 and Additional Protocol II: An Imperfect Area of Law**

Common Article 3 states that 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (…)'[60]. Moreover, it must be noted that Common Article 3 applies to every conflict that is a confirmed NIAC. Additional Protocol II has a more narrow scope of application, thus not every NIAC is subject thereto.[61] APII relates to the protection of victims of NIAC, with Articles 14 and 15 relating to the environment.[62] It is necessary to clearly explain Common Article 3 and Additional Protocol II in order to assess whether they can protect the natural environment and, if so, to what extent they can be applied.

Common Article 3 is rather transparent; it is applicable when a non-international armed conflict takes place within the borders of a High Contracting Party.[63] It lays out minimum standards of protection for civilians and persons not actively participating in hostilities.[64] However, it is a general provision and it does not mention or refer to the natural environment, or the environment in any sense.[65] The general consensus is that since Common Article 3 does not allude to the natural environment in its text, it is not applicable to the protection thereof. However, Jeanique Pretorious offers an optimistic standpoint and explains how a broad interpretation could potentially allow for 'indirect environmental protection'.[66] He claims that 'Common Article 3 may prohibit environmental damage to the extent that such warfare causes violence to life and person; cruel treatment and torture; outrages on personal dignity; or degrading treatment, which are all expressly prohibited by Common Article 3.'[67]

Although this interesting opinion goes against the general view that Common Article 3 does not extend to the protection of the environment, the chances of this argumentation

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[59] Protocol I (n 12) arts 35(3), 55(1); for reference, Article 35(3) reads: it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.' Article 55(1) reads: 'Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.'; see Gal (n 7) 43, 44.

[60] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (n 12) common art 3.

[61] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 8.

[62] Adam Roberts, 'The law of war and environmental damage' in Jay Austin and Carl Bruch (eds), *The Environmental Consequences of War:Legal Economic and Scientific Perspectives* (Cambridge University Press 2010) 76.

[63] It must be noted that Common Article 3 will no longer be relevant if the conflict moves outside the border of the High Contracting Party in which it originated.

[64] Jeanique Pretorious, 'Enhancing Environmental Protection in Non-International Armed Conflict: The Way Forward' (2018) 78 ZaoRV 903, 905.

[65] Roberts (n 62) 76.

[66] Pretorious (n 64) 905, 906.

[67] Pretorious (n 64) 906.

being successful are very weak.[68] In conclusion, Common Article 3 does not provide a substantive basis for protecting the environment in a non-international armed conflict.

APII is applicable to NIAC and was created to supplement Common Article 3. Moreover, it is applicable to both States and organized armed groups.[69] In APII, there is no directly relevant provision which explicitly protects the environment. However, Articles 14 and 15 may indirectly offer the environment protection in times of a NIAC.[70] Article 14 of Additional Protocol II reads as follows:

> Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.[71]

Article 14 has both positive and negative qualities. It has positively achieved the status of customary international law and cannot be derogated from even in cases of military necessity.[72] With these constructive elements in mind, it is also important to note a shortcoming in the case of environmental protection.[73] Strictly speaking, Article 14 offers indirect protection if an attack would lead to the starvation of civilians but does not account for other consequences of the attack, such as the starvation of members of armed groups or the death of civilians.[74]

Article 15 of Additional Protocol II does not regulate water systems per se, but targets:

> Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. [75]

The scope of application of this Article is narrow and limited.[76] It protects only in the event of attacks which are specifically enumerated therein and excludes the possibility of protection against other type of dangerous installations such as oil fields.[77] Hence, although APII does contain these two Articles, it does not provide any specific limitations with regard to methods and means of warfare affecting the environment.

### D. What is Non-International Armed Conflict?

There are generally two types of armed conflict: international armed conflict and non-international armed conflict. The International Criminal Tribunal for the former Yugoslavia

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68 Roberts (n 62) 76; Bruch (n 13) 28.

69 Pretorious (n 64) 906; Additional Protocol II and APII are interchangeable terms.

70 ibid.

71 Protocol II (n 12) art 14.

72 Pretorious (n 64) 910.

73 ibid.

74 ibid.

75 Protocol II (n 12) art 15.

76 Pretorious (n 64) 911; Protocol II (n 12) art 15.

77 Pretorious (n 64) 912.

(ICTY) narrowed down the definition of armed conflict to 'a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state'.[78]

The ICTY also differentiated between the two types of conflict by confirming that an international armed conflict can be defined as a conflict including one or more States that resort to armed force against each other or another State,[79] and that a non-international armed conflict happens internally within a State and involves one or more non-State armed groups.[80]

Primarily, according to the *travaux préparatoires* of the Geneva Conventions, 'armed conflict not of an international character' was understood to be equivalent to a civil war.[81] Despite this, there is a lack of a uniform legal definition of what precisely is encompassed in the term 'non-international armed conflict'.[82] However, it is widely agreed that, as outlined in Common Article 3, a non-international armed conflict arises when it takes place within the territory of one of the High Contracting Parties and is between the State and non-State armed groups. Furthermore, Dinstein enumerates five preconditions that must be fulfilled in order for an attack to be classified as a NIAC.[83] Firstly, he deconstructs the beginning of Common Article 3 which contains the first two conditions: '…armed conflict not of an international character'.[84] Hence, a conflict must firstly be an armed conflict, and secondly must not be of an international character. Moreover, he refers to the ICTY, which commented 'whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. [85]

From this, the remaining three requirements can be deduced. Firstly, a certain degree of organization of the non-State party to the armed conflict must exist. The second requirement is 'protracted violence', and thirdly, a certain intensity of fighting. These criteria will be applied to assess the state of the Syrian internal conflict.

Although organizations such as Human Rights Watch and the ICRC confirmed that the conflict in Syria is of an internal nature, it shall be checked against the above criteria. The conflict must be armed and not of an international character: in 2012, a report by the United Nations Independent Commission of Inquiry proved that the conflict is armed by stating that bombings took place and shelling 'with heavy weapons, leading to massive casualties and the destruction of homes and infrastructure' was employed.[86] There are multiple organized armed groups in Syria, however ISIS and FSA sustain the 'organizational degree of the non-State party' requirement, making it a conflict not of an international character.[87] The last two requirements are 'protracted violence' and intensity of fighting. Regarding 'protracted

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78 *Prosecutor v Tadic* (Judgment in Sentencing Appeals) IT-94-1-A (26 January 2000); Gal (n 7) 30.

79 Note, it is also mentioned that no formal declaration of war or recognition of the situation is required - see ICRC, 'International armed conflict' (*ICRC*, 2020) <casebook.icrc.org/glossary/international-armed-conflict> accessed 9 July 2020.

80 ICRC, 'Non-international armed conflict' (*ICRC*, 2020) <casebook.icrc.org/glossary/non-international-armed-conflict> accessed 9 July 2020; see, inter alia, Geneva Convention (n 12) common art 3.

81 Pejic (n 8) 12.

82 Pejic (n 8) 3.

83 Dinstein (n 61) 20.

84 ibid.

85 ibid.

86 RULAC, 'Non-international armed conflicts in Syria' (*RULAC*, 22 January 2020) <rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse3accord> accessed 9 July 2020.

87 See footnote 23 for analysis.

violence', Dinstein further explains that there is no ideal time frame that determines this. However, he points out that the conflict should not suddenly exist but rather start off as 'isolated and sporadic' internal disturbances which eventually turn into a non-international armed conflict. The ongoing internal battle in Syria has been taking place for over eight years, and has included extreme tactics such as 'attacking government-held areas, restricting civilians' ability to flee hostilities, kidnapping, assassinations, car bombings and more'.[88] Therefore, the criteria of 'protracted violence' and intensity of fighting can be fulfilled. The existence of NIAC in Syria is thereby confirmed.

**E. Does Customary International Law Supplement International Humanitarian Law?**

Customary international law is a supplementary source of law, affirmed in Article 38 of the Statute of the International Court of Justice. To qualify as an international custom, two requirements must be fulfilled: evidence of general practice and *opinio juris*.[89] An interesting argument shared among scholars, including Professor Meron, is that, since it is challenging to classify a conflict as international or non-international, civil wars should enjoy the broader protective rules that are suitable for international armed conflicts.[90] Thus, Professor Meron explores customary law as a possible strategy for affording the environment more protection in non-international armed conflicts, more specifically within the Martens Clause.[91] The Martens Clause states that:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[92]

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[88] Dinstein (n 61) 35, 36 - Dinstein enumerates the following indications for the criteria of intensity of fighting: 'the numbers of casualties; the diffusion of violence over territory; the deployment of military units against the insurgents; the types of weapons used, the siege of towns, and the closure of roads'; See Human Rights Watch, 'Syria Events of 2018' (*Human Rights Watch*, 2019) <hrw.org/world-report/2019/country-chapters/syria> accessed 9 July 2020.

[89] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute), art 38; *opinio juris* mean 'an opinion of law or necessity', ie a practice has to be accepted as law - see Cornell Law School, 'Opinio juris (international law)' (*Cornell Law School Legal Information Institute*) <law.cornell.edu/wex/opinio_juris_%28international_law%29> accessed 9 July 2020.

[90] Theodor Meron, 'Comment: Protection of the Environment During Non-international Armed Conflicts' (1996) 69 International Law Studies 354, 355; note, this in turn would offer the environment more protection since the type of conflict would be irrelevant if the law is applied equally.

[91] Meron (n 91) 355; the Martens Clause originates from the Preamble to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land. It functions to offer protection in cases where it is not offered in the original, specific rule and as a reminder that customary international law applies after a treaty is adopted. Note, the Martens Clause is mentioned in Chapter VI Protection of the environment in relation to armed conflicts' during the sixty-seventh session when the International Law Commission provisionally drafted Principle 12 - it states: 'In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.' - see ILC (n 4); see also Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37 International Review of the Red Cross.

[92] Ticehurst (n 91) 125.

This clause is mentioned in various different treaties, however it is worded slightly differently in each one.[93] Further discussion about the wording of this Clause and professional opinions thereon is necessary in order to establish whether the Martens Clause could assist with the protection of the environment in non-international armed conflicts.

In essence, the Martens Clause is relevant to the law of armed conflict as it is a basic provision of international humanitarian law.[94] However, the issue that arises among experts is how the Clause should be interpreted, as there is no generally accepted interpretation.[95] Judge Shahabuddeen in his Dissenting Opinion on the *Threat or Use of Nuclear Weapons* dictates that the Court confirms the Martens Clause is a customary rule.[96] Furthermore, he claims that 'the Martens Clause is not just a reminder of the existence of different norms in international law which are not given in a specific treaty, but that the Clause has a normative status in its own right and works separately from other norms.'[97] Therefore, the Clause could offer support and serve as a supplementary source of customary international law alongside the provisions that will be discussed next.

It has already been mentioned that Articles 35(3) and 55(1) API apply to international armed conflict. However, with the development of customary international law, it is pertinent to discuss whether these Articles can be extended to non-international armed conflicts. This has been discussed by the ICRC in a study on customary international law wherein they argued that Articles 35(3) and 55(1) can be applied in a NIAC.[98] It was discussed under the first part of Rule 45, which reads: 'The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.'[99]

Regarding Articles 35(3) and 55(1) API, many considerations were made. It was explained that when API was first ratified, there was concern expressed by France, the United Kingdom and later by the United States.[100] However, since ratification, State practice has consistently reflected that this prohibition has become customary.[101] In the *Threat or Use of Nuclear Weapons* case, various States submitted that they believe both Articles 35(3) and 55(1) to be customary.[102] Interestingly, the ICJ considered that, on the contrary, it is 'not to be

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93 See Additional Protocol II (n 12) preamble: 'Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'.

94 Bruch (n 13) 46.

95 Ticehurst (n 91) 125, 126.

96 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (Dissenting Opinion Judge Shahabuddeen) [1996] ICJ Rep 226.

97 ibid.

98 Britta Sjöstedt, 'The Role of Multilateral Environmental Agreements in Armed Conflict: "Green-Keeping" in Virunga Park. Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo' (2013) 82 Nordic Journal of International Law 129, 135; see also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume 1: Rules* (Cambridge University Press 2005) 143–158.

99 Henckaerts and Doswald-Beck (n 98) 151.

100 Henckaerts and Doswald-Beck (n 98) 153 - both the US and UK are doubtful of whether or not the phrasing 'may be expected to cause' is of a customary nature. The US voiced their opposition to this Rule being customary in response to an ICRC memorandum on the applicability of international humanitarian law in the Gulf region in 1991.

101 Henckaerts and Doswald-Beck (n 98) 152 - this is further evident because the prohibition is included in multiple military manuals and is an offense under the legislation of a number of States.

102 ibid.

customary as it only referred to the applicability of this provision to "States having subscribed to these provisions"'.[103] Despite this differing view from the Court, it is not substantial enough to prevent the emergence of this customary rule.[104] Furthermore, practice in terms of the methods of warfare and the use of conventional weapons 'shows a widespread, representative and virtually uniform acceptance of the customary law nature of the rule found in Articles 35(3) and 55(1) of API'.[105] In conclusion, the ICRC stated that this Rule has developed into customary international law with France, the United Kingdom, and the United States as persistent objectors.[106] The utility of these Articles will be discussed in the last subsection of this thesis.

## III. Why Define the '(Natural) Environment'?

In international humanitarian law, it is often heavily disputed what the term 'natural environment' encompasses, since there is no clear-cut, universal definition thereof.[107] Hence, these different viewpoints as to what the 'natural environment' is and what differentiates it from simply the 'environment' pose an ongoing challenge. Expert Mollard-Bannelier offers some insight and argues that 'the definition of environment has not yet been unified because of the fact that an updated description would constantly be necessary as scientific knowledge would continue to alter our understanding.'[108]

This raises a critical issue with many open-ended questions that must be confronted: what precisely is the definition of 'natural environment' in the international legal framework? It is pivotal to assess the meaning of 'natural environment' because it could vary between sources. Additionally, does the term 'natural environment' encompass more than 'environment' or vice versa? More specifically, can we precisely distinguish between 'natural environment' and 'environment'? Since the appropriate wording is a disputable matter, guidance shall be taken from the international humanitarian law perspective, which qualifies the environment as being 'natural'.[109] Hence the meaning of 'natural environment' will firstly be assessed, followed by an assessment of 'environment'. After the presentation of both

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[103] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; Henckaerts and Doswald-Beck (n 98) 153, 154.

[104] Henckaerts and Doswald-Beck (n 98) 154.

[105] ibid.

[106] Erik Koppe, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict* (Hart Publishing 2008) 244; C Greenwood, Customary Law Status of the 1977 Geneva Protocols in Delissen and Tanja (eds), *Humanitarian Law of Armed Conflict; Challenges Ahead; Essays in Honour of Frits Kalshoven* (Martinus Nijhoff 1991) 105.

[107] Weir (n 14); see, inter alia, Alexandre Timoshenko, 'Conclusions by the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, in Liability and Compensation for Environmental Damage' (Compilation of Documents, United Nations Environmental Programme, 1998) quoted in Cymie Payne and Peter Sand (eds), *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (Oxford University Press 2011); note, in international humanitarian law, 'natural environment' is accepted as opposed to 'environment'.

[108] Cymie Payne, 'Defining the Environment' in Carsten Stahn, Jens Iverson, Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford Scholarship Online 2017) 41.

[109] Weir (n 14); hence, since this is the common view in international humanitarian law, the natural environment will firstly be addressed, then the notion of 'environment' will be considered.

meanings, a grey area filled with inconsistencies regarding the definition will be visible and further discussed.

### A. Diverse Definitions of 'Natural Environment': Investigating the Inconsistencies

There are disparate meanings circulating amongst academics as to what the 'natural environment' comprises, but they do not differ immensely, and an analogy will be visible. This is precisely observed by researcher Peterson who professes that: 'generally, definitions of "natural environment" mention "a whole complex of non-living and living factors which act upon an organism or ecological community, which eventually determine its form and survival"'. [110]

This thesis focuses on non-international armed conflict and the specifically applicable sources, Common Article 3 and Additional Protocol II. However, in neither of these legal sources is there a definition of 'natural environment'.[111] The phrase 'natural environment' first debuted in an IHL instrument in 1977, in Additional Protocol I to the Geneva Conventions.[112] Although Articles 35(3) and 55(1) API refer to the natural environment, there is no definition or further explanation given of what is exactly denoted by 'natural environment'.[113] This issue is discussed in the 1977 ICRC Commentary on the Additional Protocols to the Geneva Conventions wherein it is stated that 'natural environment' should be interpreted as widely as possible.[114] Commentary 2126 states that:

> The concept of the natural environment should be understood in the widest sense to cover the biological environment in which a population is living. (…) It does not consist merely of the objects indispensable to survival (…) but also includes forests and other vegetation (…), as well as fauna, flora and other biological or climatic elements. [115]

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[110] Ines Peterson, 'The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?' (2009) 22 Leiden Journal of International Law 325, 328; note, 'non-living' may also be referred to as 'abiotic' and living as 'biotic'. Hence, these terms can be used interchangeably. The author also makes note of the fact that international environmental treaties affirm elements such as 'flora and fauna', 'air', 'soil', 'water', 'vegetation', 'habitat', 'forests', 'marine living resources', 'ecosystems', 'organism', 'climate', and 'agriculture' as belonging to the 'environment'. This is pointed out because it provides clarity and room for comparison when observing definitions in different areas of law. However, the rest of the discussion will circulate around international humanitarian law as opposed to international environmental law.

[111] Yoram Dinstein, 'Protection of the Environment in International Armed Conflict' (2001) 5(1) Max Planck Yearbook of United Nations Law Online 523, 540 - as Dinstein further pointed out, reference to the ENMOD Convention is possible. However, this Convention will be disregarded because it protects the environment from environmental modification techniques and from being used as a weapon; see Antoine Bouvier, 'Protection of the natural environment in time of armed conflict' (1991) 31 International Review of the Red Cross 567, 576; the lack of a provision in APII that is analogous to Articles 35(3) and 55(1) API was raised and a proposition was made at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH). Unfortunately, this was rejected.

[112] Hans-Peter Gasser, 'For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action' (1995) 89 The American Journal of International Law 637, 638.

[113] ibid.

[114] ibid.

[115] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) comment 2126; see Weir (n 14).

This commentary is important because it reveals that this was a concern of the ICRC at the time of writing. Moreover, this commentary provides a broad definition of what is encompassed by 'natural environment'. It could positively be argued that this wide margin of appreciation better protects the environment by offering a broad range of what can be safeguarded, as opposed to other definitions.

A few decades later, it can be observed that this is still a concern within the international legal sphere as the Parliamentary Assembly of the Council of Europe in their 2011 Report on 'Armed Conflicts and the Environment' argues that 'the natural environment is neither defined in Article 35(3) nor in Article 55(1) of Protocol I to the Geneva Conventions yet it makes reference to the natural environment.' [116]

Although international humanitarian law frequently refers to the 'natural environment' as opposed to the 'environment', the ongoing challenge, as noted by both the ICRC and the Parliamentary Assembly, is that 'natural environment' is not properly and uniformly defined.[117]

Fascinating observations are made by the International Law Commission in various reports on 'Protection of the Environment in Relation to Armed Conflicts' and the meaning of 'natural environment'.[118] In Report A/70/10 the 'environment' is defined solely as 'environment', however Principles 1 and 4 refer to 'natural environment'.[119] This was raised as a concern by members who claimed the lack of uniformity of terms created confusion and inconsistency.[120] The Special Rapporteur of the ILC commented on this differentiation by stating that 'the rationale behind the usage of these two variations was due to the scope which was wide when referred to simply "environment"'. [121]

The provisions concerning the law of armed conflict enjoyed a narrower approach, hence the term 'natural environment' was used. It was further explained that the use of 'natural environment was to avoid broadening the scope of the law of armed conflict'.[122] This Report brings to light two important issues: on the one hand, interchangeably using 'environment' and 'natural environment' can cause confusion, as was addressed by States. On the other hand, it is clear that 'natural environment' is used when discussing the scope of the law of armed conflict.[123] Two conclusions can be observed. Firstly, from the Report, it can be devised that there is a grey area that causes inconsistencies within the international legal framework when referring to the natural environment versus the environment, if these terms are not adequately explained and differentiated. Secondly, the ICRC, PACE and ILC all acknowledge the fact that the 'natural environment' is not yet properly defined within international humanitarian law.

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[116] Huseynov (n 2); Protocol I (n 12).

[117] Weir (n 14).

[118] The ILC was created by the General Assembly in 1947. Their objective is to issue recommendations with the intention of encouraging the progressive expansion and growth of international law – see UN, 'International Law Commission' (*United Nations*, 2020) <legal.un.org/ilc/> accessed 9 July 2020.

[119] ILC (n 4) - the definition of 'environment' provided in the Report is the following: it 'includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape.'.

[120] ILC (n 4) 108 – see the general comment made under point 145.

[121] ILC (n 4).

[122] ILC (n 4) 114 – see concluding remark 166 by the Special Rapporteur.

[123] ILC (n 4).

**B. 'Natural Environment' versus 'Environment'**

In order to understand the dynamic between the 'natural environment' and 'environment' in IHL, it is important to examine a few references to the term 'environment'. A well-known definition is provided by the International Court of Justice, which offers an ardent, non-binding explanation of the term in its *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion: 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.[124]

It should be noted that the Court provides this definition but does not further elaborate on terms such as 'living space', and this in turn can be interpreted in a variety of ways with potentially harmful effects on the environment.

The 1972 Stockholm Declaration was created for the preservation and enhancement of the environment, and declares in Principle 1 the 'fundamental right to … an environment of a quality that permits a life of dignity and well-being'.[125] Here, it is visible that environmental problems are an underlying, essential part of the fundamental rights of human beings because there is a correlation between human safety and a habitable environment.[126] This will be briefly examined in light of the conflict occurring in Syria.[127]

A definition was given in the 70th session of the International Law Commission wherein it was stated that '"environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristics of the landscape.' [128]

A pattern is visible regarding each definition. Crucial terms such as 'living space', 'characteristics of the landscape', and 'a life of dignity and well-being' are not adequately described. This presents an opportunity for international and non-international actors who committed a wrongdoing and damaged the environment to interpret it in such a way that benefits them and rids them of any responsibility for the harm caused to the environment.[129] As briefly stated above, it is to some extent understandable that to create a universally applicable definition of the natural environment is problematic due to the constant

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[124] Henckaerts and Doswald-Beck (n 98) 152.

[125] See United Nations, 'Report of the United Nations Conference on the Human Environment' (1 January 1973) UN Doc A/CONF.48/14/Rev.1 - note only the relevant aspect of the Principle is stated; the Principle in full reads: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.'; Furthermore, this is an interesting example of how the environment is not constricted to what a lay-person may perceive it to be but extends to include human rights - see Steven Freeland, 'Human Rights, the Environment and Conflict: Addressing Crimes against the Environment' (2005) 2 SUR International Journal on Human Rights 112.

[126] Freeland (n 125) 113.

[127] Zwijnenburg and te Pas (n 6) 11, 14, 18, 19 – note, there will be reference to the Stockholm Declaration when discussing the lack of an efficient water system due to damage caused by the internal conflict resulting in harm to the well-being of humans. It will be further argued that this is damaging the environment.

[128] ILC (n 4).

[129] Karine Bannelier-Christakis, 'International Law Commission and Protection of the Environment in Times of Armed Conflict: A Possibility for Adjudication?' (2013) 20 Journal of International Cooperation Studies 129, 131, 140 - the author specifically refers to ILC Member Marie Jacobsson, who has actively been recognizing the necessity for the ILC to continue developing legislation surrounding the recognition and protection of the environment, because although there has been notable progress it still remains vague; see also ILC, 'Report of the International Law Commission on the work of its sixty-third session' (2011) A/66/10.

development of scientific knowledge.[130] Again, this presents a certain grey area, since it is challenging to protect the 'natural environment' if officially there is no singular definition thereof.[131]

The conclusion that can be drawn from this analysis is that no certain definition of what encompasses environment, and more importantly 'natural environment', exists. What does exist is a variety of definitions that offer more or less the same amount of protection for the environment, and consequently none of them bring the environment sufficient justice. Thus, further references made in this thesis will refer to 'natural environment' and be understood in the broadest scope possible. This will allow for a wider margin of applicability and a broader analysis of what the natural environment entails, and what in turn can be protected.

## IV. The Assessment: Linking the Water Crisis to Environmental Damage

In this last Section, an assessment and analysis will take place. Consistent reference has been made in this thesis to damage the natural environment in Syria has sustained. Hence, it is critical to firstly confirm whether the damage to the water system can be connected to environmental damage. If so, it will be then questioned whether international humanitarian law can offer the natural environment any protection amidst the Syrian conflict.

Perhaps, at first glance, the discussed damage to the water systems does not appear to affect the natural environment physically. However, it can be presumed that this damage caused contamination which could have seeped into the soil as the result of a leak or the blow of an attack and caused soil pollution.[132] Furthermore, it can be extended to say that there is water pollution resulting in damage that is perhaps not accounted for due to a lack of efficient studies. Alternatively, the shortage of water can result in agricultural damage and an inability to properly care for the soil and the natural environment. This can be reaffirmed by the estimate that, due to the conflict, around 300,000 farming families left for other cities. This in turn left large areas of agricultural land unattended.[133]

With the analysis of what the 'natural environment' entails, it has been established that in order to best carry out a further analysis regarding the case study of Syria, a wide margin of appreciation would be presumed. Applying a wide margin of appreciation to the damage being done in Syria with regard to the water system is appropriate, since, as mentioned, the blockage of suitable water has diminished the standards of living in Syria. Moreover, the Commentary to the Additional Protocols discussed above stated that '"natural environment" should be elucidated as widely as possible.'[134] Hence, it would not be incorrect to say that the water crisis

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[130] Payne (n 108).

[131] The Office of the Prosecutor, 'Policy paper on case selection and prioritisation' (*International Criminal Court*, 15 September 2016) <icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 9 July 2020 – this report includes distinct points referencing the Court s capability to prosecute individuals for causing harm to the environment. Specifically, points 7, 40 and 41 all mention the investigation of destruction to the environment. Although references are made to the 'destruction of the environment', nowhere within the Policy Paper is a definition of the environment available. It must be recognized that this is a tremendously important step forward for the protection of the environment and is evidence that progress is being pursued. Nonetheless, the underlying issue is still present: how can we protect the 'natural environment' or the 'environment' if the meaning of the term is unclear?

[132] Zwijnenburg and te Pas (n 6) 19, 29.

[133] ibid.

[134] Gasser (n 112).

in Syria is resulting in environmental damage because it is countermanding a 'life of dignity and well-being'.[135] Due to this wide perspective, the damage to the water system by military attacks will qualify as damage to the natural environment. Hence, this must be assessed in light of international humanitarian law to ascertain whether or not a provision thereof can be used to protect the environment from further damage.

**A. Can the Law of Non-International Armed Conflict Protect the Syrian Environment?**

It has been reiterated that the conflict in Syria is of a non-international and armed nature, therefore the application of certain provisions proves to be problematic. The *jus in bello* mentioning environmental protection is found in Additional Protocols I and II to the Geneva Conventions.

Firstly, the provisions pertaining to non-international armed conflicts will be reviewed and it will be discussed whether they are applicable to the damage to the water systems in Syria. Common Article 3 is a general provision applicable to non-international armed conflict, but it does not explicitly relate to or mention the natural environment or water systems. Arguing purely on the basis of Common Article 3 would therefore be unsuccessful in attempting to halt the damage occurring in Syria. Some scholars, such as Pretorious, attempt to broaden the scope of this Article to include the environment.[136] However, in practice, this is neither feasible nor successful. Common Article 3 could be used as a supplementary article; however, it would not be victorious on its own.

Additional Protocol II as a whole is applicable to non-international armed conflict. It does not specifically mention the 'natural environment', but it does contain Articles 14 and 15 relating to water systems. These Articles are a positive result of the development of legislation to include more environmentally conscious terms. However, they are not perfect. Article 14 could provide indirect environmental protection in the case of Syria, specifically if an attack destroyed drinking water installations and supplies.[137] However, Article 14 states that attacks are only prohibited if they would result in the starvation of civilians. Therefore, the attacks on the water system would either have to render a situation where, due to loss of water, civilians lose copious amounts of crops resulting in a famine, or a total loss of water throughout the whole country. The likelihood of this occurring is small since these scenarios are very specific, and other outcomes such as death, or the starvation of armed opposition groups, are not mentioned. On the other hand, Article 15 refers to the prohibition of attacks on works or installations containing dangerous forces. Article 15 would be unsuccessful in protecting the natural environment from damage to water systems because, even if the water system was linked to something containing a dangerous force, it is not explicitly covered by this Article. Hence, it would not be plausible to argue effectively in this respect.

An interesting observation was made by Desgagné, who argues that 'Thus, the provisions of the Hague or the Geneva Conventions, through the protection of civilian property and objects, offer indirect protection of the environment. (…)'[138] This argument is true; however, the bigger picture must be considered. Namely, in the law of non-international armed conflict there is no provision which would truly protect the natural environment.

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[135] Sandoz, Swinarski, and Zimmermann (n 115).
[136] Pretorious (n 64) 905, 906.
[137] Pretorious (n 64) 910.
[138] Desgagné (n 16) 109.

Perhaps the even bigger question is: what is the natural environment? As discussed above, this is a grey area as no universal definition exists. Does the lack of a specific definition in IHL result in a lack of protection for the natural environment? Or, is the law on NIAC simply not as developed as the law on IAC? The answer is probably a mixture of both the lack of a specific definition and the lack of precise, specific provisions which offer exclusive protection to the natural environment in times of non-international armed conflict.[139]

**B. The Law of Armed Conflict: A Customary International Law Perspective**

The Articles applicable to international armed conflict will be assessed as customary international law. Articles 35(3) and 55(1) API regulate conduct affecting the natural environment and there are various viewpoints as to whether or not these should qualify as custom. It must be brought to light that practice, in terms of methods of warfare and the use of conventional weapons, 'shows a widespread, representative and virtually uniform acceptance of the customary law nature of the rule found in Articles 35(3) and 55(1) of API'.[140]

Moreover, the ICRC concluded that this Rule has developed into customary international law with France, the United Kingdom, and the United States as persistent objectors.[141] An interesting point worth noting is that the view that Articles 35(3) and 55(1) are not customary international law was once widely supported in literature. Greenwood argued in 1991 that 'There is little or no subsequent practice which might have had the effect of incorporating the principle stated therein into customary law'.[142] Despite this viewpoint, it is customary to qualify these two Articles as also applying to non-international armed conflicts.

Therefore, the question is: can they sufficiently prevent further environmental damage in Syria?

The Articles both present a triple requirement that, during an armed conflict, there is an absolute prohibition on causing damage that would be 'widespread, long-term, and severe Articles. these regarding literature in mentioned consistently is point important An [143].' For example, Bothe, Bruch, Diamond, and Jensen argue 'that Articles 35(3) and 55(1) are "excessively restrictive and unclear" because they contain the conjunction "and", meaning that the damage must fulfill all three requirements, two of which are not fully explained.'[144]

Hence, it would be difficult to argue under these Articles, as both not only contain the triple requirement of the damage being long-term, widespread, and severe but the terms 'widespread' and 'severe' are not properly defined. 'Long-term' was explained by the Protocol as 'a period of at least ten years'.[145] Therefore, even if the other two requirements were valid, the Syrian conflict erupted in 2011 and was classified as a NIAC in 2012.[146] Therefore, as of 2020 it would not have surpassed the ten-year minimum.

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139 ibid.

140 Henckaerts and Doswald-Beck (n 98) 154.

141 Koppe (n 106) 244.

142 Greenwood (n 106) 105.

143 Protocol I (n 12) arts 35(3), 55(1).

144 Michael Bothe and others, International law protecting the environment during armed conflict: gaps and opportunities' (2010) 92 International Review of the Red Cross 569, 570, 572.

145 Wil Verwey, Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective' (1995) 8 Leiden Journal of International Law 7, 10.

146 Arimatsu and Choudhury (n 19).

In conclusion, if the Syrian conflict continues to escalate and cause damage to the environment, then in the future Articles 35(3) and 55(1) could be applicable. As of now, however, they are not very helpful due to the high threshold that must be met for them to become applicable.

## V. Conclusion

A number of conclusions can be drawn from the presented research and analyses; however, a few important ones will be iterated. The main aim of this thesis was to present the current legal framework that protects the environment from damage sustained during non-international armed conflict and to apply it to the specific case study of Syria, with focus on the water systems. From this, the following conclusions can be derived.

The first conclusion is that the current legal framework is not sufficiently expanded and specific to do the environment justice. There have been multiple environmental attacks in Syria and no steps towards the termination of these have been taken due to the lack of applicable legislation. Common Article 3 and APII prove to be hopeful to a certain extent but are definitely not substantial enough to stand on their own. Although customary international law status has been found in Articles 35(3) and 55(1) API, which specifically relate to the natural environment, the required threshold in these Articles is too high and imprecise to apply to the damage caused in Syria. Thus, current international humanitarian law proves to be unsuccessful in protecting the natural environment in Syria.

The second conclusion is that there is a definite grey area when addressing the natural environment in international humanitarian law. With regard to the terms 'natural environment' and 'environment', there is no clear distinction and they are used interchangeably throughout various legal sources, which ultimately stimulates confusion. This presents two issues: firstly, the natural environment is not accurately represented within the legal framework, and secondly, this should urge legislators to reasonably reevaluate the outdated legislation regarding the definition of the natural environment.

The analytical findings were applied to the Syrian non-international armed conflict and the damage which is resulting. The last obvious conclusion is that there is damage occurring to the natural environment. More precisely, the attacks are ruining the water systems which is having diverse effects such as seeping into the soil, causing water pollution, and creating airborne diseases. A subsequent issue that was assessed was the effect the attacks are having on the existence of a suitable environment for the health of human beings. Moreover, the findings repeatedly conclude that damage to the water systems and the water scarcity that is ongoing is not providing a safe environment, thereby risking the health of peoples.

In conclusion, this thesis presents two threats to the environment: the first threat arises from the physical damage that the environment endures as a result of attacks, and the second is the abstract damage that is the consequence of insufficient protection for the environment within the legislative framework.

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# Political Micro-Targeting in Europe: A Panacea for the Citizens' Political Misinformation or the New Evil for Voting Rights

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**Keywords**
RIGHT TO VOTE; ONLINE POLITICAL MICRO-TARGETING; ELECTION LAW

**Abstract**
Personalised interaction between political parties and the electorate has existed since the emergence of modern elections. Nowadays, digital technology has moved the relationship between political candidates and voters to a more advanced level. Through collecting and analysing citizens' personal data via digital means, politicians have the capacity to foresee the electorate's political behaviour, its preferences, and the choices it is inclined to make. Such campaign strategy is known as 'political micro-targeting', and it has raised great interest in academia. One may consider it a panacea for political misinformation, given that political micro-targeting can increase the population's participation in politics. Nonetheless, it can be argued that this phenomenon poses a long-term threat to democracy. Accordingly, due to the high engagement with personal data that political micro-targeting entails, the question of its compatibility with citizens' voting rights arises. This thesis will explore the issue of online political micro-targeting and seek to conduct a comparative analysis between presidential election campaigns in three European states, namely France, Italy and the United Kingdom. Accordingly, current political micro-targeting practices in these legal systems, and how they can influence each other, will be illustrated. An important place will be devoted to the analysis of political micro-targeting's interference with the electorate's voting rights and its regulatory framework.

## I. Introduction

Elections lie at the heart of the democratic regime and form the essence of its core values.[1] They give the people an opportunity to express their general will and choose those who will govern them. Accordingly, it is through democratic elections that the government of any democratic State obtains its legitimacy.[2] Through electing their representatives, citizens have the right to hold them accountable if they do not adhere to the promised agenda.[3] The electoral procedure also encourages political parties to efficiently prepare their programmes and respond to the will of the electorate. As a result, it is imperative that any kind of vote-rigging during election campaigns is averted to preserve the effectiveness of the elections.[4]

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1 David A Schultz, *Election Law and Democratic Theory* (Taylor & Francis Group 2014) 45.

2 Jean-Jacques Rousseau, *The Social Contract; or, Principles of Political Rights* (first published 1762, Jonathan Bennett 2017) 57.

3 Anthony Barker, 'Accountability and Responsibility of Government and Public Bodies' (2001) 72(1) The Political Quarterly 132, 134.

4 Michael R Alvarez, Thad E Hall and Susan D Hyde, *Election Fraud: Detecting and Deterring Electoral Manipulation* (Brookings Institution Press 2008) 149.

Nonetheless, in recent years, electoral campaigns have been shaped and arguably endangered by technological advancements.[5] Due to the expansion of social media and the development of new technologies (eg big data, data science), political parties can personalise their targeting approach towards the citizens of their country and better respond to their needs. Such progress in the field of elections brings various benefits to society due to the customised nature of political agendas.[6] Indeed, the opportunity of getting closer to an ordinary citizen through conducting a psychological analysis of the population can result in a new type of government, which can be rightfully called 'the servant of the people'.[7] Notwithstanding the apparent benefits technology has brought to elections, it has also contributed to an increase in the level of electoral fraud.[8] By predicting citizens' political choices and further exploiting them, political parties are interfering with the very essence of elections. These activities are better known as online political micro-targeting. Accordingly, by way of creating data-driven elections and simplifying vote-rigging by political candidates, they constitute an imminent threat to the values lying at heart of any democratic regime.[9]

The first trace of online political micro-targeting and its regulation can be found in the United States. The leading case on the matter is the 2016 scandal surrounding Cambridge Analytica and Facebook. Using the personal data of Facebook users across the world, Cambridge Analytica facilitated personalised, online political advertisements for US politicians and thus influenced the population's voting choices. It must be emphasised that the involvement of Cambridge Analytica in States' political matters was further discovered in Europe, particularly in the United Kingdom (hereinafter 'the UK'). Nowadays, online political micro-targeting has become a highly relevant topic in the world of politics. Indeed, in many States worldwide there are a considerable number of cases in which it interferes with electoral procedures.[10] Accordingly, due to its manipulative nature, such campaign practices are a remarkably contentious phenomenon from the perspective of the right to vote. However, not enough consideration has yet been given to this facet of online political micro-targeting.

This thesis will therefore examine to what extent online political micro-targeting in Europe interferes with the electorate's voting rights. It will conduct a comparative analysis

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5 Moritz Hoferer and others, 'The impact of technologies in political campaigns' (2019) 538 Physica A: Statistical Mechanics and its Application 1, 2.

6 Frederik J Borgesius and others, 'Online Political Microtargeting: Promises and Threats for Democracy' (2018) 14(1) Utrecht Law Review 82, 85.

7 Muel Kaptein, *The Servant of the People: On the power of integrity in politics and government* (News & Politics 2014) 15.

8 Hoferer and others (n 5) 16.

9 Tom Dobber, Ronan Ó Fathaigh and Frederik J Zuiderveen Borgesius, 'The regulation of online political micro-targeting in Europe' (2019) 8(4) Internet Policy Review <policyreview.info/articles/analysis/regulation-online-political-micro-targeting-europe> accessed 22 April 2020 5.

10 The United States can be a clear illustration of this statement. It is apparent that online political micro-targeting was 'born' in the United States. It was largely used by the political leaders during both presidential and parliamentarian elections in order to influence the electorate's political views. For example, see Kate Kenski, Bruce W Hardy and Kathleen Hall Jamieson, *The Obama Victory: How Media, Money, and Message Shaped the 2008 Election* (OUP 2010) 252. Micro-targeting activities were also observed in the politics of Australia and Mexico, ror example, see Our Data Our Selves, 'Mexico: How Data Influenced Mexico's 2018 Election' (*Our Data Our Selves*, 2 July 2018) <ourdataourselves.tacticaltech.org/posts/overview-mexico> accessed 22 April 2020; Democratic Audit UK, 'How Australian activists used Obama-style micro-targeting in the 2016 elections' (*Democratic Audit*, 4 October 2016) <democraticaudit.com/2016/10/04/how-australian-activists-used-obama-style-micro-targeting-in-the-2016-elections/> accessed 22 April 2020.

of three European States, namely France, Italy and the UK, and seek to illustrate how online political micro-targeting is regulated in these legal systems. Moreover, it will contrast this campaign strategy with the citizens' right to vote and show which threats and promises online political micro-targeting brings to this right. Importantly, this thesis will advocate for regulating online political micro-targeting instead of completely prohibiting it. It finds that due to the vast array of benefits it can have on political systems, online political micro-targeting can substantively contribute to fighting political misinformation.

This thesis will be divided into three chapters. In the first chapter, the reader will be presented with a theoretical background to online political micro-targeting and related incidents in the three above-mentioned States. Particularly, the hacking attack on Emmanuel Macron during the French presidential elections of 2017 will be explained. Moreover, Matteo Salvini and Luigi Di Maio's activities on Facebook will be analysed as providing a way for both candidates to win their seats in the Italian parliament during the Italian parliamentary elections of 2018. Lastly, online political micro-targeting conducted by the British Conservative party during the UK general election of 2019 will be discussed. In the second chapter, this thesis will elaborate on the scope of the right to vote and how it is protected by international, European and national legal systems. Moreover, the algorithms behind the drafting of online political micro-targeting strategies will be explained. The third chapter will elaborate on the issue which lies at the heart of this research, namely the interference of online political micro-targeting with the right to vote. It will discuss particular examples of how these campaign practices are endangering the right to vote and the possible consequences for democracy. Nonetheless, this chapter will also attempt to shed light on the positive side of online political micro-targeting and criticise its complete banning. It will seek to present the reader with a possible regulatory framework on online political micro-targeting and define the main actors responsible for its development.

## II. Online Political Micro-Targeting: A Theoretical Background

### A. General Overview: Modern Politics Shaped by ICT

Electoral procedure fundamentally contributes to a government's democratic legitimacy and its claim to govern.[11] Consequently, from the emergence of elections, politicians have been seeking to reach the electorate through the various channels available to them.[12] For instance, before the social media era, politicians mainly sold their agenda via radio, television and newspapers. Moreover, political pronouncements in front of citizens were often made in order to create bonds with a certain candidate and gain the population's loyalty.[13] The crucial political role played by churches also should not be underestimated.[14] It was very common for a political candidate to seek endorsement from the priests of the church of the region whose confidence he wanted to earn.[15] Lastly, the appearance of a

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[11] Schultz (n 1) 46.

[12] Diana Owen, 'The Past Decade and Future of Political Media: The Ascendance of Social Media' in Michelle Baddeley (ed), *Towards a New Enlightenment? A Transcendent Decade* (BBVA's OpenMind 2019) 348.

[13] Bruno Latour, 'What if we Talked Politics a Little?' (2003) 2 Contemporary Political Theory 143, 156.

[14] IWC van Wyk, 'The political responsibility of the church: On the necessity and boundaries of the theory of the two kingdoms' (2005) 61(3) HTS Teologiese Studies/Theological Studies 647, 653.

[15] For instance, such campaign practices were widespread in the United States and South Africa; See David E Campbell, 'Acts of Faith: Churches and Political Engagement' (2004) 26(2) Political Behavior 155, 170.

candidate was of highest importance.[16] Even today, the way they dress, their family affairs and other activities outside the political realm (e.g. charity and volunteering) play major roles in the politician's personal branding.

Accordingly, it is apparent that political leaders around the globe have always sought to interact closely with the population to win their trust and further ensure that the citizens' voice is heard. Therefore, it is not entirely correct to assume that political micro-targeting is a completely new phenomenon, exclusively known to the modern community.[17] However, Information and Communication Technology (hereinafter 'ICT') and, more importantly, social media, undoubtedly had a crucial impact on how politicians can interact with the electorate. These methods have more of a mass-targeting nature, rather than being a personal communication between an individual citizen and a political candidate. It is apparent, however, how Twitter and Facebook shaped political campaigning, which is now characterised by suspiciously highly-individualised political advertisements online. Here, the notion of online political micro-targeting came into existence. Through collecting personal data and other information about citizens, political candidates can conduct psychological analysis on the population and anticipate citizens' political views and choices.[18] Politicians will further use this information to adapt their campaign programs to target a specific group of people within the electorate.

Therefore, it can be observed that modern politics experienced a shift from mass-targeting to more concrete and individualised interactions.[19] Two core factors can explain such an alteration. The first is an increase in the general standard of living of the population, as well as continued peace and security.[20] Indeed, online political micro-targeting is more widespread in more developed countries, such as the United States and European States, whereas politicians in less developed countries still use a more generalised approach to the electorate, bringing together citizens' core concerns and promising to solve problems such as hunger and poverty. Secondly, modern technologies have made the process of storing, processing and sharing citizens' personal data much faster and significantly cheaper for political parties.[21] Hence, it further encourages them to invest in data science research and develop closer links between candidates and electors.

Nonetheless, the question still lying at the heart of political micro-targeting is to what extent it misguides citizens and whether more individualised relations between the government and the population are necessarily harmful. Apparently, while identifying targeted groups for self-advertising, politicians examine the people's needs, the problems they are experiencing and possible solutions.[22] Modern technology, with all its potential, can drastically simplify this research and allow the government to create more effective

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16 Margaret Scammell, 'Political Marketing: Lessons for Political Science' (1999) 47 Political Studies 718, 722.

17 Balázs Bodó, Natali Helberger and Claes H de Vreese, 'Political micro-targeting: a Manchurian candidate or just a dark horse?' (2017) 6(4) Internet Policy Review <policyreview.info/articles/analysis/political-micro-targeting-manchurian-candidate-or-just-dark-horse> accessed 22 April 2020 3.

18 Morgan E Currie, Britt S Paris and Joan M Donovan, 'What difference do data make? Data management and social change' (2019) 43(6) Online Information Review 971, 981.

19 Sanne Kruikemeier, Minem Sezgin and Sophie C Boerman, 'Political Microtargeting: Relationship Between Personalized Advertising on Facebook and Voters' Responses' (2016) 19(6) Cyberpsychology, Behavior, and Social Networking 367, 367.

20 Sophie Thomashausen, 'Addressing the 21st Century Threats to International Peace and Security: The Reform of the UN from a European Perspective' (2005) Fondation pour l'innovation politique 13.

21 Hao Zhang and Gang Chen, 'In-Memory Big Data Management and Processing: A Survey' (2015) 27(7) IEEE Transactions on Knowledge and Data Engineering 1920, 1924.

22 International IDEA, 'Digital Microtargeting Political Party Innovation Primer 1' (2018) International Institute for Democracy and Electoral Assistance 10.

and practical policies. Moreover, online political micro-targeting represents an added value because it may give citizens the impression of a closer connection with a candidate which was often missing in the past elections.[23] Indeed, earlier in the history of politics, citizens saw politicians as a distinct, elite class, often unreachable and somehow superior. However, modern social media bought political candidates closer to ordinary citizens and made their communication with the public more informal. Additionally, online political micro-targeting can result in a higher election turnout,[24] thus in more voices being heard and the government representing the general will of the citizens in a fairer manner. Therefore, online political micro-targeting, if not misused, can strengthen the effectiveness of the citizens' political representation in State affairs.

However, it is conspicuous that online political micro-targeting also brought about numerous adverse consequences.[25] For instance, due to the very nature of the online activities political micro-targeting entails, it is inevitably intrusive from a personal data protection perspective. The scandal revolving around Facebook and Cambridge Analytica perfectly illustrates this statement.[26] The extraction of individual behavioural patterns among the electorate is achieved by obtaining the citizens' personal data without their prior consent.[27] It brings up the phenomenon known as 'dataveillance': a concept encompassing the process of collecting all online activities of the population, storing them and, when necessary, allowing third parties to use them.[28] Another equally crucial matter concerning online political micro-targeting is its undemocratic nature. Indeed, such aftereffects as mass manipulation by political leaders and data-driven elections create justifiable concerns from the perspective of a citizen's right to vote.[29] This is the dimension of online political micro-targeting that this thesis will further focus on. The following sections of this chapter will describe online political micro-targeting practices in France, Italy and the UK and give the reader valuable insights on the place of this phenomenon within their legal and political systems.

### B. The French Legal System: #MacronLeaks

It is important to note that French law forbids any kind of individual political micro-targeting during election campaigns, including online campaigns.[30] However, it is often a matter of interpretation when it comes to defining the individual nature of micro-targeting activities in the French legal system. The case of the 2017 French presidential elections sparked the interest of society after the hacking attack on Emmanuel Macron's email as an

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23 Louis D Brandeis, 'Citizens and politicians' in *World Development Report: Making Services Work for Poor People* (The International Bank for Reconstruction and Development / The World Bank 2004) 78.

24 Borgesius and others (n 6) 85.

25 ibid 87.

26 Jim Isaak and Hanna J Mina, 'User Data Privacy: Facebook, Cambridge Analytica, and Privacy Protection' (2018) 9162(18) Computer 56, 57.

27 ibid.

28 Roger Clarke and Graham Greenleaf, 'Dataveillance Regulation: A Research Framework' (2017) UNSW Law Research Paper No.17-84, 4 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3073492> accessed 22 April 2020; Anthony Nadler, 'Weaponizing the Digital Influence Machine: The Political Perils of Online Ad Tech' (2018) Data & Society Research Institute 11.

29 Iva Nenadic, 'Data-driven Online Political Microtargeting: Hunting for Voters, Shooting Democracy?' (*European University Institute: Robert Schuman Centre For Advanced Studies. Centre for Media Pluralism and Freedom*, 8 March 2018) <cmpf.eui.eu/data-driven-online-political-microtargeting-hunting-for-voters-shooting-democracy/> accessed 22 April 2020.

30 The French Electoral Code (as amended January 2020), arts L. 52-1, L. 163-1; Dobber, Fathaigh and Borgesius (n 9) 11.

attempt to meddle with the campaign and destabilise his position in the eyes of French citizens and the global community.[31] Various controversies had already appeared surrounding Macron's candidacy during runoff elections, such as monetary fraud and vote-rigging.[32] The actual data leak happened at the last minute before the election silence and, unsurprisingly, spread widely via Internet.[33] This leaked information included personal emails and other crucial documentation of Macron and his closest campaign team-members. The WikiLeaks website made this data internationally available,[34] thus creating a huge scandal around Macron's candidacy.

Although this attempt to hinder Macron's campaign failed, the hacking attack unveiled crucial information on Macron's campaign organisation. Firstly, it reaffirmed that the current French president used online political micro-targeting during his door-to-door campaign 'La Grande Marche'.[35] Here, political views of French citizens were collected and further analysed by a digital platform designed by the company Liegey Muller Pons.[36] In this way, Macron's team collected valuable information on the French electorate for the purpose of developing more personalised content for Macron's political advertisements. The French National Commission on Informatics and Liberty, the primary authority responsible for all issues related to data privacy, had earlier prohibited any type of individual micro-targeting during elections.[37] Nonetheless, Macron's strategy was designed in a manner which allowed it to bypass this requirement.[38] Accordingly, instead of individually profiling French citizens, he worked on a broader scale, analysing every French region and the political opinions shared by all of its inhabitants. However, it is arguable that such an approach still resembles online political micro-targeting in its nature. Indeed, regardless of this more generalised political profiling, Macron's team was collecting the population's personal data and further using it to manipulate, even indirectly, its political choices.

### C. The Italian Legal System: 2018 Parliamentary Elections and Facebook

Contrary to the French case, the Italian legislation does not provide for any legal framework on online campaign regulations.[39] Hence, the general elections of 2018 were fraught with online political advertisements. Two leaders of populist parties, Matteo Salvini and Luigi Di Maio, had actively used Facebook for their political campaign and, consequently, both won seats in the Italian parliament.[40] Even though there was no official

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[31] Jean-Baptiste Jeangène Vilmer, 'The "Macron Leaks" Operation: A Post-Mortem' (2019) Atlantic Council IRSEM 4.

[32] Megha Mohan, 'Macron Leaks: the anatomy of a hack' (*BBC News*, 9 May 2017) <bbc.com/news/blogs-trending-39845105> accessed 22 April 2020.

[33] Munish Sharma, 'Voter's Dilemma: Data Leaks and Electoral Interventions' (2017) IDSA 2.

[34] WikiLeaks, 'Macron Campaign Emails' (*WikiLeaks*, 31 July 2017) <wikileaks.org/macron-emails/> accessed 22 April 2020.

[35] International IDEA (n 22) 12.

[36] Privacy International, 'Data analysis to improve electoral strategy (Liegey Muller Pons)' (*Privacy International*, 20 December 2017) <privacyinternational.org/examples/2842/data-analysis-improve-electoral-strategy-liegey-muller-pons> accessed 22 April 2020.

[37] Colin J Bennett and David Lyon, 'Data-driven elections: implications and challenges for democratic societies' (2019) 8(4) Internet Policy Review <policyreview.info/data-driven-elections> accessed 22 April 2020 8.

[38] International IDEA (n 22) 12.

[39] Sofia Verza, 'Policy Brief: An overview of Italian online and offline political communication regulation' (2018) Global Freedom of Expression Columbia University 15.

[40] Ammar Kalia, Caelainn Barr and Angela Giuffrida, 'Revealed: how Italy's populists used Facebook to win power' (*The Guardian*, 17 December 2018) <theguardian.com/world/2018/dec/17/revealed-how-italy-populists-used-facebook-win-election-matteo-salvini-luigi-di-maio> accessed 22 April 2020.

proof that online political micro-targeting was employed by either Salvini's League Party or Di Maio's Five Star Party, the very nature of these campaign activities raised multiple concerns in relation thereto.

Firstly, it must be reiterated that both parties, particularly Salvini's League, actively used Facebook in order to get closer to the electorate.[41] The messages they sought to deliver to voters were targeted towards groups who were more supportive of nationalist movementsand thus encouraged them to vote for Salvini.[42] Moreover, it became apparent that the League was clearly dominating Facebook traffic and had the opportunity to build a more individualised relationship with the electorate.[43] As was further observed, this approach led to a situation whereby Italian citizens tended to rely on information provided via social media more than any other source.[44] It also allowed the League to bypass the mainstream media and exercise better control over the Italian electorate.[45]

Secondly, the structure and activities of the Five Star Party generated unease regarding online micro-targeting.[46] This party is headquartered exclusively on the Internet and has its own advanced online political platform.[47] All its members perform their political activities entirely online and, by expressing their political views and opinions via this platform, give the Five Star adequate information on the political choices they are inclined to make.[48] Hence, by knowing exactly what the electorate wanted, Di Maio was able to deliver personalised messages and customised promises to the Italian people.[49] Regardless of the tension surrounding online micro-targeting activities, both parties successfully won their seats in the Italian parliament.[50]

### D. The British Legal System: Brexit-Driven Elections of 2019

The UK General Elections of 2019 can be rightfully called Brexit-driven. Debates on Brexit were spread over the Internet and propaganda flourished on social media from the first day the Brexit discussions started. In the British legal system, the 2003 Communications Act limits paid political advertisements solely to TV, radio and newspapers.[51] However, it does not cover online advertisements.[52] Hence, when the Brexit referendum took place in 2016, an immense online UK-leave advertisement campaign targeting specific citizens' groups

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41 Kalia, Barr and Giuffrida (n 40).

42 Julia Carrie Wong, 'It might work too well': the dark art of political advertising online' (*The Guardian*, 19 March 2018) <theguardian.com/technology/2018/mar/19/facebook-political-ads-social-media-history-online-democracy> accessed 22 April 2020.

43 Kalia, Barr and Giuffrida (n 40).

44 Sofia Verza, 'The regulation of political communication during electoral campaigns in Italy' (*OBCT*, 22 February 2019) <balcanicaucaso.org/eng/Projects2/ESVEI/News-Esvei/The-regulation-of-political-communication-during-electoral-campaigns-in-Italy-193052> accessed 22 April 2020.

45 Kalia, Barr and Giuffrida (n 40).

46 Marta Musso and Marzia Maccaferri, 'At the origins of the political discourse of the 5-Star Movement (M5S): Internet, direct democracy and the "future of the past"' (2018) 2(1-2) Internet Histories 98, 99.

47 Liza Lanzone and Dwayne Woods, 'Riding the Populist Web: Contextualizing the Five Star Movement (M5S) in Italy' (2015) 3(2) Politics and Governance 54, 63.

48 Hannah Roberts, 'The dark side of Italy's Five Star movement' (*The New European*, 2 May 2018) <theneweuropean.co.uk/top-stories/the-dark-side-of-five-star-italian-movement-1-5493911> accessed 22 April 2020.

49 ibid.

50 Kalia, Barr and Giuffrida (n 40).

51 The United Kingdom Communications Act 2003 (The UK Communication Act), art 333(3)

52 Dobber, Fathaigh and Borgesius (n 9) 12.

was observed.[53] Moreover, the Conservative party already employed online political micro-targeting in order to win the General Elections of 2015.[54] Thus, a previously created comprehensive database of voters' preferences was re-used as a means to push the Brexit agenda. The Conservative party invested a great amount of resources into creating and spreading pro-Brexit propaganda on social media and presenting the idea of Brexit from an individualised perspective to every UK citizen. Arguably, many people were therefore misinformed about Brexit, and their vote influenced by misguided reasoning, resulting in a lack of understanding of the possible consequences of Brexit for the UK.[55] It can therefore be argued that, from the very beginning, the whole Brexit debate was largely guided by online political micro-targeting.[56]

Additionally, the population's opinion on the UK leaving the EU was constantly shaped in this way even after the referendum took place in 2016.[57] For the Conservatives, it was crucial to maintain the population's pro-Brexit attitude in order to win the upcoming parliamentary election. Unsurprisingly, when the 2019 UK general elections took place, they were again accompanied by millions of personalised advertisements and online Brexit propaganda.[58] Resultantly, the Conservative party won the Brexit-led elections and Boris Johnson became UK's Prime Minister. As correctly stated by various scholars, online political micro-targeting once more played a crucial role in promoting a pro-Brexit attitude and closed this chapter on the future of the EU-UK relationship.[59]

## III. Diving Deeper: From Theory to Practice

### A. Right to Vote: Definition, Scope and Limitations

The main research focus of this paper is the interplay between online political micro-targeting and the right to vote. This right, otherwise known as active suffrage, is a centrepiece of any democracy as it secures that the voices and opinions of all citizens will be heard.[60] The nature of this right is complex and raises questions relating to the scope of the right to vote and any legally acceptable grounds for its restriction. Finding the answer to these questions and unpacking the nature of the right to vote is crucial in order to properly evaluate how it is affected by online political micro-targeting.

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53 Mark Scott, 'Cambridge Analytica did work for Brexit groups, says ex-staffer' (*Politico*, 30 July 2019) <politico.eu/article/cambridge-analytica-leave-eu-ukip-brexit-facebook/> accessed 22 April 2020.

54 Borgesius and others (n 6) 84.

55 Max Hänska and Stefan Bauchowitz, 'Tweeting for Brexit: how social media influenced the referendum' in John Mair and others (eds), *Brexit, Trump and the Media* (Abramis Academic Publishing 2017) 29.

56 Mark Scott, 'Cambridge Analytica helped "cheat" Brexit vote and US election, claims whistleblower' (*Politico*, 27 March 2018) <politico.eu/article/cambridge-analytica-chris-wylie-brexit-trump-britain-data-protection-privacy-facebook/> accessed 22 April 2020.

57 Ryan Browne, 'Britain's Brexit election has become plagued by fears of online manipulation' (*CNBC*, 11 December 2019) <cnbc.com/2019/12/11/uk-election-experts-fear-online-manipulation-in-political-ads.html> accessed 22 April 2020.

58 Matthew Field and Mason Boycott-Owen, 'Microtargeting: How the Tories are deploying hundreds of Facebook ads as party swings into campaign mode' (*The Telegraph*, 31 July 2019) <telegraph.co.uk/technology/2019/07/30/microtargeting-tories-deploying-hundreds-ads-facebook-party/> accessed 22 April 2020.

59 Linda Risso, 'Harvesting Your Soul? Cambridge Analytica and Brexit' in Christa Jansohn (ed), *Brexit means Brexit?* (Akademie der Wissenschaften und der Literatur 2018) 80; Natasha Lomas, 'Brexit ad blitz data firm paid by Vote Leave broke privacy laws, watchdogs find' (*Tech Crunch*, 27 November 2019) <techcrunch.com/2019/11/27/brexit-ad-blitz-data-firm-paid-by-vote-leave-broke-privacy-laws-watchdogs-find/> accessed 22 April 2020.

60 Joshua A Douglas, 'Is the Right to Vote Really Fundamental' (2008) 18(1) Cornell Journal of Law and Public Policy 143, 149.

The two core legally-binding international documents which heavily influenced the French, Italian and British understandings of the right to vote are the European Convention on Human Rights (hereinafter 'ECHR') and the International Covenant on Civil and Political Rights (hereinafter 'ICCPR').[61] Firstly, Protocol No.1 to the ECHR emphasises that all people, regardless of their personal characteristics, should freely express their opinion regarding their choice of legislator.[62] The ICCPR has a broader scope, covering not only the legislator, but also the executive and other administrative bodies. Additionally, both conventions require the abolition of arbitrary restrictions upon the enjoyment of the right to vote and that the secrecy of the voting procedure is ensured.[63] Secondly, the right to vote is relevant to the analysis of another right recognised by the ECHR and the ICCPR: the right to free and fair elections. Indeed, it is imperative that the electorate casts their vote from their own free will, without any sort of manipulation or coercion. On that matter, the European Court of Human Rights (hereinafter 'ECtHR') established the presumption of the right to vote being included in the legal system of any democratic State.[64] Additionally, the Human Rights Committee argues that the existence of free active suffrage is an imperative condition for elections to be considered valid.[65]

When it comes to limitations to the right to vote, the ECHR and ICCPR agree that the right is not absolute. Any restrictions, however, should be proportionate, objective and not arbitrary.[66] Hence, limitations on such bases as sex, race, sexual orientation and physical capabilities are prohibited. The first acceptable basis for limitation to be discussed is nationality. The right to vote is usually applicable exclusively to the citizens of a particular State. The citizenship aspect is emphasised by the ICCPR, where the term 'citizen' is explicitly used in the Covenant and its General Comment 25.[67] Nonetheless, this argument has been challenged after the introduction of the EU citizenship. Accordingly, the Treaty on the Functioning of the European Union and the EU Directive 94/80 allow foreign nationals of one Member State, legally residing on the territory of another Member State, to vote during its local and municipal elections.[68] This broader application of the right to vote is in line with the ECHR's wording, wherein it uses the term 'people'.[69] The second acceptable limitation of the right to vote is the voter's autonomy. It prescribes that only an individual who can autonomously make clear, rational and

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61 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 25; Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) [1952] (Protocol No. 1 ECHR), art 3; Avery Davis-Roberts and David J Carroll, 'Using International Law to Assess Elections' (2010) 17(3) Democratization 416, 420.

62 Protocol No. 1 ECHR (n 61) art 3.

63 European Court of Human Rights, 'Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights: Right to free elections' (Council of Europe 2019) 6; ICCPR, art 25.

64 Ludvig Beckman, 'The Right to Democracy and the Human Right to Vote: The Instrumental Argument Rejected' (2014) 13(4) Journal of Human Rights 381, 385; For example, see *Scoppola v Italy (No. 3)* App no 126/05 (ECHR, 22 May 2012) para 82.

65 Office of the High Commissioner for Human Rights 'General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service' (12 July 1996) CCPR/C/21/Rev.1/Add.7, paras 10-11.

66 Beckman (n 64) 384.

67 ICCPR, art 25; Office of the High Commissioner for Human Rights (n 65) para 3.

68 Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, art 22; Council Directive (EC) 94/80 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals [1994] OJ L368/38 (Directive 94/80), art 3.

69 Protocol No. 1 ECHR (n 61), art 3.

weighted decisions should be allowed to vote. Hence, votes from the people whose autonomy is not asserted cannot be considered valid and elections based on such votes are invalidated.[70] Importantly, according to the ECHR and the ICCPR, the rationale behind the assessment of a person's autonomy should not be unreasonably discriminatory and should not result in the arbitrary exclusion of an entire group.[71] Resultantly, the autonomy criterion, currently common to all European States, mainly covers a person's age and mental health. For instance, the French, Italian and British legal systems extend the right to vote only to citizens who have reached the age of majority and limit the voting rights of those whose mental sanity can reasonably be questioned.[72] The third acceptable limitation is when a person loses their voting rights as a punishment for a committed crime. In such a case, the ICCPR and the ECHR prescribe that the duration of this deprivation should be proportionate to the offence. Importantly, both conventions and the ECtHR's case law state that mere imprisonment does not automatically deprive a person form his right to vote, unless this deprivation was a part of the punishment itself.[73]

Nowadays, the right to active suffrage in France, Italy and the UK implies that each citizen who has reached the age of majority should be able to freely vote for the candidate they find suitable to represent their interests.[74] Additionally, these States believe that, for the right to vote to be successfully exercised by their citizens, the elections themselves must be transparent.[75] This requirement, being one of the principles of good governance,[76] allows citizens to freely choose their representatives and hold them accountable for non-fulfilment of their duties.[77] It is also apparent that France, Italy and the UK recognise the importance of the right to vote to the electoral process. Indeed, they refrain from creating any unnecessary burdens on the exercise of this right and attempt to further protect its enjoyment. Accordingly, they control the amount of pressure exercised by politicians on the population's voting decisions by enacting statutes regulating political parties' campaign advertisements and ensuring the transparency of the electoral process.[78] However, as

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70 By analogy, see OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework for Elections* (2nd edn, OSCE ODIHR 2013) 18.

71 Beckman (n 64) 386.

72 The French Constitution adopted by referendum on 22 September 1958 (The French Constitution), art 3; The Italian Constitution adopted by the Constituent Assembly on 22 December 1947 (The Italian Constitution), art 48; The United Kingdom Representation of the People Act 1983 (The UK Representation Act), art 1.

73 European Court of Human Rights, 'Prisoners' right to vote' (European Court of Human Rights, 2019) 1; For example, see *McHugh and Others v United Kingdom* App no 51987/08 (ECHR, 10 February 2015) para 11.

74 Adem Çaylak, 'Voting: A Citizen's Right or Duty? The Case of Compulsory Voting' (2017) 5(57) The Journal of Academic Social Science 418, 424.

75 European Commission, *European Governance - A White Paper* (White Paper, COM 428 final 22, 2001); Patrick Merloe, 'Human Rights - The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections' in John Harding Young (ed), *International Principles for Democratic Elections* (Sandler, Reiff & Young 2008) 5.

76 Directorate General of Democracy and Political Affairs and Directorate of Democratic Institutions, 'Project "Good Governance in the Information Society": Guidelines on transparency of e-enabled elections' (Council of Europe, 2011) 4.

77 Wilson Wong and Eric W Welch, 'Does E-Government Promote Accountability? A Comparative Analysis of Website Openness and Government Accountability' (2004) 17(2) Governance: An International Journal of Policy, Administration, and Institutions 275, 278.

78 World Wide Web Foundation and Transparency International, 'Open Data and the Fight Against Corruption in France' (Transparency International, 2017) 22; Transparency International UK, 'How Open is the UK Government: UK Open Governance Scorecard Results' (Transparency International, 2015) 5; Renato Ruffini, 'Transparency Policies in Italy: The Case of Venice Municipality' (2013) 10(6) Journal of US-China Public Administration 577, 579.

illustrated in the previous chapter, such laws are inadequate when it comes to successfully tackling online campaign activities,[79] thus creating a necessity for the scrutiny of online political micro-targeting.

### B. Behind the Scenes: Technologies Explained

As illustrated in the previous chapter, political leaders in France, Italy and the UK collected citizens' personal data and analysed this in order to identify trends in their behaviour. Importantly, this process, known as data-mining,[80] greatly assisted politicians in influencing the outcome of elections. Nonetheless, before discussing the compatibility of such activities with the right to vote, it is necessary to understand the algorithms behind online political micro-targeting. Hence, this section will seek to explain how French, Italian and British politicians draft their campaign strategies and the research methods they tend to use while preparing online political micro-targeting.

The logic behind the preliminary demographic categorisation of citizens often depends on the electoral system of the State.[81] Hence, it can happen that there is no need for one candidate to analyse the entire population's personal data and that it will suffice to focus on only one particular societal group. Undoubtedly, this significantly simplifies the design of online political micro-targeting, as it makes a clearer preliminary division of citizens and reduces the volume of data to be processed. For example, in the French 'Two Round' system and the British 'First Past the Post' system,[82] the initial focus of Macron's and the UK Conservatives' data-mining was directed towards the citizens of a particular region (in France) or constituency (in the UK).[83] On the contrary, the Italian 'Proportionate Representation' system would require Salvini and Di Maio to conduct data-mining of the entire population and individually target each voter.[84] Moreover, there are other factors shaping this segmentation methodology that are worth mentioning. Here, three crucial concepts have to be discussed, namely data science, big data and trade of data. They appeared together with power upgrade of databases and, undoubtedly, are inherently connected to online political micro-targeting.

One must emphasise that any online political micro-targeting includes several preparation procedures.[85] Firstly, data must be collected and analysed. At this stage, data

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79 Alessandro Nai, *Access to Justice and Electoral Integrity. A policy brief of the Electoral Integrity Initiative* (Kofi Annan Foundation 2016) 10.

80 Hemlata Sahu, Shalini Shrma and Seema Gondhalakar, 'A Brief Overview on Data Mining Survey' (2013) 1(3) International Journal of Computer Technology and Electronics Engineering 114, 115.

81 International IDEA (n 22) 10.

82 In France, elections take place in two rounds. During the first round, citizens vote for a candidate of their preference. Importantly, candidates who get 12.5% of votes can proceed to the second round. The candidate who achieves the absolute majority of votes during the second round is declared winner. See Andre Blais, 'The French electoral and party system in comparative perspective' (2010) 8(1) French Politics 79, 80; In the UK, the system is a bit simpler. Seats in the UK Parliament are distributed according to the number of individual constituencies. In order for a candidate to get a seat, he has to basically win the most votes in his respective constituency. Hence, each constituency can be represented only by one political party. See David Klemperer, *The Electoral System and British Politics* (The Constitution Society 2019) 14.

83 International IDEA (n 22) 12.

84 Contrary to the French and British electoral systems, in Italy every political party can be represented in the Parliament. However, the number of seats each party can get is determined by the total number of votes this party receives. See Alessandro Chiaramonte and Roberto D'Alimonte, 'The new Italian electoral system and its effects on strategic coordination and disproportionality' (2018) 13(1) Italian Political Science 8, 10.

85 International IDEA (n 22) 11.

science comes into play. As defined by the Cambridge Dictionary, this is 'the use of scientific methods to obtain useful information from computer data, especially large amounts of data'.[86] This multidisciplinary field appeared in the early 60s and gradually evolved hand in hand with data-processing technologies.[87] It includes such areas as data analytics, artificial intelligence, data mining, and machine learning. Modern data science structures and studies citizens' data, allowing political parties to improve the population's profiling, make more concrete predictions of voters' decisions and efficiently manipulate the outcome of elections. Importantly, when it comes to constructing behavioural models of the electorate and creating personalised political messages, politicians often resort to a linear regression statistical analysis.[88] This data science method helps political candidates predict how the electorate will react to changes in the substance and presentation of their agendas, taking into account the personal characteristics of each voter. For instance, during the 2019 UK general elections, the Conservatives resorted to this technique in order to prepare and strategically spread individualised Brexit propaganda.[89] They categorised citizens into groups based on their individual interests, financial and educational background, sexual orientation, age, race and sex to better understand the rationale behind their opinion on Brexit and successfully manipulate it.

Secondly, it is apparent that gathering and processing data from the entire population of a State requires an advanced technology, a procedure in which the big data phenomenon plays a crucial role. Big data cannot be stored and analysed via ordinary technological means and possesses five main characteristics: volume, variety, velocity, veracity, and value.[90] Accordingly, big data technology allows a large quantity of citizens' data to be collected, efficiently stored and rapidly processed by political leaders. An example of big data use can be the gathering by the League and Five Star parties of personal information about all Italian-national Facebook users eligible to vote during the 2018 Italian parliamentary elections. Furthermore, from this data it would be possible to extract the data concerning Italian citizens supporting Salvini and Di Maio's populist views.[91] Importantly, it must be reiterated that there was no official evidence supporting the idea that these two candidates did resort to online political micro-targeting in their campaigns. Nonetheless, the considerable amount of their Facebook advertisements and the colossal reach they had during the 2018 Italian general elections demonstrate the recourse to big data technologies.

Additionally, online political micro-targeting often requires an exchange of personal data between political parties and different private companies (eg Facebook and

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[86] Cambridge Dictionary, 'Data Science' (*Cambridge Dictionary*, 2020) <dictionary.cambridge.org/dictionary/english/data-science> accessed 22 April 2020.

[87] Gil Press, 'A Very Short History Of Data Science' (*Forbes*, 28 May 2013) <forbes.com/sites/gilpress/2013/05/28/a-very-short-history-of-data-science/#4b095a8655cf> accessed 22 April 2020.

[88] David W Nickerson and Todd Rogers, 'Political Campaigns and Big Data' (2013) HKS Working Paper No. RWP13-045, 12 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2354474> accessed 22 April 2020.

[89] Eleonora Alabresea and others, 'Who voted for Brexit? Individual and regional data combined' (2019) 56 European Journal of Political Economy 132, 133.

[90] It is necessary to further explain these characteristics. Firstly, the volume aspect of big data refers to the quantity of stored data. Secondly, the variety aspect of big data describes the nature and diversity of this data. Thirdly, big data's veracity shows the quality of gathered data and its value. Fourthly, the value aspect describes the extent of the usefulness of the data and its potential to assist the researchers in the performance of their task. Lastly, the velocity of big data illustrates the speed of the generation and processing of the data; see Youssra Riahi and Sara Riahi, 'Big Data and Big Data Analytics: Concepts, Types and Technologies' (2018) 5(9) International Journal of Research and Engineering 524, 525.

[91] Kalia, Barr and Giuffrida (n 40).

mobile service providers).[92] Indeed, politicians must have a reliable source of voters' personal information and, unlike La Grande Marche, they are not always able to find it on their own. As clearly illustrated by the Cambridge Analytica scandal, citizen-profiling often involves other private entities who are already in possession of the required information. It must be emphasised that exchange of data was also drastically simplified by big data technologies, as the latter made the transfer of large volumes of data much faster and cheaper for the parties concerned. Resultantly, it can even take the form of outsourcing activities, for example when political leaders officially hire a private company entrusted with conducting research on the population's personal data and further developing online political micro-targeting strategies. For example, during the French presidential elections of 2017, the aforementioned company, Liegey Muller Pons, was accused of openly assisting Macron in profiling citizens.[93]

## IV. Democracy Hacked and How to Deal with It

### A. Data-Driven Elections vs Right to Vote: A New Challenge to Democracy?

There is no doubt that the right to vote is affected by online political micro-targeting, regardless of the seemingly extensive legal framework protecting it. Indeed, the algorithms and manipulative techniques behind these campaign practices endanger various aspects of the right to vote and threaten citizens' enjoyment thereof.[94] Consequently, the very essence of free elections is undermined, leading to the dismantlement of the democratic regime. This section will discuss the two primary ways in which online political micro-targeting is interfering with the right to vote and the major consequences of this intrusion.

As illustrated in the previous chapter, new technologies simplified the access of political parties to information about the electorate and allowed them to abuse this knowledge for their own benefit. Today, via predictive algorithms involved in online political micro-targeting, politicians can foresee how an individual will react to particular information in their agendas. Therefore, they can individualise their campaign promises and influence, and eventually manipulate, citizens' free will when it comes to making cognitive voting decisions. Consequently, the phenomenon of data-driven elections occurs and is characterised by two major consequences:[95] firstly, peoples' engagement in a State's political affairs can be predicted, controlled and changed according to a party's interests.[96] For instance, this was successfully done by Salvini and Di Maio via the online targeting of people with populist views and actively encouraging and pushing them to vote. Accordingly, the 2018 Italian general elections had a huge participation rate of citizens supporting the nationalistic views of the League and Five Star.[97] Similarly, the UK Conservative Party successfully suppressed voter turnout for the Labour Party during the 2019 UK general elections, but meanwhile strongly encouraged pro-Brexit citizens to make

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92 Kevin Körner, 'Digital politics: AI, big data and the future of democracy' (Deutsche Bank Research: EU Monitor Digital Economy and Structural Change, 2019) 8.

93 Varoon Bashyakarla, 'France: Data Violations in Recent Elections' (*Tactical Tech*, 2018) <ourdataourselves.tacticaltech.org/posts/overview-france> accessed 22 April 2020.

94 Alvarez, Hall and Hyde (n 4) 77.

95 Bennett and Lyon (n 37) 8.

96 Nickerson and Rogers (n 88) 3.

97 The Guardian, 'Italian elections 2018 - full results' (5 March 2018) <theguardian.com/world/ng-interactive/2018/mar/05/italian-elections-2018-full-results-renzi-berlusconi> accessed 22 April 2020.

their voices heard.[98] Hence, politicians promulgate political polarisation[99] by blocking the activities of those who can jeopardise their party's success and by actively stimulating others supporting their agenda to vote.[100] Similarly, political leaders can exclude an entire societal group from political participation.[101] For instance, people who are politically inactive or those whose involvement will not have any substantive impact on the party's victory are often ignored for cost-efficiency reasons.[102] Additionally, there may be issues of underrepresentation of some social groups through the suppression of political parties that cannot afford or are not willing to resort to online political micro-targeting during their campaign. This occurred in Italy, where the League dislodged many of its opponents who were not producing enough advertisements on Facebook.[103] Lastly, as argued by the European Commission, online political micro-targeting lacks transparency when it comes to segmentation of the population.[104]

Secondly, online political micro-targeting frequently involves the spreading of fake news and disinformation.[105] Thus, by manipulating people into blindly believing information on social media, politicians attempt to ensure that citizens will be biased and base their decisions on facts that turn out to be wrong, but beneficial for the party. This was clearly illustrated by Macron's email hacking. An unknown attacker revealed a lot of controversial information about the current French president in an attempt to undermine his reputation both in France and internationally.[106] Therefore, based on what was displayed on social media, many French citizens were indirectly forced to change the party they supported, even though it could contradict their political beliefs. Misinformation can also occur as a direct consequence of how political candidates brand themselves and their programmes for different societal groups or regions.[107] For instance, the Conservatives presented their Brexit agenda from one perspective in Beckenham and from a slightly different other in Aberconwy, but in the end both constituencies voted for the Conservative candidates.[108] Moreover, in its Brexit agenda, the Conservatives intentionally focused the

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98 Caroline Davies, 'Conservatives accused of suppressing voters' rights over leaked photo ID plans' (*The Guardian*, 13 October 2019) <theguardian.com/politics/2019/oct/13/conservatives-accused-of-election-rigging-leaked-id-plans-voter-fraud> accessed 22 April 2020.

99 Sounman Hong and Sun Hyoung Kim, 'Political polarization on twitter: Implications for the use of social media in digital governments' (2016) 33 Government Information Quarterly 777, 781; European Parliament, 'Polarisation and the use of technology in political campaigns' (Panel for the Future of Science and Technology, 2019) 22.

100 Borgesius and others (n 6) 87.

101 ibid 88.

102 Jesper Strömbäck, 'Political Marketing and Professionalized Campaigning: A Conceptual Analysis' (2007) 6(2-3) Journal of Political Marketing 49, 61.

103 Silvia S Borrelli, 'League wins landslide victory in Italian regional election' (*Politico*, 28 October 2019) <politico.eu/article/league-wins-landslide-victory-in-italian-regional-election/> accessed 22 April 2020.

104 Dobber, Fathaigh and Borgesius (n 9) 12.

105 Kate Jones, 'Online Disinformation and Political Discourse Applying a Human Rights Framework' (Chatham House The Royal Institute of International Affairs, 2019) 7.

106 Vilmer (n 31) 13.

107 Borgesius and others (n 6) 89.

108 BBC, 'UK results: Conservatives win majority: Beckenham Parliamentary constituency' (*BBC*, 13 December 2019) <bbc.co.uk/news/politics/constituencies/E14000551> accessed 22 April 2020; BBC, 'UK results: Conservatives win majority: Aberconwy Parliamentary constituency' (*BBC*, 13 December 2019) <bbc.com/news/politics/constituencies/W07000058> accessed 22 April 2020; Eleanor Busby, 'Brexit "propaganda" appeared on school digital noticeboards, MP claims' (*The Independent*, 26 September 2019) <independent.co.uk/news/education/education-news/brexit-propaganda-boris-johnson-schools-stella-creasy-walhamstow-a9121941.html> accessed 22 April 2020.

discussion on matters many people thought were endangered by the EU,[109] such as national identity and UK sovereignty. However, it is apparent that the negative consequences following Brexit, such as the loss of EU citizenship, were intentionally underestimated. This example clearly demonstrates how online political micro-targeting identifies issues individual citizens are concerned about and filters them in a manner that allows politicians to display only information that is potentially beneficial to their political party. On the contrary, matters equally crucial to citizens, but which, under normal circumstances, would negatively influence the outcome of the elections, will be hidden or refashioned into trivial information.

Consequently, such usage of online political micro-targeting unravels the enjoyment of a citizen's right to vote. Firstly, due to its dissimulated and non-transparent character, online political micro-targeting causes information asymmetry between politicians and voters.[110] Ordinary citizens are not aware of how online political micro-targeting operates or of possible means to protect themselves from its influence. Not having the same level of access to such information additionally increases the magnitude of the knowledge gap between voters and political parties. Therefore, without being acquainted with when and how its personal data are used, the electorate becomes vulnerable to manipulation and cannot 'self-legislate' on the protection of its right to vote.[111] Politicians, by contrast, can more easily ignore the interference with the right to vote in their campaign activities and avoid being held accountable for their undemocratic actions.[112] This situation further results in non-discrimination and transparency requirements being violated, as politicians can secretly choose which societal groups they want to encourage to vote and whose voting capacity they will suppress.[113] Voters, however, do not know under which logic they are being targeted. Thus, universal and equal active suffrage transforms into a right to vote indirectly granted by political leaders to citizens on a strategic and concealed basis. Lastly, such campaign practices are endangering citizens' autonomy and creating reasonable concerns regarding their rational decision-making capacities.[114] Online political micro-targeting makes people's voting decisions disproportionately dependent on, and shaped by, the information displayed by politicians on social media.[115] Resultantly, it is arguable that votes cast under the influence of online political micro-targeting cannot be considered valid. Moreover, elections won primarily by votes acquired through online political micro-targeting should also be invalidated.[116]

## B. To Forbid, or Not to Forbid, That is the Question

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[109] European Committee of the Regions and Commission for Economic Policy, 'Assessing the impact of the UK's withdrawal from the EU on regions and cities in EU27' (European Union, 2018) 55.

[110] Mireille Hildebrandt, 'Profiling and the rule of law' (2008) 1 Identity in the Information Society 55, 62.

[111] Haye Hazenberg and others, 'Micro-Targeting and ICT media in the Dutch Parliamentary system. Technological changes in Dutch Democracy' (2018) TU Delft Design for Values 21.

[112] ibid.

[113] Casper R Sunstein, *#republic Divided Democracy in the Age of Social Media* (Princeton University Press 2017) 133.

[114] Jeff Chester and Kathryn C Montgomery, 'The role of digital marketing in political campaigns' (2017) 6(4) Internet Policy Review <policyreview.info/articles/analysis/role-digital-marketing-political-campaigns> accessed 22 April 2020 8.

[115] For the British example, see Damian Tambini and others, 'Media Policy Brief 19: The new political campaigning' (2017) LSE Media Policy Project 10.

[116] International IDEA, *Electoral Justice: An Overview of the International IDEA Handbook* (International Institute for Democracy and Electoral Assistance 2010) 31.

The regulatory matters around online political micro-targeting from the perspective of the right to vote are highly complex. As specified in the previous chapters, neither Italy nor the UK have a concrete legal framework on online campaign activities and French law has a very limited scope regarding individual political targeting. The absence of case law on the link between online political micro-targeting and the right to vote makes this topic even more ambiguous.[117] Resultantly, the perpetual debate regarding further control mechanisms is ongoing. On the one hand, there are those advocating for a complete ban of online political micro-targeting. On the other hand, others are searching for an efficacious legal framework that would allow the employment of these campaign practices for society's benefit. This section will criticise the former school of thought and attempt to discuss possible ways of regulating online political micro-targeting.

The current attitude of the British and Italian governments towards online political micro-targeting is largely based on the *laissez-faire* principle.[118] A similar situation can arguably be identified when it comes to EU law or ECtHR case law, as none of these systems have specific rules dealing with online political micro-targeting. At the opposite end of the spectrum, France has entirely prohibited all kinds of individual political targeting. The latter approach was applauded by scholars and practitioners for its directness and arguable success.[119] The rationale behind banning online political micro-targeting is straightforward. Some scholars argue that such undemocratic practices, greatly imperilling not only the right to vote but also other fundamental rights and values, should be entirely prohibited.[120] Undoubtedly, such an approach has its advantages. For instance, it is more time efficient, as a blanket prohibition is usually easier and faster to arrange than a more complex regulatory system. Moreover, this proposal is more beneficial resource-wise as there is no need to hire researchers, policy makers and academics. Lastly, online political micro-targeting violates many other laws in addition to those related to elections and the right to vote, such as legislation on protection of privacy and personal data.[121] Hence, it is not a complicated task to find an appropriate legal basis in national or EU law allowing the legislature to strike down these campaign practices. Consequently, at first glance, such approach towards online political micro-targeting can be a workable solution.[122]

Nonetheless, such an approach has clear drawbacks and is highly short-sighted. Firstly, it can be criticised from a procedural point of view, as it is unclear by which institution a ban of online political micro-targeting would be initiated. The legislature or the executive would be the initial idea; however, due to lack of interest in the matter this is highly unlikely to happen. Indeed, from the perspective of politicians who have won elections by employing online political micro-targeting, it would be foolish to enact legislation prohibiting it and thus diminishing their chances of getting re-elected. On the contrary, it is more foreseeable that, in order to prevent dissatisfaction among the electorate and to avoid scandals similar to that of Cambridge Analytica,[123] legislative initiative towards the legalisation and regulation of such campaign activities is more probable.

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[117] Dobber, Fathaigh and Borgesius (n 9) 7.

[118] ibid 12.

[119] European Data Protection Supervisor, 'EDPS Opinion on Online Manipulation and Personal Data' (2018) Opinion 3/2018 18.

[120] ibid 6.

[121] Tom Dobber and others, 'Spiraling downward: The reciprocal relation between attitude toward political behavioral targeting and privacy concerns' (2019) 21(6) New Media & Society 1212, 1220.

[122] Borgesius and others (n 6) 95.

[123] Julia Carrie Wong, 'The Cambridge Analytica scandal changed the world – but it didn't change Facebook' (*The Guardian*, 19 March 2019) <theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook> accessed 22 April 2020.

Secondly, the complete prohibition of online political micro-targeting should be criticised due to all the promises these campaign practices can bring to the right to vote.[124] Undoubtedly, modern social media plays a crucial role in the life of almost every citizen.[125] Previously, when the core channels of a political campaign were the mainstream media, the possibility for politicians to reach every citizen in a State was highly problematic.[126] For instance, campaign advertisements were usually placed in specific politically-oriented journals, read exclusively by those interested in such topics.[127] Additionally, many citizens tend to avoid broadcasting channels, deeming them full of political propaganda.[128] On the contrary, online political micro-targeting allows political candidates to approach fringe groups (eg via social media), and is capable of sparking a higher interest in politics within the population. Additionally, statistics show that the French, Italian and British election turnout is decreasing every election.[129] Some scholars argue that properly administrated online political micro-targeting can halt this decline by encouraging more people to become interested in the political life of their State.[130]

Thirdly, by providing citizens with information that is relevant to them, online political micro-targeting can increase the level of their consciousness regarding the analysis of political matters and render their voting decisions more weighted and substantial. Hence, by bringing a rational kernel to the electors' decision-making, it makes electoral procedures more efficient and effective.[131] Lastly, radio, television and newspapers are more oriented towards a general body of citizens and usually highlight vaster problems. However, citizens would be more interested in seeing and feeling a personalised message from the government, targeting not only large-scale issues but also their individual concerns. Consequently, such campaign practices mobilise more citizens to rationally exercise their right to vote, and thus contribute to its promotion and strengthening.[132]

## C. The Regulatory Framework: Towards A New Era of Online Politics

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[124] Judit Bayer, 'Double harm to voters: data-driven micro- targeting and democratic public discourse' (2020) 9(1) Internet Policy Review <policyreview.info/articles/analysis/double-harm-voters-data-driven-micro-targeting-and-democratic-public-discourse> accessed 22 April 2020 9.

[125] The London School of Economics and Political Science, 'Social Media Platforms and Demographics' (2017) LSE Digital Communications 1.

[126] Ilya Somin, *Democracy and political ignorance: why smaller government is smarter* (2nd edn, Stanford University Press 2016) 21.

[127] Henry E Brady, Richard Johnston and John Sides, 'The Study of Political Campaigns Capturing Campaign Effects' in Henry E Brady and Richard Johnston (eds), *Capturing Campaign Effects* (The University of Michigan Press 2006) 3.

[128] Caroline Fisher, 'The trouble with "trust" in news media' (2016) 2(4) Communication Research and Practice 451, 458.

[129] BBC, 'French election: Turnout sharply down in Le Pen-Macron battle' (*BBC*, 7 May 2017) <bbc.com/news/world-europe-39833831> accessed 22 April 2020; Gianluca Passarelli and Dario Tuorto, 'Not with my vote: turnout and the economic crisis in Italy' (2014) 6(2) Contemporary Italian Politics 147, 151; Rod McInnes, 'General Election 2019: Turnout' (*House of Commons Library*, 7 January 2020) <commonslibrary.parliament.uk/insights/general-election-2019-turnout/> accessed 22 April 2020.

[130] Michael Bossetta, Anamaria Dutceac Segesten and Hans-Jörg Trenz, 'Engaging with European Politics Through Twitter and Facebook: Participation Beyond the National?' in Mauro Barisione and Asimina Michailidou (eds), *Social Media and European Politics. Rethinking Power and Legitimacy in the Digital Era* (Palgrave Studies in European Political Sociology 2017) 67; Borgesius and others (n 6) 85.

[131] Borgesius and others (n 6) 85.

[132] ibid 86.

It is apparent from the previous chapter that the ECHR and the ICCPR established a general legal framework regarding the right to vote, its protection and limitations. However, due to the margin of appreciation and the degree of discretion given by both conventions to their State parties,[133] France, Italy and the UK safeguard the right to vote differently. France and Italy state it in their respective constitutions and the UK spreads it among several acts of Parliament.[134] On the one hand, the French and British legal provisions do not provide any further explanation of what the duties of the State on that matter are. They solely specify that the right to vote is indeed granted to citizens and what its accepted limitations are. Consequently, this often results in uncertainties regarding the extent of regulation of campaign activities and leaves room for discretion to the government and courts. Contrary to these cases, the Italian Constitution does not merely recognise the right to active suffrage, but also imposes several duties upon the government. Accordingly, it further obliges the Italian authorities to make extra efforts to secure and promote the enjoyment of the right to vote.[135] Such an approach is decisive when it comes to scrutiny of online political micro-targeting as it provides an explicit legal basis for a stricter assessment of campaign activities from the perspective of the right to vote.

Unlike the right to vote itself, a comprehensive and far-reaching regulation of online political micro-targeting is not present in any of these three States. Indeed, as explained in the first chapter, even French law has loopholes when it comes to the prohibition thereof.[136] Hence, there is an imperative for a new approach towards online political micro-targeting. Firstly, this regulatory scheme should involve stricter techniques to protect the universal and equal right to vote. Courts, for instance, should be encouraged to employ higher scrutiny towards violations of the right to vote, thus exercising a higher degree of control over all political campaign practices which may endanger it. Moreover, where possible, they should teleologically reinterpret the law and give old electoral concepts new meaning and scope. However, the courts' freedom of interpretation is limited and they may not always interpret the law too broadly. Thus, the legislator's input is of the highest importance. As with the French Electoral Code,[137] Italian and British legislators should revamp current election laws, considering the influence of ICT, and provide courts and administrative authorities with necessary means of enforcement. Thus, alongside enlarging the protection of the right to vote, the State will facilitate control of online political micro-targeting. Secondly, particular focus should be given to designing new rules to take advantage of the benefits of online political micro-targeting, but at the same time insulating it against the abuse of power. For instance, as illustrated by the 2019 European Parliament elections,[138] a mandatory authorisation procedure on conducting online political micro-targeting can be established across social media. However, instead of being conducted by the social media service itself, this procedure should be controlled by a special

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[133] Kristin Henrard, 'A Critical Analysis of the Margin of Appreciation Doctrine of the ECtHR, with Special Attention to Rights of a Traditional Way of Life and a Healthy Environment: A Call for an Alternative Model of International Supervision' (2012) 4 The Yearbook of Polar Law 365, 367; Office of the United Nations High Commissioner for Human Rights, 'State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties: Individual report on the International Covenant on Civil and Political Rights Report No. III' (United Nations, 2007) 23.

[134] The Italian Constitution, art 48; The French Constitution, art 3; The UK Representation Act, art 1(1).

[135] The Italian Constitution, art 48; Alexander Kirshner, 'The International Status of the Right to Vote' (2003) Democracy Coalition Project 27.

[136] Dobber, Fathaigh and Borgesius (n 9) 11.

[137] The French Electoral Code, arts L. 52-1, L. 163-1; International IDEA (n 22) 14; ibid.

[138] Dobber, Fathaigh and Borgesius (n 9) 12; Facebook for Business, 'Get Authorized to Run Ads About Social Issues, Elections or Politics' (*Facebook for Business*, 2020) <facebook.com/business/help/208949576550051?id=288762101909005> accessed 22 April 2020.

administrative authority. It may impose an obligation on any perpetrator of online political micro-targeting to specify the exact methodology their campaign tactics will employ.[139] After their assessment, this administrative body will decide whether to allow this campaign strategy and, in case of an affirmative response, it will exercise careful supervision over it. Resultantly, resort to online political micro-targeting will be effectively overseen and its abuse by political parties will be strictly curtailed.

Nevertheless, a mere governmental response is insufficient. Political participation and the enhancement of the right to vote are directly connected to citizens' education.[140] Hence, it is equally imperative to empower the population by providing citizens with necessary knowledge about the involvement of technology in politics.[141] A particular emphasis should be given to making elections more transparent and enhancing people's access to literacy.[142] Indeed, it is arguable that the success of online political micro-targeting in citizen manipulation occurred due to the fact that the vast majority of the population was not informed about the existence of this issue. The deficiency of a general citizen's ICT knowledge further made people highly vulnerable to external control though social media.[143] Consequently, citizens should have open access to necessary information about online political micro-targeting, the algorithms behind it and how it impacts their voting rights. This information should be presented to them in a clear and understandable manner.[144] Thus, it should include an explanation of the scope of the right to vote and its connection to other fundamental rights. Citizens must also know how the right to vote is shaped by ICT and the modern means of its protection and enforcement.[145] Lastly, people should be aware of precautionary measures that can be taken independently to safeguard their right to vote from this modern hazard. Resultantly, such empowerment of the population will lead to two important outcomes. Firstly, a significant decrease of the information asymmetry between political candidates and the electorate will be achieved.[146] Secondly, this change will further lead to a higher accountability of the government for possible manipulations, for neglecting their campaign promises and making their actions more people-oriented.[147]

## V. Conclusion

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[139] Judit Bayer and others, 'Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States' (European Parliament, 2019) 122.

[140] James M Vanderleeuw and Baodong Liu, 'Political Empowerment, Mobilization, and Black Voter Roll-Off' (2002) 37(3) Urban Affairs Review 380, 382.

[141] Matthew Crain and Anthony Nadler, 'Political Manipulation and Internet Advertising Infrastructure' (2019) 9 Journal of Information Policy 370, 393.

[142] Susan Morgan, 'Fake news, disinformation, manipulation and online tactics to undermine democracy' (2018) 3(1) Journal of Cyber Policy 39, 42.

[143] Massimo Flore and others, 'Understanding Citizens' Vulnerabilities to Disinformation and Data-Driven Propaganda. Case Study: The 2018 Italian General Election' (2019) European Commission JRC Technical Reports 12.

[144] For more information and examples of the complexity of vote-rigging detection, see Kathleen Hall Jamieson, 'Messages, Micro-targeting, and New Media Technologies' (2013) 11(3) The Forum 429, 433.

[145] Lesley Farmer, 'Teaching Digital Citizenship' (2010) Selected Topics in Education and Educational Technology 387, 390.

[146] Haye Hazenberg and others (n 111) 31; Alex Avramenko and Parveen Tamadon-Nejad, 'Internet innovations: exploring new horizons' (2014) 5(2) EJLT <ejlt.org/article/view/254/439> accessed 22 April 2020 10.

[147] José María Maravall, 'Accountability and Manipulation' in Adam Przeworski, Susan C Stokes and Bernard Manin (eds), *Democracy, Accountability, and Representation* (CUP 1999) 161.

Technological advancement has undoubtedly shaped the international community and the world of politics is not an exception. As illustrated by this thesis, ICT has remarkably influenced the way politics are conducted and brought communication between citizens and political candidates to a completely new level. Due to the development of data-processing systems, society has encountered the phenomenon of online political micro-targeting. It has allowed politicians to closely interact with the electorate and to adapt their agendas to the citizens' needs and wants. Being a highly controversial topic, it has sparked discussion among legal practitioners and academics regarding the promise and threats these campaign practices have for democracy and its values.

This work has focused on the analysis of three European States where online political micro-targeting presumably took place during the latest elections, namely France, Italy and the UK. All three States have shown completely different types of online political micro-targeting due to the differences in their electoral and legal systems. However, they encountered one common consequence: the profiling of the electorate by political parties for the purposes of manipulation. Importantly, such an act of electoral fraud was facilitated from the perspectives of cost and time efficiency by other crucial factors, namely data science, big data and trade of data. Indeed, without the algorithms they comprise, the storage of such an immense amount of citizens' personal data and the statistical analysis necessary for the online political micro-targeting, strategy preparation would be rendered highly complicated. All of the above has resulted in the endangerment of the French, Italian and British populations' right to vote. Regardless of the existing legal framework on this right established by the ECHR and the ICCPR, France, Italy and the UK did little to secure it from this new threat. Moreover, the considerable magnitude of the ICT knowledge gap between political parties and citizens further exposed the electorate to manipulation by politicians. Accordingly, via internet and social media platforms, politicians can now control the type of information people will have access to and keep them unaware of being targeted.

It is possible to conclude that online political micro-targeting is indeed an issue that can negatively impact the right to vote, and thus the guarantee of free and fair elections. It has already entered the world of modern politics, and legal systems must adapt to it, thus reinterpreting legal provisions in light of developments in ICT. Nonetheless, it is incorrect to blindly stigmatise it as a phenomenon that is purely destructive to democratic regimes. Indeed, technologies are already able to drastically improve many aspects of life and contribute to the well-being of States and peoples around the globe. The crucial question which lies at heart of any innovation brought to the world is how society, and particularly people with power, will employ it.

This thesis has shown that online political micro-targeting is not undemocratic *per se*. Its deteriorating impact on the right to vote was caused not by the nature of the algorithms behind it, but due to the ways politicians around the world used it and the incapability of legal systems to hold them accountable in a timely manner. What is, in contrast, crucial to keep in mind is that online political micro-targeting may bring benefits to the community. Elections, just as any other process embodied in States' systems, should be open to change brought about by new technologies. It is irrational to rely on the option of simply forbidding online political micro-targeting. In contrast, it can only be seen as an attempt to delay the inevitable; electoral procedures being reshaped and adjusted to a new technological era. The history of elections and of the right to vote has already encountered similar developments, such as the establishment of the universal and equal suffrage principle. Thus, it is arguable that online political micro-targeting is just another novelty in this sector and is inherently connected to technologies that are becoming a part of the everyday life of every individual.

Resultantly, a newly designed legal framework on online political micro-targeting is required, based upon the empowerment of citizens and strict regulation of political parties' activities online. Diminishing the knowledge gap between citizens and political parties, together with strict and far-reaching legal protection of the right to vote, will thus result in online political micro-targeting being contained within reasonable limits. Moreover, it will allow countries to efficiently take advantage of all the benefits which these campaign practices can bring to electoral procedures. Indeed, consequences such as an increase in voter turnout, the establishment of closer ties between politicians and citizens and the effective adaptation of political agendas based on the needs of the population, are capable of enhancing democracy and its values. Consequently, via employing online political micro-targeting for noble purposes, it will be possible to convert it from an evil to the right to vote into a panacea for political misinformation.

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# The Orwellian Reality of Counter-Terrorism Measures Under The ECHR

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**Keywords**
NATIONAL SECURITY; HUMAN RIGHTS; PROPORTIONALITY; SAFEGUARDS

**Abstract**

This paper seeks to analyze the impact of terrorism on the enjoyment of civil liberties guaranteed under the European Convention on Human Rights (ECHR). The paper profoundly assesses case law from the European Court of Human Rights (ECtHR) in order to assess how the Court manages to guarantee that rights are still respected and upheld, even when weighed against the most severe circumstances, namely terrorism. In doing so, the counter-terrorism legal system of one of the most controversial parties to the ECHR, the United Kingdom, is assessed to identify issues which arise when combating terrorism. Surveillance and stop-and-search are archetypical anti-terrorism measures that are limited through the ECtHR in order to not excessively infringe upon human rights, in accordance with Lloyd's notion of imposing sufficient safeguards if new measures are enacted. Although the ECtHR can be considered an essential guarantor for human rights through its judicial dialogues and influences on domestic courts and governments, the issue of refoulment in torture cases must be readdressed in upcoming case-law. Moreover, grave privacy infringements are permitted to a terrifying extent, and the longer the ECtHR takes to take a solid stance against States abusing the aim of national security, the more severe it will naturally become, due to society's incremental progression towards a digital life. Ultimately, terrorism tests democratic governments in a unique way, as imposing draconian measures would be an easy way to ensure safety. Nonetheless, fighting with one hand behind one's back is necessary to uphold the status of a rights-respecting democracy. Only time will tell whether the ECtHR will evolve to give proactive verdicts to ensure human rights prior to their breach.

## I. Introduction

*'War is peace. Freedom is slavery. Ignorance is strength'*[1] – George Orwell

Throughout decades, terrorism has been rapidly shifting away from its archetype due to modern terrorists becoming more extreme and less discriminate by employing new technologies and strategies. As a consequence of the exponential increase in the severity of terror attacks following 9/11, abundant legal debate has been stimulated regarding States' approaches to combating this never-ending threat. Since 9/11, academics distinguish between modern and traditional terrorism, claiming that modern terrorists are more ruthless, indiscriminate, do not negotiate or compromise and have a religious rather than

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1 George Orwell, *1984* (Secker & Warburg 1949) 4.

secular motive for their attacks.[2] Due to this distinction, governments claim that there is a need for a vast increase in counter-terrorism measures, which cause several human rights infringements. When making new legislation, it is essential that States do not undermine or infringe upon human rights to a disproportionate extent, as – predominantly Western – States aspire to maintain their status of being legitimate, human rights respecting States. Thus, a dichotomy between national security and the maintenance of adequate human rights standards exists and must be considered carefully. As Benjamin Franklin once said, 'Those who would give up essential Liberty to purchase a little temporary Safety, deserve neither Liberty nor Safety'.[3] Moreover, the threat of terrorism is peculiar, as the total number of deaths that result from acts of terrorism is relatively low when compared to other homicide tolls or merely road traffic accidents.[4] Nonetheless, the implications of terrorism and its indiscriminate attacks on citizens are extremely dangerous to society. Thus, governments tend to impose strict counter-terrorism measures in order to protect the safety of their citizens. It ought to be essential that governments do not over-react via draconian measures and disproportionately limit fundamental freedoms, which is why the European Court of Human Rights is an essential safeguard for legitimate, democratic States. Accordingly, the ECtHR serves to protect citizens from the potential danger of Member States' encroachment on individual liberties, thus working as a Winston Smith to the 'thought police'.

This paper will aim to answer the question of whether the ECtHR treats terrorism equally to other criminal affairs or manages crimes with a terrorist element under a separate legal sphere. Next, through analysing the interplay between the ECtHR and the State parties, the question of how the Court has applied the proportionality test in order to strike a balance between security and other rights will be assessed. Ultimately, this will result in an answer to the final question: how the war against terrorism has affected the enjoyment of fundamental rights of individuals, and if the ECHR guarantees adequate protection of human rights.

This dissertation will firstly lay out the European framework for countering terrorism and analyze the need for a special system for counter-terrorism legislation. Secondly, the proportionality test will be scrutinized by explaining the extent to which particular fundamental freedoms of the ECHR can be restricted in the name of national security due to threats of terrorism in Western States. As to the methodology, ECtHR case-law on the infringement of Articles 3, 8 and 15 ECHR will be analyzed deductively, through assessing how the ECtHR applies the proportionality and necessity requirements and whether these are adequate safeguards. Subsequently, whether the derogation clause under Article 15 ECHR undermines and weakens the strength of the aforementioned freedoms will be discussed. Lastly, through engagement with ECtHR case law, the ECtHR's stance on the draconian measures of surveillance and stop-and-search imposed

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2 Martha Crenshaw, '"New" versus "Old" Terrorism: Is today's "new" terrorism qualitatively different from pre-September 11 "old" terrorism?' (2003) 10(1) Palestine-Israel Journal of Politics, Economic and Culture 5–7; Bruce Hoffman, *Inside Terrorism* (Colombia University Press 2006) 242–246.

3 Liberty fund, 'Benjamin Franklin on the trade off between essential liberty and temporary safety (1775)' (*Online Library of Liberty*, 25 February 2020) <oll.libertyfund.org/quotes/484> accessed 15 August 2020.

4 Institute for Health Metrics and Evaluation, 'Share of deaths by cause, World' (*Our World in Data*, 2017) <ourworldindata.org/grapher/share-of-deaths-by-cause-2016> accessed 10 August 2020; Anthony Cordesman, 'The Comparative Threat from Terrorism Compared to Drug Poisoning, Suicide, Traffic Accidents, and Murder: 1999-2016' (*Centre for Strategic & International Studies*, 2018) <csis.org/analysis/comparative-threat-terrorism-compared-drug-poisoning-suicide-traffic-accidents-and-murder> accessed 10 August 2020.

by the UK will be evaluated, thereby culminating with an answer to the question of how terrorism affects the enjoyment of human rights.

The research will be limited to parties to the ECHR, mainly the UK, as these countries are affected by similar forms of terrorism and are therefore comparable. The UK has been implementing numerous counter-terrorism measures since 'The Troubles' in Northern Ireland and has continued to do so from 9/11 onwards. Consequently, numerous landmark ECtHR cases have been devised through the UK's judicial dialogue with the ECtHR. Furthermore, human rights are a concern to all citizens in Europe, whether EU citizens or third country nationals, thus the demarcation lines between when to restrict freedoms in the name of national security and when not has implications on society as a whole.

## II. European Counter Terrorism Framework

Defining an action as terrorism triggers special repressive competences. Hence, the term ought to be as narrow as possible.[5] Terrorism is generally defined as a fear-inspiring method of violence for political or religious motives, whereby the general populace, rather than the direct victims, is the main target.[6] The scope of counter-terrorism measures is determined by acts that constitute terrorism. An unclear universal definition of terrorism leads to ambiguity in practice, because defining the scope of terrorism offences is at the discretion of every State.[7] An example of such juxtaposing views is the perception of Osama bin Laden, who was initially seen as a freedom fighter by the USA during the resistance of the Soviet occupation of Afghanistan, afterwards a terrorist once he had become unfavorable to the USA.[8]

Stigmatizing an act or a group in light of terrorism has the ability to delegitimize them, due to the negative connotations of terrorism implying a moral and social judgment. The lack of a definition allows for pejoratives surrounding alleged terrorists, thus a battle for legitimacy between government and terrorist groups emerges. Ultimately, this war can open itself to opportunism, attributable to the uncertainty revolving around the term.[9] Therefore, it is relevant to assess whether a harmonized definition is achievable in order to reap the benefits of better cooperation and communication in the global fight against terrorism. Moreover, States' judicial enforcement would benefit greatly, due to the sense of rapprochement and harmonization that would be enabled through a unified definition. Moreover, the lack of a definition leads to a quagmire for legal certainty and non-retroactivity, both principles being essential to a democratic State under the rule of law.[10] The issues surrounding *nulla poena sine lege* would be solved, through a universal definition enabling the foreseeable application of anti-terrorism laws by separating a legal meaning from a political concept. Moreover, for the sake of fairness, it is not plausible to allow the definition of terrorism to be at the discretion of States' unilateral interpretations.[11] The non-existent, universal, legally codified definition of terrorism leads to the possibility of

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5 Max Hill, *The Terrorism Acts In 2017* (APS Group 2018) 131.

6 Alex Schmid and Albert Jongman, *Political Terrorism* (Transaction Publishers 1987) 28.

7 Christian Walter, 'Terrorism', *Max Planck Encyclopaedia of Public International Law* (2011) <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e999?prd=EPIL> accessed 3 June 2019.

8 Sami Zeidan, 'Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism' (2004) 36(3) Cornell International Law Journal 491–492.

9 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) 3.

10 ibid 46.

11 Ben Saul, 'Defining "Terrorism" to Protect Human Rights' in D Staines (ed), *Interrogating the War on Terror: Interdisciplinary Perspective* (Cambridge Scholars Publishing 2007) 190–210.

misusing the term through politicizing it to encompass non-terrorist acts, thus undermining the rights of citizens in order to curb such activities.

To solve the issue of a non-harmonized definition of terrorism, the Parliamentary Assembly of the Council of Europe, which oversees the European Court on Human Rights, construed a broad definition of terrorism stating that it is:

> any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public.[12]

Moreover, Article 1 of the European Council Common Position on the application of specific measures to combat terrorism[13] claims that a harmonized definition operates as a benchmark for cooperation between domestic governments,[14] yet follows the UN's approach of banning an extensive list of illegal conduct.[15]

The approach taken by the ECtHR is rather distant, as it is predominantly left for national governments to ensure security. Nonetheless, the Council of Europe seeks to harmonize terrorism prevention methods in order to improve efficiency in dealing with the global threat of terrorism. The European Arrest Warrant is a prime archetype of European unity, involving Member States working in harmony to prosecute terrorists throughout their territories. Article 1 of the Council of Europe Convention on the Prevention of Terrorism prohibits a multitude of offences annexed thereto which have been established through international treaties.[16] The Convention aims to strengthen Member States in preventing terrorism through criminalizing particular acts that may fall within the ambit of terrorist offences, for example public provocation and recruitment.[17] Besides this, national prevention policies and existing extradition arrangements are to be reinforced.[18] The Convention has been ratified by 40 Member States,[19] and becomes applicable when there is an international dimension to a relevant situation, thereby assisting extraditions and the European fight against terrorism.[20] The Convention utilizes the concept of commission of an act for the purpose of committing a terrorist offence, thereby ordinary acts can be unlawful if commenced for the purpose of a terrorist act. Examples of this are Article 5, concerning public provocation to commit a terrorist offence, and Article 7, providing instruction for the purpose of carrying out terrorist acts.[21] Nevertheless, merely relying on existing sectoral conventions for a definition of terrorism leaves holes through

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12 Council of Europe, 'European democracies facing up to terrorism' Parliamentary Assembly Recommendation 1426 (1999) para 5.

13 Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ 2 344/93.

14 Replacing Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism [2002] L 164/3 and amending Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences [2005] L 253/22 art 1.

15 ibid art 3.

16 Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007) CETS No. 196.

17 ibid art 5.

18 ibid art 17.

19 ibid.

20 Adrian Hunt, 'The Council of Europe Convention on the Prevention of Terrorism' (2006) 12(4) European Public Law 605.

21 ibid 610.

which acts which have not been banned explicitly, yet have a terrorist intention, can fall. The reason for this is to ensure that the Convention does not conflict with other treaties, nor Member States' own definitions. In this way, the *acquis* of existing legislation is maintained. Yet, simultaneously, the Convention provides legal bases for potential terrorist actions.[22]

That being said, States are required through United Nations Security Council (UNSC) Resolution 1373, pursuant to 9/11, to utilize national legislation in order to combat terrorism globally.[23] For this reason, Article 1 of the United Kingdom's Terrorism Act 2000,[24] on the interpretation of terrorism, was adjusted by the Terrorism Act 2006 to include threats or uses of terrorism against international governmental organizations.[25] Despite the Resolution obliging States to take action, without a concrete and global definition of terrorism, States still have leeway to legislate on terrorism, which can allow them to manufacture dangerously vague definitions thereof. Thereby, activities that are considered to be normal such as paintballing,[26] or owning plant fertilizer,[27] can lead to convictions for the offences of training for terrorism or owning terrorist materials. On the other hand, the semantics of terrorism have changed through time as States and organizations have attempted to construct a fitting definition to distinguish terrorism from ordinary criminal violence. Due to the struggle of coining a value-neutral international definition, the European Convention on Human Rights opts to use a United Nations-esque sectoral approach, thereby banning an exhaustive list of *actus rei*,[28] which makes a concise definition on terrorism redundant.[29] Therefore, the ECtHR, as well as the European Union, seem to be content with prohibiting several commissions of offences, which avoids the need to subjectively condemn a group.[30] The next section shall analyze how the ECtHR treats terrorism and answer the question of whether the ECtHR considers terrorism to fall within the ambit of ordinary crime or under a special system.

## III. The Necessity of Anti-terrorism Laws

Lloyd argues that a 'crime model' is the optimal way of fighting terrorism, as States should opt to treat terrorists as closely to ordinary criminals as possible in order to avoid the alienation of particular minorities through singling them out as prime perpetrators of terrorist offences.[31] In so far as possible, the State ought not to use a special system to combat terrorism, as this shows weakness in the ordinary criminal procedure in dealing

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22 ibid 10.

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

24 Terrorism Act 2000, s1.

25 Terrorism Act 2006, s 34.

26 Press Association, 'Bricklayer convicted of trying to join Isis after training at paintball centre' (*The Guardian*, 15 December 2016) <theguardian.com/uk-news/2016/dec/15/bricklayer-convicted-of-trying-to-join-isis-after-training-at-paintball-centre> accessed 3 June 2019.

27 National Counter Terrorism Security Office, 'Secure your fertilizer' (*GovUK*, 24 November 2014) < <gov.uk/government/publications/secure-your-fertiliser/secure-your-fertiliser> accessed 15 August 2020.

28 Cherif Bassiouni, *A Policy-oriented Inquiry of 'International Terrorism' Legal Responses to International Terrorism: US Procedural Aspects* (Martinus Nijhoff Publishers 1988) 15–16.

29 Terry Davis, *Human rights and the fight against terrorism* (Council of Europe Publishing 2005) 13–15.

30 ibid.

31 Lloyd Berwick, *Inquiry into terrorism legislation* (Cm 3420, 1996) para 3.

with government threats.[32] Criminal law has the quintessential purpose of preventing forbidden conduct, declaring certain conduct illegal and expressing social condemnation towards crimes. This has a significant relevance to terrorism, due to the symbolic value of criminalizing terrorist acts in order for governments to gain popular support through ensuring the safety of their citizens. Creating anti-terrorism laws in times of terrorist threats is an easy win for a government when it comes to obtaining voters, as it shows that the government is protecting its people. Through criminalizing terrorism, the message that terrorism is an abhorrent crime is demonstrated to the public and helps shape a communal public repugnance towards terrorist groups and their aspirations.[33] As a consequence of treating terrorists and criminals alike, they become condemned whilst the government's authority becomes legitimized. Democratic values, such as public trials, result in justice being seen to be done, as well as trust in the State's ability to protect its population. Checks and balances help to guarantee that the guilty are convicted, whilst maintaining a high standard of human rights, as abandoning rights in the pursuit of safety would finally lead to the loss of both.[34] Therefore, some risks are worthwhile for the enjoyment of liberty.[35]

The dyad of the Islam-West has endured more killings than any other pairs of civilizations across the globe.[36] Therefore, there is an assumption that a trade-off between civil liberties and the risk of terrorist attacks exists. This leads to the interpretation that liberal democracies must create a trade-off between civil liberties and national security. On the other hand, in a democratic society, citizens grant the State competences and legitimacy only to the extent that order and peace are guaranteed. Therefore, excessive force by the State may encourage citizens to retaliate in opposition and more 'rebels' to emerge.[37] Moreover, when a State begins to evolve from merely infringing democratic participation to physical harm in the sense of torture and summary executions, a justification for rebel groups to resort to violence is created as human security rights have been violated.[38] Consequently, implementing a human rights based approach to combating terrorism does not leave a country more prone to threats; it strengthens the rule of law whilst hindering the recruitment of further alienated individuals to terrorist groups.[39] Due to this, States must avoid using draconian measures and rather attempt to fairly prosecute and try accused perpetrators to ensure that the Lloyd principle,[40] keeping counter-terrorism law as similar to ordinary criminal law as possible, is respected.[41]

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32 In contrast, the 'war model' would consider the war against terrorism to be an armed conflict, thus potentially making terrorists combatants falling under the Geneva Conventions. As a result, States would be permitted to employ military necessity until submission of the enemy, leading to the potential of collateral damage. Alongside the dangers of civilian life, human rights can be easily infringed due to the State being able to make an easy claim for a state of national emergency.

33 Diaz-Paniagua, *Negotiating terrorism: The negotiation dynamics of four UN counter-terrorism treaties* (University of New York 2008) 41.

34 Todd Landman, 'Imminence and Proportionality: The US and UK Responses to Global Terrorism' (2007) 38(1) Californian Western International Journal 106.

35 Clive Walker, *The Ashgate Research Companion to Political Violence: Human Rights and Counterterrorism in the UK* (Ashgate Publishing Limited 2012)10.

36 Eric Neumayer and Thomas Plümper, 'International terrorism and the clash of civilizations' (2009) 39(4) British Journal of Political Science 728–734.

37 Landman (n 30) 85.

38 Rhonda Callaway and Julie Harrelson-Stephens, 'Toward a Theory of Terrorism: Human Security as a Determinant of Terrorism' (2006) 29(8) Studies in Conflict & Terrorism 778.

39 Landman (n 30) 78.

40 Berwick (n 27).

41 Clive Walker, *The Ashgate Research Companion to Political Violence: Human Rights and Counterterrorism in the UK* (Ashgate Publishing Limited 2012) 10.

Nevertheless, in reality, some special powers of arrest are needed, as the grave consequences of terrorism are a risk neither the public nor police can bear to take.[42] In addition, different States and their inhabitants value safety to altering extents. In particular, countries living in the presence of greater terrorist threats permit human rights violations more easily as necessary to combat terrorism more effectively. Dogmatically, the judiciary contravenes the executive or legislative decision makers to preserve constitutionally protected rights. However, in times of emergency, courts often sidestep issues in order to avoid conflict with the governmental branches, thereby capitulating legitimacy.[43] An example of this was during 'The Troubles', where numerous coerced confessions were used in court. Due to the state of emergency, the courts deemed the government to be more suitable at risk assessment, even though this is debatable as the judiciary is not influenced by the populace.[44] As a consequence thereof, the ECtHR becomes an important body of judicial oversight, which can step in in cases where domestic courts fail to protect human rights.

Since the 1998 Human Rights Act,[45] UK courts have been granted the unprecedented ability to remark on, yet not void, provisions violating said Act. Nonetheless, courts do not operate within an isolated vacuum, as they too are subject to the fear instilled through terrorist threats and thus are not entirely objective when reflecting and judging upon the legislature's decision making. During times of national emergency, the *trias politica* suffers as a consequence of the threat at hand. For instance, British courts gave abundant, perhaps even excessive, leeway to counter-terrorism policies and competences against Northern Irish rebels, even allowing law enforcement officers to 'shoot to kill.'[46] Notably, Lord Bingham asserted that since the entry into force of the Human Rights Act, courts have the function of upholding the rule of law in human rights cases, thereby possessing the prerogative to independently interpret and apply the law, as this is a quintessential characteristic of the modern democratic State.[47]

Terrorism entails a uniquely dangerous threat to sovereign States, especially democratic ones, due to the State no longer having a monopoly over the use of force.[48] This struggle over the legitimate use of force has resulted in numerous countries turning to the legal doctrine of proportionality, which is essential when creating, as well as implementing, counter-terrorism measures. Accordingly, the infringement of human rights ought to be no greater than what is necessary to prevent terrorist attacks. Therefore, domestic European courts strive to function as guardians of the rule of law and to find the intricate balance between security and human rights. Terrorist threats lead to primary and secondary victims. However, civilians should not be victims of courts allowing the over-restriction of their rights.[49] Terrorist offences differ from ordinary criminal activities, in the sense that they are punishable from their mere commencement and through the fact that they are politically motivated. In other words, acts which are preparatory to a terrorist crime are already punishable, which is not the case in ordinary criminal law. For example, ordinary English criminal law[50] states that an act has to be 'more than merely preparatory'

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42 David Anderson, *The Terrorism Acts in 2011* (The Stationary Office Limited 2012) 133.

43 Mary Volcansek, *Courts and Terrorism: Lessons Learned* (Cambridge University Press 2011) 227.

44 ibid 228.

45 Human Rights Act 1998.

46 Volcansek (n 39) 230.

47 *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87 [42].

48 Max Weber, *Weber's Rationalism and Modern Society* (Palgrave Books 2015) 131.

49 Volcansek (n 39) 233.

50 Criminal Attempts Act 1981.

in order to constitute an offence.[51] The reasoning behind this is the harm principle. As there is a threat to a person's security when a crime is attempted, from a utilitarian standpoint an individual who attempts to commit a crime is dangerous, and thus must be punished as a deterrent to themselves and others.[52] However, careful consideration must be given to the maintenance of human rights when seeking to convict terrorists, as measures that are too far-reaching can be counterproductive by creating more alienation within society and thus an increase in the number of terrorist recruits. Modern terrorists utilize anxiety in order to stimulate politicians to over-react, thus causing the side-effect of discrimination and alienation of particular groups. Modern terrorists are deemed to have a divine motivation for their acts.[53] However, Al-Qaeda pursued a war against American imperialism, as stated after 9/11. Al-Qaeda used this line of thought to their advantage, through appealing to alienated Muslims who felt discriminated in Western Countries,[54] and through politicians who took discriminate, targeted measures, further creating a vicious circle of alienation.[55] An example of a measure overstepping human rights boundaries is that of stop-and-search, which was used in a blanket manner disproportionately against ethnic minorities, thus alienating segments of the population in the UK. This will be analyzed further below.

## IV. Proportionality as a Safeguard for Human Rights

When balancing rights against one another, the methodology used by the ECtHR consists of firstly determining whether the infringement of liberty falls under the scope of the rights protected through the ECHR. Next, the ECtHR applies the proportionality test, which is intrinsic to the necessity test and is composed of three steps. The first step is the legality test, meaning the Court determines if the interference is prescribed by law and in pursuit of a legitimate aim. Consequently, the Court assesses whether the interference is necessary in a democratic society and whether the measure is suitable to achieve the legitimate aim or if there is a less burdensome alternative. Lastly, proportionality is assessed *sensu stricto*.[56] The Court accomplishes the final step through balancing the impact of the right infringed with the foreseeable benefit of the measure.[57] One can consider the principle to be an optimization mechanism, whereby values are compared and ranked against one another. For example, when the intrusion of a person's liberty is low and the benefit to society is large then the individual loses their right and vice versa.[58] The way the proportionality test is employed seems to weigh the interests of the applicant with those of the government pertaining to the interest of society, ultimately basing the decision on utilitarianism in the sense of what is best for society. Therefore, the proportionality test can be criticized as it is *au contraire* to the anti-utilitarian nature of rights, as they are intended to protect individuals

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51 ibid s1(1).

52 Clarkson*, Clarkson and Keating Criminal Law: Text and Materials* (Sweet & Maxwell 2010) 473.

53 Crenshaw (n 2) 245.

54 The Guardian, 'Full text: bin Laden's "letter to America"' (*The Guardian*, 24 November 2002) <theguardian.com/world/2002/nov/24/theobserver> accessed 15 August 2020.

55 Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism* (Pluto Press in association with NCCL/Liberty 1993) 173.

56 Jan Jans 'Proportionality Revisited' (2000) 27(3) Legal Issues of Economic Integration 239, 241.

57 George Letsas, *The Scope and Balancing of Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2014) 42.

58 Robert Alexy, 'Constitutional rights, balancing and rationality' (2003) 16(2) Ratio Juris 131, 133.

without regard to society in general.[59] If all rights were balanced based on utilitarianism then most would be restricted. For example, a person expressing something mildly offensive would always be restricted as the utility created through restricting the right would be greater.[60] Thus, the restriction of rights should not be subject to utilitarian style cost-benefit analyses, but rather assessed on a case-by-case basis.

In the context of counterterrorism, the ECtHR's approach can be criticized, as it allows national governments to prioritize national security over individual rights. This undermines ECHR rights, which should be protected. On the other hand, safety can equally be considered a human right, providing it is also an obligation of domestic governments. The ECtHR serves as a forum for judicial dialogue between Council of Europe Member States in combating terrorism, and through analyzing this dialogue the leeway granted through the proportionality and necessity tests can be assessed. The next part of this paper shall analyze how the ECtHR applies the proportionality test to safeguard fundamental freedoms, particularly Article 8 ECHR: the right to private life.

### A. Proportionality in Relation to Private Life

Through juxtaposing the ECtHR's approach towards Article 8 ECHR infringements in ordinary criminal proceedings with its method regarding infringements with terrorist elements, one can analyze the effect that terrorism has on several aspects of the right to private life. It is important to note that Article 8 ECHR is a relative fundamental freedom, meaning that it can be restricted, as opposed to an absolute right such as Article 3 ECHR on torture, which cannot. Further, in this paper, the difference between the ECtHR's rulings on absolute rights in a terrorist context will be delineated to depict how some rights can be relinquished with ease.

Article 8 ECHR has the salient purpose of protecting individuals against arbitrary interferences into their family or private life. The ECtHR has interpreted the right as simultaneously a negative obligation[61] and a positive one.[62] Member States must also guarantee that this freedom is upheld between private parties.[63] The text of the Article declares that everyone has the right to respect for private and family life, alongside their home and correspondence.[64] The interpretation of 'home' was further clarified in *Niemietz v Germany*,[65] where the French term 'domicile' was utilized in order to broaden the scope of private life to include a person's business premises and work vicinity. Indeed, the right is not absolute and can therefore be restricted if there is a legitimate aim,[66] which justifies an interference by a public authority when 'necessary in a democratic society in the interests of national security and public safety.'[67] The exception in practice firstly makes use of a necessity analysis followed by a proportionality test, in order to determine whether an infringement of private life is permissible. This approach will be used in the example of

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59 Stavros Tsakyrakis 'Proportionality: an assault on human rights?' (2009) 7(3) International Journal of Constitutional Law 468, 471–472.

60 Letsas (n 51) 49.

61 *Kroon and Others v the Netherlands* App no 18535/91 (ECHR, 27 October 1994) para 31.

62 *Von Hannover v Germany* (2005) 40 EHRR 1.

63 *Evans v the UK* App no 6339/05 (ECHR, 10 April 2007) para 75.

64 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8(1).

65 *Niemietz v Germany* App no 13710/88 (ECHR, 16 December 1992) paras 29–31.

66 ECHR (n 58) art 8(2).

67 Right to respect for private and family life 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.

the ECtHR's stance on stop-and-search. The Court has identified that the grounds for interference must be sufficient as well as pertinent,[68] and the necessity test requires that the restriction must be established convincingly.[69]

Although the ECtHR is quite rigorous in its consideration of exceptions to Article 8,[70] the balance between the reason for the right being infringed and the right itself remains a quintessential question regarding the margin of appreciation granted to Member States. Member States are responsible for assessing whether a circumstance which would give rise to the infringement of a fundamental freedom exists due to the fact that their government has leeway to determine a legitimate interest. Hence, in the context of terrorism, it is the Member State who determines when a national emergency exists or when public safety is in jeopardy. The reason for the ECtHR allowing a margin of discretion is that the domestic government is in a better position to determine the security situation of its territory than a court in Strasbourg.[71] Despite the leeway given to Member States, the ECtHR claims to be the ultimate arbiter, after consulting legislation and domestic institutions and having regard to the case as a whole, to assess whether the aim and necessity of the infringement are compatible with the ECHR.[72]

The ECtHR considers the fight against terrorism to be exceptional, thus granting leeway to Member States when they pursue legitimate and proportionate aims to prevent terrorism.[73] Nevertheless, the Court still takes the protection of individuals into account when determining the compatibility of an infringement with Article 8 ECHR.[74] This is achieved by ensuring that counter-terrorism laws contain adequate safeguards to prevent abuse.[75] Another example of the Court applying the proportionality test to weigh national security considerations against individual rights is the case of *Sabanchiyeva and Others v Russia*.[76] The case revolved around the Russian authorities prohibiting a funeral of Chechen rebels in the name of national security, under their anti-terror legislation. The ECtHR judgment stated that a fair balance between the forestallment of disturbance, which could have potentially arisen during the funeral proceedings, alongside the feelings of the victims of terrorism and the applicant's right to pay respect through a burial had not been struck. Despite the Court's appreciation of the State's position in regards to the threat of terrorism, counter-terrorism law has enabled the automatic refusal of burials for terrorists and has failed to take a case-by-case approach to the individual circumstances of the departed.

On the other hand, in a recent judgment,[77] the applicant was prevented from paying her respects to her deceased father. The ECtHR agreed with the local authorities' decision because the convicted terrorist applicant had not renounced her ETA membership and there was no possibility to organize a timely escort. Therefore, the Court held that the

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68 *The Observer Ltd and Others, Guardian Newspapers Ltd and Others v The United Kingdom* App no 13585/88 (ECHR, 12 July 1990) para 72.

69 *Autronic AG v Switzerland* App no 12726/87 (ECHR, 22 May 1990) para 61; *Weber v Switzerland* App no 11034/84 (ECHR, 2 May 1990) para 47; *Barthold v Germany* App no 8734/79 (ECHR, 25 March 1985) para 58.

70 *Klass and Others v Germany* App no 5029/71 (ECHR, 6 September 1978 ) para 42.

71 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe Publishing 2000) 8.

72 *Handyside v The United Kingdom* App no 5493/72 (ECHR, 7 December 1976) para 48; *The Sunday Times v The United Kingdom* App no 6538/74 (ECHR, 26 April 1979) paras 50, 59.

73 *Erdem v Germany* App no 38321/97 (ECHR, 9 December 1999) paras 60, 66–69.

74 *Murray v The United Kingdom* App no 18731/91 (ECHR, 27 August 1991) para 91.

75 *Khamidov v Russia* App no 72118/01 (ECHR, 23 October 2006) para 143.

76 *Sabanchiyeva and Others v Russia* App no 38450/05 (ECHR, 6 June 2013).

77 *Guimon v France* App no 48798/14 (ECHR, 11 April 2019).

French authorities had not overstepped their margin of appreciation. This demonstrates that the ECtHR truly does take a case-by-case approach and applies the proportionality test to render justice in each individual case, taking into account the particular circumstances.

In *Nada v Switzerland*,[78] the Court further reiterated its statement that domestic authorities must take the particular circumstances of the case into account. The Court held that there had been a violation of Article 8 ECHR due to the non-removal of the applicant's name from the Swiss Taliban Ordinance, in which he was listed due to his prior placement on the UN Security Council Sanctions Committee's list of persons suspected of association with al-Qaeda and the Taliban. The applicant had not been found guilty of any terrorist offence, and thus his right to an effective remedy and a private life had been infringed, as he was restricted from seeing family and receiving medical attention. Despite UN Security Council Resolution 1267, the ECtHR deemed that the Swiss authorities must nevertheless take the individual's situation into account, emphasizing the importance of the proportionality assessment being based on a case-by-case approach.

The following section aims to analyze the ECtHR's use of the proportionality safeguard to alter the UK's stop-and-search measure, thus preventing the infringement of human rights as well as further alienation of affected individuals.

**B. Proportionality of the UK's Stop-and-Search Measure**

According to Pantazis and Pemberton,[79] building upon Hillyard's 'suspect community' theory in Northern Ireland,[80] the stop and search competence was used disproportionately against ethnic minorities. The wide discretion granted to police officers required no reasonable ground for suspicion, thus leading to the alienation of minority groups, predominately Muslims. On the other hand, Greer disagreed with the aforementioned hypothesis,[81] claiming that it relied upon interpretive, empirical and logical errors due to the treatment of Muslims as one homogenous group and the consequent failure to address the alienation of Muslims not associated with terrorism. Greer deemed stop-and-search to be a flawed counter-terrorism measure due to its arbitrariness and lack of prosecutions, despite being utilized extensively.[82] In day to day affairs, stop-and-search was introduced to enable police officers to determine whether an individual may be guilty of a crime without having to make an arrest, thus being convenient for innocent civilians. In scenarios where stop-and-search is utilized, the legitimate aim thereof is the protection of national security. Therefore, the domestic courts must ensure that the aim is proportionate to the burden the individual incurs due to the consequent infringement of their right to a private life. The ECtHR steps in when the domestic courts have failed to protect individuals' human rights and an application to the ECtHR is made after the individual has exhausted all domestic remedies. The legal bases for stop-and-search fall under numerous pieces of

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78 *Nada v Switzerland* App no 10593/08 (ECHR, 12 September 2012).

79 Christina Pantazis and Simon Pemberton, 'From the "Old" to the "New" Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation' (2009) 49(5) The British Journal of Criminology 646–655.

80 Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism* (Pluto Press in association with NCCL/Liberty 1993) 173–176.

81 Steven Greer, 'Anti-Terrorist Laws and The United Kingdom's: A Reply to Pantazis and Pemberton' (2010) 50(5) British Journal of Criminology 1171, 1171–1175.

82 Only 1.4% of those stopped and searched were arrested - see National statistics, 'Police powers and procedures, England and Wales, year ending 31 March 2018' (*Gov.UK*, 2018) <gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2018> accessed 3 June 2019.

legislation such as Section 6(1) Police and Criminal Evidence Act (PACE),[83] and the Aviation Security Act 1982, Section 27(2),[84] which requires a reasonable ground for suspicion in order for the measure to be utilized fairly and in a discriminatory manner. Although searches carried out with the aim of preventing terrorism fall under Schedule 7 to the 2000 Terrorism Act, Sections 44 and 47[85] have no reasonable suspicion requirement and are thus exposed to the opportunity of misuse. In contrast, the goal behind PACE was to construct an equilibrium between the rights and freedoms of the individual and the competences of the police. In practice, the extensive use of stop-and-search proved that this competence did not merely deter terrorism, but also infringed upon numerous individuals' rights to protest and assemble.[86] Consequently, Gillan and Quinton brought a case to the ECtHR,[87] after having used their domestic remedies to claim an infringement of Article 8 ECHR, which the Court granted. The two individuals, who had been attending a protest at an arms fair in London, were stopped and searched and subsequently had some possessions seized. The Court reasoned that the competences held by police officers were not subject to sufficient legal safeguards to prevent abuse, nor were they adequately restricted to certain scenarios,[88] resulting in an adaptation of the UK's Stop and Search legislation by the Home Secretary, making the measure lawful only when there is a reasonable suspicion of an individual being a terrorist.[89]

The ECtHR has since further strengthened the significance of the right to private life, even in the context of counter-terrorism legislation. In a recent judgment,[90] the Court found an infringement of Article 8 ECHR as a consequence of the arbitrary detention of people for a duration of up to nine hours. Moreover, they were compelled to respond to questions without access to a lawyer or being formally arrested. The case was in 2011 and revolved around an applicant being stopped and questioned at an airport whilst trying to visit her convicted terrorist husband, which has since led to an amendment of the UK counter-terrorism legislation. As of 2014, frontier officials must arrest a person in order to interrogate them for a duration exceeding one hour and grant prior access to a lawyer, as well as releasing the suspect after no more than six hours.[91] The ECtHR held that the legislation at time of questioning was too broad, lacked safeguards and did not take the newly amended UK legislation into account. Presumably, the newly adopted legislation has been altered to contain sufficient safeguards. However, the ECtHR does not ignore the fact that terrorism is a serious hazard to national security, as manifested in *Sher*. Following *Sher*, the search of a person's domicile during custody was not held to be a violation of Article 8 ECHR,[92] as the urgency of the fight against terrorism calls for a broadly phrased search warrant. There must, however, be safeguards to ensure that the warrants are not arbitrarily granted and are permitted by a judge. Ultimately, the ECtHR seems to be satisfied if Member States stay within the limits of their marginal discretion when restricting Article 8 ECHR. The leeway granted when national security is at stake is

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83 Police and Criminal Evidence Act 1984 sec 6(1).

84 Aviation Security Act 1982 sec 27(2).

85 Terrorism Act 2000 sec 44, 47.

86 Louise Smith, 'Human Rights and Powers of Stop and Search' (*About Human Rights*, 29 August 2017) <abouthumanrights.co.uk/human-rights-powers-stop-search.html> accessed 3 June 2019.

87 *Gillan and Quinton v The United Kingdom* App no 4158/05 (ECHR, 12 January 2010) para 10.

88 ibid.

89 ibid para 86.

90 *Beghal v The United Kingdom* App no 4755/16 (ECHR, 28 February 2019).

91 ibid.

92 *Sher and Others v The United Kingdom* App no 5201/11 (ECHR, 20 October 2015).

broader, due to the domestic authorities being better suited to determine a security hazard. The following section addresses the proportionality of surveillance measures used in the UK to combat terrorism.

### C. Proportionality of Surveillance when Countering Terrorism

The national security justification is highly relevant to counter-terrorism operations, as secret surveillance is often used and regarded as an interference with Article 8 ECHR. Despite this, in the ECtHR's jurisprudence, it has been allowed in situations where surveillance was strictly necessary in order to safeguard democratic institutions.[93] The margin of discretion is limited to the extent to which the court must be convinced that the surveillance in question was subject to sufficient safeguards preventing arbitrary abuse.[94]

In the Gaskin judgment, it was determined that a fair balance between the interests of the individual versus those of the community, such as national security, must be struck.[95] The delineation between cases with a terrorist element compared to those without can be scrutinized via the issue of security services granting access to information to individuals. The Court held that the barriers constructed by public authorities to the access of private information can lead to a violation of Article 8 ECHR,[96] as they have a duty to provide an effective procedure within a reasonable period of time regarding the retrieval of said information. On the other hand, when there is a suspicion of terrorism, the Court has deemed the interests of combating terrorism and national security to be of greater significance than the defendant's interest.[97] Marginal discretion granted by the ECtHR allows for the domestic government to make a security assessment, thereby creating a legitimate basis for a proportionate infringement upon an individual's right to private life. The development of such case law can lead to misuse and overextension of the restriction of freedoms. Thus, the use of secret surveillance is governed by the proportionality test.

The ECtHR advocates that when an applicant claims to be the victim of an Article 8 infringement, the mere presence of secret surveillance can amount to a violation.[98] Further, the Court has argued that legislation which enables a system of secret surveillance to be legitimate is a threat to society.[99] Governments' margin of discretion is limited in so far as adequate safeguards against abuse must be guaranteed, and competences pertaining to secret surveillance may only be tolerated if strictly necessary for the protection of democratic institutions.[100] The lack of procedural safeguards surrounding the use of surveillance methods amounts to a violation,[101] and therefore an *ex ante* judicial authorization ought to be granted through a body independent of the executive.[102] However, pursuant to the modernization of technologies that terrorists can utilize, governments ought to be allowed to employ state of the art technology, including mass

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93 *Klass and Others v Germany* App no 5029/71 (ECHR, 6 September 1978 ) para 41.

94 Steven Greer, *Human Rights files no 15 The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing 1997) 10–20.

95 *Gaskin v The United Kingdom* (1989) 12 EHHR 36 para 42.

96 *Haralambie v Romania* App no 21737/03 (ECHR, 27 October 2009) para 96.

97 *Segerstedt-Wiberg and Others v Sweden* App no 62332/00 (ECHR, 6 June 2006) para 91.

98 *Roman Zakharov v Russia* App no 47143/06 (ECHR, 20 October 2006) paras 171–172.

99 *Weber and Saravia v Germany* App no 54934/00 (ECHR, 29 June 2006) para 78.

100 *Klass and Others v Germany* App no 5029/71 (ECHR, 6 September 1978 ) para 42; *Szabó and Vissy v Hungary* App no 37138/14 (ECHR, 6 June 2016) para 72–73.

101 *Bykov v Russia* App no 4378/02 (ECHR, 10 March 2009) para 81.

102 *Roman Zakharov v Russia* App no 47143/06 (ECHR, 20 October 2006) para 258; *Szabó and Vissy v Hungary* App no 37138/14 (ECHR, 6 June 2016) para 77.

surveillance, to prevent terrorist atrocities. This notwithstanding, in times of severe emergency where no time may be wasted, authorities must still be subject to and held accountable through *ex post facto* judicial review, for the sake of preventing the misuse of invasive measures and enabling a judicial remedy as a safeguard.[103] The ECtHR therefore prevents an Orwellian-type surveillance State from coming to be, by placing limits on the discretion that national security considerations gives States in their fight against terrorism. This is a vital position for the Court to take, as otherwise a snowball effect of using national security to infringe upon human rights could occur.

The legal basis, the Regulation of Investigatory Powers Act, permitted extensive surveillance in the UK and was deemed unlawful in the *Big Brother* case.[104] Yet, the ECtHR did not render mass surveillance programmes disproportionate in a blanket fashion. The Court grants wide discretion to States when protecting national security,[105] and does not require the safeguard of prior judicial authorization as quintessentially necessary for the sake of legality.[106] Moreover, the technological advances that assist terrorists to remain under the radar have broadened the discretion granted to States, thus warranting mass surveillance to an extent.[107] Hence, less burdensome measures, such as targeted interception, were not deemed adequately efficient in combating terror.[108] Consequently, the Court established necessity and foreseeability safeguards, through limiting the duration of data interception, as well as taking necessary precautions to ensure that data remains confidential. This was achieved through creating clear procedures for data management to tackle the issues of lack of transparency and ambiguity surrounding data interception.[109] Ultimately, the mass infringement of the privacy of the population was deemed necessary in a democratic society, due to the need for an information flow between States when combating the global threat of terrorism, thus normalizing information sharing.[110] Sophisticated terrorist tactics result in the need for ingenuity, as regular criminal procedures are less efficient and cannot always keep pace with this evolving threat. Moreover, the deterring nature of ordinary criminal punishments is less potent with regard to terrorism, as terrorists are radical and uninfluenced by the threat of imprisonment. Optimally, States should use specific, safeguarded surveillance tactics for the specific purpose of countering terrorism. Any data retention not in line with the aim of combating terrorism must be held unlawful, as a huge triumph for terrorists is for traditional freedoms to be undermined.[111]

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[103] *Szabó and Vissy v Hungary* App no 37138/14 (ECHR, 6 June 2016) para 86.

[104] *Big Brother Watch and Others v The United Kingdom* App nos 58170/13, 62322/14, 24960/15 (ECHR, 13 September 2018).

[105] *Weber and Saravia v Germany* App no 54934/00 (ECHR, 29 June 2006) para 106.

[106] *Big Brother Watch and Others v The United Kingdom* App nos 58170/13, 62322/14, 24960/15 (ECHR, 13 September 2018) para 314.

[107] ibid para 384.

[108] ibid para 357.

[109] Theodore Christakis, 'A Fragmentation of EU/ECHR Law On Mass Surveillance: Initial Thoughts On The Big Brother Watch Judgment' (*European Law Blog*, 20 September 2018) <europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-echr-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment/> accessed 3 June 2019.

[110] *Big Brother Watch and Others v The United Kingdom* App nos 58170/13, 62322/14, 24960/15 (ECHR, 13 September 2018) para 446.

[111] Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art 17 ICCPR and Art 8 ECHR' (2015) 31(80) Utrecht Journal of International and European Law 104, 120–130.

States use counter-terrorism measures such as mass surveillance to prevent terrorist recruitment, which triggers a conflict between safety and the fundamental value of privacy. The assessment made by the ECtHR is strongly influenced through the Member State declaring a state of emergency as, in the event of a state of emergency, additional leeway in the form of a margin of appreciation is granted to the State.[112] The nature of surveillance being based on algorithms leads to selective profiling, which functions discriminately in practice, resulting in minority groups having a high chance of being singled out. Despite this contribution towards the incarceration of terrorists, large numbers of innocents are affected.[113] The permittance of new powers infringes the rights of law-abiding internet users, resulting in a populace sleepwalking towards a surveillance society for the potential gain of safety, which is horrifyingly reminiscent of an Orwellian tale. Hence, the ECtHR, alongside the Court of Justice of the European Union (CJEU), has established standards surrounding data protection and law enforcement, requiring a specific legal basis for any collection, storage, analysis and disclosure of data for anti-terrorism purposes. Moreover, the basis must entail binding rules with limits on statutory powers, for instance through an exact description of the type of information recorded, as well as the precise groups of people against whom the measures of gathering and retention of information may be taken.[114] Additionally, a transparent procedure for the authorization of surveillance measures is equally essential for them to be lawful.[115] Due to the intrusive nature of surveillance measures, such as phone tapping, strict necessity and proportionality tests, combined with strong safeguards as mentioned above, are of fundamental importance.[116]

In the following chapter, the Member States' dialogue with the ECtHR regarding the prohibition of torture, an absolute right, will be analysed, in order to show that national security is a substantial interest even when the ECtHR appears to be stringent.

## V. To Torture or Keep the Nation Secure?

The global fight against terrorism, regardless of its definition, is never-ending, even at a national level, due to sporadic attacks preventing it from becoming a passing phenomenon. Thus, the implications of declaring an emergency situation as a response to terrorism are different from those declared in an ordinary situation of warfare. Life-threatening scenarios invoke a positive obligation upon States to ensure the safety of their citizens through doing everything that can be reasonably expected of them in preventing a real and immediate risk of death.[117] As a result thereof, the right to security has in a sense been codified by the ECtHR as a human right, perhaps considering that security as an absolute right would relieve the tension between national security and other rights. For example, rather than a court weighing national security against a fundamental freedom, it could consider the absolute right to security of numerous citizens, thus legitimately superseding other human rights. In addition, the Guidelines on Human Rights and the Fight against Terrorism reiterate that it is a duty of the State to protect its populace from potential terrorist attacks.[118] Therefore, it naturally follows that the ECtHR grants leeway to Member States

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[112] Ian Brown and Douwe Korff, 'Terrorism and the Proportionality of Internet Surveillance' (2009) 6(2) European Journal of Criminology 119, 120.

[113] ibid 132.

[114] *Rotaru v Romania* App no 28341/95 (ECHR, 4 May 2000).

[115] Brown and Korff (n 101) 129.

[116] ibid 130.

[117] *Osman v UK* ECHR 1998–VIII 3124.

[118] Council of Europe, *Guidelines on Human Rights and The Fight Against Terrorism* (Council of Europe Publishing 2012).

in fulfilling this obligation. Nonetheless, the police must still exercise their competences in a way that respects due process and other Convention rights.[119] Due to the State having the task of balancing these competing rights with one another, they often resort to the implementation of 'sunset clauses' during a state of emergency, which ordinarily would expire after a given time period and would have to be passed through parliament again.[120] Due to the timeless nature of terrorism, states of emergency can last an extraordinarily long time, thus enabling allegedly temporary measures which are more intrusive than normally permitted to be established and codified into ordinary criminal law.

In *Lawless v Ireland*,[121] the ECtHR supported a state of emergency as an 'exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.'[122] Further, the Court deemed Ireland justified in utilizing the derogation, due to the violent and unconstitutional nature of the activities on its territory.[123] Moreover, special anti-terrorism laws were justified due to the ordinary justice system being insufficient to restore peace and order, as evidence gathering methods were inadequate to achieve prosecutions.[124] This is in accordance with the criteria later proposed through the Commission in *The Greek Case*.[125] The Court controversially claimed jurisdiction in assessing whether an emergency truly threatens the life of a State, but subsequently employed a wide margin of appreciation when making such an assessment on the respective government's derogation.[126] This is much to the appeasement of sovereign States who believe themselves to be in a better position to assess emergency situations than a court in Strasbourg, as it is their *domaine reserve*.[127] Democratically elected national governments should possess responsibility for the lives of their citizens and should ideally be supervised by the ECtHR, which can assess whether a particular measure invoked under the derogation clause is proportionate. The Court assesses proportionality by considering the nature of the rights affected, whether they are absolute or fundamental, the severity of the restriction and the length of the emergency situation.[128] For example, a lengthy ban on the fundamental right to assembly due to a state of emergency would be disproportionate due to the importance of the freedom of assembly to a democratic society,[129] unless no alternate measures were available and the result would be disorder.[130]

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[119] *Osman v UK* ECHR 1998–VIII 3124.

[120] For instance, the Terrorism Act 2006 was subject to a 12-month sunset provision meaning it had to be extended on a yearly basis.

[121] *Lawless v Ireland* (1961) 1 EHRR 15.

[122] ibid para 28.

[123] ibid para 30.

[124] ibid paras 36–37.

[125] *The Greek Case* App nos 3321/67, 3322/67, 3323/67, 3344/67 (ECHR, 1969); (1) It must be actual or imminent; (2) Its effects must involve the whole nation; (3) The continuance of the organized life of the community must be threatened; (4) The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

[126] *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977) para 96.

[127] Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute? The Undermining of Article 3 in Ahmad v UK' (2013) 76(3) The Modern Law Review 580, 585.

[128] Julian Müller, 'European human rights protection in times of terrorism – the state of emergency and the emergency clause of the European Convention on Human Rights' (2018) 28(4) Zeitschrift fuer Politikwissenschaft 581, 587.

[129] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press 2011) 425.

[130] *Christians against Racism and Fascism v the United Kingdom* App no 8440/78 (ECHR, 16 July 1980).

During times of emergency, a lower limit still exists, which States must not cross when combating terrorism even if the life of the nation is in jeopardy. *Ireland v UK* was a landmark judgment,[131] resulting in the ECtHR considering that five techniques amounted to a violation of Article 3 ECHR,[132] although they were not considered to be torture, but rather inhuman and degrading treatment.[133] The Court created a delineation between degrading treatment and torture, thereby creating a potentially dangerous flexibility regarding the margin of appreciation granted to the UK under Article 15 ECHR,[134] which could potentially lead to allowing brutal methods which cannot quite be considered torture. Although a wide margin of appreciation is granted, power is not unlimited.[135] On the other hand, a precedent of cumulative mistreatment amounting to a breach of Article 3 ECHR was established. Yet, in *Becciev v Moldova,*[136] a violation of Article 3 was not found due to mistreatment occurring in isolated instances.

The ECtHR has directly impacted counter-terrorism legislation through its precedents, but also indirectly in the UK. The Home Secretary had the power to label an individual as an international terrorist,[137] thereby allowing the person to be deported or, if they would be subject to torture, to be incarcerated indefinitely.[138] The derogation clause invoked by the UK hindered the ECtHR from taking action.[139] This derogation was contested in *Belmarsh detainees*,[140] where the applicants claimed unlawful discrimination on the ground of nationality, contrary to Article 14 ECHR in conjunction with Article 5 ECHR. The House of Lords quashed the UK's derogation order and announced that the indefinite detention of foreign terrorists was incompatible with the right to liberty and the parasitic right of the prohibition of discrimination. The majority of the Lords considered the emergency derogation to be legitimate, as the life of the nation had been threatened. Regardless, under the circumstances, the indefinite detention of, specifically, foreigners, was disproportionate and lacked justification. The Lords employed a proportionality test and concluded that alleged international terrorists were not any more of a risk than British ones who were not subject to such a draconian measure.[141] Moreover, less burdensome measures to control the suspects would have been sufficient to neutralize the threat.

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[131] *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977).

[132] (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers'; (b) hooding: putting a black or navy-colored bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep; (e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations; *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977) para 96.

[133] *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977) para 167; *Babar Ahmad and Others v The United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09 ,67354/09 (ECHR, 10 April 2012) para 179.

[134] Mavronicola and Messineo (n 115) 598.

[135] *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977) para 207.

[136] *Becciev v Moldova* (2007) 45 EHRR 11.

[137] Anti-terrorism, Crime and Security Act 2001.

[138] ibid part 4 s23.

[139] The ECtHR would have prevented this violation of Article 5 ECHR, deprivation of liberty, from happening if the UK government had not opted to derogate from the ECHR under Article 15.

[140] *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WLR 87.

[141] For example, in the 7/7/2005 bombings in London, all offenders had British citizenship.

Furthermore, the UK government hypocritically permitted the suspects to vacate the country to States where they did not face the threat of torture, despite the suspects allegedly posing an international terror threat.[142] Conclusively, the mere existence of the ECtHR influences domestic British judges to respect human rights. Prior to the *Belmarsh* case, it had been unprecedented for UK judges to adjudicate on the legitimacy of measures adopted in good faith on national security grounds, thereby demonstrating that the judicial dialogues between the European and UK courts have led to a greater assurance of human rights.[143]

Unlike fundamental freedoms, an absolute right such as Article 3 ECHR has no provision for exceptions and, pursuant to Article 15(2) ECHR, cannot be deviated from,[144] even under an emergency derogation and the most difficult circumstances, such as the fight against terrorism.[145]The *Gäfgen* case ostensibly does not reaffirm prior precedents such as *Saadi v Italy*,[146] which deemed torture absolutely prohibited in all circumstances. The absolute prohibition of torture was non-negotiable, even in cases of extradition where there was a 'genuine risk' of torture,[147] until the recent *Ahmad v UK* case,[148] where the ECtHR seemingly undermined the non-refoulment principle. Despite rejecting the relativist notion of the UK House of Lords,[149] which attempted to alleviate the responsibility of the extraditing State, the ECtHR left the status of Article 3 ambiguous with respect to extraditions.[150] The Court permitted the extradition of numerous suspected terrorists to face prosecution in an extreme maximum-security detention center in the USA.[151] The ECtHR deemed that a highly restrictive prison did not amount to a violation of Article 3,[152] as an extensively long period of incarceration would not be considered incompatible with the aforementioned Article, but rather would be grossly disproportionate and therefore incompatible.[153] The Court considered that ill-treatment must achieve a minimum standard of severity to trigger Article 3 ECHR through analyzing the particular context,[154] duration, physical and mental effects of the punishment.[155] As the Court's methodology is fact-sensitive, a degree of relativity regarding the absolute right still exists pragmatically, because defining inhuman and degrading treatment does involve a degree of subjectivity. The affected individual also plays an important role in the proportionality assessment of

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142 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 (HL).

143 David Feldman, 'Proportionality and Discrimination in Anti-Terrorism Legislation Case and Comment' (2005) 64(1) Cambridge Law Journal 271, 271–273.

144 *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977) para 163.

145 *Gäfgen v Germany* (2011) 52 EHRR 1 para 87.

146 *Saadi v Italy* (2009) 49 EHRR 30 para 82.

147 *Chahal v the United Kingdom* App no 70/1995/576/662 (ECHR, 11 November 1996).

148 *Babar Ahmad and Others v The United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECHR, 10 April 2012) para 176.

149 *R (on the application of Wellington) (FC) v Secretary of State for the Home Department (Criminal Appeal from Her Majesty's High Court of Justice)* [2008] UKHL 72.

150 *Babar Ahmad and Others v The United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECHR, 10 April 2012) para 177.

151 In para 177 the Court ruled: 'treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case.'.

152 *Babar Ahmad and Others v The United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECHR, 10 April 2012) paras 218–224.

153 ibid para 242.

154 *Ireland v UK* App no 5310/71 (ECHR, 13 December 1977) para 65.

155 *Soering v UK* (1989) 11 EHRR 439 para 90.

whether a punishment constitutes a violation of Article 3.[156] For instance, in the *DD* case,[157] the British court took the applicant's mental state due to PTSD into account when assessing whether a TPIM,[158] entailing numerous movement restrictions, equaled torture. Nevertheless, the Court reasoned that in order to determine whether something is torture, one must assess the impact of the measure on the individual against the measure's proportionality pursuant to national security.[159] As the effects of the TPIM did not pass the threshold of Article 3, no violation was found. Yet, the fact that the applicant was mentally ill played a role in reducing some of the restrictions imposed on him.[160]

Ultimately, the ECtHR's ruling is worrisome,[161] as a right being absolute ought to mean that no exceptions are permitted, and universal application is enforced. Besides this, the Court claimed in its reasoning for permitting the extradition that a real risk would rarely be found in countries with historic democratic values, hence a dichotomy between trustworthy countries and non-trustworthy countries was implied, despite the USA being predisposed to the use of torture.[162] Lastly, the preventative scope of Article 3 was impaired, as in cases of expulsion one can only know after the event whether torture occurred, thus rendering the absolute right less effective.[163]

## VI. Conclusion

This paper has analyzed the extent to which terrorist threats limit the enjoyment of individual liberties. Conclusively, the ECtHR appreciates the necessity of a special system of anti-terrorism laws due to the significance of national security. Consequently, discretion is granted to Member States when defending themselves against terrorist threats, which is nonetheless limited through the proportionality assessment. Proportionality functions as a strategy that ensures Member States utilize sufficient safeguards when imposing restrictive legislation, through demanding specifically targeted and transparent laws.

Terrorism is treated differently to ordinary crimes, as governments declare emergency situations. Hence, national security becomes of paramount importance in contrast to other rights. This is evident when comparing jurisprudence on human rights infringements associated with terrorist measures, which are drafted in the name of national security, with ordinary interferences. Moreover, the derogation clause's interplay with relative and absolute rights permits additional leeway via the margin of appreciation.

Surveillance and stop-and-search are archetypical anti-terrorism measures limited by the ECtHR in order to not excessively infringe upon human rights, thereby being in accordance with Lloyd's notion of imposing sufficient safeguards if new measures are enacted.

Although the ECtHR can be considered an essential guarantor for human rights through its judicial dialogues and influences on domestic courts and governments, the issue of refoulment in torture cases must be readdressed in upcoming case law. Moreover, the extent to which grave privacy infringements are permitted is terrifying, as the longer the ECtHR takes to take a solid stance against States abusing the aim of national security, the

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[156] Mavronicola and Messineo (n 115) 593.

[157] *DD v Secretary of State for Home Department* [2014] EWHC 3820 (Admin).

[158] Terrorism and Prevention and Investigation Measure in the form of an ankle brace.

[159] *DD v Secretary of State for Home Department* [2014] EWHC 3820 (Admin) [126].

[160] ibid [136].

[161] *Babar Ahmad and Others v The United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECHR, 10 April 2012) para 177.

[162] ibid para 179.

[163] Mavronicola and Messineo (n 115) 600–602.

more severe it will naturally become due to society's incremental progression towards a digital life.

Ultimately, terrorism tests democratic governments uniquely, as imposing draconian measures would be an easy way to ensure the safety of the population. Nonetheless, fighting with one hand behind one's back is necessary to uphold the status of a rights-respecting democracy. Only time will tell whether the ECtHR will evolve to hand down proactive verdicts to ensure human rights are protected prior to their breach.

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# Countering Terrorism Through Multilateralism: Reviewing the Role of the United Nations

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UNITED NATIONS; COUNTER-TERRORISM; TERRORISM; MULTILATERALISM; INTERNATIONAL LAW; VIOLENT EXTREMISM

**Abstract**

The United Nations (UN) came into being after the world had been ravaged by two World Wars and was on the brink of a Cold War. It was uncharted territory, even for a global organisation, to acknowledge the perils of the new era, which were not limited to regional issues but also included territorial and communal tensions, the arrival of full-fledged non-State organisations and an intrinsic link to politics. The UN has witnessed the development of terrorism as a major international issue. Many of its agencies were conceived as part of its counter-terrorism strategy. It has sought the implementation of this strategy on an operational basis worldwide and brought about cooperation, aid and assistance for the same. This article analyses the history of the UN's role in defining and countering terrorism, along with the reconfiguration of its stance according to the changing times. It lays out various new challenges put forth by terrorism in the 21st century and questions the legitimacy of the UN's current counter-terrorism strategy. While advocating the necessity of the UN as a guide, a watch dog and an initiator, it highlights the major hurdles in a comprehensive plan of action and suggests a way forward to the revise the perception of the threat and realign the existing institutional efforts and policy changes, as well as highlighting the need to reconfigure the responses and techniques used.

## I. Introduction

Terrorism is an omnipresent phenomenon in every part of the world today. It derives its driving force from a diverse set of circumstances, including discrimination,[1] religious

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[1] James A Piazza, 'Repression and Terrorism: A Cross-National Empirical Analysis of Types of Repression and Domestic Terrorism' (2017) 29(1) Terrorism and Political Violence 102–118.

ideals,[2] economic disparity,[3] self-determination,[4] and political ambitions.[5] In the first instance, responsibility was undoubtedly attributed to the States on whose soil or with whose resources this agenda was being furthered. However, it was soon observed that these forces, often acting as non-State entities, shifted their operations and adapted to any country which had fertile conditions. Thus, uniformity in the recognition of this danger is sought, as opposed to isolated State action, without which its containment is impossible. The United Nations initially acted as a broker of peace, recognising specific acts and formulating policies as punitive action. However, after the attacks on the World Trade Center, its role diverged into seeking normative behaviour from Member States. The UN aimed to send out a clear, immutable message that terrorism was condemned in all forms, and to enforce international standards based on accountability and the application of sanctions by default if any party contributed to the cause of terrorism.[6] Previously, groups like Al-Qaeda, with Osama Bin-Laden as its leader, were a relatively lesser threat because of their pronounced anti-Western agenda based on Islamic radicalisation. In comparison, in the present times, terrorism has sprung up in various parts of the world with different aims ranging from religious ideals to self-determination, political motives, and overthrowing discriminatory regimes.

Thus, the UN not only grapples with a multifarious threat, but also the lack of a comprehensive yet balanced approach to combat it. With new-found international acceptance, finances, logistics and information at its disposal, it must actively govern the international response to terrorism to prevent the outbreak of sporadic conflicts on these issues. Moreover, its role becomes more important since the threat of terrorism is now 'globalised',[7] with sufficient indications of the physical and psychological impacts thereof. This article aims to review the approach that the UN and its affiliated bodies have taken to curb terrorism. It examines the foremost efforts made in the Cold War era and subsequently discusses the high voltage approach adopted by the UN post-9/11. It analyses the contemporary challenges that terrorism has posed and the new trends of prevention that have surfaced. Lastly, it seeks to the highlight the lacunae in various approaches and suggest possible ways forward that the UN could take in countering global terrorism as a multi-faceted threat.

## II. The UN Approach Towards Terrorism in the Cold War Period

The idea of international terrorism was nascent during the institutionalisation of the UN. Hence, naturally, the drafters did not 'fully anticipate the existence, tenacity, and

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2 Ruth Stein, *For Love of the Father: A Psychoanalytic Study of Religious Terrorism* (Stanford University Press 2010); Mariya Y Omelicheva, 'The Ethnic Dimension of Religious Extremism and Terrorism in Central Asia' (2010) 31(2) International Political Science Review 167–186.

3 James A Piazza, 'Rooted in poverty? Terrorism, poor economic development and social cleavages' (2006) 18(1) Terrorism and Political Violence 159–177; James A Piazza, 'Poverty, Minority Economic Discrimination, and Domestic Terrorism' (2011) 48(3) Journal of Peace Research 339–353.

4 See generally, Yonah Alexander and Robert A Friedlander, *Self-Determination: National, Regional, And Global Dimensions* (Routledge 1980); Robert A Friedlander, 'Terrorism and National Liberation Movements: Can Rights Derive from Wrongs Dialogue' (1981) 31 Case Western Reserve Journal of International Law 281.

5 Seung-Whan Choi and James A Piazza, 'Ethnic Groups, Political Exclusion and Domestic Terrorism' (2014) 27(1) Defence and Peace Economics 37–63.

6 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 21–70.

7 Taofiki Okunola and M Abiodun 'Terror-Globalisation and the Rise of Modern Terrorism' (2018) 67 International Affairs and Global Strategy 1.

technology of modern-day terrorism'.[8] However, it evolved precipitously in the Cold War era, due to the bipolarity in international politics and proxy wars. Even during this period, the UN was focused on developing an international regime on terrorism by creating criminal justice treaties. After the International Law Commission's attempts to assign definitive fundamentals to the question of 'what is terrorism?' proved futile,[9] efforts were undertaken by the General Assembly in the wake of the 1972 Munich Olympics bombings. However, they fell short as States disagreed on the distinction between terrorists and revolutionaries.[10] This discord continued to plague any effort by the General Assembly to establish a global consensus on terrorism.[11]

A significant step towards adopting a 'general' approach towards terrorism was made through General Assembly Resolution 40/61 in 1985.[12] The UN removed the 'shield of legitimacy' under which terrorists were hiding and States officially accepted acts of terrorism as criminal acts rather than political acts.[13] On reviewing the contents of the Resolution, the authors observe that it was truly the foundation of what would be known as the Comprehensive Convention on International Terrorism as, unlike other Resolutions, Resolution 40/61 took a very inclusive and wide approach towards terrorism and requested parties to implement the recommendations of the Ad Hoc Committee.[14] The General Assembly subsequently played a large role in the setting up of a treaty regime on terrorism during the Cold War. On the other hand, the United Nations Security Council (UNSC), though mostly dormant, has long been accused of circumventing the treaty mechanisms of the Cold War era. These allegations find support several of the UNSC's actions, for example the Lockerbie case.[15] Here, in response to the bombing of a Pan Am Flight, it passed a Resolution directly in conflict with the 1971 Montreal Convention,[16] by demanding transfer of the accused to a US military base situated in Netherlands.[17] The UNSC's politically motivated actions worked to weaken the already volatile treaty framework on terrorism and raised questions regarding the viability of the existing mechanisms. Apparently, in view of the difficulty in creating a universally accepted definition of terrorism, the UN shifted its focus to following a piecemeal approach to strengthen the legal regime on terrorism.

The last quarter of the 20th century witnessed a trend of specific treaties relating to terrorist acts. About a dozen treaties relating to specific terrorist acts were concluded from

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8 Mark Baker, 'Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)' (1987) 10 Houston Journal of International Law 25.

9 International Law Commission, 'Documents of the sixth session including the report of the Commission to the General Assembly, Volume II' (1954) A/CN.4/SER.A/1954/Add.l, 117 (observations of the UK).

10 UNGA, 'Draft Convention for the Prevention and Punishment of Certain Acts of Terrorism' UN GAOR 27th Session UN Doc A/C.6/L.850 (1972); John M Murphy, 'United Nations Proposals on the Control and Repression of Terrorism' in M Cherif Bassiouni (ed), *International Terrorism and Political Crimes* (Charles C Thomas 1975) 499.

11 Jackson Nyamuya Maogoto, 'War on the Enemy: Self-Defense and State-Sponsored Terrorism' (2003) 4 Melbourne Journal of International Law 406, 410.

12 UNGA Res 40/61 (9 December 1985) UN Doc A/RES/40/61.

13 Douglas Kash, 'Abductions of Terrorists in International Airspace and on the High Seas' (1993) 8 Florida Journal of International Law 65, 75–76.

14 Author's comment on UNGA Res 40/61 (n 12).

15 *Libyan Arab Jamahiriya v United Kingdom* [1992] ICJ Rep 3.

16 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 14118, art 7.

17 UNSC Res 731 (21 January 1992) UN Doc S/RES/731.

1963 to the end of the millennium.[18] These treaties relied on the 'extradite or prosecute' approach,[19] and ranged from aviation[20] and nuclear materials[21] to financing terrorist activities.[22] These developments were indeed promising, but were not so efficient in the absence of a comprehensive treaty on terrorism, which was soon realised by States and the UN. Hence, in 2000, the UNGA Ad Hoc Committee (established by Resolution 51/210 of 17 December 1996) began working on the Comprehensive Convention on Terrorism (CCT).[23] However, the Ad Hoc Committee was faced with a similar deadlock as was seen during previous attempts at concluding a Convention.[24] Nonetheless, after making significant progress in 2000–2001, it was halted by 9/11, until States reached the 'bottom-line' position on disputed issues.[25] In its latest Report, the Committee noted the difficulties in making 'substantive progress' on outstanding issues.[26] The Convention is far from being concluded and the General Assembly is still debating the definition of terrorism.

## III. The United Nations Approach Towards Terrorism Post-9/11

The 9/11 attacks were unprecedented in their magnitude. They urged the international community to change its perceptions of threats to world peace. In light of loopholes in the 'specific' treaty regime, the UNSC formulated Resolution 1373,[27] on the basis of its powers

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[18] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 15410; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) SUA/CONF/15/Rev.1; Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256.

[19] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 15410, art 7; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art 8; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256, art 8.1.

[20] Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 art 1; Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 12325; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 14118.

[21] Convention on the Physical Protection of Nuclear Material (adopted 17 December 1979, entered into force 8 February 1987) 1456 UNTS 24631.

[22] International Convention for the Suppression of Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

[23] UNGA Res 51/210 (17 December 1996) UN Doc A/RES/51/210.

[24] UNGA Res 54/110 (2 February 2000) UN Doc A/RES/54/110; UNGA, 'Report of the Ad Hoc Committee established by UN General Assembly Resolution 51/210 of 17 December 1996 on its 6th session' UNGAOR Supp No 37 UN Doc A/57/37 (2002).

[25] UNGA, 'Report of the Ad Hoc Committee established by UN General Assembly Resolution 51/210 of 17 December 1996 on its 6th session' UNGAOR Supp No 37 UN Doc A/57/37 and Corr.1 (2002).

[26] UNGA, 'Report of the Ad Hoc Committee established by UN General Assembly Resolution 51/210 of 17 December 1996 on its sixteenth session' UNGAOR Supp No 37 UN Doc A/68/37 (8 to 12 April 2013); United Nations, 'Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996' (*United Nations Office of Legal Affairs*, 21 November 2018) <legal.un.org/committees/terrorism/> accessed 30 May 2020.

[27] UNSC Res 1373 (28 September 2001) S/RES/1373.

enumerated in Chapter VII of the UN Charter.[28] This was the first counter-terrorism initiative which was mandatory for all UN Members and sought to ensure global cooperation. Resolution 1373 was an attempt to build a comprehensive legal framework for counter-terrorism measures, laying the foundations for the legislative actions that the UNSC would subsequently take for its counter-terrorism mission. Hence, the introductory text called for a compulsory system to attack the root of the problem, namely financing.[29] It not only obligated the Member States to freeze funds likely to be utilised in terrorist activities but also to criminalise and prohibit the provision of funds to entities directly or indirectly controlled by terrorists.[30] One of the most notable developments in this aspect was the setting up of a Sanctions Committee, which monitored the implementation of sanctions over terrorist groups.[31] This was a step forward from the earlier Convention which only criminalised acts and did not sufficiently address the causes.[32]

The second part aimed to create a reflection of these norms in the domestic laws of Member States. It propounded general principles, such as having effective machinery to prevent the planning, facilitation and commission of such activities, prescribing adequate punishments, the exchange of information and evidence between members and so forth.[33] Most importantly, it focused on border regulations and immigration.[34] In consonance with the first part, it put due regard on the symbiotic relationship between the transnational crimes of, *inter alia*, money laundering, extortion, kidnapping, smuggling and terrorism, which could be thwarted by the implementation of these principles through domestic agencies, and thus urged nations to ratify the pre-existing Conventions and Protocols on these issues.[35]

Resolution 1373 also brought into existence the Counter-Terrorism Committee (the Committee). Much along the lines of the international human rights treaty bodies regime, Resolution 1373 credited the Committee with ushering in a new method of compliance which was based on dialogue and consensus.[36] Member States were required to submit reports to the Committee periodically, in order to show whether their obligations had been followed. The objective of the Committee was to ensure that States had existing legislative norms as well as adequate executive machinery to prevent terrorist funding[37] through

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[28] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, art 41.

[29] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[30] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, paras 1(a)–1(d).

[31] UN Security Council, 'Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities' (*UNSC)* <un.org/securitycouncil/sanctions/1267#work_and_mandate> accessed 29 May 2020.

[32] International Convention for the Suppression of Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

[33] Communications Intelligence Gathering Act 2016 (Germany); Agreement Between the United States and the European Union on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of Terrorist Financing Tracking Program (signed 28 June 2010) <treasury.gov/resource-center/terrorist-illicit-finance/Terrorist-Finance-Tracking/Documents/Final-TFTP-Agreement-Signed.pdf> accessed 24 May 2019.

[34] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, para 2(g).

[35] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, paras 3(c)–3(f).

[36] Guidance for the Submission of Reports Pursuant to Paragraph of Security Council Resolution 1373 (2001) of 28 September 2001, available at <http://www.un.org/Docs/sc/committees/1373/guide.htm>.

[37] CTC Discussion Paper (*Counterterrorism Committee*, 24 July 2002) <www.un.org/Docs/sc/committees/1373> accessed 25 May 2020.

international cooperation.[38] The accomplishments of these agencies were dependent on their approach of gradual prioritisation, instead of imposing uniformity when dealing with State parties. Initially, States were apprehensive to submit to a roadmap laid down by an international organisation.[39] The Committee examined the human and technical resources of States to put these norms into practice and regulated even those areas which were not covered by Resolution 1373. In the first round itself, all 191 Member States submitted assessment reports and a significant number went forward for the second round of monitoring. There has been a sharp rise in the acceptance of the major international terrorism Conventions and Protocols since the Committee's establishment.[40]

The UNSC had aimed for sweeping reforms in the area of counterterrorism; however, the Resolutions and their implementation seem myopic in light of the challenges posed by modern-day terrorism. Firstly, compliance with these norms is highly subject to budgetary hindrances. Despite financial and technical assistance, there are States that would rather employ their resources to combat economic, health and social crises which are accorded a higher level of priority.[41] Secondly, in the absence of any penal mechanism, the Committee finds itself in a vacuum when it comes to addressing repeated defaults in the provision of information by any country. Although it has the power to highlight defaults,[42] there has not been a single case of referral to the UNSC for penalisation. The UNSC did not even attempt to define 'terrorism', and the myriad interpretations by different States further results in a lack of unanimity in deciding on a course of action.

However, the biggest obstruction in the UN's strategy against terrorism does not stem from external factors but from the internal organisational structure. As previously mentioned, Resolution 1373 led to numerous accusations of the UNSC abusing its power, in that it could not exercise the legislative functions accorded to the General Assembly at the behest of merely fifteen members.[43] The UNSC in turn claimed to derive its powers from Chapter VII of the UN Charter, which allows it to take necessary action when faced with a grave threat to international peace and security.[44] Moreover, the General Assembly resembled a parliamentary logjam of political clashes and delay, and it was clearly impossible to expect a reasonable measure therefrom after the 9/11 attacks. The Resolution was adopted by a sweeping majority which further cemented its legitimacy. This long-lasting feud resulted in a fractious approach towards counterterrorism. A major problem remained regarding the unestablished hierarchy, as a multiplicity of organs leads to each following their own mandate, resulting in overlapping duties. There is minimal

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38 CTC Discussion Paper (*Counterterrorism Committee*, 22 Nov 2002) 3 <www.un.org/Docs/sc/committees/1373/Stage%20B.htm> accessed 23 May 2020.

39 Council on Foreign Relations, 'The Global Regime for Terrorism' (*Council on Foreign Relations*, 31 August 2011) <cfr.org/report/global-regime-terrorism> accessed 23 May 2020.

40 UNSC, 'Fifty-seventh year, 4618th meeting' (4 October 2002) S/PV.4618.

41 Office of the United Nations High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism: Fact-sheet No. 32' (*OHCHR*, 2008) <ohchr.org/documents/publications/factsheet32en.pdf> accessed 28 August 2020, 47.

42 Sebastian von Einsiedel, 'Assessing the UN's Efforts to Counter Terrorism' (United Nations University Centre for Policy Research, Occasional Paper 8, 4 October 2016) <collections.unu.edu/eserv/UNU:6053/AssessingtheUNsEffortstoCounterterrorism.pdf> accessed 28 August 2020.

43 UNSC, 'Fifty-sixth year, 4394th meeting (resumption 1)' (25 October 2001) S/PV.4394, 7.

44 Bryan C Banks, 'The Security Council as Global Legislator: Using Chapter VII Authority to Redefine the United Nations' Role in Developing International Legal Norms' in Abdul Ghafur Hamid Khin Maung Sein (ed), *The Theory and Practice of International Law: Responses to a Variety of International Legal Issues* (Serials Publications 2009) 58–60.

consultation between the entities which consequently leads to redundancy and tasks being handled without a strategy or aggregation of complementary initiatives.[45] This fragmented methodology has resulted in the directionless working of related entities such as the Counter-Terrorism Action Group.[46]

The immediate effect of the shortcomings of the previous Resolution was the Global Counter Terrorism Strategy.[47] Formulated in 2006, the Strategy revolves around four pillars which focus on building the capacity of States to prevent and combat terrorism within the framework of the rule of law.[48] The Strategy borrows significantly from the European Union's Action Plan on Combating Terrorism.[49] However, this strategy was similar to its predecessor because even though it focused on capacity building and imposing positive obligations on Member States, it failed to induce the political will and commitment necessary to combat terrorism, devise a system of accountability or induce regional or bilateral cooperation. It put the cart before the horse, since it did not prioritise the Member States' distinctive social, political and economic responses before implementing an all-encompassing plan. This was also highlighted in the Secretary General's report pursuant to Resolution 70/291 where the 'deficit in multilateral cooperation' was mentioned in light of the growing technological and financial enhancement of cross-regional terrorism.[50] It specifically stated that centrality of national ownership, strengthening governance and devising sustainable policies, should be the cornerstone of new Resolutions, along with governmental and non-governmental coordination and less friction between UN organs.[51] The Sanctions Committee has been relatively more effective but does suffer from transparency issues.[52]

## IV. The United Nations' Shift to the Prevention of Violent Extremism

The rise of organisations such as ISIL, Al-Shabaab and Boko Haram is the latest manifestation of terrorism. Having been defined as violent extremism,[53] this is a phenomenon which is not only a threat to international peace and security but may also lead to a humanitarian crisis.

The UN has realised the need for a more layered approach towards battling this situation, as recognised by UNSC Resolution 2178, which states that a truly successful approach must be comprehensive in addressing not only military challenges, but also political, socio-economic and financial ones.[54] This means that efforts should also focus on

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45 Alistair Millar, 'Mission Critical or Mission Creep? Issues to Consider for the Future of the UN Counter-Terrorism Committee and Its Executive Directorate' (*Global Centre on Cooperative Security,* 2017) 5.

46 Eric Rosand, 'The G8's Counterterrorism Action Group' (*Centre on Global Counter Terrorism Cooperation*, May 2009).

47 UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288.

48 ibid.

49 Council of the European Union, 'Declaration on Combating Terrorism' (29 March 2004) Doc 7906/04.

50 UNGA 'Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy, Report of the Secretary-General' (20 April 2018) UN Doc A/72/840.

51 ibid.

52 Kimberly Prost, 'Fair Process and the Security Council: A Case for the Office of the Ombudsperson' in AM Salinas de Frias and others (eds), *Counter-Terrorism. International Law and Practice* (Oxford University Press 2012) 409–424.

53 UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368; Fund for Peace, 'Insurgency Defectors: Dangers and De-Radicalization Processes' (*Relief Web*, 27 January 2016) <reliefweb.int/report/world/insurgency-defectors-dangers-and-de-radicalization-processes> accessed 23 May 2020.

54 UNSC Res 2178 (24 September 2014) UN Doc S/Res/2178 paras 13–14.

issues such as de-radicalisation and disengagement, re-integration and addressing terrorist financing instead of the typical preventive security measures.[55]

In his report, the Secretary General laid down the target groups of these entities, which are primarily people disillusioned with government. The majority of recruits come from a disenfranchised youth, who are readily indoctrinated due to their impressionable minds and are thus easier to control in militant units.[56] The fundamental reasons for this are a lack of opportunities, in particular regarding education and employment; a sense of discrimination and exclusion; and the oppressive nature of some counterterrorism measures which result in the destruction of civilian homes and communities, leading to a large number of these recruits being below the age of 25.[57]

This challenge has led the UN to introduce International Development Plans to re-establish areas ravaged by conflict and combat the plague of ideology that exploits the disgruntled mindset of vulnerable groups.[58] This marked the first shift in the UN's approach, in which it broadened its focus from merely perpetrators to also victims. Consequently, international policy swayed from having a narrow focus on security towards a more holistic approach that prioritises development, human rights, democratic governance, engaging youth in opportunities and decision-making processes and reversing violations of international humanitarian law or human rights law.

The rise of violent extremism also presented new threats to the ever-changing dynamics of the global terrorism landscape.[59] Organisations such as ISIL and ANF popularised the practice of recruiting foreign fighters to unprecedented levels.[60] The UNSC's concerns regarding this dimension of the spreading of violent extremism were obvious.[61] The Council, in its Resolution 2178, aimed to deal with the threat by placing a variety of obligations on States.[62] Interestingly, the scope of the Resolution is extremely broad and vague. Instead of clearly defining the categories of activities or persons that would fall under its scope, the Council uses the term 'foreign terrorist fighters', stating that this concerns all forms and manifestations of terrorism.[63] The Council does not limit its scope to international terrorism, and it certainly does not define what terrorism is. It once again leaves it to States to decide and identify who falls under this category. It is a missed opportunity that the UNSC, with the adoption of Resolution 2178, did not refer to

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55 UN Secretary-General, 'UN Secretary-General's Remarks at General Assembly Presentation of the Plan of Action to Prevent Violent Extremism' (*United Nations*, 15 January 2016) <un.org/sg/statements/index.asp?nid=9388> accessed 23 May 2020.

56 UNGA, 'Plan of Action to Prevent Violent Extremism' (24 December 2015) UN Doc A/70/674.

57 ibid.

58 Eric Rosand, Alistair Millar and Jason Ipe, 'Civil Society and the UN Global Counter-Terrorism Strategy: Opportunities and Challenges' (*Center on Global Counterterrorism Cooperation*, September 2008) <globalcenter.org/wp-content/uploads/2008/09/civil_society.pdf> accessed 28 August 2020.

59 Orla Hennessy, 'The Phenomenon of Foreign Fighters in Europe' (*International Centre for Counter-Terrorism*, July 2012) <icct.nl/download/file/ICCT-Hennessy-Phenomenon-of-Foreign-Fighters-Europe-July-2012.pdf> accessed 7 August 2020, 3.

60 European Parliament, 'Combating Terrorism' (*European Parliament*, September 2017) <europarl.europa.eu/RegData/etudes/BRIE/2017/608682/EPRS_BRI(2017)608682_EN.pdf> accessed 7 August 2020.

61 UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

62 ibid.

63 UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, para 7.

Resolution 1566, in which it came up with a definition of terrorism, in order to limit the scope of the Resolution and avoid the risk of its disproportionate use.[64]

## V. Solving the Definitional Puzzle: The Question of 'What'

As discussed above, international law gradually advanced through treaties on specific crimes which are indicative of terrorism, for example plane hijacking,[65] hostage-taking,[66] and crimes involving nuclear materials.[67] While the 'specific' approach has been relatively successful as compared to the almost non-existent 'general' approach, it cannot be the final solution to the problem. Supporters of the specific approach argue that it not only avoids political disagreement but, above all, it is practical and allows agreements to be concluded.[68]

However, in the age of organised violent extremist groups, the essence of 'terrorism' cannot be captured by referring to specific acts that relate to the idea thereof. It also blurs the distinction between terrorist acts and criminal acts. For instance, under South African law, hijacking a plane for mercenary reasons will also amount to a terrorist act, for it is an offence under international Conventions against hijacking and the taking of hostages.[69] Therefore, the 'specific' approach sees a departure from the foundational tenets of terrorism, significantly 'producing terror'.[70] More importantly, terrorism as a concept is ever-expanding and recent times have seen it in newer forms.[71] Following a specific approach and reaching a new agreement after the emergence of these new forms of terrorism will not only be too onerous a task for the international community, but it will also be inefficient in tempering the growth of terrorism across the globe. Global terrorism is perpetrated by terrorists; therefore, the instruments must address terrorists and not specific terrorist acts.

Analysing various attempts made in the Cold War and post-Cold War eras, we conclude that the international community is gradually bridging the discord and the intrinsic problem of definition is not as pronounced as it used to be. Nonetheless, the UN's sustained efforts to reach a consensus have prompted regional organisations to reach an agreement on their respective levels. The European Union's Framework Decision on Combating Terrorism is a standout example of this.[72] The UN, therefore, must adhere to its mission of adopting a widely accepted definition of terrorism.[73] Devising an all-inclusive

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64 Bibi van Ginkel, 'The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach' (*International Centre for Counter-Terrorism*, 4 November 2014) <icct.nl/publication/the-new-security-council-resolution-2178-on-foreign-terrorist-fighters-a-missed-opportunity-for-a-holistic-approach/> accessed 23 May 2020.

65 Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 12325.

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

67 Convention on the Physical Protection of Nuclear Material (adopted 17 December 1979, entered into force 8 February 1987) 1456 UNTS 24631.

68 Geoffrey Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 Northwestern University Law Review 102.

69 South African Anti-Terrorism Bill (2002) cl 1(a).

70 Jennifer Trahan, 'Terrorism Conventions: Existing Gaps and Different Approaches' (2002) 8 New England Journal of International & Comparative Law 215, 222.

71 UNGA, 'Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy Report of the Secretary-General' (20 April 2018) UN Doc A/72/840.

72 Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism [2002] L 164/3.

73 Susan Tiefenbrun, 'A Semiotic Approach to a Legal Definition of Terrorism' (2003) 9 ILSA Journal of International and Comparative Law 357, 365.

definition is an impossible task. Hence, the focus should be on solving the political disputes relating to the distinction between self-determination movements from acts of terrorism. Some scholars propose that instead of strictly focusing on the definition, States could insert an annex to the Comprehensive Convention on International Terrorism (CCIT), listing prevalent terrorist organisations.[74] They propose that such a list could be monitored and periodically updated by an independent body.[75] This idea does not sound plausible, as most of the definitional conflicts on terrorism are only in reference to the differing character and motivations of terrorist organisations.[76] Currently, the Sanctions Committee, under the UNSC, functions in a similar manner with respect to the list of organisations on which sanctions are to be imposed. However, as previously discussed, the functioning of the Sanctions Committee was rendered ineffective due to transparency issues. To ensure transparency and fairness, States could borrow from the United Nations Framework Convention on Climate Change's successful model of 'Conference of the Parties' (CoP),[77] to monitor and update the list. States could decide on the status of controversial organisations through a democratic system. An inclusive setup would provide much-needed legitimacy to the CCIT.

## VI. The Drawbacks of the 'War' against Terrorism

Past practices have shown that military force plays a central role in weakening and often ending well-organised and relatively large terrorist groups.[78] The military defeat of ISIL at the hands of Iraqi armed forces, assisted by the US-led coalition's air forces, only exemplifies the efficiency of military force in crippling terrorist organisations.[79] However, heralding this as a victory over ISIL would be a myopic interpretation of terrorism, and the growth of regional groups such as Islamic State of West Africa and the Khorasan group cements this view.[80] The inability of military strength to eradicate terrorist groups is attributable to the fact that terrorist groups are constituted by their ideology, which cannot be defeated by arms alone.[81] Another factor that contributes to the bluntness of military strength in countering terrorism is the mobile nature of terrorist organisations.[82] Therefore, when military force weakens organisations such as Al-Qaeda or the Taliban in Afghanistan, they transfer their activities and focus to neighbouring regions, making

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74 Sara De Vido, 'The future of the draft UN convention on international terrorism' (2017) 3(3) Journal of Criminological Research, Policy and Practice 233–247.

75 ibid.

76 Tiefenbrun (n 73).

77 United Nations, 'Conference of the Parties (COP)' (*United Nations Climate Change*) <unfccc.int/process/bodies/supreme-bodies/conference-of-the-parties-cop> accessed 28 August 2020.

78 Audrey K Cronin, 'How al-Qaida Ends: The Demise and Decline of Terrorist Groups' (2006) 31 International Security 7.

79 Lara Seligman, 'U.S.-led Coalition Set to Launch Final Fight Against ISIS in Syria' (*Foreign Policy*, 1 August 2018) <foreignpolicy.com/2018/08/01/u-s-led-coalition-set-to-launch-final-fight-against-isis-in-syria/> accessed 23 May 2020.

80 Jacob Zenn, 'ISIS in Africa: The Caliphate's Next Frontier' (*Centre for Global Policy,* 26 March 2020) <cgpolicy.org/articles/isis-in-africa-the-caliphates-next-frontier/> accessed 29 May 2020; see also Kabir Taneja, 'End of the Islamic State, but not the end of ISIS' (*Observer Research Foundation*, 25 March 2019) <orfonline.org/expert-speak/end-of-the-islamic-state-but-not-the-end-of-isis-49249/>_accessed 29 May 2020.

81 Paul R Pillar, 'The Diffusion of Terrorism' (2010) 21(1) Mediterranean Quarterly 1–14; Dipak K Gupta, *Understanding Terrorism and Political Violence: The Life Cycle of Birth, Growth, Transformation, and Demise* (Routledge 2008).

82 David Galula, *Counterinsurgency Warfare: Theory and Practice* (Praeger 1964) 72.

themselves equally impactful in wider areas.[83] This phenomenon perhaps explains why only seven percent of terrorist groups have 'ended' as a result of military force.[84]

In fact, military force unintentionally contributes to the radicalisation of terrorist ideologies.[85] The legitimacy of the US-led NATO invasion in Iraq remains a matter of debate. However, the brutality of the conflict, leading to the birth of ISIS in Iraq,[86] adds substantial value to claims of the counter-productivity of military strategy in combating terrorism in the long-term.[87] With that being said, long-term schemes to counter terrorism must not rely on military strength.

Even when military strength is to be applied, the UN and its allied organisations ought to ensure that principles of the conduct of engagement, or *jus in bello*, are upheld. Powerful States have attempted to justify their questionable actions by adopting diverging interpretations of laws, such as the United States on the issue of Guantanamo Bay.[88] Such interpretations have resulted in gross violations of the principles of human rights and humanitarian law. The use of autonomous weapons, such as drones in Yemen and Pakistan,[89] also raised numerous questions.[90] Despite the disturbances and terrorist activities, these are peaceful States. Hence, legally, the employment of such weapons and measures results in nothing but extra-judicial civilian killings and violations of human rights law.[91]

The genesis of the problem lies in the inability of the General Assembly to maintain its role as the guardian of the UN Charter. The General Assembly, without a doubt, is competent to discourage and condemn targeted killings as a breach of the principles of the UN Charter. However, its failure to exercise strong measures is greatly disheartening.[92] The General Assembly regularly passes Resolutions to counter terrorism.[93] It emphasises the importance of international cooperation and lawful conduct while asking States 'to make best use of the existing institutions of the UN' in their quest to curb international

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[83] Martin C Libicki, 'The Limits of America's al Qa'ida Strategy' in Seth G Jones and Martin C Libicki (eds), *How Terrorist Groups End: Lessons for Countering al Qa'ida* (RAND 2007) 111–114.

[84] Seth G Jones, 'How Terrorist Groups End*'* in Seth G Jones and Martin C Libicki (eds), *How Terrorist Groups End: Lessons for Countering al Qa'ida* (RAND 2007) 19.

[85] Philip Vertigans and Philip Sutton, 'The role of anti-terror measures in the development of "Islamic" terrorism' (2006) 4(4) International Journal of Humanities 87.

[86] Seth G Jones, 'How Terrorist Groups End*'* in Seth G Jones and Martin C Libicki (eds), *How Terrorist Groups End: Lessons for Countering al Qa'ida* (RAND 2007) 89.

[87] William Maley, 'Transitioning from military interventions to long-term counter-terrorism policy: The case of Afghanistan (2001–2016)' (*International Centre for Counter-Terrorism*, April 2016) 40 <icct.nl/wp-content/uploads/2016/04/transitioning_from_military_intervention_afghanistan_2016.pdf> (accessed 7 August 2020.

[88] Third Geneva Convention Relative to the Treatment of Prisoners of War 1949 (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 5; 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) (API) 1125 UNTS 3, art 51.

[89] CNN, 'US Kills Cole Suspect' (*CNN Online*, 5 November 2002) <edition.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html> accessed 7 August 2020.

[90] Chris Downes, 'Targeted Killings in an Age of Terror: The Legality of the Yemen Strike' (2004) 9 JCSL 277.

[91] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 EJIL 171.

[92] Nigel D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (Manchester University Press 1997) 173–8.

[93] UN, 'Measures to eliminate international terrorism (Agenda item 109)' (*United Nations*) <un.org/en/ga/sixth/74/int_terrorism.shtml> accessed 28 August 2020.

terrorism.[94] These statements are at best ambiguous and do little to check terrorism or violations of the UN Charter by States. In the absence of a community response to violations, the legitimacy of the Charter provisions is being sabotaged. One of the foundational principles of the United Nations was to avoid conflict, let alone those conflicts followed by more catastrophic counterblows. Military force is an exception, international cooperation is the rule and it is the duty of the United Nations to ensure that it remains that way.

## VII. Winds of Change

One of the most remarkable innovations in the field of counterterrorism has been regarding peacekeeping missions. With a view to encouraging more States to participate in counter-terrorism initiatives, the UN set up an All Sources Information Fusion Unit (ASIFU) for its peacekeeping mission in Mali. The UNSC carefully aligned the mandate of MINUSMA with the UN Global Counter-Terrorism Strategy and gave it a greater role than previous peacekeeping missions.[95] The mandate also stressed disarmament, demobilisation and reintegration mechanisms. The overhaul of purely military peacekeeping missions is a relatively new tool in the UN's peace and security toolbox, yet the initial success of MINUSMA shows that such multidimensional peacekeeping missions can play an important role in preventing violent extremism in vulnerable regions.[96]

The UN's involvement in Central Asia, in the Joint Plan of Action including five Central Asian countries, also paved the way for less intervention and more coordination with national governments, especially in Tajikistan and Kyrgyzstan, where it made good on its promise to aid States in the enhancement of a cooperative regime.[97] Though the position of the UN's Preventive Diplomacy Offices in these countries was conveniently downgraded later,[98] it was a rare occasion where the reasons for this stemmed from the UN's acts of promoting dialogue on an international level between disgruntled governments and exiled citizens instead of gross violations of sovereignty, human rights or a domestic plan of action.

## VIII. Conclusion

As the preceding chronology confirms, the pattern of the past two decades has been one of expanding and deepening UN engagement in counterterrorism. There have been pauses, perhaps a retreat or two, but the overall direction has been unambiguous. Continuing disagreements over a comprehensive definition have not prevented either the General Assembly from endorsing an ever-expanding set of proscribed actions or the UNSC from adding – through unanimous votes – one layer of counter-terrorism mechanisms after

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94 UNGA Res 64/118 (15 January 2010) UN Doc A/RES/64/118; UNGA Res 65/34 (10 January 2011) UN Doc A/RES/65/34.

95 UNSC Res 2295 (29 June 2016) UN Doc S/RES/2295.

96 Natasja Rupesinghe and others, 'Assessing the Effectiveness of the United Nations Mission in Mali (MINUSMA) Report 4/2019' (*Norwegian Institute of International Affairs*, 2019) <nupi.brage.unit.no/nupi-xmlui/bitstream/handle/11250/2599513/EPON-MINUSMA-Report-Exec-Summary.pdf?sequence=2> accessed 7 August 2020.

97 United Nations Regional Centre for Preventive Diplomacy for Central Asia, 'The Joint Plan of Action for Central Asia' (*United Nations*, 2020*)* <unrcca.unmissions.org/joint-plan-action> accessed 01 June 2020.

98 Miroslav Jenca, 'The Concept of Preventive Diplomacy and Its Application by the United Nations in Central Asia' (2013) 24(2) Security and Human Rights 183–194.

another. Efforts such as these usually involve a high, often looked-down-upon, intervention in the monitoring of the legislative processes of the Member States. Even in its extensive pursuit to innovate and implement these strategies, the United Nations still commands a modest, even marginal position in the global counter-terrorism campaign.[99] In light of the challenges highlighted above, it has struggled to maintain any effective role in dictating the direction of counter-terrorism measures. This is also complemented by the inherent limits on its ability to contribute to this area.[100]

As a general rule, most Member States have preferred to keep such sensitive matters as their counter-terrorism agendas out of global fora – particularly the UN's political bodies – where they fear further politicisation of the local issues in dispute. Once the General Assembly, or even the UNSC, is seized of such an issue, the course of deliberations tends to become increasingly difficult to control or to predict. As a result, throughout most of its existence, the United Nations has been discouraged by those Member States which are affected by the bulk of terrorist incidents.[101]

The UN has achieved the insurmountable feat of global acceptance of its mandates without having to wield an iron fist, except in drastic situations. However, it is this which makes the task of ensuring compliance even tougher. Whether it is about exchanging information between nations or making a joint alliance in a region, it is presumptive to think that a mere push shall result in phenomenal change. This is where the importance of dialogue and consensus becomes paramount. Communication should not be a two-way channel between the State party concerned and the UN, but a multilateral discussion between allies, opponents and the UN. Not only would this guarantee transparency and dialogue, but it would also legitimise UN intervention in the event of discord. Terrorism is an evolving phenomenon and it is next to impossible to nip each causal circumstance in the bud. Hence, the UN must be attuned to this dynamic threat to world peace and security. Similarly, States certainly have the primary responsibility to prevent and counter terrorism, with the acknowledgement of the role of civil societies in preventing radicalisation of ideologies amongst youth at local level.

Almost two decades after 9/11, there is general agreement on the idea that the phenomenon as such will probably not end, and that actions against terrorist groups or networks require long-term counter-terrorism policies. Despite several military interventions against terrorism, our understanding of the link between military interventions and counter-terrorism policies is still remarkably limited. In particular, the link between the closure of military interventions and the establishment and implementation of long-term counter-terrorism policies is not well understood and has remained under-researched. An evolving threat needs an evolving plan of action, spearheaded by one but supported by everyone.

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[99] Edward C Luck, 'The Uninvited Challenge: Terrorism Targets the United Nations' in Edward Newman et al (eds), *Multilateralism Under Challenge: Power, International Order, And Structural Change* (United Nations University Press 2009) 348.

[100] ibid.

[101] Naureen Chowdhury Fink, *Meeting the Challenge: A Guide to United Nations Counterterrorism Activities* (International Peace Institute 2012) 21.

# National Security and Human Rights in International Law

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**Keywords**
HUMAN RIGHTS; NATIONAL SECURITY; CONFLICT; STATIST LOGIC

**Abstract**
The post war-on-terror era has witnessed several developments in international law, including the nature and function of national security. This article establishes a link between national security and human rights by looking at some practical implications from a State policy perspective and theoretical views. Any discussion on the two distinct areas of 'national security' and 'human rights' are, of course, not equal. However, the discussions in this article relate to how international law interacts with national security over human rights given that national security relates to a State's domestic affairs but with implications for the international legal system. Thus, through theory and practice, this article demonstrates that national security and human rights are unstable. This article addresses the question of whether national security and human rights obligations are in conflict or whether international law has been over-responsive or under-responsive to either human rights or national security concerns.

## I. Introduction

There are two uncontested doctrines in international law concerning States – *sovereignty* as a form of right, and the right to the *national security* of the State. The former is a well-known doctrine in international law,[1] whilst the latter is a broad standard and usually contains, *inter alia*, the right to declare war, the right of a State to defend itself, and the right to public order.[2] For a State to exist, it must display these two characteristics as a genuine political entity 'in order to procure their mutual welfare and security,'[3] or promote its 'internal security and national defense',[4] and therefore claim its place among nations as a *sovereign* State. This means that security is at the heart of the very existence of a State and, as such,

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1 See generally, J Bartelson, *A Genealogy of Sovereignty* (CUP 1995).

2 See BVA Rolling, 'The Concept of Security and the Function of National Armed Power' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Nijhoff 1986) 283–322; J Robb, *Brave New War: The Next Stage of Terrorism and the End of Globalization* (John Wiley & Sons 2007); White House, 'The National Security Strategy of the United States of America' (17 September 2002); Michael Supperston, *Brownlie's Law of Public Order and National Security* (2nd ed, Butterworths 1981); Antonela Sofinet, 'Defining Doctrinal Principles in the Area of Public Order and National Security' (2015) 2015 European Journal of Public Order and National Security 33; Matej Avbelj, 'Security and the Transformation of the EU Public Order' (2013) 14 German Law Journal 2057.

3 James Crawford, *The Creation of States in International Law* (OUP 2007) 7, citing Vattel.

4 William Thomas Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' (2009) 27 Boston University International Law Journal 115, citing Robert Delahunty & John Yoo, 'Statehood and the Third Geneva Convention' (2005) 46 Virginia Journal of International Law 131; HB Jacobini, 'The Right of State Existence in International Law' (1950) 30 Southwestern Social Science Quarterly 277.

security, for modern purposes, includes the vague and broad concept of national security.[5] Under this broad concept, in which the *ordre public* of a sovereign State's internal affairs seeks shelter from the realms of evil (aggression and subversion), States are the supreme law-makers and power brokers on the international legal plane.

As there are competing aspects of security in legal and policy discourse, this paper deals with national security, as determined by a State, particularly at the domestic level. Hence, it is a sort of State security that focuses on the safety of the nation State, as opposed to *collective security* or *human security*. For instance, a government may deploy troops on home soil in order to tackle crime or illegal immigration for national security reasons.[6] In other instances, the where and when of national security being invoked can be on very vague and evasive grounds.[7] The conception of national security in this paper plays on the Cold War realist conception, which encompasses the self-interest of the nation State.[8]

All sovereign States have different means at their disposal to safeguard their national security interests. Since the war on terror, a number of States have developed 'national security strategies' that set out the policy, legal and other methods to safeguard their national security.[9] Furthermore, due to the vagueness of the concept of national security, States can justify any action within that paradigm.[10] In some States, the idea of national security will often escape the judicial community due to the integration of intelligence strategies, the *ordre public* or counter-terrorism. When judicial bodies do consider national security, the issues often remain sensitive and / or confidential. In some jurisdictions, questions of national security are also linked to criminal law and this creates a blur between traditional civilian courts and those that are designated as special tribunals for national security matters.

Moreover, due to the convergence of national security with criminal law in some States, it is increasingly difficult to separate the two when both are at play, if defendants have recourse to only one legal system. Take, for example, *A v Secretary of State for the Home Department*,[11] a case where foreign prisoners challenged the UK's Anti-Terrorism Act 2001[12] as unlawful, at least in relation to international law such as the European

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5 For example, the 1995 Hungarian Act on the National Security Services (Act CXXV of 1995), provides in Section 3 that national security also covers the protection of national sovereignty and the constitutional order; For a concrete discussion on the notion of a 'national security State' see Amichai Cohen and Stuart Cohen, *Israel's National Security Law: Political Dynamics and Historical Development* (Routledge 2012).

6 See Michael Head and Scott Mann, *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights* (Ashgate 2009) 8; see generally, Scott Sheeran, 'Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) 34 Michigan Journal of International Law 491; Douglas Lee Donoho, 'The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique' (1993) 14 Michigan Journal of International Law 827.

7 For example, under the British Civil Contingencies Act (2004), which empowers the government to deploy troops in case of certain 'emergencies'.

8 Nigel White, 'Security Agendas and International Law: The Case of New Technologies' in Mary Footer, Julia Schmidt, Nigel White and Lydia Davies-Bright (eds), *Security and International Law* (Oxford: Hart Publishing 2016) 6; David Forsythe, *Human Rights in International Relations* (3rd edn, CUP 2012) 3, noting that 'realism is a synonym for attention to State interests – foremost among which is security.'; Rhonda Callway and Elizabeth Matthews, *Strategic US Foreign Assistance: the Battle between Human Rights and National Security* (Routledge 2008); Jiri Valenta and William Potter, *Soviet Decision-Making for National Security* (London: George Allen & Unwin 1984); see also Piet Hein van Kempen, 'Four Concepts of Security – A Human Rights Perspective' (2013) 13 Human Rights Review 1.

9 See, for example, US National Security Strategy (n 2).

10 Hitoshi Nasu, 'State Secrets and National Security' (2015) 64 International and Comparative Law Quarterly 365.

11 *A and Ors v Secretary of State for the Home Department* (2004) UKHL 56.

12 Anti-Terrorism, Crime and Security Act (2001).

Convention on Human Rights (ECHR),[13] since they were being indefinitely held without trial. In that case, the then House of Lords agreed with the foreign defendants but the significance of the case relates to the fact that the Anti-Terrorism Act 2001 applied only to foreign defendants and UK defendants had recourse to domestic criminal law.

In other areas, most EU States have a policy of rehabilitation regarding criminal sanctions for citizens and aliens alike, most notably in the Nordic countries, whilst the US and the UK concentrate on maximum incarcerations.[14] This observation is significant for two reasons. The first is that domestic criminal law and policy affects how the courts in those jurisdictions approach and view international law and aliens in their criminal justice system. This was most evident in cases such as *Hamdan v Rumsfeld* and *A v Home Department*, where two distinctive approaches were taken. In *Hamdan v Rumsfeld*, alien criminals are excluded from the scope of international law and human rights in the American context,[15] and, in the case of the UK, the reliance on human rights by alien criminals and terror suspects affects effective criminal justice.[16]

Under these scenarios, in jurisdictions such as the US, where alien terror suspects pose a threat to national security, it is the applicable domestic law, such as the Military Order of 2001, that is relevant.[17] The Military Order of 2001 circumvents the need to apply international law to alien terror suspects. As such, the US effectively and legally denies alien criminals and terror suspects human rights claims or the possibility of such claims deserving credence.[18] In the words of one commentator: 'American courts are giving short shrift by and large to human rights norms when they come into conflict with national security.'[19] Thus, for alien criminals or terror suspects facing the criminal justice system of the USA, raising human rights arguments as a defence is not straightforward.

Firstly, the rights of aliens are, for the most part, seen as part of the broader scope of 'human freedom'.[20] Moreover, human rights in the US context are best construed as constitutional rights.[21] In this regard, for aliens to construct their arguments in terms of what are understood as human rights in Europe and other parts of the world would be seen by the US courts as 'fads or fashions',[22] or foreign moods. However, this does not mean that that US courts outright reject human rights as understood internationally. On the contrary, the US has long been the champion of a number of international human rights instruments that have had a profound effect in Europe and other parts of the world.

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13 European Convention on Human Rights 1950.

14 For similar views, see John Pratt and Anna Eriksson, *Contrasts in Punishment: An Explanation of Anglophone Excess and Nordic Exceptionalism* (Routledge 2013).

15 See, for example, *Hamdam v Rumsfeld*, 548 US 557 (2006) and *A v Home Department* [2005] UKHL 71.

16 The UK has often objected to parts of the ECHR and rulings from the ECtHR pertaining to alien criminals or voting rights for prisoners: see, for example, *Hirst v UK (No.2)* App No 74025/01 (ECtHR, 6 October 2005).

17 Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 CFR 919 (2002).

18 P Ward, 'National Security versus Human Rights: An Even Playing Field' (2010) 104 ASIL Proceedings 458, 459.

19 ibid 461.

20 *Lawrence v Texas*, 539 US 588 (2003); ibid.

21 For a discussion on the morality of human rights in America, see Michael Perry, *Human Rights in the Constitutional Law of the United States* (CUP 2013); For an assessment of human rights in general, see Mark Goodale (ed), *Human Rights at the Crossroads* (OUP 2013); For legal and other insights into questions of legitimacy and human rights, see Andreas Follesdal, Johan Karlsson Schaffer and Geir Ulfstein, *The Legitimacy of International Human Rights regime: Legal, Political and Philosophical Perspectives* (CUP 2013).

22 Lawrence (n 20).

However, it is important to note that the line between national security and human rights has become such a dangerous zone of legal landmines that it is possible to use certain instruments in some domestic settings (such as the US Alien Tort Act)[23] to detect and raise human rights claims whilst, on the other hand, it is possible to directly encounter other instruments (such as the US War Crimes Act) that can strike human rights claims hard. The primary reason for this is because, under certain circumstances, human rights claims are in direct conflict with national security, meaning there is a dichotomy to balance between these two interests.[24] I do not pretend that I can find such balance in this paper. Rather, I am approaching some specific issues regarding human rights and national security in order to determine the significance of other relevant legal regimes, particularly international law.

## II. Conflicts and the Essence of National Security

It is safe to argue that conflicts highlight the importance of national security. The form that such conflict may take is another matter.[25] Furthermore, the rise in armed conflicts can also be attributed to new actors which, some scholars have argued, have their sole motive as the erosion of the State.[26] Interestingly, the modern trend in armed conflicts seems to either rise or remain unsettled through attempts at peaceful negotiation.[27]

Regional skirmishes involving the internal security of minor or failed States may not pose a security threat to powerful States, unless the minor State has weapons of mass destruction and there is a possibility of such weapons falling into the wrong hands. On the other hand, a civil war or other internal conflict in a powerful State such as Russia may have consequences beyond the Russian border and may even affect the national security of the US or the *ordre public* of the European Union. In comparison, conflicts in African failed States do not necessarily affect the national security of the European Union or the US, but only the national security of the States directly involved. The counterargument is that conflicts in failed States in Africa affect the national security of the US or the EU through immigration policies, where generous refugee rules can result in loopholes allowing those with terrorist motives to find sanctuary in Western States.

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23 Alien Tort Act 28 US Code § 1350.

24 See, for example, Liora Lazarus and Benjamin Goold, 'Security and Human Rights: The Search for a Language of Reconciliation' in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart 2007); see also, J Petman, 'Security and Rights in the War on Terror: On the Constitutive Insecurity of Rules' in Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 129–177, at 151–160; see generally Harold Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale 1990).

25 For example, in the late 1990s a number of conflicts around the world that affected the national security of the States involved with spill-over effects on the international arena were raging in areas such as Kosovo, Tajikistan in the Former Soviet Union, Northern Ireland, Kashmir on the Indian Sub-Continent and Rwanda, among many other regions. Most of these were deemed armed conflicts where the use of force was an essential part of the 'defence' and thus involved customary rules of international law, thereby involving international security in the traditional sense, and not 'national security' as this paper advances; see, for example, SIPRI, *Armaments, Disarmament and International Security, Yearbook 1999* (OUP 1999); see generally Ustina Dolgopol and Judith Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff Publishers 2006).

26 See Arnaud Blin, 'Armed Groups and Intra-State Conflicts: The Dawn of a New Era?' (2011) 93 International Review of the Red Cross 287, 296 (arguing that human right, in principle, has a long history in armed conflicts).

27 See, for example, SIPRI, *Yearbook 2014: Armaments, Disarmament and International Security* (OUP 2014); Sean Morris, 'Book Review: Stockholm International Peace Research Institute, SIPRI Yearbook 2014: Armaments, Disarmament and International Security' (2016) 14 Political Studies Review 440, discussing the amount of conflicts settled through negotiation in 2013.

During the various uprisings in the Middle East, conveniently named the Arab Spring, such civil unrests in principle only exacerbated some of the underlying conflicts that posed a threat to the sovereignty of those States. Some of the underlying problems were drawn along ethnic lines, or concerned political opposition, and manifested in various revolutions starting in 2011. This is most notable in Syria, where a civil war threatened the unity of the State and included external States as proxies. That civil war has drawn in the lone superpower, the United States, partly for national security reasons and partly due to the involvement of the erstwhile superpower, the Russian Federation, for reasons of pride and to reassert its power.

Due to the number of refugees that the prolonged Syrian civil war has generated and their claims for refugee status in Europe, there is always the concern that some refugees may pose a national security risk to EU Member States.[28] The EU has nevertheless dealt with refugee claims within its obligations under international law,[29] but often finds itself between heaven and hell. This is because, on the one hand, from a strategic economic point of view, the surge of refugees in Europe is a boon to the labour force and yet, at the same time, these countries have to deal with the grave threat to their national security that some of these refugees have brought to their shores. In the strictest of legal senses, these arguments are better considered in light of the principle of *non-refoulment*.[30] However, an extensive analysis thereof is not the object of this article.[31]

The issue of national security and human rights is also a further concern regarding the new type of conflict that occurs in cyberspace because of internet communication technologies. Cyber conflicts,[32] whether initiated through distributed denial of service

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[28] See also Sarah Singer, *Terrorism and Exclusion from Refugee Status in the UK: Asylum Seekers Suspected of Serious Criminality* (Brill 2015); For similar discussions in relation to the US see Peter Margulies, 'Uncertain Arrivals: Immigration, Terror, and Democracy after September 11' (2002) 2002 Utah Law Review 481; For some other general commentaries see J Huysmans, 'Migrants as a Security Problem: Dangers of "Secrutizing" Societal Issues' in R Miles and D Thranhardt (eds), *Migration and European Integration: the Dynamics of Inclusion and Exclusion* (Pinter Publishers 1995); SW Choi and I Salehyan, 'No Good Deed Goes Unpunished: Refugees, Humanitarian Aid and Terrorism' (2013) 30 Conflict Management and Peace Science 53; A Sivanandan, 'Race, Terror and Civil Society' (2006) 47 Race and Class 1; J Hatch, 'Requiring a Nexus to National Security: Immigration, "Terrorist Activities," and Statutory Reform' (2014) BYU Law Review 697.

[29] See James Hathaway, *The Rights of Refugees under International Law* (CUP 2005).

[30] See, for example, Veronika Flegar, 'Vulnerability and the Principle of Non-Refoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?' (2016) 8 Contemporary Readings in Law and Social Justice 148; Christopher Michaelson, 'The Renaissance of Non-Refoulment: The Othman (Abu Qatada) Decision of the European Court of Human Rights' (2012) 61 International and Comparative Law Quarterly 759.

[31] I must point out that the ECtHR addressed the principle of non-refoulment in a number of cases, such as *Soering v United Kingdom* App No 14038/88 (ECtHR, 7 July 1989) where it confirmed state obligations pertaining to extradition; furthermore, the non-refoulment principle is included in a number of treaties, and in that regard, the *Soering* Court argued that provisions such as Article 3 in the ECHR contains 'inherent' obligations of non-refoulment (para 88); In another case, *Chahal v UK* App No 22414/93 (ECtHR, 15 November 1996) para 80, the Court affirmed: 'whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion….).'.

[32] For some general discussion see Richard Clarke, 'Threats to U.S. National Security: Proposed Partnership Initiatives Towards Preventing Terrorist Attacks' (2000) 12 DePaul Business Law Journal 33; Nathan Sales, 'Regulating Cyber-Security' (2013) 107 Northwestern University Law Review 1503; Yoram Dinstein, 'The Principle of Distinction and Cyber War in International Armed Conflicts' (2012) 17 Journal of Conflict and Security Law 261; Annegret Bender and Andrew Porter, 'European Cyber

(DDoS) attacks such as on Estonia in 2007, or through more modern and sophisticated methods, generally constitute a form of 'attack' for the purposes of the law of armed conflict.[33] Therefore, under such circumstances, human rights implications also emerge even if such 'attacks' occur in cyberspace.[34] For instance, the right to privacy as enunciated under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) forms a direct correlation to cyber conflicts, as the activities of a belligerent cyber entity or individual can harm the targeted person and therefore breach his rights under international law. In the *Delfi Case,* the ECtHR found that the equivalent of Article 17 ICCPR was breached when an Estonian information internet site caused harm to a ferry operator.[35] These examples show that cyber conflict is a form of silent conflict, as I posited elsewhere,[36] that outdistanced Cold War era conflicts, and reasserted espionage and destruction in a contemporary sense with devastating effects. The international initiatives to respond to cyber conflict, such as the Tallinn Manual, are admirable,[37] although such efforts to some extent are in vain when they develop principally as adversarial tools in organisations such as NATO.

Regardless of where a conflict occurs, whether in cyberspace or on the territory of sovereign States, States are prepared to take actions to defend their territory or territorial information infrastructures. States are required to observe international human rights law when facing such conflicts. However, given that national security concerns often drive States to 'protect' themselves in event of an 'attack', it is still unclear where human rights laws are applicable in the event of an 'attack' and national security justifications are often invoked to suspend human rights laws. Thus, armed conflicts still require peaceful settlement, and the settlement of these conflicts would be of mutual benefit to the international community, in particular if the States where the conflicts are taking place are considered as sources of a national security threat to other States.

From a theoretical point of view, one study identifies four concepts of security that are inextricably linked to human rights. According to van Kempen, 'international security through human rights protection by States',[38] 'negative individual security against the State',[39] 'security as justification to limit human rights'[40] and 'positive State obligation to offer security to individuals'[41] are all part of a complex system that links human rights to security. Yet, despite this positive relation between human and security norms, van Kempen concludes that 'international human rights law offers neither an unequivocal nor a clear perspective on security.'[42] This finding is important because the international legal

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Security within a Global Multistakeholder Structure' (2013) 18 European Foreign Affairs Review 155; Titiriga Remus, 'Cyber-Attacks and International Law of Armed Conflicts: A Jus Ad Bellum Perspective' (2013) 8 Journal of International Commercial Law and Technology 179.

33 See also Dinstein (n 32) 264.

34 See Herbert Lin, 'Cyber Conflict and International Humanitarian Law' (2012) 94 International Review of the Red Cross 515.

35 *Delfi As v Estonia* App No 64569/09 (ECtHR, 16 June 2015).

36 See P Sean Morris, 'iSpy: International Silent Conflicts, Cyber Warfare and Developments in International Diplomatic Law' (Working Paper, 2012) (on file with author).

37 See, for example, Lianne JM Boer, 'Restating the Las as it Is: On the Tallinn Manual and the Use of Force in Cyberspace' (2013) 5 Amsterdam Law Forum 4.

38 van Kempen (n 8) 3.

39 ibid 9.

40 ibid 13.

41 ibid 16.

42 van Kempen (n 8).

system, including international human rights law, has long championed human rights as the most privileged and safe concept for the vulnerable and stateless in international law.

Yet, at the same time, international norms reveal that the international human rights system of rules depends on how they interact with the national rules of States, and whether those human rights rules contravene or interfere with the administration of justice and national security.[43] Another argument that van Kempen develops is the idea of peace as a result of conflict, which involves human rights peace theory, whereby on some occasions 'security between States has increasingly come to depend on security within those States.'[44] For the purposes of this section of this paper, this observation is actually part of the essence of conflict and national security. In other words, and as van Kempen also posits, due to the complexity of internal conflict, human rights breaches (at the national level) are often the root cause of, or can directly trigger, conflict.[45] Thus, if the human rights (or constitutional or political rights at the national level) of citizens are not upheld by the State, such States can plunge into internal conflict as a result of those breaches.

In a number of States where internal conflicts have taken place, or are still ongoing, it is easily deducible that such conflicts occur because of repression by a regime or other systematic deprivation of human rights. The response at the international level is a call for the respect of international human rights law and similar obligations in the international legal system. The next section addresses such obligations.

## III. International Human Rights Obligations: Link to National Security

The international human rights system is a legal minefield, dotted with various legal instruments and regulations which, in one sense, provide the possibility to incorporate a vast array of concepts into the human rights narrative.[46] Thus, linking international human rights to national security is not far-fetched. Van Kempen found that there is no real linkage between international human rights and security,[47] but one can question whether this is really the case and what the exact nature of international human rights obligations is in relation to national security. There are no answers to these questions, and this section merely attempts to extrapolate upon some of these intricacies.

The current international legal regime on human rights is a consequence of the Second World War. Thus, the Charter of the United Nations (UN Charter),[48] the Universal Declaration of Human Rights (UDHR),[49] the International Covenant on Civil and Political Rights (ICCPR)[50] and the International Covenant on Economic, Social, and Cultural

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43 ibid 22 noting: 'in order to be able to operate an adequate criminal justice system and other security measures, authorities must – under specific conditions and if necessary – have the possibility to infringe some human rights.'.

44 ibid 5; see also, Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice and Policy* (CUP 2015).

45 van Kempen (n 8) 5.

46 Some have proposed that the relationship between the media and the law has a beneficial impact on society, see Daniel Joyce, 'Human Rights and the Mediatization of International Law' (2010) 23 Leiden Journal of International Law 507.

47 van Kempen (n 8).

48 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI; for commentary, see Alex Petrenko, 'The Human Rights Provisions of the United Nations Charter' (1979) 9 Manitoba Law Journal 53; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009).

49 UNGA Res 217A (III) (10 December 1948) UN Doc A/810.

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

Rights (ICESR)[51] were designed to provide the necessary legal avenues for the protection of Europeans who endured much suffering during the conflict.[52]

The 1945 UN Charter was the first international legal instrument to promote modern international human rights. From the perspective of the UN Charter, fundamental rights and freedoms were designed as part of the grand bargain that resulted in the establishment of the UN and brought in the 'new international law of human rights.'.[53] However, it is the UDHR that is the actual blueprint of the modern international human rights legal system and some argue that even the UDHR has a long and complicated history, going as far back as the American and French Revolutions.[54]

Outside the debate on the actual origins of the UDHR, it is accepted as one the current normative pillars of international human rights law and, as such, there are linkages between that document and national security as I have broadly conceived it to be in this paper. From this argument, it follows that the intersection of human rights with other regimes involves some form of State practice. Hence, a State may have special interests in national security as a regime and create customary obligations. State practice is the mechanical device that gives rise to customary international law and, therefore, acts or statements (such as those on national security strategies) which allows for inferences to be made regarding State belief on international law.'[55] Thus, the interaction of national security strategies with human rights lies in the fact that national security strategies are a form of State practice and therefore part of the process that generates customary international law.

Of course, one could interpret references in the preamble of the UDHR as references to security, such as 'recourse, as a last resort, to rebellion against tyranny and oppression.'[56] However, these can also be viewed as a description of the internal chaos of States, whereby State administrators (dictators/leaders) opposed their own people, and hence not a national security issue in the traditional sense. The UDHR was adopted in 1948 when the state of affairs was not exactly rosy. The war was still fresh in the memory of many people and the victors were concerned with how human rights violations in States

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51 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Although the ICESCR is considered part of the family of human rights treaties, it is more designed as a human security charter, addressing the economic and social aspects of human security. Furthermore, the ICESCR is, in some respects, a protégé of its much older sibling, the European Social Charter of 1961.

52 See, for example, Pamela Ballinger, 'Entangled or "Excluded" Histories, Displacement, National Refugees, and Repatriation after the Second World War' (2012) 25 Journal of Refugee Studies 366; PR Ghandhi, 'The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact' (1998) 41 German Yearbook of International Law 206; Dennis Gallagher, 'The Evolution of the International Refugee System' (1989) 23 International Migration Review 579; James Carlin, 'Significant Refugee Crises Since World War II and the Response of the International Community' (1982) 3 Michigan Journal of International Law 3, 6 (noting that 'the focus of international attention on the refugee problem in the early and mid-1950s remained in Europe').

53 Louis Henkin, *The Rights of Man Today* (Westview Press 1978) 94; See also, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Preamble.

54 On this point, see generally Pamela Slotte and Miia Marika Halme-Tuomisaari, *Revisiting the Origins of Human Rights* (CUP 2015); see also Christian Reus-Smit, *Individual Rights and the Making of the International System* (CUP 2013).

55 Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 BYBIL 1, 10.

56 UDHR (n 49) 3rd Preamble.

could destabilise those States' national security and the effect of such destabilisation on the wider international community.[57]

Conscious of this, the UDHR proclaims from the outset: 'whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'[58] as a direct reference to human rights violations that were well within the national laws of States. Nazi Germany was perhaps the ideal example of this scenario, whereby the State trampled on the rights of its own citizens (mostly in relation to Jews and other minority groups).[59] The problem was that States could not intervene *per se* in the affairs of another State.

The UDHR itself has other examples that can be seen as references to national security. For instance, in Article 3, a clear link to national security is established. Article 3 provides that 'everyone has the right to life, liberty and security of person.'[60] The latter part of Article 3 confirms that 'security of person' refers to 'the right of being protected against certain intensive interferences from the State.'[61] In other words, Article 3 of the UDHR is concerned with protecting the rights of individuals from State sponsored national security objectives that affect the human rights of the individual.

Taken literally, what this means is that States ought to ensure that, as a part of their internal national security policy, the security of their citizens is well protected when the broad and vague policy objectives of national security are implemented. The alternative would be that internal chaos would prevail and therefore destabilise national security. Article 3 should also be seen in relation to Article 5 and Article 9 of the UDHR, which cover, in Article 5, torture and inhuman and degrading treatment or punishment and, in Article 9, arbitrary arrest or detention. Together, these provisions of the UDHR create a triad of links between national security and human rights which are, in a sense, the very same aspects in contemporary human rights discourse that provoke questions on national security.

Perhaps the strongest linkage the UDHR creates between human rights and national security is that, as the grand dame of the international human rights system, most other regional and national human rights rules adopted or used the model of the UDHR.[62]

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[57] The actual origins of modern human rights law must always be understood as European in that they were created to deal with tragic events in Europe and out of concern for the European people, to stand against oppression, barbarism and political oppression. Nevertheless, as an instrument that applies to all peoples of the world, over the years various States have made use of the language and aspirations of the UDHR within the broader framework of international law, especially regarding the issue of rights. For philosophical observation on rights see, for example, Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (OUP 2012); Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 European Journal of International Law 903.

[58] UDHR (n 49) 2nd Preamble.

[59] See, however, Jan-Olof Sundell, 'The Destruction of Democracy and Civil Rights in Germany 1933' in Peter Wahlgren (ed), *Human Rights: Limitations and Proliferation* (Stockholm 2010) 243–268.

[60] UDHR (n 49) Article 3.

[61] See L Rehof, 'Article 3' in Asbjorn Eide et al (eds), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press 1992) 73.

[62] See, for example, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter); the court systems for these regional human rights treaties interpret and provide guidance; the ECHR has a court system that is able to interpret and provide guidance on the fundamental freedoms that are provided for in the ECHR, Article 8 in particular has a direct connection

The European Convention on Human Rights and Fundamental Freedoms[63] and the UK Human Rights Act 1998[64] are prominent examples, the latter being an instrument that legally binds a State to international treaties on human rights that follow the aspirations set out in the UDHR.

The ICCPR is one of the major binding international legal instruments on human rights which is, in one sense, a direct descendant of the UDHR. Echoing Article 12 of the UDHR, the ICCPR provides, in Article 17, for the protection of privacy, family, home and correspondence.[65] However, Article 12 of the ICCPR explicitly mentions national security as a subject matter of human rights. According to this provision, individual freedoms should not be curtailed unless a national security measure to protect them is required: '[human] rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*)...'.[66] Similarly, Articles 13, 14, 19, 21, and 22 reinforce exceptions to human rights on the ground of national security.[67]

The wording used in Article 12 regarding the permissible purposes for interference in human rights protection connotes two levels of exception: a low-level exception based on public order and a high-level exception based on national security. Thus, the low-level exception in the ICCPR conceivably involves internal threats to the State, and/or threats posed by individuals. In such instances, the freedoms of individuals may be suspended or denied on certain grounds. An example of a low-level exception could the posting of an army in the internal borders of a State to help mitigate threats such as illegal immigration. However, one can argue that it is up to the domestic criminal justice system to properly respond to the low-level exception that Article 12 of the ICCPR advocates.

On the other hand, the high-level exception that I interpret Article 12 of the ICPR as advocating would perhaps involve external threats to the State, such as war, military threats,[68] or even cyber-attacks, and therefore would pose a national security problem. In

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to national security concerns; see cases such as *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) ECHR 192.

63 ECHR (n 62).

64 Human Rights Act (1998).

65 The ICCPR in general expands the rights that are in Articles 1–21 of the UDHR. Some ICCPR cases include: *Celepli v Sweden*, Communication No.456/1991, UN Doc CCPR/C/51/D/456/1991 (1994); *Karker v France*, Communication No.833/1998, UN Doc CCPR/C/70/D/833/1998 (2000).

66 ICCPR (n 26) article 12(3); in general, Article 12 of the ICCPR refers to freedom of movement, and Article 12(3) only notes that limitations to this right may be put in place; in the General Comments provided by the Human Rights Committee on the ICCPR, it notes in paragraph 11 that Article 12(3) 'authorises the State to restrict these rights only to protect national security, public order (*ordre public*)' and to be permissible, 'restrictions must be provided by law, must be necessary in a democratic society.' Reproduced in Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material's, and Commentary* (2nd edn, OUP 2004) 361.

67 ICCPR (n 26) Article 12(3); see also, Myriam Feinberg, 'International Counterterrorism – National Security and Human Rights – Conflicts of Norms or Checks and Balances' (2015) 19 International Journal of Human Rights 388; Alexander Orakhelashvili, 'The European Convention on Human Rights and International Public Order' (2003) 5 Cambridge Yearbook of European Legal Studies 237; see also, Jan Oster, 'Public Policy and Human Rights' (2015) 11 Journal of Private International Law 542 (discussing human rights in the public policy perspective as oppose to the 'public order' approach that can be linked to national security, as I am arguing).

68 On this point, see also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: Engel Publishing 1993) 212; for general commentary, see Joseph (n 35); Markus Schmidt, 'Reservations to United Nations Human Rights Treaties – the Case of the Two Covenants' in J Gardner, *Human Rights as General Norms and a State's Right to Opt Out: reservations and Objections to Human Rights Conventions* (London: BIICL 1997) 20.

a scenario such as this, it is for other branches of international law to respond. Then again, other such branches of international law would not be able to determine the obligations of the ICCPR in relation to external threats that pose a problem to human rights based on national security.

It is these exceptions to human rights in international legal instruments such as the ICCPR which have actually provided for the direct linkage between the policy and legal objectives of these two fundamental functions of the State. The State must, on the one hand, ensure that basic freedoms and rights are guaranteed and that its citizens can enjoy such rights.[69] The State, however, is in a position to determine the limits of those rights, as long as those limits are justified using the language of national security.[70] This is where the complexity of the interactions between human rights and national security norms becomes challenging, as international law then interacts with domestic law.

Moreover, one cannot deny the fact that the exceptions in international human rights instruments are also a reflection of the broader corpus of international law, where varying approaches and interpretations often create the operating space for national security within the realm of international law. In essence, national security gives rise to grey zones in international law, and international law, in turn, facilitates how the norms of national security function as a means of enforcing the sovereignty of the State.[71]

Furthermore, given that it is domestic law that, on most occasions, implements international law, one can hardly ignore the political ramifications of transplanting international norms onto domestic systems, especially if there are concerns about their implications or motives. Thus, a clash of the moral and political objectives of international norms and domestic policy norms can lead to domestic norms gaining the upper hand.[72]

Furthermore, in the case of human rights at the domestic level, human rights norms relate to the criminal justice system,[73] whose primary objective is the maintenance of law

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69 See, for example, Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 Journal of Political Philosophy 181.

70 See Joseph Zand, 'Article 15 of the European Convention on Human Rights and the Notion of State of Emergency' (2014) 5 Journal of the Faculty of Law of Inou University 159; LC Green, 'Derogation of Human Rights in Emergency Situations' (1978) 16 Canadian Yearbook of International Law 82; Scott Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrines and Politics' (2013) 34 Michigan Journal of International Law 491; Mohamed El Zeidy, 'The ECHR and States of Emergency: Articles 15-A Domestic Power of Derogation from Human Rights Obligations' (2002) 11 Michigan State University Detroit College of Law Journal of International Law 261.

71 See Hannes Schloemann and Stefan Ohlhoff, '"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 American Journal of International Law 424, 426: 'Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. …As long as the notion of sovereignty exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.'.

72 See generally, Naomi Roht-Arriaza, 'Just a "Bubble"? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11 Journal of International Criminal Justice 537; Hisashi Owada, 'Problems of Interaction Between the International and Domestic Legal Orders' (2014) 5 Asian Journal of International Law 246.

73 See generally, John Andrews, *Human Rights in Criminal Procedure: A Comparative Study* (Martinus Nijhoff 1982); Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (London: Sweet and Maxwell 2002).

and order. However, the trend towards the conditionalisation of human rights has in some ways excluded criminal law from direct conflict with constitutions.[74]

In the ECHR, as amended by Protocol 15,[75] which is perhaps the most ubiquitous of the descendants of the UDHR, there are four references to national security (in Articles 6(1), 8(2), 10(2) and 11(2)), largely reinforcing the original text of the ECHR of 1950. In terms of express limitations on human rights, only one provision of the ECHR, Article 9(2), mentions that limitations may be placed on freedom of thought, conscience and religion: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' Interestingly, this provision does not include the term 'national security'. Rather, a longer list of related matters, which are vague enough to be interpreted as including national security, were listed alongside the close ally to national security: *public order*. Therefore, in one sense, the practicing of religion can pose a national security threat under the ECHR in the same way that detention is permissible if it is to prevent the spread of infectious diseases and protect public health.[76]

## IV. National Security, Human Rights and International Law: A Forward and Critical Outlook

Any discussion on human rights and the state of international law is often shrouded in some form of agenda-setting. There is generally self-interest, moral, political and other interests behind the human rights narrative. Thus, a paper such as this must escape the (normative) agenda-setting of the human rights discourse with some form of radical departure from critique or theoretical propositions.

However, that too will prompt the reader to question my agenda. In truth, there is no agenda; rather, I am attempting to put into perspective the normative and doctrinal functions of the human rights discourse in international law with some critical observations. Moreover, these observations are from the point of view of national security. If there should ever have been a different agenda on my part, it is perhaps a sceptical loathing of the politics of the international human rights movement which, if I may borrow David Kennedy's take, is a part of the problem,[77] and the need for change across the entire international human rights regime, both in a legal and political sense.

However, as an academic paper, perhaps it is safer to resort to diplomatic and cunning theoretical perspectives, however far-fetched some may seem. However, therein lies another problem: theoretical propositions or critical observations can hardly achieve much in terms of practical solutions. In this regard, I find it more prudent to endorse a statist logic of human rights put forward decades ago by Richard Falk.[78]

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[74] For some discussion see, for example, Rett Ludwiokowski, 'Constitionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis' (2004) 33 Georgia Journal of International and Comparative Law 1.

[75] Protocol 15 was adopted in June 2013 and provides for, among other things, the margin of appreciation principle; for discussion, see Nikolas Vogiatzis, 'When "Reform" Meets "Judicial Restraint": Protocol 15 Amending the European Convention on Human Rights' (2015) 66 NILQ 127.

[76] *Enhorn v Sweden* App No 56529/00 (ECtHR, 25 January 2005).

[77] On this, see David William Kennedy, 'The International Human Rights Movement – Part of the Problem?' (2002) 15 Harvard Journal Human Rights 1011.

[78] Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes and Meier Publishing 1981) - the chapter 'Theoretical Foundations of Human Rights' was republished in Richard Pierre Claude and Burns Weston, *Human Rights in the World Community* (University of Pennsylvania Press 1989) 29–41 and it is this version I rely on to interpret Falk.

Falk provides in his book a structural formation of human rights in world politics and not purely legal constructs. To this end, Falk argues that there six types of logics, or theoretical views, that make up human rights: statist, hegemonial, naturalist, supranaturalist, transnational, and populist, and that these logics reflect the normative aspiration and political constraints of States in international legal relations. For my purpose, the focus on State sovereignty is one of the highlights of the book and, in a provocative chapter, Falks delineates some of the hard political realities of State sovereignty in the world order, which in turn affects how human rights are implemented. This statist approach to human rights, according to Falk, in some ways inhibits the proper functioning of the State or at least is incompatible with how States operate, since human rights encroach upon State sovereignty. Although Falks' work appeared during the Cold War, it still has some relevance, at least in relation to the way I am framing human rights and national security in this article. In this regard, international norms such as human rights fit into a global paradigm only when a 'particular government so agreed.'[79] Furthermore, 'the statist matrix of political life also means that the most substantial contributions to the realization of human rights arise from the internal dynamics of domestic politics.'[80] In other words, through Falk's comments, one can observe that States are motivated by their own internal selfish desire for power and are not genuinely committed to global human rights norms.

One way of interpreting this argument is that States do engage with global norms of human rights but do so half-heartedly: with one foot in and one foot out. Moreover, even when States engage with global human rights norms through treaties, they often fall back on the most diplomatic and legally cunning way to reflect their partial commitments to global human rights norms: limitations and restrictions based on national security.[81]

In choosing the statist logic, or theoretical view of human rights, I am in a position to relabel it as a human right by the State to national security under the cloak of Dworkinian language. These perspectives, I posit, offer some of the best hopes for balancing national security and human rights in international law.

### A. The Threat of Human Rights: A Right to National Security?

Should States be subject to a (human) right to national security? Or, taken in context, should States have a right to national security by arguing that human rights form part of that right when the individual concerned breached their own human rights? Seen another way, and taking Kennedys' view into consideration, I argue in this section of the article that human rights are a threat to national security.

Although, in general, sovereign States enact legislation as part of their territorial and sovereign function, the argument should not be seen as such: that is, States can enact any legislation they want without the requirement to do so as a form of a right, but as their prerogative. Rather, the argument should be that States enact legislation in light of human rights laws as a right within that paradigm. The reason for this is because national security and human rights are fundamentally different norms whose ideologies continue to clash

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79 ibid 30.

80 ibid 31.

81 This is based on the argument that human rights treaties such as the ECHR in Article 15 allows States to derogate from human rights obligations, and cases such as *Lawless v Ireland* in which the court confirmed derogations based on 'emergency situations' Lawless v Ireland (No 1) (1960) 1 EHRR 1 para 28; for general discussions on reservations to human rights treaties see, for example, Massimo Coccia, 'Reservations to Multilateral Treaties on Human Rights' (1985) 15 California Western International Law Journal 1; Eric Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36 Journal of Legal Studies 397.

and any form of compromise requires one regime giving into the other by using the norms (and the logics) of the other regime.

Thus, national security should use the regime and language of human rights as a *right* to national security, or the human rights regime should use the language of national security as a *right* to human rights. It is the former that I am advocating. There is more resonance in this argument compared to the latter, given that the human rights that individuals enjoy, to paraphrase Dworkin, can only be restricted by other human rights,[82] not by national security.

The two regimes, national security and human rights, offer different forms of protection. The regime of national security arguably offers protection for the State, and the regime of human rights protects individual liberties. Naturally, considering these two regimes and their objectives is always a balancing act. Thus, whether it is an 'emergency situation' or other form of public order concern, national security involves the full power of the State to restrict individual liberty even in peace time. On the other hand, human rights during peacetime are usually restricted if the State invokes a national security issue. Thus, in some Dworkinian sense, national security interests will always result in the individual rights later being truncated in the name of national security.[83] Taking Dworkin seriously, therefore, suggests that the rights that individuals enjoy under the rubric of constitutional and human rights are only put in place to create a social illusion in which the individual can operate with the belief that their rights are greater than those of the State.

In one sense, Dworkin's arguments support the view that States should apply the regime and language of human rights to the concept of a right to national security. Thus, in a Dworkinian sense, and under extreme circumstances, 'if the right were so defined, the cost to society would not simply be incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved.'[84] When this view in taken into account, States may rely on their right to national security as a right of the State, by engaging the language of human rights.

The State right to national security is a strong right,[85] as opposed to a weak right. For instance, as shown in the ICCPR and other regional derivatives such as the ECHR, there are provisions, such as Article 8 ECHR, that allow for human rights to give way to national security exceptions. On some occasions, the European Court of Human Rights has acknowledged the precedence of national security, such as in relation to State secrets and limits to human rights claims. For instance, in *Moiseyev v Russia*,[86] the court concedes that national security considerations, under certain circumstances, can limit procedural restrictions (in human rights claims) in cases where State secrets are involved. It is not often that national security restrictions are invoked in the ECtHR. Then again, faced with the reality of national security, even if it concerns an external State such as Russia, the ECtHR gives way to realism. In the US, in 1981, the US Supreme Court seemed to have the perfect answer for issues on national security: 'matters intimately related to questions of foreign

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82 Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 200; see, however, Christopher McCrudden, 'A Common Law on Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499.

83 Dworkin (n 82) 200 noting: 'although great social cost is warranted to protect the original right, this particular cost is not necessary'.

84 ibid.

85 On the notion of strong rights, see Ashworth (n 73) 76.

86 *Moiseyev v Russia* App no 62936/00 (ECtHR, 9 October 2008).

policy and national security are rarely proper subjects for judicial intervention'.[87] However, that is the no longer the situation in the post-9/11 world.

### B. Statist Logic and the Right to Restrict Human Rights

Based on the statist argument that Falk advances, and when seen in the light of the broader politics of international law, sovereign States, no matter the circumstances, enjoy the right to legislate, even to make legislation that restricts human rights. Thus, the statist logic shows that States engage in organised hypocrisy when it comes to international human rights obligations that they willingly sign,[88] but enforce only in ways that are beneficial to the State. This observation is not about undemocratic States, such as the Democratic Peoples' Republic of Korea, but is rather about States in the West that take the moral high ground when it comes to human rights.

Restricting human rights in the name of national security (or its close ally, *ordre public*) does not mean that a State is undemocratic or authoritarian. It simply means that restrictions on human rights in fact, when temporary or done in the name of national security, make it harder to protect those very same human rights. However, by doing so, States see themselves as *defending* human rights – safeguarding the State from external and internal threats. Individuals and non-State actors cannot defend human right*s* on behalf of the State. States defend *their* human rights, via restrictions, in their own interests from external threats that can pose severe harm to national security, such as the threat of war or engagement in conflict, including conflicts that occur in cyberspace.

Another mortal enemy from which States defend human rights through imposing restrictions is the internal threat to national security posed by internal actors of the human rights systems. These actors may vary from non-governmental organisations, opposition groups, activists' lawyers, the intelligentsia and those seeking public inquiries into States' armed forces in overseas operations.[89]

As a State may defend its human rights through restrictions, that State should not be able to criticise other States who have done the same. States in contemporary international legal relations vary by their democratic *modus operandi* and, as such, they tend to have different approaches to the defence of human rights through imposing restrictions on national security grounds. In fact, it is the various norms and moralities in different States that allows them to defend human rights by imposing such restrictions and actually allows States to cooperate when they engage in the defence of human rights through restrictions.

Some defences of human rights through restrictions include the Rendition programme and black sites for torture during the war on terror, where legal questions surrounding the detention and treatment of detainees and enhanced interrogation

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87 *Haig v Agee*, 453 US 280 292 (1981).

88 See also, Christine Wotipka and Kiyoteru Tsutsui, 'Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001' (2008) 23 Sociological Forum 724.

89 For example, UK armed forces and alleged human rights abuses in Iraq. Even if such cases were to make it to an international tribunal, a more problematic question would arise as to what extent those tribunals would have jurisdiction; for comments on a similar point from an interdisciplinary perspective, see Andrea Birdsall, *The International Politics of Judicial Intervention: Creating a More Just Order* (Routledge 2009); see also Sarah Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law* (Oxford: Rowman and Littlefield 2000); Rebecca Sanders, 'Exceptional Security Practices, Human Rights Abuses, and the Politics of Legal Legitimation in the American "Global War on Terror"' (PhD thesis, University of Toronto 2012).

techniques were suspended regarding non-combatant suspects.[90] Thus, when one suspect, al-Jeddawi, was taken by American intelligence operatives to Jordan during the war on terror, it was precisely because such tortures could not be morally possible (via public acknowledgment) in the US, as opposed to Jordan, where such practices were well known to have taken place.[91] Both the US and Jordan, on that occasion, I posit, were defending their human rights by imposing restrictions for the same strategic goal: national security via the war on terror. As such, it would have been unfriendly for the US to publicly denounce the human rights record of Jordan while engaging Jordan to carry out activities that were deemed to violate basic human rights and international legal obligations.

From a legal point of view and also in accordance with international human rights obligations, the rendition and black sites operations were feasible within legal limits, provided that those acts were a response to the national security threat to the US. This is even more so if the national security threat was defined, as above, to be high-level or, as the Office of the Legal Counsel to the White House observed in 2002, as a national security *necessity*: 'The necessity defense may prove especially relevant […] the purpose behind necessity is one of public policy.'[92] Therefore, defending human rights via restrictions is justified when confronted with a high-level national security threat, such as an attack or other form of aggression which surveillance and intelligence can prevent. As the Bybee Memo further notes: 'If intelligence and other information support the conclusion that an attack is increasingly certain, then the necessity for the interrogation will be reasonable.'[93]

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[90] See generally David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 Harvard Human Rights Journal 123; K Levit, 'The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror' (2005) 1 Journal of National Security Law & Policy 341; Alan Clarke, 'Rendition to Torture: A Critical Legal History' (2009) 62 Rutgers Law Review 1; Louis Fisher, 'Extraordinary Rendition: The Price of Secrecy' (2008) 57 American University Law Review 1405.

[91] There are sketchy details surrounding the exact identity of al-Jeddawi, whose real name can either be, but not limited to, Ibrahim 'Abu Mu'ath' al-Jeddawi or Ahmad Ibrahim Abu al-Hasana. Apart from his identity, there are also few details on his alleged abduction or rendition; for some discussion see generally Jillian Button, 'Spirited Away (Into a Legal Black Hole): The Challenges of Invoking State Responsibility for Extraordinary Rendition' (2007) 19 Florida Journal of International Law 531; Leila Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law' (2007) 15 ILSA Quarterly 9; Naureen Shah, 'Knocking on the Torturer's Door: Confronting International Complicity in the U.S. Rendition Program' (2007) 38 Columbia Human Rights Law Review 581; Alan Clarke, 'Rendition to Torture: A Critical Legal History' (2010) 62 Rutgers Law Review 1; Timothy Synhaeve, 'Take the War on Terror to the Court: A Legal Analysis on the Right of Reparation for Victims of Extraordinary Renditions' (2011) 5 Vienna Journal on International Constitutional Law 439; Bruce Zagaris, 'Introductory Note to the European Court of Human Rights: Othman (Abu Qatada) v. the United Kingdom' (2013) 52 International Legal Materials 496, 534, discussing renditions to Jordan.

[92] US Department of Justice (Jay Bybee) Office of the Legal Counsel, *Memorandum for Alberto R Gonzales Counsel to the President* (1 August 2002) 40; see also, US Department of Justice (John Yoo) Office of the Legal Counsel, *Memorandum for William J Haynes II, General Counsel of the Department of Defense* (14 March 2003) 61, noting that the US Administration should be given discretionary powers 'to respond to the grave threat of national security' posed by the War on Terror; other legal memorandums produced by US government functionaries during the war on terror include US Department of Justice (Steven Bradbury) Office of the Legal Counsel, *Memorandum for John A Rizzo, Senior Deputy General Counsel of the Central Intelligence Agency* (30 May 2005); for general commentary see, for example, Michael Scharf, 'International Law and the Torture Memos' (2009) 42 Case Western Reserve Journal of International Law 321, 335: 'international rules that constrain U.S: power and thus compromise national security are not really binding'; Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP 2005) 103: 'Powerful States may do better by violating international law when doing so shows that they will retaliate against threats to national security.'.

[93] Jay Bybee (n 92) 44; see also Ryan Goodman, 'Rationales for Detention: Security Threats and Intelligence Value' (2002) 96 American Journal of International Law 531.

The rights that the individual enjoys under those circumstances would therefore give way to high-level concerns of national security – a right of the State.

Another argument that supports the statist logic on the restriction of human rights is the broader question of sovereignty and States' commitments to international legal obligations via human rights treaties. Although States have signed up to numerous human rights treaties, those States have not surrendered their sovereignty to the international human rights system.[94] Unlike other regimes in the international legal plane, such as the world trade organization (WTO), that have a dispute settlement body, the international human rights system is fragmented, and acts as a political tool through which States are able to use and patch leakages in their human rights record.

The International Criminal Court (ICC) is the nearest institution to an international human rights court. However, the ICC has many weaknesses and, with its limited mandate (the US is not party to the ICC Statute), does not fit the bill as an international human rights court. This gap in the administration of justice on the international legal plane concerning human rights then leaves States' sovereignty intact. As a result of this, States are able to spin the sovereignty wheel in favour of the defence of human rights by imposing restrictions on the grounds of national security. In this regard, an international or global legal order of human rights is purely utopian as States, in Pufendorfian terms, are the highest moral and legal authorities.[95]

The debate on sovereignty over human rights is well-catalogued,[96] so I am not going to bolster it any further here. To conclude this viewpoint, sovereignty, human rights and national security form, define and cosmopolitise the nation State. In this race to cosmopolitise, the State embraces the values of the UN Charter,[97] the UN being a sovereign and equal entity in international legal relations.

The State further shapes those legal relations by committing to human rights obligations, at the same time invoking its sovereign and equal status, implying that there is an extent to which it is committed. In this regard, sovereignty, human rights and national security are the pillars on which the legitimate authority of the State is entrenched in international law. Without all three, the State can collapse on nebulous foundations. By committing to international human rights obligations, the State lays claim to civilised cooperation. As such, the State's claim is well-grounded in the customary principles of international law.

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94 For a sociological, take on this point see, for example, Wade Cole, 'Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966–1999' (2005) 70 American Sociological Review 472.

95 See Richard Devetak, 'Between Kant and Pufendorf: Humanitarian Intervention, Statist Anti-Cosmopolitanism and Critical International Theory' (2007) 33 Review of International Studies 151, arguing that Pufendorf has always defended the political morality of authority.

96 See, for example, Noha Shawki and Michaelene Cox (eds), *Negotiating Sovereignty and Human Rights: Actors and Issues in Contemporary Human Rights Politics* (Ashgate 2009); Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015); Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 European Journal of International Law 513; Panu Minkkinen, 'The Ethos of Sovereignty: A Critical Appraisal' (2007) 8 Human Rights Review 33; Natsu Taylor Saito, 'The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty' (2002) 51 Catholic University Law Review 1115; Jack Donnelly, 'State Sovereignty and International Human Rights' (2014) 28 Ethics and International Affairs 225; Kurt Mills, 'Reconstructing Sovereignty: A Human Rights Perspective' (1997) 15 Netherlands Quarterly of Human Rights 267; W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 American Journal of International Law 866.

97 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 2(1).

As a sovereign State within the system of international law, the State then further buttresses its authority by creating and conforming to constitutional-like principles in the domestic setting that guarantee the freedom and fundamental values of its citizens. This in turn creates the legitimacy of the State to operate on the international legal plane. The final pillar of national security allows the State to demonstrate that it enjoys sovereignty over its legislative actions and is able to shape the contours of the international legal system when faced with external threats. States are thus the creators and enforcers of international law. Thus, a threat or an act of aggression that can destabilise the national security of the State can force the State to respond with the defence of human rights (freedom and fundamental values) via restrictions by invoking national security as a reasonable cause.

Part of the response to external threats involves legislation that questions the very existence of human rights and the prerogative of the State as a sovereign nation. In the post-9/11 world, the rise of security laws has shown how States react to national security threats and aggressions.[98] These legislative reactions, that one commentator has termed as 'juris-generative',[99] have spilled over to other nation States and within international law-making, the result of which is the cosmopolitisation of security laws.

The post-9/11 world has seen a rapid expansion of security laws, not only in the US but at the global level, on a scale that saw 'legalism […] abounded, not receded.'[100] The multiplicity of international security laws at the global level[101] has seen States, both strong and weak, sign onto these global standards or adjust their own domestic laws[102] to meet the global standards that first emerged from the US Patriot Act.[103] The multiplicity of such abounded legalism in international security underwent mitosis in an eco-system set on replication. Such mitosis is best characterised as such:

> as the meaning in a *nomos* disintegrates, we seek to rescue it – to maintain some coherence in the awesome proliferation of meaning lost as it is created – by unleashing upon the fertile but weakly organized juris-generative cells an organizing principle itself incapable of producing the normative meaning that is life and growth.[104]

The securitisation of laws at the global level has allowed States to engage with the language of human rights so as to a posit a right to national security, and enabled them to engage in mass surveillance on a scale that, in some countries, does have the tacit approval of

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[98] For example, where countries were required to enact or amend legislation to comply with anti-terror financing or extradition requirements; see, for example, Navin Beekarry, 'The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy: A Critical Analysis of Compliance Determinants in International Law' (2011) 31 North-Western Journal of International Law and Business 137; for an eloquent reading of security laws, see Kim Lane Scheppele, 'The Empire of Security and the Security of Empire' (2013) 27 Temple International and Comparative Law Journal 241.

[99] Sanders (n 89) 346.

[100] Sanders (n 89) 346; on the origins of the term see Robert Cover, 'The Supreme Court 1982 Term – Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4, 15: 'law is jurisgenerative by a process of juridical mitosis.'.

[101] See also Kim Lane Scheppele, 'The International State of Emergency: Challenges to Constitutionalism After September 11' (Working Paper, 2006) 46, describing American (international) security legislative making as 'enormous outbursts of lawmaking'.

[102] Scheppele (n 98) 247 discussing 'global security law'.

[103] The USA Patriot Act, Pub L No 107–56, 11 Stat 272 (2001).

[104] Cover (n 100) 16.

citizens,[105] regardless of whether or not human rights concerns are central to their notion of national security.

### C. Cybernetic Cold War and Organised Hypocrisy

Over the years, as the issue of human rights and national security was debated in the legal literature,[106] the courts of justice and public opinion were engaged in practical national security issues such as terrorism,[107] counter-terrorism,[108] torture[109] and deportation.[110] In recent years, online privacy and whistleblowing, and the extent of national security within these two areas,[111] have also generated legal and political debates.[112]

As a direct result of these developments, for example in the normative jurisprudence of the American legal system, privacy protection and how national security laws affect it must also come to terms with the first and Fourth Amendments of the American constitution. This is most evident in whistleblowing after the Snowden revelations.[113] However, because there are a number of specific issues that are embodied in the broad concept of national security that the domestic State must respond to, exemptions that are related to privacy *per se* and the objectives of national security are often not easy to define. Instead, they are situated between the untamed worlds of public policy (*ordre public*), national security and human rights.

What is, however, significant is that the first act of response by the domestic State to national security threats caused by whistleblowing, for example, is to mobilise State resources to combat such threats,[114] and also respond with legislation that limits the right

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[105] For example, on 25 September 2016, Switzerland voted for mass surveillance laws that gives the security forces greater powers to monitor private communications, see Federal Act on the Intelligence Service (Intelligence Service Act/ISA).

[106] See also, Itzhak Zamir, 'Human Rights and National Security' (1989) 23 Israel Law Review 375.

[107] Richard Wilson (ed), *Human Rights in the 'War on Terror'* (CUP 2009).

[108] Fergal Davis and Fiona de Londras, *Critical Debates on Counter-Terrorism Judicial Review* (CUP 2014).

[109] See generally, Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 Columbia Law Review 1681.

[110] See generally, Elspeth Guild and Paul Minderhoud, *Security of Residence and Expulsion: Protection of Aliens in Europe* (Kluwer 2001); Elspeth Guild, *Security and Migration in the 21st Century* (Polity Press 2009).

[111] See also, Sahar Aziz, 'Security and Technology: Rethinking National Security' (2015) 2 Texas A&M Law Review 791; P Sean Morris, '"War Crimes" Against Privacy: The Jurisdiction of Data and International Law' (2016) 17 Suffolk Journal of High Technology Law 1.

[112] See, for example, Mark Friedman, 'Edward Snowden: Hero or Traitor – Considering the Implications for Canadian National Security and Whistleblower Law' (2015) 24 Dalhousie Journal of Legal Studies 1; Melanie Reid, 'Government Secrets: The Public's Misconceptions of the Snowden Disclosures' (2015) 3 Lincoln Memorial University Law Review 36; Stephen Vladeck, 'Big Data Before and After Snowden' (2014) 7 Journal of National Security Law and Politics 333; Zachary Smith, 'Privacy and Security-Post Snowden: Surveillance Law and Policy in the United States and India' (2014) 9 Intercultural Human Rights Law Review 137; Jill Frayley, 'The Government Contractor Defense and Superior Orders in International Human Rights Law' (2009) 4 Florida A&M University Law Review 43.

[113] See generally, Margaret Hu, 'Taxonomy of the Snowden Disclosures' (2015) 72 Washington and Lee Law Review 1679; Jason Zenor, 'Damming the Leaks: Balancing National Security, Whistleblowing and the Public Interests' (2015) 3 Lincoln Memorial University Law Review 61; Susan Opt, 'Naming Edward Snowden's Actions as Heroic or Villainous: Implications for Interpreting First Amendment Trends' (2015) 49 First Amendment Studies 98.

[114] See, for example, the then SIGNINT Statute 18 USC § 798 (2006); after the Snowden revelations, the enactment of the USA Freedom Act (2015) is one of the primary legislative responses, see The USA Freedom Act HR 2048, Pub L 114–23; hence, the State must on the one hand protect its national security and or 'classified' information, but at the same time engage in some form of transparency; see generally

to online privacy.[115] State resources are generally coordinated via agencies responsible for intelligence, both internally and externally. The internal security apparatus can be anything from the Internal/Interior/Home Affairs or National Security Ministries, which include the police, justice departments and the intelligence agencies responsible for internal intelligence.

In this regard, one must always view national security as a concept that cannot be isolated from its political masters and, therefore, the role of national security apparatus should also be viewed in its wider policy context.[116] At the same time, external intelligence responses can raise questions on their interaction with human rights and present a clear and present danger to human rights values as such. These interactions may vary from the very nature of collecting intelligence, to surveillance and modern cyber-communications that raise concerns regarding online privacy.

To put things in perspective regarding the State response to, for example, whistleblowing, the general norms of politics in international law should also be contextualised. This is because these often meet realism head on and, as result, finding a proper legal solution to protect whistleblowing from a human rights perspective is not that easy; especially when such whistleblowing has been determined as treasonous from a national security perspective. International law and the underlying international relations that require legal attention regarding whistleblowing are always issues of complicated *realpolitik*. Some of the crusades to leak State secrets can be compared to scripts from some of the best spy novels or fiction films.

Through the emerging constitionalisation of global security laws as a result of the war and terror and the Snowden disclosures, the international legal system was not prepared to handle the more serious developments in global affairs that require States to respond decisively and to use international law in that response. How the leaders of States respond in terms of both policy and language to global developments is important. In other words, using the language of international law to denounce one State but using the same language to praise another State is nothing but a form of hypocrisy in the international system. This was most evident in the Snowden affairs given that the self-interest of the United States was undermined. It was a moment that allowed, for example, Vladimir Putin of Russia to quip that the West (America and Europe) suddenly remembered international law during the Crimean crisis of 2014.[117] Putin was justifying why Russia annexed

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for some discussions on these issues Richard Hyde and Ashley Savage, 'The Response to Whistleblowing by Regulators: A Practical Perspective' (2015) 35 Legal Studies 408; Stephen Vladeck, 'The Espionage Act and National Security Whistleblowing After Garcetti' (2008) 57 American University Law Review 1531; Colin McLaughlin and Michael Scharf, 'On Terrorism and Whistleblowing' (2007) 38 Case Western Reserve Journal of International Law 567; Alexander Kasner, 'National Security Leaks and Constitutional Duty' (2015) 67 Stanford Law Review 241; Ashley Deeks, 'An International Legal Framework for Surveillance' (2015) 55 Virginia Journal of International Law 291; for discussions on the Sarbanes-Oxley Act of 2002, see Terry Morehead, 'Sox and Whistleblowing' (2007) 105 Michigan Law Review 1757.

[115] See also Aziz (n 111); Stephen Schulhofer, 'An International Right to Privacy? Be Careful What You Wish For' (2016) 14 ICON 238; Paul Finkelman and Abraham Wagner, 'Security, Privacy, and Technology Development: The Impact on National Security' (2015) 2 Texas A&M Law Review 597; Cynthia Laberge, 'To What Extend Should National Security Interests Override Privacy in a Post 9/11 World' (2010) 3 Victoria University of Welling Working Paper Series 1.

[116] See, for example, L Lustgarten, 'National Security and Political Policing: Some Thoughts on Values, Ends and Law' in Jean-Paul Brodeur, Peter Gill and Dennis Tollborg (eds), *Democracy, Law and Security* (Ashgate 2003) 319–334.

[117] Vladimir Putin, *Address by President of the Russian Federation (regarding the Crimean Referendum of 16 March 2014 to Join Russia)* (Moscow, 18 March 2014) <eng.kremlin.ru/transcripts/6889> (accessed 1 August

(incorporated) the Crimean Peninsula in 2014 and was also reacting to the hypocrisy of the West because the West, he implied, tends to use international law in its own self-interest to justify any actions they undertake outside of their borders; yet when other countries justify their actions under international law, then those countries are deemed to be in 'breach' thereof. Putin, himself a trained (international) lawyer and master spy, knows that international law is a questionable project and in a troubled state because the double standards that have plagued the science and practice of international law makes it seem like a system of organised hypocrisy.[118]

The reference to Vladimir Putin, the restorer of Russian power in contemporary international law and relations,[119] carries a certain weight because it was Putin who granted Snowden (temporary) political asylum in Russia 2013.[120] Why did Snowden need political asylum? It so happened that in that same year, Snowden blew the whistle on the mass surveillance and data grabbing (retention) techniques that the US intelligence apparatus used to collect data and gather intelligence from all over the world. This data was then stored in fortified US data repository banks that were impenetrable even to the forces of nature.[121]

Snowden became the hero (for freedom of information activists) and Putin, in an ironic twist, became the great Statesman and saviour of the (Western) freedom of information. Naturally, all of the above is arguable, but the larger point here is that States have embarked on mass data surveillance and data-grabbing techniques in recent years, as the Snowden files revealed. Those data surveillance and grabbing techniques have been carried out in the name of national security.[122]

What links both Putin and Snowden is their known work as intelligence operatives for their respective governments; Putin for the former KGB of the Soviet Union and Snowden for the American mega intelligence apparatus (via a temporary contract with an external source), which includes the Central Intelligence Agency (CIA) and the National Security Agency (NSA).[123] The role of the NSA involves mainly telephone eavesdropping

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2020): 'They say [Russia is] violating norms of international law. Firstly, it's a good thing that they at least remember that there exists such a thing as international law – better late than never'; see also J Goldsmith and E Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective' (2002) 31 Journal of Legal Studies 115.

[118] On this latter point see, for example, Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 212 discussing various contradictory norms such as human rights, and also pointing out that 'Soviet rulers were motivated by both concerns about national security and the legitimacy of Marxism-Leninism'.

[119] See generally, Maria Engstrom, 'Contemporary Russian Messianism and New Russian Foreign Policy' (2014) 35 Contemporary Security Policy 356; Ingmar Oldberg, 'Russia's Great Power Strategy under Putin and Medvedev' (2010) UI Occasional Papers 1; Natalia Morozova, 'Geopolitics, Eurasianism and Russian Foreign Policy under Putin' (2009) 14 Geopolitics 667.

[120] Jacob Stafford, 'Gimme Shelter: International Political Asylum in the Information Age' (2014) 47 Vanderbilt Journal of Transnational Law 1167, 1171 (discussing Snowden's political asylum application); William Herrington, 'Snowed in in Russia: A Historical Analysis of American and Russian Extradition and the Snowden Saga Might Impact the Future' (2015) 48 Washington University Journal of Law & Policy 321.

[121] See, for example, *Klayman v Obama*, 957 F Supp 2d 1 (2013) challenging the constitutionality and statutory authorisation of certain intelligence-gathering practices by the United States government relating to the wholesale collection of the phone record metadata of all US citizens.

[122] The Swiss Federal Act on the Surveillance of Mail and Telecommunications Traffic (2016); the proposed Investigatory Powers Bill (2016) (UK); so-called snooping laws.

[123] For Snowden's connection to the NSA see, for example, Hu (n 113) 1681; on the background of Putin, see, for example, Dale Herspring and Jacob Kipp, 'Understanding the Elusive Mr. Putin' (2001) 48 Problems of Post-Communism 3.

and cybernetic activities.[124] Nowadays, Putin and Snowden are no longer part of those agencies, since Putin has become a great Statesman (but retains the nominal head of such agencies) in the eyes of his countrymen, and Snowden a villain in the eyes of some of his US compatriots. However, the Snowden files confirm a new era of cybernetic cold war where internet data collection and cyberattacks is at heart.

The mass collection and storage of data in recent years also reveals another terrifying and important development that has often been overlooked; that is, the steps that have been taken by various countries towards waging a war of sorts on privacy (through data retention/data-grabbing laws), whilst at the same time enacting laws to protect privacy.[125] This double-edged sword in information privacy laws is somewhat bewildering, because several countries have enacted strong data protection laws guaranteeing their citizens control and liberty over their personal and sensitive data.[126] On the other hand, some of these countries have also enacted data retention laws, which allow government and their law enforcement apparatus unhindered access to the personal and sensitive data of their citizens.[127] The latter approach is akin to war crimes against privacy and personal data because not only does it invade the individual liberty of the human data subject, but it also crosses borders, or attempts to cross borders, to carry out such atrocious acts.[128] Furthermore, this assault on privacy is also feeding the blood line of twenty first century cybernetic warfare – leaving privacy as its main casualty.[129]

Nowadays an enormous amount of data are created on a daily basis by corporations, individuals, artificial intelligence devices and other entities, and most of that data is subject to the territorial laws of the State in which the data was created. That data is therefore the target of access and control by States. This data and its storage have formed a new paradigm in international relations because such data contains a wealth of information and intelligence necessary for every conceivable aspect of society to function. The data, if processed by cloud computing commercial agencies, is normally stored in server farms scattered around the world.[130] Other data are stored on private server facilities,

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[124] Anna Persky, 'Cover Blown: NSA Surveillance and Secrets' (2014) 28 Washington Lawyer 23; PD Watkins, 'FISA and NSA Spying: Are there Constitutional Implications' (2009) 2 Homeland Security Review 125; Stephanie DeVos, 'The Google-NSA Alliance: Developing Cybersecurity Policy at Internet Speed' (2010) 21 Fordham Intellectual Property Media and Entertainment Law Journal 173.

[125] I have discussed this at length in an article written in conjunction with this one, but which has since been published - see Morris (n 111).

[126] See also, Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/2; see also, Schullhofer (n 115) warning on the dangers of global privacy laws.

[127] See Morris (n 111) 32.

[128] ibid.

[129] See also Schullhofer (n 115); Arthur Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (Ann Arbor: Michigan 1971) 2 giving perhaps one of the earliest accounts of how the early 'cybernetic age' has affected the individual's way of life and detailing the responses by the law, government and industry; Alex Kozninski and Stephanie Grace, 'The (Continued) Assault on Privacy: A Timely Book Review Forty Years in the Making' (2012) 90 Oregon Law Review 1135; Frederick Lane, *American Privacy: The 400-year History of Our Most Contested Right* (Beacon Press 2011); Colin Bennett and Charles Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (MIT Press 2006); Fred Cate, 'Government Data Mining: The Need for a Legal Framework' (2008) 43 Harvard Civil Rights-Civil Liberties Law Review 435.

[130] James Grimmelmann, 'The Structure of Search Engine Law' (2008) 93 Iowa Law Review 1, 10 noting that a server farm consists of many thousands of computers; Anshul Ghandi, Mor Harchol-Balter and Ivo Adan, 'Server Farms with Setup Costs' (2010) 67 Performance Evaluation 1; Albert Greenberg, James

such as those of the SWIFT system, only to be shared with, for example, financial institutions if the data concerned is of a financial nature.[131]

Personal and sensitive data, and those of a simple electronic mail (or this article), are the private property of those of those that created them. Such data are then governed by the laws of the States in which they are stored.[132] For example, the Russian law on data storage that came into effect on 1 September 2016 requires that all Russian citizens' personal data be stored on servers inside the Russian Federation as opposed to servers outside the Russian Federation.[133] This amendment to the Russian Civil Code is technically following in the footsteps of EU law, such as the Data Protection Regulation, which requires authorisation before EU citizens' data can be transferred outside of the EU.[134] Primarily, the problem that these examples highlight is the matter of access to the data; can a third State legally access it and, if so, how much of a threat to a State's national security is that? There is also the important question of whether human rights laws were breached in the process.

Accessing these kinds of data, in particular when outside the jurisdiction of the State in which they are stored, is a unique process carried out through either legal or illegal means, or through the Snowden strategy of whistleblowing when that data is considered as being trampled on by governments (what I prefer to call a war crime against privacy, due to the mass surveillance and retention of data in which various governments are engaged). For instance, in *Shimovolos v Russia* (2011),[135] the legality of a secret surveillance security database was questioned by the ECtHR. It was found that the applicant's right to a private life under Article 8 of the European Convention on Human Rights was violated. Although this case involved the security services of Russia, States other than Russia engage in these actions.[136] As some of the data that concerned the applicant emanated from his air travels, in one respect such a ruling was short of hypocrisy given that the passenger names and records (PNR) database between the US and the EU allows for similar information to be gathered on individuals.[137]

Particularly when the data concerned is located in another sovereign State, a State not only invades an often friendly State to carry out such heinous war crimes, but also practices a form of organised hypocrisy by ignoring the various treaties that exist for mutual assistance between States.[138] Furthermore, it appears that war crimes against privacy enable States to engage in mass data surveillance as an accepted form of espionage and intelligence gathering, by targeting access to data storage facilities in overseas States.

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Hamilton, David Maltz and Parveen Patel, 'The Cost of a Cloud: Research Problems in Data Center Networks' (2009) 39 Communication Review 68.

131 Morris (n 111).

132 For example, the recently adopted Russian law on internet data storage: see Federal Law on Personal Data and on Information, Information Technologies and Protection of Information, 4 July 2014 [0 внесении дополнения в Федеральный закон «0 введении в действие части четвертой Гражданского кодекса Российской Федерации]; N Purtova, *Property Rights in Personal Data – A European Perspective* (Kluwer 2011).

133 Federal Law on Personal Data (n 132).

134 GDPR (n 126); a recent judgment by the Court of Justice of the European Union struck down the privacy shield on the transfer of personal data outside of the EEA: see Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [16 July 2020].

135 *Shimovolos v Russia* App no 30194/09 (ECtHR, 21 June 2011).

136 See, for example, *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002).

137 See Agreement between the United States and the EU on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security (11 August 2012) OJ L 215/5.

138 See Morris (n 111) 32.

**D. Human Rights as a Problem: Some Doctrinal Perspectives**

The general academic debate and contribution to the analysis of human rights in international law is such a great body of work that the science of human rights itself has hardly any room for criticism. Yet, this modern science of human rights has also a problem that is crucial for its survival. The language, practice and rhetoric of human rights are a problem because they have traversed many disciplines and such adaption has resulted in different interpretation and practice.

The modern conception of human rights is a product of post-war normative instruments such as the UDHR, which stipulates in Article 1 that 'all human beings are born free and equal in dignity and rights'.[139] This not only set the legal tone for (international) human rights law but also created a new science of human rights where practitioners are vastly shielded from reality. It is this science, which is also part of the problem and is in search of meaning and original intent outside of exotic field trips.

In the rest of this paper, I will highlight in broader context what I see as some of the problems with the science of human rights that are generally lacking in the literature and how human rights practitioners perceive it. My analysis of these points is not to argue that the human rights literature in general should develop these arguments. I want to merely offer a critique of what I see as some of the problems with the practice and rhetoric of human rights.

**i. 'Historicities' and clashes of regimes involving human rights**

Much of the historicities of human rights were not necessarily attributed to human rights as we understand them today. The historical origins of human rights were concerned with religion, ethics or the morally right thing to do when the dignity of fellow humans was being degraded, deprived or robbed in inhumane or atrocious ways.[140] Saving the life of a fellow believer during the Inquisition or helping to free a plantation slave was not necessarily motivated by human rights; it was motivated by the religious ethics of the few good men of the times.[141] The massacres of thousands of Chinese citizens in the nineteenth and twentieth centuries were grave crimes,[142] as were the killings of thousands of Christians in Syria and Lebanon in the nineteenth century.[143] In contemporary times, the trend still exists, where massacres and other forms of genocide occur in modern conflicts. These developments should not be seen as a human rights problem *per se*. Rather, such crimes are in themselves serious crimes, and local and international legal norms can respond adequately to them without invoking the language of human rights. Invoking human rights when considering the severity of such crimes unnecessarily convolutes and obstructs the proper application of the relevant legal instruments.

This also raises a deeper question: that of where to draw the line between applicable laws, such as criminal law, and human rights. Should all such crimes and atrocities be

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[139] UDHR (n 49) Article 1.

[140] See, for example, Rik Torfs, 'Human Rights in the History of the Roman Catholic Church' in Hans-Georg Ziebertz and Johannes van der Ven (eds), *Human Rights and the Impact of Religion* (Brill 2013) 55–74.

[141] See also Ralph Mclnerny, 'Natural Law and Human Rights' (1991) 36 American Journal of Jurisprudence 1; RP Boast, 'The Spanish Origins of International Human Rights Law: A Historiographical Review' (2010) 41 Victoria University of Wellington Law Review 235.

[142] See, for example, Burensain Borjigin, 'The Complex Structure of Ethnic Conflict in the Frontier: Through the Debates around the Jindandao Incident in 1891' (2004) 6 Inner Asia 41.

[143] Eugene Rogan, 'Sectarianism and Social Conflict in Damascus: The 1860 Events Reconsidered' (2004) 51 Arabica 493.

grouped under crimes against humanity, where they are broadly a violation of the laws of war, human rights conventions and local criminal laws? Or more provocatively, to give legitimacy to human rights norms and principles nationally and internationally, should such crimes also include charges of human rights violations? This is only one area where human rights pose a problem, as what is largely conceived as human rights clashes with various legal regimes.

These clashes of legal regimes go deeper, to the legal origin of human rights in the modern and international context, and to how that origin relates to domestic rights that were found in various State constitutions prior to the emergence of instruments such as the UDHR and other international legal instruments that are modeled thereon. The clash of legal regimes in the human rights movement is only the tip of the iceberg and it is up to legal scholars to go beyond the mere interpretation of current human rights instruments to offer a concerted and methodological normative discourse, in order to derail clashes of legal regimes involving human rights.

**ii. Interdisciplinary studies**

Scholarly output often benefits from the critique or the knowledge of experts in other fields and this often generates an interdisciplinary approach. In the field of human rights, interdisciplinary studies are voluminous and the literature keeps growing.

The problem with the interdisciplinary approach to human rights is that not only are too many hands painting the same fence, but the paint can be corrosive and the fence may gradually decay. This is the major problem facing the language, practice and rhetoric of human rights. In addition to this corrosive paint, other scientific fields that are on the verge of extinction or face academic glut jump on the human rights bandwagon and free-ride their way to prominence.[144] This leaves the target, the *human*, out of human rights and relegates it to a largely academic rhetorical discourse.

Nowhere in this grand game of rhetoric is the human present, nor is his dignity a practical concern.[145] The rhetoric of human rights through an interdisciplinary approach is not only a cottage industry in most Western nations, but also creates a false sense of security in the rest of the world and in the efforts of people to survive the practicalities of everyday live or the perceived injustices created by (international) legal instruments in the Western world.[146]

While there are added benefits of interdisciplinary approaches to human rights, the science itself has created a division among various academics and this division is borne out through interdisciplinary interpretation while, at the same time, human rights allows for the propping up of failed academic disciplines.[147] Similar to grey clouds that can be shifted by the wind, human rights as a language and tool of rhetoric, often used by the Western world, are expanding due to interdisciplinary approaches. Such grey clouds darken the

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[144] When this article was first written, I had specific fields in mind, but my memory lags upon revision several years later to pinpoint a specific field. Needless to say, there are indeed interdisciplinary challenges with human rights; see, for example, Lindsey Kingston, 'The Rise of Human Rights Education: Opportunities, Challenges, and Future Possibilities' (2014) 9 Societies Without Borders 188.

[145] See, however, Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655.

[146] Some of the more scientific forms of this claim can also be inferred, see Sally Merry, 'Global Human Rights and Local Social Movements in a Legally Plural World' (1997) 12 Canadian Journal of Law and Society 247.

[147] See my comment above (n 144); for some critical reflections see Sara O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427.

original purpose of human rights, and human rights becomes a problem as it has come to a crossroads without any sense of direction.

**iii. What does it really mean to have human rights?**

Does a country's (conservative) values and opposition to same-sex marriage really involve human rights? Another problematic area in the human rights movement is the real meaning of human rights. Human rights can be attributed to anything and this creates a false sense of security regarding the real meaning of human rights. If a country enacts laws in order to ensure that the family is not diluted by ensuring that fathers have an equal say in parenting, does it really discriminate against same sex-couples and, if so, is that a human rights problem? In a sense yes, based on the current trend in human rights courts (mostly in the Western world), it is a human rights problem.

We have seen this in *Vallianatos and Others v Greece*,[148] and other cases where a human rights claim can offer judicial reprieve for those who felt disadvantaged by laws or State actions. Same-sex issues are not the only ones that human rights have solved. Violent criminals, sex offenders, asylum seekers and immigrants alike have used the courts (again, mostly in the Western world) to argue that their human rights have been violated.[149]

What is interesting about these claims is that they are often made by those originally from other parts of the world, where Western standards of human rights are not fully practiced *per se*. For instance, in *JR v Secretary of State (UK)*,[150] a Caribbean man was ordered to be deported from the UK after he served a prison sentence for the killing of another man. However, the English Court of Appeal held that the man could not be deported as it would violate his human rights under Article 3 of the Human Rights Act (UK),[151] since the man in question asserted at the last minute that he was gay.

Furthermore, in other instances, such as in *Kiobel v Shell*,[152] citizens of States where Western standards of human rights are questionable often resort to human rights to seek financial compensation, by alleging that their human rights have been violated by a corporate entity for aiding and abetting alleged atrocities. The larger point here is that human rights have become a farce whereby they are applicable to all things, yet the courts must often comply with legislation that is being abused. Such abuse is largely the making of the Western world as it broadly adopted the language of human rights and enacted legislation reflecting that language in order to give an image of civility beyond their borders.

Given the numerous atrocities that the majority of countries in the Western world have allegedly committed in the last five centuries, either by wars or colonisation,[153] it sometimes seems that the language of human rights and its accompanying laws are a way of expressing guilt and apology. The question of what human rights really means goes beyond the vernacular from European to 'global South' languages. It is also akin to a large

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[148] *Case of Valliantos and Others v Greece* App Nos 29381/09 and 32684/09 (ECtHR, 7 November 2013).

[149] A classic example is raising human rights claims when objecting to deportation; see also Vanessa Bettinson, 'Deportation of Migrant Following Criminal Conviction: European Convention on Human Rights, Article 8' (2010) 74 Journal of Criminal Law 113; See also *R (On the application of JR (Jamaica) v Secretary of State for the Home Department*, EWCA Civ 477 (2014).

[150] *R (On the application of JR (Jamaica) v Secretary of State for the Home Department*, EWCA Civ 477 (2014).

[151] Human Rights Act (1998) (UK), Article 3.

[152] *Kiobel v Royal Dutch Petroleum Co.,* 133 S Ct 1659 (2013).

[153] See for example, Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387; for discussion on early twentieth century genocide in a colonial context see Rachel Anderson, 'Redressing Colonial Genocide under International Law; The Hero's' Cause of Action Against Germany' (2005) 93 California Law Review 1155.

patch of sky, covered with grey clouds that can be easily moved by winds to another part of the sky. In this constant shift of grey clouds, anyone and anything can argue that it rained on them and thus violated their human rights.

The above perspectives are some singular insights into the direction of international human rights rhetoric in the global sphere and how that rhetoric can easily be adapted to suit other norms such as national security.

## V. Conclusion

From the above analysis, one thing that does seem to have emerged is that international human rights law does not offer protection to domestic situations regarding the violation of human rights. In other words, where national security intersects with human rights violations at the domestic level, international human rights law is weak because there are so many firewalls against what is considered national security at the domestic level, which States can invoke based on their domestic laws.

Within the realm of international relations and international law operations, it is up to States to determine the reach and scope of international law and, as such, 'the nation State still prevails globally, international law is not normally legally binding domestically unless it is incorporated into national legislation.'[154] Furthermore, where international law is incorporated into domestic legislation, the risk of incompatibility with other constitutional norms may render international human rights norms incompatible with national security legislation.

Naturally, the views in this paper are only some of many questions that those who sit on the opposing side can raise regarding human rights. The more questions asked, the more academics in various fields struggle to come up with the right answers that can satisfy the curious questioner. On the one hand, some academics tend to gather radical minds to think freely and present their conception of human rights and, on the other, some academics offer their insights from years of practice in human rights settings. What most of us can agree is that human rights are a force to be reckoned with and have probably come to a crossroads.

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[154] Head and Mann (n 6) 177.

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# The Ramifications of Reservations to Human Rights Treaties

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**Abstract**

This paper discusses the legal ramifications of reservations to multilateral human rights treaties. It examines the approach of the International Court of Justice (ICJ), compared to that of the European Court of Human Rights (ECtHR), in light of the general practice in international law relating to reservations and the International Law Commission's commentary. The paper then discusses the scope for change and growth, given the nature of the two different approaches. Once it has set out the current law it describes the role of the evolving moral, social and political climate in society and the effect that it has on the conversation around human rights and treaty reservations. It answers three main questions around reservations: first, whether reservations are allowed; second, the conditions under which they are allowed; and third, if reservations are not allowed, whether the invalid reservation cancels a party's membership of the treaty. Having answered these three questions, the paper draws to the conclusion that, ultimately, for international law to continue to be effective, state sovereignty must be given the utmost respect and importance in relation to reservations. With the current polarisation of the political climate, as is evidenced by the traditionally liberal states' leaning towards conservative values, as in Britain and the United States, a push by the ECtHR to sever reservations from treaties and still bind the state will only alienate key players from the international stage. At face value, one may be inclined to think that the stringent protection of human rights values and limiting the reservations to such values is beneficial but, in reality, this would make participation in the international framework unappealing to states as their sovereignty would be infringed. Therefore, the ICJ's approach is advantageous as it understands the role of reservations in achieving participation and it also understands the state practice element. Thus, in line with the ILC commentary and the ICJ's judgements, the ECtHR's recent rulings will not become the international law norm and state sovereignty with respect to reservations will continue to prevail.

## I. Introduction

This essay discusses the legal ramifications of reservations to multilateral human rights treaties. It will examine the approach of the International Court of Justice (ICJ), compared to that of the European Court of Human Rights (ECtHR), in light of the general practice in international law relating to reservations and the International Law Commission's commentary. The paper will then discuss the scope for change and growth, given the nature of the two different approaches. Once the current law has been described, the role of the evolving moral, social and political climate in society and the effect that it has on the conversation around human rights and treaty reservations will be analysed. The paper will conclude with a discussion of what can be expected in the future, given the varying approaches and societal changes.

This paper seeks to answer three main questions in relation to reservations: first, whether reservations are allowed; second, the conditions under which they are allowed; and third, if reservations are not allowed, whether the invalid reservation cancels a party's membership of the treaty.

## II. General Background on Reservations

Before beginning the enquiry into these three questions, some general context on reservations and the legal setting in which they are analysed is necessary. A reservation results in the absence of obligations that the treaty would otherwise entail.[1] International law can be applied in three main ways when analysing a legal problem: the doctrinal approach, the State practice approach and the policy-oriented approach. The doctrinal approach seeks to provide 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.[2] In essence, this approach adheres closely to the letter of the law. State practice is 'a pattern of behaviour by states which, if accompanied by a conviction by those states that their behaviour is required as a matter of law, may give rise to customary international law'.[3] The State practice *approach* is the practical implementation of State practice to form the basis of a legal decision. In order for a general principle to be established as State practice, the court must ascertain that the practice is 'recognized by civilized nations', which in practice means that the principle can be found in 'diverse legal families'.[4] The policy-oriented approach looks at what the law ought to be, given the public policy of the society, and seeks to shape and enforce the law accordingly.[5]

Ultimately, this paper will argue for a State practice and policy-oriented approach. It argues that to rely on policy alone would infringe on certainty and State sovereignty, which would lead to a lack of State participation. This would destroy the foundation of international law and the entire system would cease to function effectively. This will be elaborated upon in the context of the Courts' approaches and the ILC commentary below. The general practice around treaties will be discussed first, with reference to the three questions raised in the introduction.

The Vienna Convention on the Law of Treaties (VCLT)[6] is an authoritative instrument on international law treaties and forms part of international customary law (making it binding on all States whether they have ratified it or not).[7] The VCLT defines a reservation as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application

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1 International Law Commission, 'Report of the International Law Commission on the Work of its Fiftieth Session' (23 July 1998) A/CN.4/SER.A/1998/Add.1 (Part 2) paras 490–504.

2 Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) The Erasmus Law Review 130, 131.

3 John Currie, *Public International Law (*2nd edn, Irwin Law 2008) 321.

4 Katerina Linos, 'How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics' (2015) The American Journal of International Law 475.

5 Myres McDougal, 'Law as a Process of Decision: A Policy-Oriented Approach to Legal Study' (1956) Natural Law Forum 53.

6 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 33.

7 David Jonas & Thomas Saunders, 'The Object and Purpose of a Treaty: The Interpretive Methods' (2010) Vanderbilt Journal of Transitional Law 572.

to that State'.[8] Due to State sovereignty a reservation is always allowed, except in the following circumstances: (1) the treaty prohibits all reservations; (2) the treaty allows only certain reservations but not including the one at hand; or (3) the reservation is incompatible with the object and purpose of the treaty.[9] Reservations cannot be made after a State has accepted a treaty; the reservation must be made at the time that the treaty is being signed and negotiated by the State. Traditionally, a State that wants to attach a reservation that is not permissible will not be permitted to become a party to the treaty unless all the other nation-States that are parties to the treaty agree to the reservation.[10] However, this traditional position has been challenged in practice, and these challenges will be discussed below when answering the third question raised in the introduction.

As previously discussed, Article 19(c) of the VCLT created 'the object and purpose' test as the default rule for deciding whether a reservation was permissible or not. This applied to all treaties,[11] not only those with a 'humanitarian or civilizing purpose'.[12] The other States that were parties to the treaty decided whether a reservation passed the test. This obviously politicises reservations, as States have the power to object on any basis they see fit. However, there is a cap on this, as Article 20(5) of the VCLT states that there is a 12-month time limit on State objections.[13] If other States make no objections within twelve months, the reservation is considered to be accepted by the non-objecting State; this is also known as 'the twelve month tacit consent rule'.[14] Three doctrines have been developed in response to the consequences of a State making a reservation that is objected to: permissibility, opposability and severability.[15] When reservations are regarded as unacceptable, one of these three doctrines is employed.

The permissibility doctrine holds that a reservation that is irreconcilable with the 'object and purpose' test is invalid and has no legal effect. This is the case whether other States object or not, and 'this view stems from the natural reading of Vienna Convention Article 19(c) and suggests that incompatible reservations are void *ab initio* or are not proper reservations'.[16] The opposability doctrine, by contrast, argues that if another State objects to a reservation then the State that made the reservation will no longer be a party to the treaty.[17] The severability approach holds that if an invalid reservation is objected to then the reserving State 'will be bound to the treaty without the benefit of the reservation'.[18] The severability approach is the one employed by the ECtHR when finding a reservation impermissible and this is evident from decisions of the ECtHR, which will be discussed later in the paper.

The *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion was handed down by the ICJ in 1951 and showed the

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8 Vienna Convention (n 6) art 2(1)(d).

9 ibid art 19(c).

10 ibid art 20(2).

11 ibid art 1.

12 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 1951 <icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf> accessed 14 July 2020 [7].

13 Vienna Convention (n 6) art 20(5).

14 Belinda Clark 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) The American Journal of International Law 312.

15 Kasey McCall-Smith, 'Severing Reservations' (2014) International and Comparative Law Quarterly 2.

16 ibid 12.

17 ibid 14.

18 ibid 17.

application of the general rules surrounding reservations that are outlined above.[19] In summary, the Court held that where treaties do not explicitly state that reservations can be made, one cannot 'infer that they are prohibited'.[20] This means that if there is no specific clause indicating that reservations of any kind are forbidden, it is assumed that they will be allowed. The Court then analysed the Genocide Convention to see whether it allowed for reservations by implication. The Court stated that being stricter with reservations to the Convention would deter States from signing up to the treaty and this would nullify the treaty's objectives.[21] The Court then spoke about the legal effect of objections from other States to any particular reservations. It held that other States were within their rights to object, but since the goal was to have as many nations becoming parties to this Convention as possible, the objection would affect only the two States concerned as they themselves would decide whether they considered the reserving State to be a party.[22] Ultimately, the issue was whether any State felt that the reservation of another State went against the 'object and purpose' of the Convention and then each member State would decide, on the basis of its individual appraisals of the reservation, whether it deemed the reservation to be objectionable or not.

This decision echoes the general rules relating to reservations set out above, but also allows for a broader range of reservations in an attempt to respect State sovereignty and to encourage as many States as possible to consent to being part of a global legal framework. Allowing this broader range of reservations in the case of the Genocide Convention is evidenced by the fact that the States were not barred from becoming parties to the treaty, even though all nation-States did not accept their reservations.

The Court states at the outset that its decision to widen the range of permissible reservations and apply it only to the two States in question is 'expressly limited by the terms of the Resolution of the General Assembly to the Convention on Genocide'.[23] This approach was therefore adopted given the specific circumstances surrounding the Convention, rather than being the norm. However, the judgment's reasoning is persuasive and shows the multitude of considerations at play when deciding how to handle reservations. The decision also confirms that the Court recognises 'that some treaties have special character and that they aim to achieve wide participation of the states therein'.[24] This was the first instance where reservations were treated differently due to the magnitude of the rights addressed by the instrument concerned, and shows that in order to achieve widespread compliance with what were considered integral values, changes had to be made to the status quo.

Subsequently, the United Nations Human Rights Commission, the body that administers and interprets the International Covenant on Civil and Political Rights, has adopted the approach that an inadmissible reservation to the Covenant will mean that the reserving State is still party to the treaty, but without the benefit of the reservation.[25] This view is controversial, given that reservations are seen as the State's prerogative, and inadmissible reservations would generally exclude them from a treaty, rather than binding

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19 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (n 12).

20 ibid 6.

21 ibid 8.

22 ibid 10.

23 ibid 5.

24 Ineta Ziemele and Lasma Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) European Journal of International Law 1137.

25 Elena Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 Berkeley Journal of International Law 277–278.

them yet disregarding the reservation. However, this approach does not seem to be applied beyond the scope of human rights treaties. This could indicate that reservations to treaties of this nature (that is, treaties that are seen to be of the utmost importance due to the character of the rights they protect) are being handled in an atypical manner. In General Comment No 24, the Human Rights Committee stated, when discussing the substance of human rights treaties, that 'such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place [there]'.[26] In light of this changing view of human rights treaties, it has been argued that the VCLT is incapable of providing the necessary framework for handling reservations of this nature because many of its provisions are written to reflect the operation of a multilateral treaty between States in issues where States act in their own interest in respect of other States, where there are no third parties with their own rights or obligations involved and where the treaty does not establish an independent international mechanism for its application and interpretation.[27]

Here it is necessary to note that the human rights culture was borne from the trauma of the Second World War and the purpose of international law was to ensure State accountability to other States for atrocities committed during and after the war.[28] International law has only recently evolved into a means of regulating and universalising social, economic and political rights, which States are required to guarantee for their people.[29]

Therefore, as law and society evolve, there are more instances of reservations being prohibited. While this may deter States from becoming parties to the treaties, it has been argued that the fact that the conventions are intended to be legislative in nature means that enforcing the standardised application of their regulations is vital, and thus the growing resistance to reservations is necessary.[30] Furthermore, it can be argued that the complexity of multilateral treaties and the need for a multitude of parties with varying interests to compromise further shows the need to limit reservations. Rather than allowing countries to reserve as they wish, these limitations on reservations could streamline the creation and application of international human rights law. However, the United Nations Convention on the Law of the Sea is an example of how a strict approach to excluding reservations can backfire.[31] The United States did not become a party to the Convention due to the provisions on mining the deep seabed, to which no reservations could be made.[32] If strict rules are applied to reservations, States will often willingly exclude themselves from treaties that are of great importance. As a result, they are not bound at all, as opposed to at least being bound in part.

The examples above show the tension between the growing desire to hold States more strictly to treaties and the need to not deter States from engaging in international law and agreeing to be parties to treaties. Several judges have taken issue with the strict banning of reservations, such as Sir Hersch Lauterpacht in his Separate Opinion in the *Norwegian Loans* case. Judge Lauterpacht stated that the particular clause at hand could be severed

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[26] Office of the High Commissioner of Human Rights 'General Comment No 24' (11 November 1994) CCPR/C/21/Rev1/Add6 para 17.

[27] Ziemele and Liede (n 24) 1136.

[28] McCall-Smith (n 15) 4.

[29] ibid.

[30] OHCHR (n 26) para 17.

[31] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

[32] David Sandalow, 'Law of sthe Sea Convention: Should the US Join' (*Brookings*, 2004) <www.brookings.edu/research/law-of-the-sea-convention-should-the-u-s-join/> accessed 23 July 2020.

and the treaty could then be deemed to have been accepted, but the will and intention of the accepting State were crucial in deciding if this was the case.[33] This shows that the 'content of the state's consent plays a significant role in determining the effects of impermissible reservations.'[34] The *Interhandel* case followed this line of reasoning and looked closely at the intention of the United States when it reserved a particular aspect of the treaty.[35] At this point, it is important to acknowledge that both these cases dealt with a different kind of reservation to the ones related to treaty obligations that have been discussed thus far. These cases dealt with the acceptance of the ICJ's jurisdiction under Article 36 of the Statute of the ICJ.[36] When the ICJ's cases are discussed further below, it will be explained why these cases are still relevant to the topic under discussion, despite this difference.

The approach adopted in the cases above appears to be contrary to that of the VCLT, since the VCLT states that an impermissible reservation excludes the State from being party to the treaty, unless all other state-parties agree to the reservation.[37] However, the object and purpose of the treaty must also be taken into account.[38] By looking at the object and purpose of the treaty, as was discussed earlier in relation to the *Genocide Convention* Advisory Opinion,[39] the special character of the treaty would be taken into account when deciding whether the reservation fell within the ambit of permitted reservations, or how the reservation could be addressed to maximise State participation. When looking at the object and purpose, the courts may alter the requirements that affect the validity of a reservation accordingly, as was done in the *Genocide Convention* Advisory Opinion.

Having provided the legal context, I will now answer the three questions posed previously.

The first question is whether reservations are permitted. International law has accepted that reservations to multilateral treaties are allowed and human rights treaties are not exempt from this. The *Genocide Convention* Opinion and the VCTL recognise that reservations to human rights treaties are always permitted where treaties are silent on the matter.[40]

The second question deals with the conditions under which reservations are permitted. Reservations are allowed unless the treaty states otherwise. The drafters of a treaty can limit a State's ability to reserve on certain matters. The State must then decide whether it wishes to become a party to the instrument in spite of its inability to reserve on certain matters. Furthermore, according to the VCLT, the reservation of the State may not go against the object and purpose of the treaty.[41] However, when looking at the commentary of the International Law Commission (ILC), it becomes apparent that this requirement is often seen as vague and unhelpful.[42]

The third question -whether or not an invalid reservation cancels a party's membership to a treaty- is more complex than the first two and will be analysed in the

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33 *Certain Norwegian Loans (France v. Norway*) (Judgment) [1957] ICJ Rep 9 [35(I)(3)].

34 Ziemele and Liede (n 24) 1138.

35 ibid.

36 United Nations Statute of the International Court of Justice (adopted 18 April 1946) 33 UNTS 993.

37 Vienna Convention (n 6) art (20)(2).

38 ibid art 19(c).

39 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (n 11).

40 ibid 6.

41 Vienna Convention (n 6) art 19(a)-(c).

42 Ziemele and Liede (n 24) 1145.

remainder of the paper. This question has led to two very different approaches by the ICJ and the ECtHR. This paper will seek to provide the necessary context to answer the third question and will also comment on the proposed ambiguity of the second.

In 2011, the ILC established a working group on reservations to treaties to work on a final rendition of the Guide to Practice that was originally adopted in 2010, including the changes proposed by the Special Rapporteur subsequent to the oral and written observations that have been made by States on the topic since 1995.[43] In August 2011, the ILC decided to recommend that the General Assembly take note of the Guide to Practice and ensure that it was disseminated as widely as possible, in terms of Article 23 of the United Nations Charter.[44]

The ILC specifically chose to create 'guidelines accompanied by commentaries',[45] rather than a binding instrument; this was unlike the ILC's usual practice. The Guide to Practice was intentionally created as a combination of hard law and soft recommendations. The Special Rapporteur explained the reasons for this in his preliminary report. He noted that 'what should be termed a "modest approach" certainly offers great advantages'.[46] In summary, these advantages were the following: formally changing the existing provisions would create immense technical difficulties and might deter State participation in international law; clarifying existing principles is more helpful than changing them; and State representatives had made it clear to the ILC that they were happy with the status quo because, while it created ambiguity, this ambiguity had never led to a serious dispute and international law treaties had enjoyed widespread participation.[47]

The ILC stated that it was not recalling the provisions on reservations contained in the VCLT.[48] It referenced the findings of the Special Rapporteur's report and the reasons for the 'modest approach'.[49] It then stated that it was fully aware that there had to be an equal weighting between the integrity of a treaty and the need for the widespread participation of States. The ILC specifically acknowledged 'the efforts made in recent years, including within the framework of international organizations and human rights treaty bodies, to encourage such a dialogue'.[50] With this in mind, the ILC then stated that the reservations should be formulated as narrowly as possible. In addition, statements of reasons for a reservation should be given that explain why the reservation is necessary, as this is important for ascertaining the validity of a reservation. States should also periodically review their reservations 'with a view of limiting their scope or withdrawing them where appropriate'.[51]

In light of the concerns frequently expressed by other States, international organisations and monitoring bodies can assist in determining the validity of reservations.

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43 International Law Commission, 'Guide to Practice on Reservations to Treaties' in 'Report of the International Law Commission on the Work of its 63rd Session' (2011) A/66/10, para. 75; For background information, see International Law Commission, 'Analytical Guide to the Work of the International Law Commission' (*International Law Commission,* updated 28 February 2020) <legal.un.org/ilc/guide/1_8.shtml> accessed 27 July 2020.

44 ibid.

45 Alain Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur' (2013) The European Journal of International Law 1071.

46 ibid 1072.

47 ibid.

48 ibid.

49 ibid.

50 Guide to Practice on Reservations to Treaties (n 43) 38.

51 ibid.

The bodies tasked with enforcing the treaties can express their concerns about the reservation and ask for clarification. These bodies can also encourage withdrawals of reservations, the limiting of their scope, or the reconsideration of proposed reservations. The ILC noted that there should be close cooperation between the bodies to exchange their evolving views on reservations, and recommended that '[t]he General Assembly call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner'.[52]

The Rapporteur took the position that the approach to reservations established by the VCLT was flexible enough to accommodate the special character and purpose of human rights treaties. While it was argued that limiting contractual thinking had often become part of the law of treaties, and by extension reservations, the ILC's interpretation of the VCLT discarded this more narrow, contractual approach.[53] The normal order of affairs, or what some may call the *ordre public,* was maintained by the notion that the VCLT could be interpreted more widely so as to apply to the special character of human rights treaties.[54] Some have argued that the VCLT was drafted too long ago to reflect the growing importance of a human rights culture in recent years. For example, the development of socio-economic rights means that States are accountable to their citizens, as opposed to only other States.[55] The ILC's broader interpretation of and guidelines around the VCLT's 'object and purpose' clause clearly indicated that the 'object and purpose' must take into account the special character of the treaties and the changing society that led to this special character.

This changing society can be seen in the role of the human rights treaty bodies. Human rights treaty bodies are 'committees of independent experts that monitor implementation of the core international human rights treaties'.[56] The role of the treaty bodies was discussed by the ILC, especially in relation to reservations, as these bodies were not envisaged when the VCLT was drafted. The ILC looked at the effects of this development on international law practice with reference to the usual approach, which looked at the consequences of reservations for States that were parties to the treaty and their obligations to each other. Human rights treaty bodies, however, are concerned with holding the State accountable to its people.[57] Thus, there is tension between the standard - or old order- of affairs and the new order, which requires that different obligations be fulfilled by the State.

In essence, the ILC has noted that the VCLT is malleable and can accommodate the special character of human rights treaties. The ILC has left the hard law of the VCLT intact but added additional guidelines, which give more scope, interpretation and practical implementation to the broad and vague provisions of the VCLT. These guidelines are a clear reflection of the shift in the international sphere with regards to how reservations are being addressed. While keeping the conventions of the VCLT alive, the guidelines broaden their ambit by interpreting the object and purpose of a treaty. The guidelines also show that they are expected to evolve over time. They focus on human rights and the importance of the accountability of States for the reservations they make in this sphere.

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52 ibid.

53 Pellet (n 45) 1064–065.

54 Ziemele and Liede (n 24) 1140.

55 ibid.

56 See OHCHR, 'Human Rights Bodies' <ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> accessed 23 July 2020.

57 Ziemele and Liede (n 24) 1140.

Overall, the ILC recognises that maintaining certainty and sovereignty when it comes to reservations is key in encouraging State participation, which is the backbone of international law. However, the ILC also sees that a practical guide is necessary to link the old to the new and to create substantive ways of addressing the issues of the future, given that there are new obligations on States, such as social and political rights. These changes include the increased participation of citizens and the obligations that States owe to their citizens, as opposed to the old order of affairs at the time the VCLT was drafted, when States owed obligations only to each other. Thus, it has been established that reservations are allowed and the conditions under which they operate are either governed by the VCLT or can be found within the treaty itself.

The next section of this paper will look at the approach of the ICJ and the ECtHR to reservations, and how the hard law and the soft law is being interpreted by the Courts. I will look at whether the actions of the Courts reflect what has been discussed above and whether there is scope for growth in terms of how reservations are handled. The ILC's commentary has not yet been implemented by the General Assembly, meaning that it amounts to no more than a set of recommendations with little authority. However, as stated above, the ILC intended it to be more of a guide than an instrument. However, there are other instances where a commentary of this nature has amounted to *opinio juris.* This statement will be elaborated upon below, but in order to do this an examination of the Courts and their jurisprudence is necessary.

## III. The Approach of the ECtHR

The ECtHR is a court of law that relies on legal sources in its analysis. It is a constitutional panel that interprets the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (the European Convention).[58] As seen above, the question of human rights law and how it relates to any major legal instrument is complex and requires interpretation:

> …put simply, it is difficult for a government to ratify an instrument which affirms the profound belief of its members in those Fundamental Freedoms which are the foundation of justice and peace in the world and at the same time make reservations to those fundamental freedoms as if they were no more important than any one of the routine provisions in the myriad of agreements that most governments enter into every year without the appearance of some, if not a considerable, degree of insincerity.[59]

When the empowering treaty, the European Convention, was proposed, it was meant to universalise human rights law throughout Europe and it was made clear that no reservations could be made to protect national law that was contrary to the Convention.[60] It was later argued that the courts extended the scope of the Convention and that State parties never intended to assume certain obligations when they ratified the Convention. Those who originally ratified the Convention without the benefit of making extensive reservations felt that those who ratified later had an unfair advantage in terms of reservations, now that the courts had increased the ambit of the Convention. This led some States to consider withdrawing from the Convention so that they could re-ratify with the

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[58] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

[59] Judge Ronald MacDonald, 'Reservations Under the European Convention on Human Rights' (1988) Revue Belge de Droit International 429.

[60] Ziemele and Liede (n 24) 1138.

benefit of being able to make more reservations.[61] Distinguished scholars have commented that this development is concerning. Frowein, for instance, has drawn attention to this issue and opines that this conduct 'may run counter to the very essence of what the Convention is about'.[62] He is uncertain whether reservations are really in line with the objective of the Convention and sees the 'possibility of unilateral derogation through reservations'[63] as a fundamental weakness of the European Convention. Before considering his opinion, I will outline the requirements for making reservations in terms of the Convention.

The European Convention states that there are four requirements for a reservation to be valid: (1) it must be made at the moment it is signed or ratified; (2) it must relate to specific laws in force at the moment of ratification; (3) it must not be a reservation of a general character; and (4) it must contain a brief statement of the law concerned.[64] These criteria seem to be significantly different from those seen in other human rights treaties. The Convention does not refer to the 'object and purpose' clause of the VCLT, but it can be assumed that the clause applies since it is part of customary international law. This leads us to the third question that the paper seeks to address: if a reservation is not allowed due to not fulfilling these requirements and those of the VCLT, is the reserving State consequently no longer party to the treaty?

In the *Temeltasch*[65] and *Belilos*[66] cases, both the European Commission of Human Rights and the ECtHR chose not to address the argument made by the Swiss Government that its interpretative declarations were not offensive in any way to the object and purpose of the European Convention and that other States had implicitly acknowledged its declarations by raising no objections. Thus, Switzerland's argument was that there had been a tacit acceptance of its terms as no issues were brought up by other States. The dissenting opinion of members of the European Commission (Mr Kiernan and Mr Gözübüyük) in the *Temeltasch* case shows that the members wanted more clarity about reservations to the European Convention.

The European Convention organs were among the first to examine the consequences of impermissible reservations to any given treaty. In the *Belilos* case, the Swiss Government submitted an interpretative declaration, which was seen to be a reservation that did not comply with the Article 57 criteria and was therefore invalid.[67] The reservation in this case was to Article 6(1) of the European Convention. Switzerland argued that it was severable because it did not fulfil the requirements for validity set by the Convention.[68] The Court held that the reservation was not of a general nature, as is required by Article 57(1), and there was no 'brief statement of the law concerned',[69] as is required by Article 57(2). The Court clarified its stance on whether the silence of other member States meant that the reservation was valid when it stated that 'the silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment'.[70]

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61 Judge Ronald St John MacDonald (n 59) 432.

62 ibid.

63 ibid 432–433.

64 Ziemele and Liede (n 24) 1141.

65 *Temeltasch v Switzerland* App no 9116/80 (ECtHR, 5 March 1983).

66 *Belilos v Switzerland* App No 10328/83 (ECtHR, 29 April 1988).

67 ibid para 40.

68 ibid para 49.

69 ibid para 39.

70 ibid para 47.

The consequences of the invalidity of the reservation were that the ECtHR adopted the severability approach and declared that 'it is beyond doubt that Switzerland is, and regarded itself as, bound by the Convention',[71] in spite of the fact that its reservation was not taken into account. The court made the distinct choice to choose severability over opposability, as Switzerland argued that its reservation was valid by virtue of the fact that it had not been objected to by any of the other member States.[72] Thus, the court chose to hold Switzerland to the treaty without the benefit of its interpretative declaration.

In the *Loizidou*[73] case, the ECtHR looked in detail at the Turkish government's declarations under then Articles 25 and 46 of the European Convention and Turkey's intention to continue to be bound by the optional clause agreeing to the Court's jurisdiction.[74] Even though the ECtHR refused to take into account the statements by Turkey's representatives that post-dated the declarations, it considered the text of the declarations and concluded that the impermissible parts could be separated from Turkey's consent to accept (what was at the time) the optional clause in the European Convention.[75]

The ECtHR has been criticised for applying the doctrine of severability because, in doing so, it disregarded the relevant State's consent. The State consented to be bound with the benefit of its reservation, not without it. The subsequent case law of the ECtHR has not addressed this issue, arguably because, to the present day, the *Belilos* and *Loizidou* cases are still the most relevant authority on the matter. The Human Rights Committee received considerable criticism for General Comment No 24. The Comment stated that 'the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'.[76] France and the United States were the greatest critics, because the VCLT is applicable also to impermissible reservations, and the VCLT is customary international law.[77] This has also been made clear by the ILC, which still regards the VCLT as the reigning hard law in relation to reservations. This leaves one with the uneasy feeling that any invalid reservation seems to be almost automatically severable according to the Human Rights Committee. The ICJ's approach will be contrasted with this before further thoughts on the matter are offered.

## IV. The Approach of the ICJ

The ICJ is the main judicial organ of the United Nations. Its empowering statutes are the United Nations Charter and the Statute of the International Court of Justice.[78] The purpose of the ICJ is to settle legal disputes between States in accordance with international law. Furthermore, it provides advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies.[79] The severability of invalid reservations has been considered twice by the ICJ, in the *Norwegian Loans*[80] and *Interhandel*[81] cases.

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71 *Temeltasch v Switzerland* (n 65) para 60.

72 ibid para 57.

73 *Loizidou v Turkey* App no 40/1993/435/514 (ECtHR, 23 February 1995).

74 ibid para 105.

75 ibid.

76 OHCHR (n 26) para 18.

77 Ziemele and Liede (n 24) 1139.

78 International Court of Justice, 'The Court' <icj-cij.org/en/court> accessed 16 July 2020.

79 ibid.

80 *Certain Norwegian Loans* (n 33).

81 *Interhandel Case (Switzerland v US*) (Judgement) [1959] ICJ Rep 6.

In both instances, Judge Lauterpacht gave Separate Opinions and suggested that reservations that were not essential and reservations that were invalid were severable from a State's document of ratification. The *Norwegian Loans* case dealt with reservations to the jurisdiction of the ICJ and the principle of reciprocity.[82] It must be noted that there is a significant difference between a condition attached to an article about jurisdiction and a reservation to a treaty. However, the reasoning of the judges is still relevant and so this reasoning will be examined before explaining its relevance. As it stands, the majority of States have an automatic reservation to the jurisdiction of the ICJ. This means that States do not accept the automatic jurisdiction of the ICJ but rather accept it only when they see fit to do so. A State may thus accept or reject the ICJ's jurisdiction when a dispute arises.[83] As stated in *Norwegian Loans*, the reservation is automatic 'in the sense that, by virtue of it, the function of the court is confined by registering the decision made by the defendant government and not subject to review by the court'.[84] The principle of reciprocity states that a benefit, favour or penalty granted to one State should reciprocally be granted to the other.[85] The right to use this principle is found in Article 36(2) of the UN Charter.[86] Using this principle, Norway, which did not have an automatic reservation to the ICJ's jurisdiction, could invoke the reservation of France. Norway then argued that it was exercising this reservation, thus excluding the jurisdiction of the ICJ. The majority of the ICJ agreed with this and held that 'it is without jurisdiction to adjudicate upon the dispute which has been brought before it by the Application of the Government of the French Republic'.[87]

Judge Lauterpacht argued in a Separate Opinion that the ICJ did not have jurisdiction, but for different reasons. His analysis of the reservation itself is of interest. He states:

> If that type of reservation is valid, then the Court is not in the position to exercise the power conferred upon it—in fact, the duty imposed upon it—under paragraph 6 of Article 36 of its Statute. That paragraph provides that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court'. The French reservation lays down that if, with regard to that particular question, there is a dispute between the Parties as to whether the Court has jurisdiction, the matter shall be settled by a decision of the French Government. The French reservation is thus not only contrary to one of the most fundamental principles of international—and national—jurisprudence according to which it is within the inherent power of a tribunal to interpret the text establishing its jurisdiction. It is also contrary to a clear specific provision of the Statute of the Court as well as to the general Articles 1 and 92 of the Statute and of the Charter, respectively, which require the Court to function in accordance with its Statute.[88]

Lauterpacht argued that these automatic reservations go against the express wording of the treaty, which is to allow the ICJ to adjudicate over all matters of international law at its discretion, not at the discretion of the State itself. However, if one were to apply the usual approach of opposability in this regard, it would mean that almost every member State would no longer be party to the treaty, as the majority have reserved, in a similar manner, to the ICJ's jurisdiction. Thus, while Lauterpacht's reasoning was logical and doctrinally sound, the majority chose to uphold the State practice approach to

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82 *Certain Norwegian Loans* (n 33) 23.

83 Ziemele and Liede (n 24) 1137–1138, referring to automatic reservations as 'self-judging'.

84 *Certain Norwegian Loans* (n 33) 35.

85 ibid 23.

86 ibid.

87 ibid 27.

88 ibid 44.

jurisdictional reservations and allow the reservation to be enforceable. Choosing the opposite approach would have left the ICJ without much power, as there would be few member States left for it to adjudicate over.

In the *Interhandel* case, Judge Lauterpacht stated his view once more. This case involved a suit by Switzerland against the United States, and the US invoked its automatic reservation. The ICJ found that the objection was 'without object at the present stage of the proceedings'.[89] However, Judge Lauterpacht refused to sever a reservation that he felt was indispensable to the acceptance by the United States of the ICJ's jurisdiction. He referred once more to the 'general principle of law' relating to severability, saying that it was 'a maxim based on common sense and equity'.[90]

In the *Nicaragua* case,[91] Judge Schwebel, while noting Lauterpacht's view that automatic reservations were invalid, as was seen in the *Norwegian Loans* case, also made it clear that with time this argument had become less convincing, since for many years and on many occasions such automatic reservations had been treated as valid.[92] This way of thinking shows that the doctrine of severability in regard to impermissible reservations was part of legal thinking before the European Commission and the ECtHR applied this approach to the European Convention. However, as can be seen from all the cases discussed, especially when comparing the approaches of the ECtHR and the ICJ, there is confusion as to exactly how reservations should be addressed. The ILC commentary adds value here, as it settles these disputes to a degree. The case law from both the ICJ and the ECtHR helps to answer the third question posed at the beginning of the paper – whether an invalid reservation cancels a party's membership to a treaty. Both Courts have regard for the importance of widespread participation and thus seem reluctant to cancel a State's membership, even though, as Lauterpacht's dissent shows us, cancellation of membership can sometimes be the most logical and doctrinally sound conclusion. In the next part of the paper, I will critically analyse the approaches of the Courts.

## V. Critical Analysis of the Approaches of the ECtHR and ICJ

At the beginning of this paper I referenced three schools of thought used when analysing the law: the doctrinal approach, the State practice approach and the policy approach. All three have come into play in the cases discussed. Lauterpacht's dissent in *Norwegian Loans*[93] was doctrinally sound, as it applied the law exactly as it stands and was impeccably reasoned. Practically speaking, however, if the doctrinal approach were to be followed, the ICJ would become irrelevant as it would have no member States that would be party to its Statute and thus within its jurisdiction. The majority in *Norwegian Loans* looked at the facts less doctrinally and more in the spirit of State practice. Reservations of this nature have been allowed to many States and have met with no objections from other States, thus they are valid and the ICJ must respect them to ensure its own survival and relevance. The ECtHR has adopted a more policy-oriented approach. By holding States to the European Convention without the benefits of their reservations, the court is trying to enforce human rights universally throughout Europe without being hampered by any reservations that may hinder this enforcement.

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89 *Interhandel* (n 81) 26.

90 ibid 116.

91 *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgement) [1984] ICJ Rep 392.

92 Ziemele and Liede (n 24) 1138.

93 *Certain Norwegian Loans* (n 33).

In theory, the approach of the ECtHR seems admirable because of its quest to enforce international law, especially in the sphere of human rights, but in practice it is not sustainable. International law survives on the premise that States are sovereign and that they volunteer to partake in international law with the benefit of creating their own conditions. Both the ICJ and the ECtHR understand that widespread participation is important, but the ECtHR fails to see that by binding States to agreements in the manner that it does, State participation may be lost altogether. Arguably, if States begin to feel that they may be bound by restrictions that they did not agree to when signing a treaty, they will become cautious about any participation in treaties. This will destroy the system, as treaties are not worth the paper they are written on if no member States have agreed to adhere to them.

The approach of the ICJ thus seems far more logical. Allowing automatic reservations may seem illogical when one reads Judge Lauterpacht's dissent, but automatic reservations allow for the ICJ to have member States to adjudicate over. If the ICJ had outlawed automatic reservations, this would have drastically decreased State participation. The commentary of the ILC is not a binding document in regard to reservations and was never meant to be. It was meant to provide guidelines that could be implemented to clarify reservations, but also to foster more accountability for the reservations that States choose to make. The commentary has made it clear that, as a general principle, reservations are of the utmost importance to the functioning of international law and thus should be allowed. Conditions can be put in place, but the ILC makes it clear that vagueness or room for flexibility can often be beneficial. While this flexibility may seem counterintuitive, it provides enough scope to allow for customary international law, State sovereignty and consent to be respected.

In light of the above, it is clear that the ICJ's approach is preferable to that of the ECtHR. At face value, it may seem that forcing States to adhere to human rights treaties by disregarding their reservations will enforce State accountability. In practice, it would simply eliminate States' engagement with international instruments and bodies. The ECtHR's approach runs counter to the VCLT, the ILC's commentary and customary international law by holding that States remain parties to treaties and by nullifying their reservations. The ICJ's approach, while flawed in that it does not stick to the letter of the law, is preferred because it is cognisant of the implications of its decisions on the functioning of international law.

Ultimately, despite the fact that the ICJ was dealing with a reservation to jurisdiction and the ECtHR was dealing with reservations to human rights treaties, the underlying values are the same. In essence, Judge Lauterpacht stated that automatic reservations undercut the entire purpose and meaning of the treaty as the courts do not have real power to adjudicate on their own accord. Similarly, the ECtHR sees reservations to human rights treaties as weakening the very meaning of the treaties. Thus, the core value system underlying the conclusions reached is the same. However, the ECtHR fails to see that implementing this reasoning means that you risk losing the participation of States. Without participation, international law ceases to have parties to adjudicate over and States' participation is conditional upon the protection of their sovereignty. Therefore, the ICJ's approach, as seen in the *Genocide Reservations* Opinion[94] and *Norwegian Loans*,[95] is the more practical approach, as it protects international law from its demise by allowing States the freedom to make reservations and it provides States with an incentive to participate.

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[94] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (n 12).

[95] *Certain Norwegian Loans* (n 33).

## VI. Scope for Growth

In terms of scope for growth, one must keep in mind the ever-changing landscape in which international law finds itself. International law thrived in the aftermath of the human rights atrocities of the Second World War and the potential of nuclear war that gripped the world during the Cold War. In this era, international law broadened its scope, deepened its content and embraced a focus on individuals' rights and the idea of holding States accountable, not only to each other, but also to their citizens.[96] During this time, many governance projects were realised and there was a shift towards unity and global governance on issues that affected countries worldwide.[97] However, over the last few years, the world has seen rising nationalism – for example, United States policy under the Trump administration and Brexit. Scholars have argued that this rise in nationalism is a reaction to the liberal framework created by international law.[98]

According to a report by the RAND Corporation, a United States non-profit think-tank that focuses on issues of global policy, the liberal international order's dominance in the global landscape has been severely threatened by various developments since 2014.[99] According to the report, the events that are threatening this dominance are Russian aggression in the Ukraine, Brexit, the election of Donald Trump as US president, and the increased influence of right-wing political parties in Europe.[100] However, the authors make it clear that 'this conclusion is tentative, based on trends that could reverse themselves, and not mature to the degree that some fear (or hope)'.[101] This suggests that, in the future, areas of international law that are seen by some as too liberal will be vulnerable to change as tensions grow between key States in regard to how the law applies to developing global challenges.

These developments indicate that we are approaching a more difficult phase in international law, compared to what it has seen since its creation. The role of international human rights law is to influence, guide and develop the normative framework in terms of which domestic legislation is created.[102] International law is changing the framework slowly and strong domestic laws are needed so that international law can make a concrete difference in a short period of time.[103] Countries that have traditionally pioneered the creation of international law are relinquishing space as they step out of the global arena and focus on their domestic issues. This could result in reduced global power, tainted prestige and the rise of nationalism.[104]

However, in spite of the above, most of international law continues to be uncontested and assists in the daily functioning of a multitude of countries on a global stage, and States continue to rely on international law to settle disputes in a peaceful manner. As the world becomes ever more interconnected, the continued legitimacy of international law requires that the courts and drafters account for a multitude of needs and

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96 McCall-Smith (n 15) 4.

97 ibid.

98 Doug Stokes, 'Trump, American hegemony and the future of the liberal international order' (2018) 94(1) International Affairs <chathamhouse.org/sites/default/files/images/ia/INTA94_1_8_238_Stokes.pdf> accessed 26 July 2020.

99 Michael Mazarr et al, *Measuring the Health of the Liberal International Order* (RAND Corporation 2017) 116.

100 ibid.

101 ibid.

102 United Nations, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations 2005) 43.

103 ibid.

104 Doug Stokes (n 99) 134.

desires to maintain participation. While a degree of disagreement is par for the course and beneficial to the evolution of the international legal order, we need to remain vigilant about maintaining a balance between pleasing the key players and maintaining and developing social norms.

Human rights are intended to be universal in nature, and they are meant to apply to all people regardless of differences (for example, race, religion, nationality).[105] The rise in the assertiveness of States with a sovereign approach creates risks for universal values, like sexual and reproductive rights.[106] Due to their universality, these rights were often seen as liberal and idealistic. While a negative reaction to these universal rights used to be predominantly located in the developing world, the developed world is beginning to support illiberal values too. The United States and a number of European States are increasingly pushing for these universal values to be abolished.[107]

## VII. Conclusion

Ultimately, for international law to continue to be effective, State sovereignty must be given the utmost respect and importance in relation to reservations. With the current polarisation of the political climate, as is evidenced by traditionally liberal States leaning towards conservative values, as in Britain and the United States, a push by the ECtHR to sever reservations from treaties and still bind the State will only alienate key players from the international stage. At face value, one may be inclined to think that the stringent protection of human rights values and limiting the reservations to such values is beneficial but, in reality, this would make participation in the international framework unappealing to States as their sovereignty would be infringed. Thus, while relying on policy alone may seem favourable, it would in fact destroy the entire system of international law. Therefore, the ICJ's approach is advantageous as it understands the role of reservations in achieving participation and it also understands the State practice element. Sovereignty is sacrosanct to a country's integrity and its relationship with international law. At a doctrinal level, to adopt an approach that accommodates the demands of State sovereignty in regard to issues like automatic reservations may not be the most logical approach. However, it is necessary for the survival of the system. The ICJ has more jurisdictional standing than the ECtHR and, taking into account the move away from a global society towards a more nationalist approach in many key States, the ICJ's approach is the most pragmatic and logical. Thus, in line with the ILC commentary and the ICJ's judgements it can be predicted that the ECtHR's recent rulings will not become the international law norm and State sovereignty with respect to reservations will continue to prevail.

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105 McCall-Smith (n 15) 4.

106 Eric Levenson, 'Abortion Laws in the US: Here are the states pushing to restrict access' (*CNN*, 30 May 2019) <edition.cnn.com/2019/05/16/politics/states-abortion-laws/index.html> accessed 26 July 2020.

107 Doug Stokes (n 99) 134.

# Revisiting the Legal Framework for Private Military and Security Contractors: Maritime Perspective

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**Keywords**
PRIVATE MARITIME SECURITY COMPANY; PRIVATE CONTRACTED ARMED SECURITY PERSONNEL (PCASP); PRIVATE MILITARY AND SECURITY COMPANY; INTERNATIONAL HUMANITARIAN LAW (IHL); LAW OF THE SEA; STATE RESPONSIBILITY

**Abstract**
The paper aims to analyse legal lacunas and suggest possible solutions for the acts and wrongdoings of Private Military and Security Companies within the lens of maritime activities. The paper has been divided into three parts. Part I deals with the necessity and role of Private Military and Security Companies in the present times. Part II discusses the legal status of Private Military and Security Companies and ways of ensuring responsibility for their acts. Part III examines the legal framework for the acts of Private Maritime Security Companies. An assessment of the rules of international humanitarian law (IHL), state responsibility, applicability of the Montreux document and efforts such as GUARDCON have been discussed to highlight the inadequacy of the laws on Private Maritime Security Companies. There has been an upsurge in the employment of Private Maritime Security Companies since 2008 to cope with a myriad of problems at sea including piracy and robbery. However, an umbrella of rules including employment procedures, agreements, training techniques, responsibility in peacetime as well as in times of conflict and the guidelines of IHL must be restructured or enhanced in order to be made applicable to Private Maritime Security Companies.

## I. The Need for Private Military and Security Companies in the 21st Century: Hegemonic Control over the Sea and Increased Security Issues

### A. Relevance of Sea Power

Supremacy over the sea has been contested many times. The sea promotes life on land multifariously through colossal trade, transportation, rich mineral and metal deposits, oxygen provision and sea-dwelling marine life functioning as climate moderators, making it – to an extent – the conductor of life on Earth. The United Nations (UN) Secretary General aptly remarked that it would not be wrong if we substitute the name 'planet Earth' with 'planet water',[1] as the surface of Earth predominantly consists of water

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[1] United Nations Secretary General, 'Secretary-General's opening remarks to the Ocean Conference' (*United Nations Secretary General,* 5 June 2017) <un.org/sg/en/content/sg/statement/2017-06-05/secretary-generals-opening-remarks-ocean-conference-delivered> accessed 17 July 2019.

(approximately 70%). The struggle for the title of hegemon is irrefutably routed via seaways. The undisputable master of the sea could easily elevate his dominance to rule the entire world. The great strategist Alfred Mahan theorised the supremacy of sea power and substantiated the theory with examples from history.[2] The democratisation of the world has unshackled the sea from being a despotic kingdom to being under the rule of none. The segmentation of power has brought major challenges to seaways. In 1982, the UN Convention on the Law of the Sea (UNCLOS) became the official word on maritime governance.[3] Nevertheless, the quest for power continues in individuals, agencies and nations as approximately 60% of the area of the sea remains untamed and beyond the direct control of any country.[4]

**B. Need for Private Military and Security Companies**

Prior to the establishment of the UN, world domination and intolerance remained a prevalent hidden agenda across the globe. The UN emerged in 1945 and made a paradigm shift by advocating for peace and prosperity in the world. The globalised nations then faced promising challenges in terms of achieving peace, with better connectivity, emerging economic needs and technical advancement. The need for Private Military and Security Companies lay in the non-participation of Member States, as nations deviated from their duty to pool support for peacekeeping missions,[5] which were created to address international security breaches. Threats from emerging non-State actors (repression of the public, extending unaccountable power and indirect control over failing States) remains one of the latent prerogatives for the establishment of Private Military and Security Companies, as these provide instant solutions and available professionals to offer varied security, military and technical assistance. They have even seeped into the maritime industry by providing on-board guards and logistical services.

Modern problems can be fathomed and resolved only with modern solutions and the privatisation of peace has become inevitable, despite the world not being completely ready for this.[6] Growing pressure from the world community and lack of muscle in the UN framework are two essential reasons for peace being susceptible to privatisation. This apathy from fellow nations has led to the privatisation of not only peace but the use of force, which is a key function associated only with nation States.

Private Military and Security Companies function as close substitutes for military or security forces for individuals, companies, nations and international organisations. The price of safety is too high to be borne by the common people, hence these services tend to evade the core balance of rights in the society. The legitimacy of Private Military and Security Companies is based on the flimsy foundation of speedier and more efficient service provision, hence incorporating into the world a new non-State actor, the strongest

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2 Office of the Historian, 'Milestones 1866-1898, Mahan's The Influence of Sea Power upon History: Securing International Markets in the 1890s' (*Office of the Historian*) <history.state.gov/milestones/1866-1898/mahan> accessed 17 July 2019.

3 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

4 Global Environment Facility, 'Areas beyond National Jurisdiction' (*GEF*) <thegef.org/topics/areas-beyond-national-jurisdiction#:~:text=Marine%20Areas%20Beyond%20National%20Jurisdiction,95%20percent%20of%20its%20volume.> accessed 4 August 2020.

5 Tristan Ferraro, 'The applicability and application of international humanitarian law to multinational forces' (2013) 95(891/892) International Review of the Red Cross 561, 603.

6 United Nations, 'Secretary-General Reflects On 'Intervention' In Thirty-Fifth Annual Ditchley Foundation Lecture' (*United Nations,* 26 June 1998) <un.org/press/en/1998/19980626.sgsg6613.r1.html> accessed 17 July 2019.

amongst all in the contest for world dominance. The bidding of Private Military and Security Companies has not only changed the way in which we look at State functions and the division of power, but has set out a distinct archetype for governance and safety. In the future, we may see the emergence of non-State superpowers who are capable of ruining nations with active military bases in almost all regions of the world. Currently, the majority of Private Military and Security Companies are British or American in origin, leading to consolidation of strategies to compete for hegemonic rule. The power seems to have already started to corrupt them. This is evident in contemporary incidents like that of the Nisour Square, where Blackwater guards employed in Iraq started shooting on a civilian-occupied road whilst they were escorting the US Ambassador's convoy. The guards later were tried and convicted for different charges: murder (of Nicholas Slatten) and manslaughter. Fourteen civilians lay dead and several were injured in this fire, including children and women.[7] In another infamous incident known as the Abu Ghraib scandal, several gruesome acts and human rights violations were performed in a prison camp that was held by the US-led coalition occupying Iraq. The guards were claimed to have committed several crimes against the detainees, including rape, sodomy and torture. Later the guards were convicted, as was the company rendering services to the Pentagon (CACI) for working in the prisons of Iraq.[8] The tales of atrocities committed by Private Military and Security Companies are several in number and the atrocities are being performed in several parts of the world.[9] Despite these violations, there is a dynamic increase in the demand for employment of Private Military and Security Companies. The reasons behind this could be the urge to establish control over occurrences of resistance, control wars, impose de facto control over other States' territories and the denial of responsibilities to cooperate with fellow nations for pooling resources for peacekeeping missions. The breach of obligations and the misconduct of the Private Military and Security Companies raises concerns about the governance of employment of Private Maritime Security Companies which function at sea.

## II. Legal Status of Private Military and Security Companies

The legal status of Private Military and Security Companies under international law is not yet clear. Their status depends on the functions they perform. For example, within the scope of IHL, their legal status will be derived from concepts such as civilian, combatant and mercenary.[10] Confirming the legal status of these private firms is necessary to attribute responsibility and liability in the event that they breach any international obligation, especially considering that they are present in diverse regions of the world.

Under international law, these private firms and their employees can be recognised as non-State actors. A State does not have any responsibility for the actions of non-State actors unless and until the State has knowledge of the acts or the non-State actors act on

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7 Matt Apuzzo, 'Blackwater Guards Found Guilty in 207 Iraq Killings' (*The New York Times,* 22 October 2014) <nytimes.com/2014/10/23/us/blackwater-verdict.html> accessed 4 August 2020.

8 Carolyn Patty Blum et al, 'Prosecuting Abuses of Detainees in U.S. Counter Terrorism Operations' (ICTJ Policy Paper 21, 2009).

9 Spencer Ackerman, 'Abu Ghraib torture suit against contractor revived by Federal Court' (*The Guardian*, 30 June 2014) <theguardian.com/law/2014/jun/30/iraq-lawsuit-defense-contractor-torture-abu-graib> accessed 22 July 2019.

10 Louise Doswald-Beck, 'Private Military Companies under International Humanitarian Law' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP 2007).

the direction of the State.[11] The definition of non-State actor comprises all entities not related to any State and which have the power to influence international relations.[12] Private Military and Security Companies can be broadly defined as those companies which are not allied to any particular State when it comes to performing their functions. They consist of employees which belong to different States and work under contract with other States.

The *Tadic* case prescribes an 'overall control' test for ascertaining the responsibility of a State for the acts of non-State actors. According to this test, the State must have control over the actors, not over the act.[13] Any sort of direct involvement of the State is not necessary for it to be held responsible. Hence, if the State recruits Private Military and Security Companies for any State function, then they are responsible for the wrongs of these entities.

The employees of Private Military and Security Companies can be held accountable under individual criminal responsibility, or these entities can be held liable under corporate responsibility.[14] The unclear status of employees hired for functions other than taking part in hostilities makes it difficult to charge the individual with any criminal wrong. These entities cannot be considered as de jure or de facto members of the armed forces, nor can they come under the ambit of mercenary; instead, they are classified as civilians. Hence, in compliance with Article 25(2) of the Rome Statute,[15] the individual can be held accountable for crimes they commit.

The concept of corporate civil liability has gained recognition in relation to several violations of human rights law.[16] However, in cases of violations of IHL, there is no international instrument specifically attributing responsibilities to transnational corporations. Nevertheless, jurisprudence from the US Military Tribunal discusses the liability of transnational corporations for violations of IHL. In a decision passed by the US Military Tribunal where a company was held liable for war crimes and crimes against humanity via its officers, it was held that, as a company cannot run by itself, persons in authority shall be made responsible for the breach of humanitarian obligations.[17] Consequently, a breach of humanitarian law by a Private Military and Security Company engaged in performing military or security services shall entail liability for the company in accordance with the status of the company and employees as civilians, combatants or mercenaries.[18] Moreover, Article 75 of the Rome Statute provides emerging powers to the International Criminal Court to pass discretionary orders of reparation against legal persons in case breach of humanitarian laws takes place.[19]

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[11] David Isenberg, 'State or Non-state: Ay, There's the Rub' (*Global Policy Forum,* 14 February 2012) <globalpolicy.org/pmscs/51281-state-or-nonstate-ay-theres-the-rub.html?itemid=id> accessed 4 August 2020.

[12] ESCR, 'Non-state Actors' (*ESCR-Net*) <escr-net.org/resources/non-state-actors> accessed 4 August 2020.

[13] Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649, 651.

[14] Andrea Carcano. 'International, Corporate and Individual Responsibility for the Conduct of Private Military and Security Companies' (35th Round Table on Current Issues of International Humanitarian Law, Sanremo, 6–8 September 2012) 108, 111, 115.

[15] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), art 25(2).

[16] OHCHR, *The Corporate Responsibility to Respect Human Rights* (United Nations 2012).

[17] *The United States of America v Carl Krauch et al* (Judgment) US Military Tribunal (30 July 1948) Concurring Opinion of Judge Hebert On the Charges of Crimes Against Peace para 1214.

[18] Emanuela-Chiara Gillard, 'Business goes to war: private military/security companies and international humanitarian law' (2006) 88(863) International Review of the Red Cross 530–541.

[19] Rome Statute (n 15) art. 75.

The Geneva Conventions and their Additional Protocols recognise three types of person having obligations and rights during an armed conflict. A question raised here is into which of these categories Private Military and Security Companies and their employees fit: civilian, combatant or mercenary?

**A. Mercenary**

Article 47(2) of Additional Protocol I to the Geneva Conventions (API) defines the parameters for what constitutes a mercenary. This is any person, who is neither a national nor a resident of a party to the conflict, recruited for the purpose of *fighting* in *armed conflict* and taking *direct* part in hostilities.[20] If we analyse the functions of Private Military and Security Companies, their primary function is providing logistical support such as weapons management, guarding, food service, training military personnel: therefore, they do not take part directly in hostilities. Private Military and Security Companies' personnel will only come under the category of mercenary under IHL if they directly take part in hostilities.

**B. Combatant**

'Combatant' is defined in Article 43 of Additional Protocol I. Combatants are those persons who are legally allowed to take direct part in hostile activities. However, any person who is a member of the armed forces and does not obey international law ceases to be a combatant. The personnel of Private Military and Security Companies must fulfil the following criteria in order to be considered combatants: they should work under the authority of a person responsible for his subordinates; be recognisable with a fixed, distinctive sign; handle and carry arms openly; and lastly, but most importantly, abide by the laws and customs of war.[21] Therefore, those taking part in an armed conflict, fulfilling all the above-mentioned criteria, can enjoy the protection given to combatants under IHL.

**C. Civilian**

Civilians are provided with extensive protection during an armed conflict. IHL clearly states that civilians and civilian objects cannot be attacked. Civilians are described as those persons who are neither part of the armed forces nor act as combatants.[22] This makes it evident that Private Military and Security Companies' personnel, who do not take part in hostilities but provide logistical support for the armed forces, will be treated as civilians. Hence, the status of Private Military and Security Companies' personnel under IHL is dependent on the functions performed by them.

**D. State Responsibility**

State responsibility for the acts of Private Military and Security Companies can be entailed if the State is their employer and, by the virtue of the task assigned to them by the State,

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[20] Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 8 June 1977) 1125 UNTS 3 (Additional Protocol I), art 47(2).

[21] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 1929, revised 12 August 1949) 75 UNTS 135 (Geneva Convention III), art 4A(2).

[22] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted August 1949, entered into force 12 August 1949) 75 UNTS 287 (Geneva Convention IV), art 4(3).

the company qualifies as a mercenary.[23] In practice, it is difficult for Private Military and Security Companies to have the status of mercenaries because of the high threshold provided under Article 47 of Additional Protocol I.[24] However, State responsibility can be established by several means. For example, if the Private Military and Security Company has a certain legal status according to internal law of a State, or is a State organ, then Article 4 of Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA) is applicable.[25] The reference to a State organ is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whichever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.[26]

Moreover, it was held by the ICJ that if an entity is completely dependent on the State, State responsibility cannot be curtailed on the ground that it does not fit the internal legal definition of an organ of the State. It is, in this case, accepted as an organ of the State.[27] This is an increasingly common phenomenon in relation to parastatal entities, which exercise elements of governmental authority in place of State organs, as well as in situations where former State corporations have been privatised but retain certain public or regulatory functions under which State responsibility arises.[28] Further, if direction, instruction or control over the wrongful act is exercised by the State, then the State will be responsible for that act.[29] In situations where no such attribution exists, but later the State acknowledges or adopts the act as its own, then State responsibility arises.[30]

## III. Evaluating the Legal Framework on Private Military and Security Company at Sea

### A. Montreux Document

The Montreux Document is an agreement with 54 signatories as of 2018, initiated by the Swiss government and International Committee of the Red Cross (ICRC) in 2006. This document is neither a treaty nor soft law, but a restatement of binding laws on military and security companies.[31] It was made in light of the deliberations amongst governmental experts, civil societies and the Private Military and Security Company industry. It came in force to fill the legal vacuum existing in the context of international regulations for Private Military and Security Companies and is applicable even in the times of conflict. It also highlights best practices and acknowledges the already existing obligations to be respected by the companies and nation States. It levies indispensable international obligations on

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23 Won Kidane, 'The Status of Private Military Contractors Under International Humanitarian Law' (2010) 38 Denver Journal of International Law and Policy 411–412.

24 Additional Protocol I (n 20) art 47.

25 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (12 December 2001) UN Doc A/56/10 (ARSIWA), art 4.

26 ILC, 'Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) 40.

27 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)* (Judgment) [2007] ICJ Rep 43; Marie-Louise Tougas, 'Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (2014) International Review of the Red Cross 305–358.

28 ARSIWA (n 25) art 5.

29 ARSIWA (n 25) art 8.

30 ARSIWA (n 25) art 11.

31 Philip Spoerri, 'The Montreux Document' (35th Round Table on Current Issues of International Humanitarian Law, Sanremo, 6–8 September 2012).

States and non-State actors, being one of a kind in addressing the issue of governing Private Military and Security Companies.[32] It contains guiding obligations of IHL, international human rights law and State responsibility which are also applicable to Private Maritime Security Companies in the high seas in times of armed conflict.[33] The document can also be distinguished in terms of legal obligations or in terms of capacities of States.

States in issue are categorised as contracting, home or territorial States. The contracting State is the one with which a contractual legal obligation in terms of work is established; the home State is the State of incorporation of the Private Military and Security Company; and the territorial State is the territory in which the Private Military and Security Company works or provides a service.

The concept of the territorial State per the Montreux document denotes the State under whose territorial jurisdiction a Private Military and Security Company operates. This becomes complex when we apply it in a maritime setting as the active jurisdiction of States is decided by UNCLOS and there exists the possibility that more than one State can be considered a territorial State for the purpose of the dispute at hand. In land disputes, an area can come under one State's jurisdiction only until the control of the land is disputed. Meanwhile, at sea, the port, coastal and flag States may all exercise territorial control by law and accepted State practice, since UNCLOS does not preclude concurrent jurisdiction.[34] In the case of Private Maritime Security Companies, as many as seven contenders can claim territorial jurisdiction. These are: the flag State of the merchant ship; the State where the shipping company is registered; the home State or States of the merchant crew; the State where the Private Security Company is registered; the home States of the individual security guards; the coastal States whose waters the vessel transits; and the port State on which the ship enters.[35] This creates a variety of obligations and rights for each State, which sometimes results in mayhem as overlapping obligations dilute responsibility in the event of any breach of international law.

The 1856 Paris Declaration proclaimed that the ability to use force at sea was in the hands of States and disallowed the private use of force.[36] Subsequently, international law grew to prioritise States as agents to wage war and bring peace.[37] The employment of Private Military and Security Companies at sea, also known as Private Maritime Security Companies in this context, is growing heavily in order to guard merchant ships and is seen as an effective tool to hunt pirates. UNCLOS was not drafted with Private Military and Security Companies in mind; it merely breaks down the responsibilities of vicinal States in terms of their distance from water. It is suggested to amend UNCLOS to create a consistent regime for the regulation of the sea. New stakeholders, like Private Maritime Security

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[32] ICRC, 'The Montreux Document' (*ICRC*, 2009) <icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf> (accessed 30 July 2020) foreword.

[33] Marie-Louise Tougas, 'Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (2014) International Review of the Red Cross 305–358.

[34] Anna Petrig, 'Looking at the Montreux Document from a Maritime Perspective' (2016) 2 Maritime Safety and Security Journal 1.

[35] Anna Petrig, 'Regulating PMSCs at Sea: Operational and Legal Specificities' (UN Human Right Council 5th Session of Intergovernmental Working Group on Private Military and Security Companies, 12–16 December 2016).

[36] The Declaration of Paris Respecting Maritime Law (Paris, 16 April 1856).

[37] Natalino Ronzitti, 'Regulating and Monitoring the Privatization of Maritime Security' (35th Round Table on Current Issues of International Humanitarian Law – Private Military and Security Companies, Sanremo, 6–8 September 2012) 1.

Companies, should be enumerated and formal, binding responsibilities should be levied upon them.

Most of the existing legal guidelines like UNCLOS, the Montreux Document and UN Security Council Resolution 2316[38] either do not apply to private entities or do not regulate the general activities taken up by such private companies at sea. The Montreux Document is not directly relevant to situations of piracy and armed robbery in the maritime domain and does not provide sufficient guidance for Private Maritime Security Companies.[39] Activities at sea are far more complex than on land and clarification on, inter alia, the applicability of self-defence, the responsibility of masters and ship owners, flag status, rules of engagement, the use of force and transportation of weapons is needed.[40]

The Montreux Document Forum was established in 2014 to discuss implementation and problems arising in the employment of Private Military and Security Companies. The consultations and deliberations amongst nations were supposed to help solve the problems not directly addressed by the Montreux Document, thus making the application thereof more efficient. Foreseeing disputes regarding Private Military and Security Companies at sea, a Working Group on the use of Private Military and Security Companies in maritime security (hereafter Maritime Working Group) was initiated.[41] This group sat together for the first time in 2018 to deal with interpretation of the Montreux Document and the needs of law and policy in the maritime sphere with regard to Private Maritime Security Companies. Work is in progress to develop a legal framework for Private Maritime Security Companies within the guidelines of the Montreux Document.[42]

**B. International Maritime Organization**

The International Maritime Organization (IMO) has, for years, taken multiple stances on the issue of access to weapons for private personnel and their legality, discouraging the carrying and usage of firearms for the protection of a ship or individual at sea.[43] Currently, it only raises a duty of care for the flag State to ensure that violence does not escalate through armed personnel in a ship, and the applicable law has always been complied with.[44] Private Maritime Security Companies have captured the market so influentially that it became crucial to determine minimum agreed performance standards for the conduct, liability and responsibility of their Private Contracted Armed Security Personnel (PCASP). It began with the issue of piracy in Somalia, affecting the shipping community in all regions surrounding the Gulf of Aden, the Arabian Sea and the Northern Indian Ocean. The IMO suggested numerous basic ways to protect ships, including razor wires, water spray, foam

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38 United Nation Security Council Resolution 2316 (9 November 2016) UN Doc S/RES/2316; OHCHR Human Rights Resolution 2005/2 (7 April 2005) E/CN.4/RES/2005/2; UNGA Human Rights Council Resolution 15/26 (7 October 2010) A/HRC/RES/15/26.

39 IMO 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1443.

40 Natalino Ronzitti, 'Regulating and Monitoring the Privatization of Maritime Security' (35th Round Table on Current Issues of International Humanitarian Law – Private Military and Security Companies, Sanremo, 6–8 September 2012).

41 Montreux Document Forum, 'The Montreux Document Forum is Launched' (*MD Forum,* 16 December 2014) <mdforum.ch/mobile/news/2014-12-16.html#:~:text=Dec.,16%2C%202014&text=The%20Montreux%20Document%20Forum%20(MDF,increase%20support%20for%20the%20initiative> accessed 4 August 2020.

42 Montreux Document Forum, 'Working Group on the use of private military and security companies in maritime security (Maritime Working Group)' (*MD Forum,* 29 November 2018) <mdforum.ch/pdf/2018-11-29mdf_maritimeworkinggroup_chairssummary_29-november-2018.pdf> accessed 4 August 2020.

43 IMO 'Piracy and Armed Robbery against Ships' (2009) MSC.1/Circ.1334 23.

44 IMO 'Piracy and Armed Robbery against Ships' (2015) MSC.1/Circ.1333/Rev.1.

monitors and armed Private Maritime Security Companies.[45] The circulation entitled 'Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia' laid responsibility on the employment of Private Maritime Security Companies for conducting risk assessments of individual merchant ships with due approval of the flag State.[46] Moreover, it did not endorse or recommend the usage of the armed Private Maritime Security Companies but suggested it as an additional layer of insulation to prevent any harm to the ships.[47] Hence, Private Maritime Security Companies are not an alternative to best management practices, but a part of these, which has been reiterated several times in documents issued by IMO.[48]

The 'Revised Interim Guidance To Shipowners, Ship Operators And Shipmasters On The Use Of Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area'[49] came subsequently to the 'Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area'[50] to revise and fill the void in the guidelines governing the legitimate transport, carriage and use of firearms. It is noted that the IMO circulars MSC.1/Circ.1443 and MSC.1/Circ.1406/Rev.2[51] mention that flag State has jurisdiction and thus any laws and regulations imposed by the flag State concerning the use of Private Maritime Security Companies apply to their ships. Furthermore, it is also important to note that port and coastal States' laws may also apply to such ships.[52] In addition, it includes the procedure for reporting the use of force, the criterion of risk assessment and management of firearms and ammunition from embarkation to disembarkation.[53]

Subsequently, the 'Recommendations for Flag States Regarding the use of Privately Contracted Armed Security in High Risk Area' expanded the earlier guideline but failed to evaluate all the legal issues that might arise while deploying PCASP on ships.[54] However, it did attend to the responsibilities of the flag States, which should provide clarity to masters, seafarers, ship-owners, operators and companies with respect to national policies

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45 IMO 'Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia' (2011) MSC.1/Circ.1339, section 8.

46 IMO 'Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia' (2011) MSC.1/Circ.1339, section 4.

47 IMO 'Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia' (2011) MSC.1/Circ.1339.

48 IMO 'Revised Industry Counter Piracy Guidance' (2018) MSC.1/Circ.1601.

49 IMO 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1405/Rev.2.

50 IMO 'Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1443.

51 ibid; IMO 'Revised Interim Recommendations For Flag States Regarding The Use Of Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area' (2012) MSC.1/Circ.1406/Rev.2.

52 IMO 'Revised Interim Recommendations For Port And Coastal States Regarding The Use Of Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area' (2012) MSC.1/Circ.1408/Rev.1.

53 IMO 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1405/Rev.2.

54 IMO 'Revised Interim Recommendations For Flag States Regarding The Use Of Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area' (2015) MSC.1/Circ.1406/Rev.3, Annex para 3.

on the carriage of armed security personnel.[55] Moreover, compliance with all relevant requirements of flag, port and coastal States was made necessary.[56]

In light of Circulars 1405 and 1406 issued by the IMO, the Standards for Private Maritime Security Company (also known as SAMI) Accreditation Programme was established for the accreditation of Private Maritime Security Companies.[57] It lays down a detailed assessment to check upon the credibility and suitability of Private Maritime Security Companies, assessing their accountability and providing a track record of their previous misconducts. The evaluation follows a three-tiered approach, beginning with the assessment of the financial, legal and insurance status of the Private Maritime Security Companies. Then, once the earlier stage has been cleared, it consists of valuing the company's infrastructure, including physical verification of the premise system and their documents. Lastly, the Private Maritime Security Companies' personnel are evaluated on a pre- and post-operational basis to check on their background, conduct, knowledge and skills.[58]

The IMO 'Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' help in assessing the management, staff and operations conducted by Private Maritime Security Companies. The port and coastal States are major facilitators of firearms and security-related equipment which may be linked to the use of force, hence this lacuna was filled and the need to make national laws and policies to curb such activities was emphasised by these guidelines. The rules governing embarkation, disembarkation and situations which may arise during porting and voyaging in the High Risk Area when carrying PCASP were also addressed, suggesting a need for uniform guidelines.[59] Further, an attempt to effectively regulate Private Maritime Security Companies was also made with the IMO 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', which envisaged the legal obligation of the company towards the flag State, the Private Maritime Security Company's home State and the territorial/transit State.[60] Although the guidelines were not legally binding, they provided for the minimum standards to be followed by companies and by the selectors before employing any Private Maritime Security Companies.

The 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' marked the missing standardisation in governing the PCASP and assisted in opening the forum for questions on the certification process of any Private Maritime Security Company. A proper solution to piracy can be worked out by employing PCASP who are well-regulated. For the better functioning of PCASP, they could be employed through a

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55 ibid.

56 IMO 'Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1406/Rev.2.

57 SAMI, 'Standards for Private Maritime Security Company (PMSC) Accreditation' (*SAMI*, 2011) <psm.du.edu/media/documents/industry_initiatives/sami_standard_executive_summary.pdf> accessed 21 July 2019.

58 ibid.

59 IMO 'Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1443.

60 IMO 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1408/Rev.1.

documented procedure, and a standard framework could be laid down to enable the shipowners to make an informed decision between competing Private Maritime Security Companies.

The Private Maritime Security Companies must at all times have an understanding of the law applicable to them, which is influenced by the location of an incident and/or the nationality of the ship, the companies and the individuals employed by them.[61] The master and the PCASP team should sign an undertaking that they have read and understood the rules concerning the use of force and that the use of force will be reported and a record will be maintained about the same. Finally, basic rules for vetting, training and selection of PCASP teams for better deployment and success are suggested, in order to have consistent standards for employment.

### C. International Humanitarian Law

The Geneva Conventions and their first Additional Protocol are applicable in situations of armed conflict of an international character.[62] They also contain, in their Common Article 3, obligations and rights of the High Contracting Parties when the conflict is of a non-international character. There is no rule or practice which allows derogation from IHL by any corporation.

IHL specifically applies in times of conflict between two or more High Contracting Parties.[63] As discussed earlier, the status of Private Military and Security Companies' employees under IHL can be that of civilian, combatant or mercenary depending on the part they take in hostilities. The prime function of the private military security company is to accompany the armed forces of a State and provide logistical support in times of conflict. Article 4(4) of Geneva Convention III provides that people who accompany the armed forces, such as suppliers or contractors, will be provided the status of Prisoner of War, provided that those people are equipped with IDs authorised by the armed forces.[64]

The application of the Geneva Conventions and their Additional Protocols to Private Military and Security Companies begins when their personnel start taking part directly in hostilities. When the conflict is of an international character, the Private Military and Security Company's employees will be qualified as combatants.[65] If the Private Military and Security Company's members start taking part in hostilities, they will become part of a military object and all the rights and obligations of the members of the armed forces will be applicable to them. However, when the conflict is of a non-international character, Common Article 3 of the Geneva Conventions would be applicable even to the Private Military and Security Company's employees taking direct part in hostilities.[66] Persons captured during a non-international armed conflict would be subject to the national laws of that country.

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61 IMO 'Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (2012) MSC.1/Circ.1443 25.

62 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 1929, revised 12 August 1949) 75 UNTS 135 (Geneva Convention I), art 2; Additional Protocol I (n 20) art 1.

63 Geneva Convention III (n 21) art 2.

64 Geneva Convention III (n 21) art 4.

65 Additional Protocol I (n 20) art 43.

66 Geneva Convention III (n 21) common art 3.

Furthermore, in case of an international armed conflict, people who are not taking direct part in hostilities are protected with civilian status.[67] The status of civilian ceases only when a member is inflicting actual harm upon a member of the rival armed forces,[68] though a clear definition of direct participation in hostilities is not given. Private Military and Security Companies hence do not generally take direct part as their role is restricted to mere service providers.

One of the functions of Private Maritime and Security Companies which function at sea is to guard and protect ships from acts of piracy. Here, a pertinent question arises which is whether the collection of intelligence data also amounts to taking part in hostilities. Guarding and other security activities do not, per se, fall under the domain of direct part in hostilities. Article 52(2) of Additional Protocol I, which has become a customary international obligation,[69] suggests that the target of an attack should only be military objectives. Military objectives are those objects which are making an effective contribution to the military action.[70] This brings a new debate on whether private contractors protecting army bases, barracks and other facilities would be deemed to be taking direct part in hostilities. On this note, the US Air Force Commanders Handbook provides some clarity and states that Private Military and Security Companies would not be protected under the status of civilian when they function as guards for army bases, barracks or military objects, and thus would not be immune from direct attack.[71]

The training of Private Military and Security Companies depends on their status as members of the armed forces. If Private Military and Security Companies are not treated as members of the armed forces, then the application of Geneva Convention III also comes into consideration. Article 127(2) of Geneva Convention II,[72] and Article 144(2) of Geneva Convention IV,[73] provide that any authority who assumes the responsibility to protect persons in times of war must comply with the Convention. The term 'other authorities' has not been defined, thus Private Military and Security Companies can fall within the ambit of the Convention if they are hired with responsibilities to protect persons.

Private Military and Security Companies are specifically governed with the help of the Montreux Document.[74] In regard to the maritime perspective, the Second Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea would be applicable to Private Maritime Security Companies. This Convention applies during times of conflict between land and naval forces.[75] Article 12 of Geneva Convention II provides protection to members of armed forces or *other members* who are wounded, sick or shipwrecked at sea.[76]

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67 Additional Protocol I (n 20) art 50.

68 Y Sandoz et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff 1987) art 51.3 para 1944.

69 Jean-Marie Henckaerts, *Customary International Humanitarian Law* (Cambridge University Press 2005) 31.

70 Additional Protocol I (n 20) art 52(2).

71 Department of the Air Force of the United States 'Commander's Handbook on the Law of Armed Conflict' Air Force Pamphlet 110–34 (25 July 1980) 2–2.

72 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (adopted 12 August 1949, entered into force 12 August 1949) 75 UNTS 85 (Geneva Convention II) art 127(2).

73 Geneva Convention IV (n 22) art 144(2).

74 Marie-Louise Tougas, 'Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (2014) International Review of the Red Cross 305–358.

75 Geneva Convention II (n 72) art 4(2).

76 Geneva Convention II (n 72) art 12.

In the case of Private Maritime Security Companies, performing security functions would not cause them to come under the ambit of armed forces but as *other members*. Hence, any member of the Private Maritime Security Company who is wounded, sick or shipwrecked during the conflict must be provided with the protection and rights enshrined in Geneva Convention II. Additionally, members of Private Maritime Security Companies have the right to private self-defence if they are not taking part in hostilities. Thus, they are allowed to attack and protect themselves in response to an attack by pirates or another contracting party.[77] Therefore, Private Maritime Security Companies can fall within the scope of the Geneva Conventions if the conflict is between two High Contracting Parties and is of an international or non-international character.

### D. ISO PAS 28007: Part 1 – Guidelines for Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board Ships (and Pro Forma Contract)

The International Standard Organization (ISO) pilot project, ISO/PAS 28007,[78] has emerged as a standard for States, service providers and service users to ascertain the credibility and professionalism of any Private Maritime Security Company. Approval is given when international standards, human rights standards and relevant laws and regulations are abided by. The guidelines provided are applicable to Private Maritime Security Companies providing PCASP.[79]

The guidelines are inclusive of rules on the rights and liabilities of flag States and coastal States and regulations for the licensing of the Private Maritime Security Companies deploying PCASP. Moreover, a register must be maintained for interested parties and stakeholders relevant to the functioning of the organisation, considering, inter alia, their perceptions, values, needs and risk tolerance. This is done to foster consultation and deliberation amongst clients and service providers. Further, the scope of 'security' is defined, with a clear and distinct management system. A high level of commitment and competence is expected out of the employees of the Private Maritime Security Companies at all times.

### E. Part 2 – The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force

The Model Set of Maritime Rules for the Use of Force (RUF) sets out situations under which the use of force as self-defence against piracy, armed robbery or hijacking is permissible,[80] as the Geneva Conventions and military guidelines do not apply to the private sector. The purpose of the RUF is to set the mandate to be followed for the lawful use of force and to increase the threshold of liability for such use of force. RUF was drafted in conjunction with IMO Circulars and ISP PAS 28007, as well as in coherence with the international laws prevalent in the current times. In situations of actual or perceived threat,

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77 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 51.

78 International Organization for Standardization 'Guidelines for Private Maritime Security Companies (PMSC) Providing Privately Contracted Armed Security Personnel (PCASP) On Board Ships (And Pro Forma Contract)' (2015) ISO/PAS 28007.

79 International Organization for Standardization 'Guidelines for Private Maritime Security Companies (PMSC) Providing Privately Contracted Armed Security Personnel (PCASP) on Board Ships (and Pro Forma Contract) – Scope' (2015) ISO/PAS 28007.

80 Human Rights at Sea 'The 100 Series Rules of the use of force (RUF)' (May 2013) (hereafter RUF), Rule 103.

the use of force requires detailed risk assessment, which has been addressed in the RUF,[81] though no comprehensive standard operating procedures are laid down by it. The division of decision-making power between PCASP and the master of the ship has not been sufficiently clarified. Fundamental principles are laid down in the document and it is lucidly stated that the right to individual self-defence shall not be derogated from by any means. The principles of reasonable and necessary use of force are upheld.[82] To reduce casualties, the reduction of probability in order to avoid confusion in the nature of the threat perceived is advocated.[83] Further, at all times, all available information must be noted and considered, hence reducing liability for incorrect decision making or delayed communication of facts.[84]

The rules from 100 to 103 in the RUF differ in accordance with increased threat; the application and degree of lawful force which may be applied is increased on par with the potential attack. All the rules provide for the intimation of the use of force and several measures of deterrence to prevent conflict. In the event of the absence of the team leader, fellow members of the PCASP must suggest to the master of the ship that they must invoke the rules of use of force under actual, perceived or threatened attack by third parties.[85] Moreover, in case of craft showing behaviours or signs of being a potential threat, non-kinetic warnings must first be displayed, of which a non-exhaustive list has been provided in the document. Display of, but not use of, weaponry is permitted.[86] Arms can be used to deter the craft against an actual, potential and perceived attack and, further, their usage may only be from an assessed safe distance around the attacker/potential attacker's threatening craft.[87] If all other RUF measures fail then the last resort remains the use of force when attack is imminent and it becomes necessary to save lives and the ship.[88] The force must be reasonable and necessary, hence the use of force as self-defence becomes legitimate in such circumstances.[89]

## F. GUARDCON

GUARDCON is a standard contract when making use of security services in the maritime zone. It is not a shortcut to due diligence but it tends to increase the standards which security companies must attain, in terms of insurance cover for their risks and permits and licences to allow them to lawfully transport and carry weapons.[90] Moreover, it rules out the possibility of a smaller company participating in such a contract, due to rigorous requirements.

GUARDCON is an agreement between the owner of the vessel and the security contractors, where authorities delegated with any responsibility for the vessel is said to be done on the owner's behalf, and this agreement can be used for the employment of both armed and non-armed guards. The applicability of this contract is not only for High Risk Areas but as agreed upon in the contract. The security service regulations require a

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81 ibid Scope, para 3.

82 ibid Rule 103.

83 ibid Fundamental Principles, para 14.

84 ibid Fundamental Principles, para 15.

85 ibid Rule 100.

86 ibid.

87 ibid Rule 102.

88 ibid Rule 103 Note 3.

89 ibid Rule 103.

90 BIMCO 'GUARDCON: Standard Contract for the Employment of Security Guards on Vessels: Explanatory Notes' (2017) V1.4 24-02-2017.

minimum employment of four guards, which can be lowered under extreme circumstances. Additionally, all reasonable care and skill must be employed by the contractor.[91] The authority of the master in matters concerning the ship is unquestionable, but they may heed to advice in the context of security from the security guards employed. The contract makes the security service agencies traceable and records their liabilities so that insurance and relevant documents are easily available if necessary.

The obligations of the contractors are explicitly mentioned, distinguishing between the owner and the contractor. For example, in case of sick personnel, the carrying and repatriation of such personnel ashore is the responsibility of the owner of the ship, whereas the cost for this transportation and carrying home is the contractor's responsibility.[92] The agreement provides bare minimum standards such as personnel having training in first aid, and group leaders having prior experience of this,[93] but this does not overpower the due diligence mechanism to check the guards and their abilities. Moreover, subcontracting must be done in liaison with the owner of the ship.[94]

The owners of the ship do not have many obligations except monetary responsibility.[95] The master's obligation is one of a nascent character. Though the supremacy of the command of the master is undoubted, he or she is required to respond to the invoking of the RUF by the team leader of the security guards, and in the absence of the master the officer of watch is required to fulfil this obligation.[96] The decision to use force lies with the guards themselves and the master has no role or liability.[97] The master has authority to stop the firing at all times,[98] but not to start it, as it is done in adherence to the RUF Rules.

In the event of hijacking, the responsibility is to stop the hijacking by all reasonable means, and if the contrary occurs then the loss cannot be held against the contractors. The crew members at this point include the security guards, and the ransom if asked is levied on the owner and not the contractors. The permit and licenses include requirements for both the owners and the contractors, with the obligation to indemnify each other if there is failure to comply.[99] The motive behind such failure to abide by laws is generally to carry illegal weapons. Lastly, liabilities are mutually distributed with a duty to indemnify each other on failure to perform the contractual obligations.[100] GUARDCON guidelines are very wide and cover all sorts of employees, whereas ISO PAS 28007 is specifically designed for the Private Maritime Security Companies deploying PCASP. Hence, GUARDCON covers extensive responsibilities and liabilities applicable while contracting with Private Maritime Security Companies for any services on board.

## IV. Conclusion

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91 BIMCO, 'GUARDCON' (*BIMCO)* <bimco.org/contracts-and-clauses/bimco-contracts/guardcon> accessed 4 August 2020.

92 BIMCO 'GUARDCON: Standard Contract for the Employment of Security Guards on Vessels' (2012), clause 12.

93 ibid clause 6(b)(ii).

94 ibid clause 6(d).

95 ibid clause 7.

96 ibid clause 8(b).

97 ibid clause 8(c).

98 ibid clause 8(d).

99 ibid clause 9.

100 ibid clause 15(b).

It cannot be denied that the UN recognises the existence of Private Military Security Companies and uses them in order to meet the goals of peace and international cooperation. Private Military and Security Companies are shadowing almost all major functions performed by the State, although their status is not yet uniform, consistent or clear. This paper was an attempt to analyse various legal frameworks which cover the functioning of Private Military and Security Companies, especially Private Maritime Security Companies which function at sea. However, there is no universal policy or framework for the functioning of Private Maritime Security Companies. In this situation, the liability and responsibility of Private Maritime Security Companies is a major question and is hard to resolve even with the aid of general principles of international law and existing soft laws.

Specific laws guiding Private Maritime Security Companies must be drafted, keeping in mind the roles they can and are taking up at the sea. There exists a void in terms of standards for professionalism, keeping in mind human rights and international humanitarian law for Private Maritime Security Companies. Although several initiatives have been taken in making the levels at which Private Maritime Security Companies function more uniform, via pro forma contracts and good practices, there is a need for a global body for intervention in cases of breach by Private Maritime Security Companies, regulation of arms and ammunition at sea, extradition of wrongdoers and redress of the grievances of victims affected by wrongdoings of Private Maritime Security Companies.

An attempted draft Convention on Private Military and Security Companies still awaits acceptance and confirmation by the international community. The draft contains provisions guiding non-outsourcing of necessary State functions, regulation and monitoring of works by Private Military Company Security Companies. It also suggests amendment of domestic laws as per the Convention for better implementation, extradition and transfer of proceedings. Another feature of the draft is the enhancement of responsibilities on States to comply with relevant rules and be responsible for the acts of Private Military and Security Companies operating and registered under their laws.[101] Uniform laws will deter smuggling of illegal weapons and violations of international laws by Private Military and Security Companies.

The fundamental principles of the UN Charter are upheld in the draft Convention by providing for non-intervention clauses, respect for State sovereignty and human rights for all. Remedies, duties and liabilities have been mentioned regarding issues with Private Military and Security Companies, but not all possible situations are analysed, leaving loopholes within the framework contemplated to be explored by Private Military and Security Companies. The document also lacks the comprehensiveness in laws required for different situations such as the functioning of Private Military and Security Companies at sea, on land and in the air. It is the need of the hour to deal with the legality of the functioning of Private Maritime and Security Companies, and the State responsibilities entailed, before there is more contravention of the principle of non-use of force and violations of human rights at sea.[102]

It is suggested to draft a convention which must include adequate provisions addressing all the ambiguities of the functions and liabilities of Private Military and Security Companies, also relevant to their operational base: land, air or sea. Uniform draft contracts and background databases can be sanctioned as formal steps for the usage of

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[101] UNHRC 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council – Annex' (2010) UN Doc A/HRC/15/25.

[102] ibid.

Private Military and Security Companies. A temporary tribunal to address the conflicts arising due to the acts of Private Military and Security Companies can be proposed to interpret the draft convention, enhance jurisprudence and hold wrongdoers accountable. This will accelerate the remedial process and will act as a deterrent to wrongdoers. The use of Private Military and Security Companies does not seem to be lessening; instead, their ambit is evolving to cover even sea routes. Hence, effective steps must be taken for their proper handling and to hold them responsible for breaches. First, the function of Private Military and Security Companies must be strictly outlined and subsequent laws must be made in accordance with international laws for their employment and formation. Secondly, it is suggested that the status of members of Private Military and Security Companies must be clarified for their usage in times of war and peace. Thirdly, the liability of the individual companies and States must be dealt with in separate heads. All three suggestions should be dealt with comprehensively. The law regarding Private Military and Security Companies must be codified, especially for those employed at sea, to pave a way for peace and love among nations. Good practice must be taken into account to establish standard practice. Keeping in mind the objectives of the UN Charter, it is necessary to harmonise the end results of any change occurring in our global set-up. Policies and reforms to regulate Private Military and Security Companies and Private Maritime Security Companies will be a step towards the realisation of one such objective.

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