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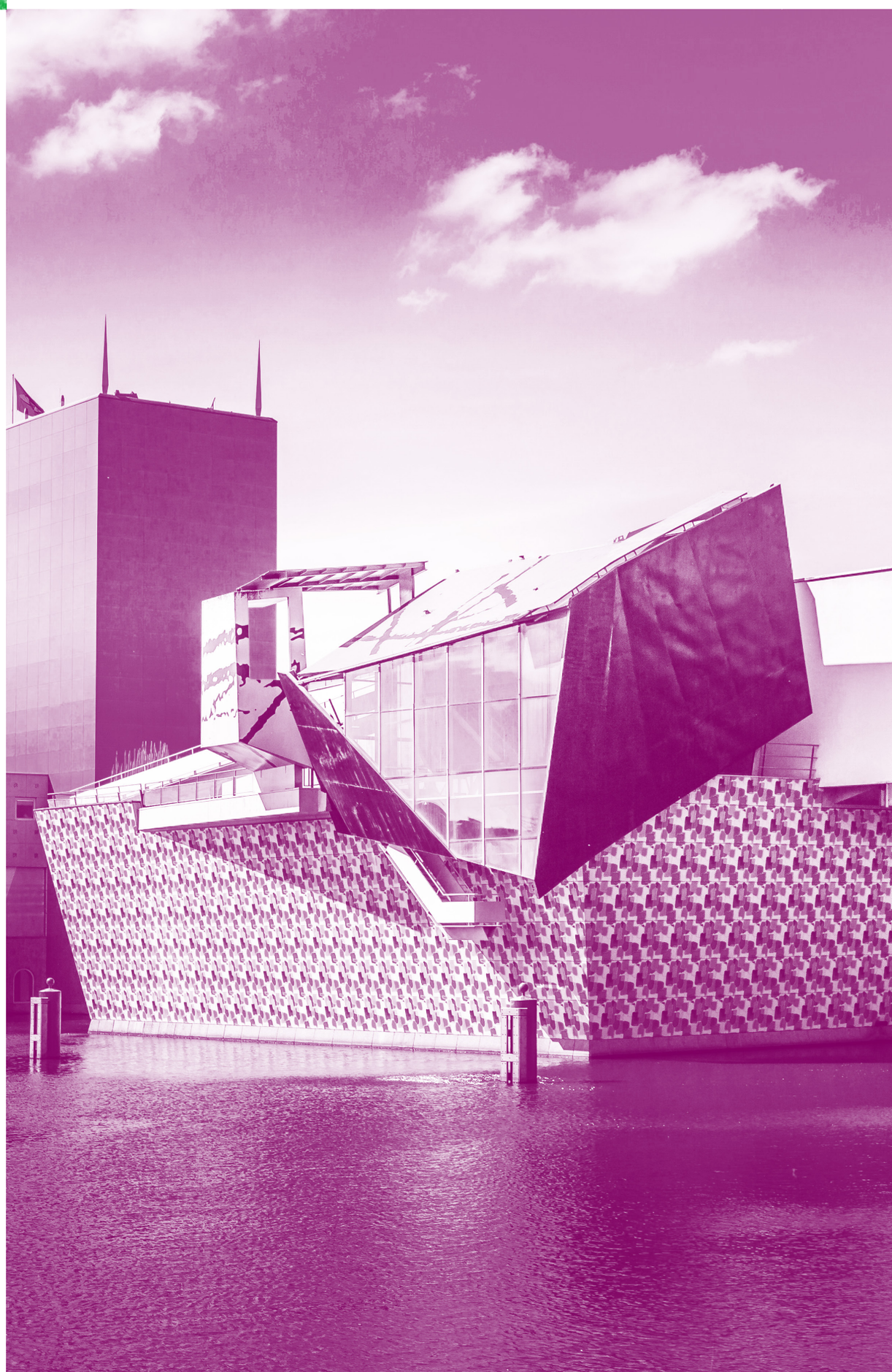

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EDITOR-IN-CHIEF'S AND PRESIDENT'S NOTE

Dear reader,

Hereby we would like to proudly introduce 1st Issue of the 9th 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 9(1) presents you with several articles on the various topics of International Law. All of the articles have been peer-reviewed. The editorial team worked very hard on them and thus our Publishing Director Medes Malaihollo has created an overview of the articles and the basic concepts they are discussing.

Ramat Tobi Abudu's article reviews piracy in the Gulf of Guinea and evaluates piracy and human rights law from the victims' perspective (seafarers, crew members and masters of the ship), the suspects (the arrested pirates) and the state with a general evaluation of the global requirement. In doing so, the findings of this article set a new course for building a sustainable approach to piracy at sea by balancing rights and security approaches towards ensuring the protection of lives at sea.

Subsequently, Kawser Ahmed addresses in what way the name of a state can be an additional element of statehood, a matter that has not been extensively touched upon by previous legal scholarly work. According to Ahmed, the name of a state concerns the most appropriate indicator of a state's identity which is linked to the establishment of a state as a legal entity. By analysing practice regarding the name and naming of states, it becomes apparent that the importance of a state's name cannot be overestimated.

In her article on international crimes in a digital age, Chiraz Bilhadj Ali provides an insight into the advantages and challenges shaped by social media when it comes to the investigation and prosecution of international crimes in international criminal law. She also suggests a legal change to accommodate the digital age. The creation of a special chamber within the International Criminal Court that has a specific and exhaustive protocol might be a fundamental and initial step for the evolution of the legal framework and fulfilment of the existing legal lacuna.

Ana Costov and Jessica Appelmann deal with an often-neglected issue in international law: the legal framework applicable to the use of Antarctic ices to satisfy the increasing demand for freshwater. By presenting the legal framework applicable to iceberg water exploitation and discussing the possible future developments in this area, Costov and Appelmann pinpoint where the legal regime may be lacking, what may be the competing claims that this may lead to and what normative considerations may be taken into account in the future when clarifying this legal regime.

Malina Greta Meret Gepp analyses the doctrine of Responsibility to Protect in the context of the August 2017 situation in Myanmar when thousands of Rohingya had to flee from the alleged genocide taking place in their home, northern Rakhine in Myanmar. By

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exploring the root causes of the alleged genocide, the legal status of the R2P and various options open to the international community to protect the Rohingya, the author discusses the potential application of the doctrine of Responsibility to Protect and to what extent this doctrine can be used to save the Rohingya from the atrocities committed.

In their article on human rights and space, Danielle Ireland-Piper and Steven Freeland discuss in what manner international human rights frameworks could apply to space activities. In doing so, they advance a dialogue on the intersection between space law and human rights and explain that human activity in space has significant impacts on the advancement of human rights. Whereas the contemporary legal frameworks on international human rights law apply extra-terrestrially, there is still room for more specific frameworks addressing the nexus between human rights of human activities in outer space.

Vugar Mammadov analyses the implementation of Article 19 of the Convention on the Rights of Persons with Disabilities in community settings in Estonia. With the help of the case study of the Maarja Kula organisation, the author illustrates both the current situation in community settings and how Estonian experiences can shift the development of independent living and deinstitutionalisation of other non-European Union member states of Eastern Europe.

Emmanuel Sarpong Owusu addresses how human rights and environmental law abuses by multinational corporations are currently addressed in international law. Given the nature of this topic, the author adopts an infra-national legal approach, focussing on how domestic law has been used to substitute international legal enforcement. As such, this article attempts to critically explore, and navigate, the extent to which the existing regulatory frameworks have been effective in holding multinational corporations accountable for their environmental and human rights-related transgressions.

Tamta Zaalishvili covers the right to asylum and the non-refoulement rule in the context of international law. By highlighting the current ambiguity surrounding the refugee protection regime, Zaalishvili showcases how that affects international corporations and burden- and responsibility-sharing on refugee matters. This lack of a coherent international understanding substantiates the premise that there is a dire need for the creation of a common understanding of these rules to effectively protect the rights of asylum seekers and refugees.

Finally, Agata Zwolankiewicz illustrates that the two branches of international economic law, namely international investment law and trade law, are currently in crisis. The investor-state dispute settlement system has been criticised in recent years and the current dispute settlement of investment disputes could benefit from particular modifications. In this article, Zwolankiewicz discusses the investor-state dispute settlement system and the proposal of a multilateral investment court, by analysing the prism of successes and failures of the WTO dispute settlement system.

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.

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Moreover, we personally would like to thank each Board Member for their great dedication and work on this issue.

Happy reading, stay safe and healthy!

Kyrill Ryabtsev
Editor-in-Chief
Groningen Journal of International Law

Reet Varma
President
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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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A Human Rights View of Maritime Piracy Law: Exploring the Gulf of Guinea

Ramat Tobi Abudu*

DOI: 10.21827/GroJIL.9.1.1-22

Keywords:
UNCLOS; HUMAN RIGHTS LAW; GULF OF GUINEA; NIGERIA; PIRACY LAW

Abstract

As a result of pirates' unique *modus operandi* in the Gulf of Guinea (GoG), the current approach to counter-piracy is mainly securitised and repressive. This approach follows the international provisions on piracy framed based on the customary international law categorising pirates as "enemy of mankind"; which, considering the vicious nature of the crime, is quite justified. Moreover, the increase in piracy activities at sea within the GoG is foreseeable considering the economic recession faced by countries within the region due to the Covid-19 pandemic. This prediction calls for the strengthening of law enforcement operations at sea, which must be justifiable in international human rights law in order to ensure the protection of all persons. Thus, reviewing the current piracy laws and their coherence with international human rights law is a requisite. This paper recognises the repressive counter-piracy approach's success, but takes a glance from a human rights lens, which raises questions relating to "lawfulness". Consequently, this paper builds on the existing literature criticising the repressive policy towards countering piracy in the GoG. It also advances the research probing the alignment of counter-piracy operations with human rights obligations. This paper additionally takes it a step further by evaluating the piracy laws in the GoG and their alignment with human rights provisions. These findings set a new course towards a more sustainable approach to countering piracy in the GoG, balancing rights and security approaches towards ensuring the protection of lives at sea.

I. Introduction

There is a well-founded fear that the aftermath of the Covid-19 pandemic will welcome more vicious pirate attacks due to global and national economic recession.[1] Although global piracy has plummeted since 2018 due to the current proactive international counter-piracy operations carried out by both states and organisations, there are still concerns for the sustainability of the existing legal and operational measures. The initial epicentre for piracy was the Horn of Africa and the Gulf of Aden, which was overrun by Somali-based pirates, but currently, that area records no cases of piracy. The present epicentre is the Gulf of Guinea (GoG). While it has always been infiltrated by Nigerian pirates, the cases in the GoG have persistently increased in the last five years. The current *modus operandi* of pirates in the GoG differs from that in the Gulf of Aden. Therefore, there is a need to investigate the region's specificity in addressing the crime of piracy. It is, however, beyond the scope of this paper to consider all the areas infiltrated by pirates.

In this paper, international piracy law refers to the United Nations Convention on Law of the Sea (UNCLOS) and the Convention for the Suppression of Unlawful Acts

[1] Brandon Prins, 'Piracy is on the rise, and coronavirus could make it worse' (*World Economic Forum*, 15 May 2020) <https://www.weforum.org/agenda/2020/05/global-sea-piracy-coronavirus-covid19/> accessed 18 July 2021.

Against the Safety of Maritime Navigation (SUA Convention).[2] National and regional piracy laws replicate the international level provisions with a few differences, reflected in this paper. Using the GoG as a case study, this paper evaluates the questionable aspects of the current regional and domestic anti-piracy law for their non-alignment with international human rights law standards. Considering that these regional and domestic laws depict international provisions, this paper argues that the problem exists *ab initio* from international law and questions these provisions.

In outlining the above submission, after briefly reviewing the nature of piracy in the GoG, this article analyses the current regional and domestic legal framework on piracy in the GOG. The next section of the paper first argues that the nature of the maritime environment influences how courts interpret human rights law and law enforcement operations at sea. Yet, there are still gaps in consideration of these operations, which regardless violates the right to liberty. Subsequently, the section evaluates piracy and human rights law from the victims' perspective (seafarers, crew members and masters of the ship), the suspects (the arrested pirates) and the state with a general evaluation of the global requirement. This part of the paper mostly makes reference to the European Court of Human Rights (ECtHR) cases because of the Court's progressive jurisprudence in interpreting human rights law at sea compared to other courts.

After the above section, the author discusses the reality of building a sustainable approach to piracy at sea. A strategy that focuses on protecting all human lives at sea through human rights law and security-based policies. It is beyond the scope of this paper to provide a framework for sustainable counter-piracy policy and operation. However, the author offers a blueprint from pre-existing materials. Consequently, the conclusion gives an overview of the findings by recounting three questions in the paper and ultimately suggests further research to build this much-needed sustainable approach to countering piracy at sea.

II. Case Study: Gulf of Guinea

The Gulf of Guinea (GoG) is part of the Atlantic Ocean off the western African coast and is considered the Earth's geographic centre.[3] The GoG includes both oil-producing and potentially oil-producing states along the coast of West Africa, Central Africa and Southern Africa. Therefore, piracy in the GoG poses a threat to global energy security. The region encompasses over a dozen countries, namely Angola, Benin, Cameroon, Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo (DRC), Equatorial Guinea, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Nigeria, Republic of the Congo (Congo-Brazzaville), São Tomé and Príncipe, Senegal, Sierra Leone and Togo.

The International Maritime Bureau's Piracy Reporting Centre (IMB PRC) records an increase in global piracy. In 2020, the IMB recorded 195 incidents of piracy and armed robbery against ships, compared to 162 incidents in 2019.[4] This rise is attributed to

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[2] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1984) 1833 UNTS 3 (UNCLOS); See also Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 222 (SUA Convention).

[3] Kennedy Mbekeani and Mthuli Ncube, 'Economic Impact of Maritime Piracy' (2011) 2(10) African Development Bank, <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Maritime%20Piracy_Maritime%20Piracy.pdf> accessed 18 July 2021.

[4] ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships' (Report, January 2021) <https://www.icc-ccs.org/reports/2020_Annual_Piracy_Report.pdf> accessed 18 July 2021.

increased piracy and armed robbery in the GoG, accounting for 95% of the crew members kidnapped globally.[5] Conversely, no Somalia-based piracy cases were recorded in 2020, but the threat of events still exists in the Southern Red Sea and Gulf of Aden's waters, including Yemen. Aside from the increase in piracy in West Africa, there was also an increase in piratical activities in Southeast Asia, and 2020 saw a significant rise in kidnappings in the Singapore Strait.[6]

GoG piracy is not the traditional paradigm of Somalia-based piracy; it is a hybrid of conventional and insurgent piracy. Although Somali pirates operated with considerable skill and resolve, aided by sophisticated criminal networking, their *modus operandi* still fits into the paradigm of traditional piracy.[7] In this context, the pirates hijack a ship and require a ransom payment negotiated for the ship's release. East Africa's piracy crisis has ceased due to a combination of international, national and privately contracted security personnel, including reforms to the regional judicial system.[8] The GoG presents a different scenario, with its hybrid of traditional and insurgent piracy. Unlike Somalia, pirates in West Africa frequently disable a ship's equipment and take control of the ship - this model requires combating piracy and other consequently related crimes.[9] Instead, Somali pirates concentrate on kidnapping for ransom, capturing vessels and controlling their cargo and crew to extort money from their shipowners.

The GoG pirates launch attacks primarily from Nigeria to steal cargo, equipment or valuables from a vessel and its crew. [10] The kidnapping of crew members happens, albeit rarer than in the Indian Ocean. Yet, the levels of violence are high because the GoG pirates are less concerned with maintaining the wellbeing of hostages.[11] The causal factors contributing to piracy in the GoG are: "legal and jurisdictional weakness, favourable geography, conflict and disorder, underfunded law enforcement, inadequate security, permissive political environments, cultural acceptability, and promise of reward".[12] The key drivers of piracy are poverty, unemployment, lack of economic opportunities, environmental conditions and political corruption. Other drivers are the domestic conflicts and border disputes between GoG countries that fuel piratical activities in the GoG. For instance, some Nigerian pirates relate to the separatist Movement for the Emancipation of the Niger Delta (MEND). Although the Federal Government gave amnesty to the MEND group, they rebelled for politically motivated reasons, and it is unclear if it comes within the treaty definition of piracy.[13] Still, their violence against foreign-flagged vessels mimicked piracy attacks. A border dispute on the Bakassi Peninsula between Cameroon

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5 ibid.
6 ibid.
7 Kamal-Deen Ali, 'Anti-Piracy Responses in the Gulf of Guinea: Addressing the Legal Deficit' in Carlos Esposito et al (eds), *Ocean Law and Policy : Twenty Years of Development Under the UNCLOS Regime* (Brill Nijhoff 2016) 211.
8 ibid.
9 ibid.
10 ibid 213.
11 ibid 211.
12 Eero Tepp, 'The Gulf of Guinea: Military and Non-Military Ways of Combatting Piracy Baltic Security and Defence' (2012) 14 Baltic Security and Defence 181, 182.
13 UNCLOS (n 2) art 101(a) provides that piracy is "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft." The wording for 'private ends' is disputed within the international community: it is unclear if this includes political motivations or not; See Arron N Honniball, 'Private Political Activists and The International Law Definition of Piracy: Acting for 'Private Ends' (2015) 36 Adelaide Law Review 279, 279-328; Honniball argues that private ends includes private politically motivated crimes that involves violence.

and Nigeria led to large areas of their maritime borders being under-governed, allowing a haven to develop for pirate groups.

Piracy in GoG is a "symptom of a deeper malaise" but also a disease itself.[14] Yet, both the root causes and the security concern posed by piracy must be dealt with simultaneously to ensure a sustainable solution building upon peace, justice and strong institutions. The reality is that these root causes prevalent in developing countries turn people towards piracy, while weak law enforcement and corruption allow piracy to flourish in the GoG. Therefore, there must be a balanced solution to piracy – including in the GoG– which involves an all hands-on deck approach. There are various bilateral, regional, national and extra-regional regimes to combat piracy and armed robbery at sea in the GoG; nonetheless, they are only repressive. Nigeria is the only country in the GoG with an anti-piracy law. However, other countries have some security-focused rules embedded in their criminal codes. This gap in legislation affects the effective prosecution of the offence of piracy within the GoG and, in turn, affects the effectiveness of counter-piracy operations.

Nevertheless, the current legal regime in maintaining security in the GoG ranges from hard law to soft law. The only binding African Union regime is the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter).[15] The other is a soft law document titled Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa (Yaoundé Code of Conduct) specifically for the GoG.[16] There are also several international operational initiatives to combat piracy in the GoG. In 2013, the international community established the G7++ Friends of the Gulf of Guinea (G7++ FOGG), with the G7 states together with Belgium, Denmark, the Netherlands, Norway, Portugal, Spain, Switzerland (and Brazil as an observer) and international bodies (the European Union (EU), the United Nations Office on Drugs and Crime and Interpol) as members of the initiative. The G7++FOGG initiated co-operation with the oil and shipping industry and Economic Community of Central African States (ECCAS) and Economic Community of West African States (ECOWAS) to support the Yaoundé Code of Conduct implementation. Another initiative is the reporting mechanism operated by the French and UK navies called the Maritime Domain Awareness for Trade in the GoG (MDAT-GoG). This mechanism allows shipmasters to report their presence in the GoG and report any occurring incident to signal a warning to other ships. In 2016, the EU launched the GoG Inter-Regional Network (GoGIN), covering 19 GoG states, aimed at improving maritime security in the GoG, mainly by establishing an effective and technically efficient regional information-sharing network.

In 2020, the plummet in the national economy of most West African states due to the coronavirus pandemic presented the potential for increased pirate activities in the

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[14] Freedom Onuoha 'Piracy and Maritime Security in the Gulf of Guinea: Trends, Concerns, and Propositions' (2013) 4 The Journal of the Middle East and Africa 267, 270-74; See also Paul Williams and Lowry Pressly, 'Maritime Piracy: A Sustainable Global Solution' (2013) 46 Case Western Reserve Journal of International Law 177, 184.

[15] African Union regime is the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) (adopted October 15, 2016) < https://au.int/sites/default/files/treaties/37286-treaty-african_charter_on_maritime_security.pdf> accessed 1 September 2021.

[16] Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa (adopted March 13, 2013) (Hereinafter referred to as "The Yaoundé Code of Conduct) <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf accessed 1 September 2021.

GoG.[17] The real fear is whether the current legal and operational framework is sufficient to combat the predicted increase in piratical activities. Currently, several GoG states are adjusting their national budget. Pigeon and Moss argue that if Nigeria's budget constraints curtail the "government's ability to sustain its demobilisation and reintegration programs for former combatants in the Delta, history suggests piracy and armed robbery may rise".[18] Besides, regional and international co-operation in the GoG might be affected considerably given the pandemic's impact on nations. For example, in March 2020, the Italian Navy stepped in for a French naval mission deployed to the GoG to support regional counter-piracy operations after it was recalled to France.[19] Although the volunteer action by the Italian Navy is commendable, it might not be sustainable for all states in the long run, considering the global economic impact of the coronavirus pandemic.[20]

III. Regional Anti-Piracy Law: Yaoundé Code of Conduct

The United Nations Security Council (UNSC) adopted Resolutions 2018 and 2039 in October 2011 and February 2012 respectively.[21] This, among other things, encouraged states of the ECOWAS, the ECCAS and the Gulf of Guinea Commission (GGC) to fashion a comprehensive strategy through the development of domestic laws and regulations, where these are not in place, criminalising piracy and armed robbery at sea; the development of a regional framework to counter piracy and armed robbery at sea, and the development and strengthening of domestic laws and regulations, as appropriate, to implement relevant international agreements addressing the safety and security of navigation, in accordance with international law. [22]

After adopting these resolutions, ECOWAS, ECCAS and GGC member-states convened the Cotonou Joint Ministerial Conference on Maritime Security in the Gulf of Guinea held in March 2013 to draft a regional strategy. The Cotonou conference participants set a summit in Yaoundé Cameroon for the 24th and 25th of June in 2013. The summit with the theme of Maritime Security in the GoG brought together twenty-five countries from the GoG to formalise the adoption of an integrated response to a comprehensive security challenge in the region. The majority endorsed the documents drafted during the Cotonou Conference at the Yaoundé Summit, known as the Yaoundé Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, otherwise known as the Yaoundé Code of Conduct of June 2013.[23]

The Yaoundé Code of Conduct is a non-legally binding document aimed at addressing piracy, armed robbery against ships, illegal fishing and other illicit maritime activity in the area. This document came out of the need to step up the continent's strategic approach towards maritime safety and security. Moreover, it is part of the increasing

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17 Maisie Pigeon and Kelly Moss, 'Why Piracy Is a Growing Threat in West Africa's Gulf of Guinea' (*World Politics Review,* 9 June 2020) <https://www.worldpoliticsreview.com/articles/28824/in-west-africa-s-gulf-of-guinea-piracy-is-a-growing-threat> accessed 18 July 2021.

18 ibid.

19 Martin Manaranche, 'Italian Navy Deploys Frigate to The Gulf of Guinea While French Navy Suspends Patrol Mission' (*Naval News*, March 29 2020). <https://www.navalnews.com/naval-news/2020/04/italian-navy-deploys-frigate-to-the-gulf-of-guinea-while-french-navy-suspends-patrol-mission/> accessed 18 July 2021.

20 Pigeon and Moss (n 17).

21 See UNSC Res 2018(2011) (31 October 2011) UN Doc S/Res/2018(2011). See also UNSC Res 2039(2012) (29 February 2012) UN Doc S/Res/2039(2012).

22 The Yaoundé Code of Conduct (n 16) Preamble, Recital 2.

23 Ken Ifesinachi and Chikodiri Nwangwu, 'Implementation of the Yaoundé Code of Conduct and Maritime Insecurity in the Gulf of Guinea' (2015) 5 Research on Humanities and Social Sciences 54, 57.

commitment of African leaders to express political will and set the leadership tone in the governance of Africa's maritime domain. Accordingly, Article 2 (1) (a) of the Code of Conduct states that the Signatories intend to fully cooperate in the repression of transnational organised crime in the maritime domain, maritime terrorism, IUU fishing and other illegal activities at sea.

Compared to the SUA Convention,[24] the Yaoundé Code of Conduct explicitly provides that measures taken according to Code should be carried out by law enforcement or other authorised warships or military aircrafts.[25] Therefore, unlike the SUA Convention, the Code of Conduct applies to warships. Furthermore, Article 1(3) of the Code of Conduct reiterates piracy under Article 101 UNCLOS, while Article 1(4) defines armed robbery at sea following the International Maritime Organization (IMO)'s definition. Accordingly, it reiterates the geographical limitation of the piracy definition under UNCLOS, including the private ends and two ships requirements, [26] which some consider a gap problem affecting the prosecution of pirates.[27] But these gaps are supplemented by laws to prosecute other offences such as armed robbery at sea.

The main provisions dealing with piracy and armed robbery at sea are Articles 6 and 7. Article 6 requires full cooperation between the member states in carrying out enforcement and adjudicatory functions such as arresting, seizure of pirate ships, investigating and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy. However, a profound requirement omitted in the SUA Convention but included in the Yaoundé Code of Conduct is that member states cooperate to rescue ships, persons, and property subject to piracy.[28] This provision recognises that pirate attacks induce distress and gives rise to the duty to assist persons or vessels in distress (Article 98 UNCLOS). An occurrence of distress means the existence of a risk to life.[29] The protection of the right to life is fundamental to the enjoyment of all other human rights, which informs other human rights.

Nonetheless, international law does not recognise the right to life as a corresponding right to the duty to assist persons in distress at sea. Trevisanut argues that the right to be rescued at sea is the corresponding right derived from the positive obligation on states to protect life.[30] From a sceptical point, Papastavridis agrees with Trevisanut's view only to the extent that it applies within the normative framework of human rights law and cannot be transposed into the law of the sea (as a matter of *lex lata*).[31] Accordingly, the right to be rescued at sea cannot find its basis in the law of the sea— as it is mainly focused only on the state's duty rather than the right of persons in distress. Also, the protection of such rights requires an individual and state-oriented redress system like the human rights courts and other monitoring and enforcement mechanisms, unlike the solely state-oriented redress mechanism under the law of the sea.

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24 SUA Convention (n 2).

25 The Yaoundé Code of Conduct (n 16) art 3.

26 See United Nation Conference on Trade and Development (UNCTAD), 'Maritime Piracy: An overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy' (2014) 2 Studies in Transport Law and Policy.

27 Waseem Ahmad Qureshi, 'The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself' (2017) 19 San Diego International Law Journal, 95.

28 The Yaoundé Code of Conduct (n 16) art 6(1)(c).

29 Yoshifumi Tanaka, 'Key Elements in International Law Governing Places of Refuge for Ships: Protection of Human Life, State Interests, And Marine Environment' (2014) 45 Journal of Maritime Law and Commerce 157, 160

30 Saline Trevisanut, 'Is there a right to be rescued at sea? A constructive view' (2014) 4 Questions of International Law 3, 7.

31 Efythimous Papastavridis, 'Is there a right to be rescued at Sea? A skeptical view' (2014) 4 Questions of International Law 17, 20.

Article 6(4) the Code points out that consistent with international law, the signatory's courts that carry out a seizure may decide upon the penalties to be imposed and may also determine the action to be taken against the ship or property. However, the issue is that international law does not prescribe the content of national criminal proceedings for piracy, i.e., penalties and actions against piracy. Criminalisation is subject to national laws of the state deciding the piracy case, which ranges from fines/imprisonment, life sentences and the death penalty. Consequently, transferring or delivering a piracy suspect to another adjudicating state with strict sentencing such as a death penalty/life imprisonment can raise human rights concerns.

The Code of Conduct focuses on developing and promoting training and educational programmes to maintain safety and order at sea to repress piracy.[32] At the national level, the Code of Conduct requires states to develop and implement national maritime security policies, committees and plans to safeguard and enhance maritime transport from all unlawful acts.[33] Following the Yaoundé Code of Conduct, the signatories created maritime safety and security architecture in the GoG (Yaoundé Architecture). The Yaoundé Architecture comprises the Interregional Coordination Centre (ICC), the coordination and information-sharing structure that connects the Regional Maritime Security Centre for Central Africa (CRESMAC) and the Regional Maritime Security Centre for West Africa (CRESMAO).

Underneath the regional CRESMAC and CRESMAO levels, the maritime security architecture in the GoG is made up of five operational maritime zones (A; D; E; F; G) covering the ECOWAS and ECCAS maritime space, each co-ordinated by a Maritime Multinational Coordination Centre (MMCC). The various zones and their coastal states are Zone A (Angola, Congo DRC), Zone D (Cameroon Equatorial Guinea, Gabon, Sao Tome & Principe), Zone E (Benin, Niger, Nigeria, and Togo), Zone F (Ghana, Burkina Faso, Guinea, Côte d'Ivoire, Liberia and Sierra Leone), Zone G (Cabo Verde, Gambia, Guinea-Bissau, Mali, and Senegal). At the national level, Maritime Operational Centres (MOC) envisaged in each country gather the main stakeholders connected to states action at sea (maritime police, customs, fisheries and environment protection) and the national navies in charge of the coordination.

The Yaoundé Code of Conduct has a repressive approach towards piracy in the GoG, which has led to securitisation measures by the Signatories to the document. These securitisation measures are "cross border and regional naval acquisitions, international naval training and assistance programmes, increased naval interventions in pirate attacks, heightened naval patrols and vessel security measures, employment of local armed security, use of extra-watch duty, reinforcement of ships self-defence and use of citadel safe rooms."[34] However, the securitised approach is not optimal and, therefore, incapable of addressing a sustainable basis—states carry out such measures without equal consideration of the coastal communities' socio-economic development.[35] Thus, the reason why this "repressive approach has been implicated in the rising spate of these illegal maritime activities" in the GoG.[36]

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[32] The Yaoundé Code of conduct (n 16) art 14.
[33] The Yaoundé Code of Conduct (n 16) art 4.
[34] Ifesinachi and Nwangwu (n 23) 63.
[35] ibid, 63; See also Ramat Tobi Abudu, 'Global Human Security: A Cornerstone in Bridging the Divide Between Securitisation and The Human Rights Maritime Security Framework' (2020) 4 Edinburgh Student Law Review 27.
[36] Ifesinachi and Nwangwu (n 23) 63.

IV. Domestic Anti-Piracy Law: The case of Nigeria

The oil development influences maritime piracy in Nigeria, and the resulting economic, social, and environmental conditions in the Niger Delta.[37] Nigeria is the first and currently the only country as of 2020 in the GoG region to pass a standalone anti-piracy law. Nigeria's Suppression of Piracy and Other Maritime Offences Act 2019 (POMO Act) aims to prevent and suppress piracy, armed robbery, and any other unlawful act against a ship, aircraft including fixed and floating platforms. It also gives effect to UNCLOS and the SUA Convention and its Protocol. The POMO Act's strengths are, among others, its definition of piracy, which is in line with UNCLOS, and its specific punishments for violations.

One main challenge with the POMO Act is its lack of clarity on the various security agencies' roles and responsibilities in dealing with piracy. Section 17(1) and (2) of the POMO Act mandates the Nigerian Maritime Administration and Safety Agency (NIMASA) to coordinate all maritime activities and security, including "to prevent and combat piracy, maritime offences and any other unlawful acts prohibited by this Act". Even though the Armed Forces Act of 1993 makes Nigeria's Navy responsible for enforcing safety in Nigerian waters, including the Exclusive Economic Zone (EEZ) – The POMO Act makes no mention of NIMASA and the Navy's relationship.[38] Furthermore, NIMASA is not the only authorised agency. Section 17(3) of the POMO Act provides that the law enforcement and security agencies be responsible for gathering intelligence, patrolling waters, and investigating offences. Unfortunately, the POMO Act does not provide which law enforcement agencies are responsible for the functions under Section 17(3). Accordingly, the Institute for Security Studies points out that "oversight may deepen inter-agency rivalry", and thus affecting the national co-operation to deal with piracy in the GoG.[39] Nonetheless, the Nigerian government designed a Harmonised Standard Operating Procedures on arrest, detention, and prosecution of vessels and persons in Nigeria's maritime environment (HSOP) to guide the operation of maritime law enforcement agencies and adequately address the overlap of responsibilities between various agencies.

Furthermore, the POMO Act operates independently of other land-based domestic laws that influence piracy at sea. This includes laws governing firearms, kidnapping and money laundering. Usually, piracy proceeds are connected to illicit financial activities and document fraud; therefore, it is crucial to deal with related crimes.[40] Also, as an organised crime, piracy is linked to the trafficking of guns, illicit drugs, trafficking and smuggling of people and fuel smuggling. Yet, the POMO Act does not address the procurement of pirates' weapons, the recruitment of pirates, and those who provide pirates with safe-havens. In Kenya, for instance, the anti-piracy law covers other related crimes like money laundering and organised crime.[41]

The POMO Act's final challenge is that it did not reference the Yaoundé Code of Conduct, which is the only viable document — albeit not legally binding — that enables co-operation to deal with piracy in the GoG. The inclusion of the Yaoundé Code in the

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[37] Tepp (n 12) 186.

[38] The Armed Forces Act 1993, Section 1(4) <https://www.ecoi.net/en/file/local/1041285/4765_1465378595_armed-forces-act.pdf> accessed 18 July 2021.

[39] See Maurice Ogbonnaya, 'Nigeria's anti-piracy law misses the mark' (*Institute for Security Studies*, 7 May 2020) available at <https://issafrica.org/iss-today/nigerias-anti-piracy-law-misses-the-mark> accessed 18 July 2021.

[40] ibid.

[41] The Merchant Shipping Act (2009) arts 369 and 371.

POMO Act would have strengthened the document's effectiveness and transitioned it from soft law into hard law. The omission of the Yaoundé Code of Conduct which supports regional co-operation signifies Nigeria's stance in counter-piracy cooperation in the GoG.

V. Private Maritime Security Contractor

Private maritime security onboard foreign vessels largely contributed to reducing piracy attacks in the Gulf of Aden (including the Somali territorial waters).[42] Unfortunately, most West African states prohibit the use of private security within their territorial waters. Nigeria has taken a particularly aggressive stance against any use of private security; going so far as to apprehend ships making use of private security within their EEZ.[43] As a result, the only legal options available to shipping companies seeking to bolster their defences are security companies sanctioned by the state or national forces such as the navy or marine police.[44] Such limitation makes transiting external private armed security personnel through the GoG almost impossible, increasing the risk of pirate attacks. As discussed further below, the growing international standard and practice of using private security personnel might presumably influence the stance in the GoG. Currently, various soft law regimes govern this thriving practice.

There are some non-legally binding guidelines to regulate the use of force by private security personnel in their defence against pirates.[45] IMO points out that the use of privately contracted maritime security personnel onboard a merchant ship or fishing vessel is a matter for the flag state to determine in consultation with shipowners, operators and companies.[46] All legal requirements of flag, port and coastal states should be met before the private armed contactor(s) boards the ship.[47] Also, the UN Firearms Protocol, a legally binding agreement that entered into force in 2005, contains clauses that allow states to authorise the movement of firearms through their domestic legislation.[48] Through the UN Firearms Protocol, states can transit privately armed security providers or Military Vessel Protection Details (VPDs) to protect commercial vessels.

However, the role of private armed security appears to be limited to defending persons/cargo and not the arrest of pirates or the seizure of their ships. Article 107

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42 Gregory DeAngelo and Taylor Leland Smith 'Private security, maritime piracy and the provision of international public safety' (2020) 60 Journal of Risk and Uncertainty 77, 77-97.

43 The Armed Forces Act (n 38) Section 1(4).

44 Kyle Best, 'The Development of Piracy Law in West Africa & the Institutions Underpinning Counter-Piracy Efforts' (2015) 3(10) International Human Rights Internships Working Paper Series, 7 <ihri_wps_v3n10-kyle_best.pdf (mcgill.ca)> accessed 31 August 2021.

45 'Interim Guidance to private maritime security companies providing contracted armed security personnel on board ships in High-Risk Area' (*International Maritime Organisation*) <https://www.imo.org/en/OurWork/Security/Pages/Private-Armed-Security.aspx> accessed 18 July 2021; See 100 Series Rules: An international Model Set of Maritime Rules for the Use of Force <https://www.humanrightsatsea.org/wp-content/uploads/2015/04/20130503-100_Series_Rules_for_the_Use_of_Force.pdf> accessed 18 July 2021; See also BIMCO, 'Guidance on Rules for the Use of Force by Privately Contracted Armed Security Personnel (PCASP) in Defence of Merchant Vessel (MV0)' <https://www.bimco.org/-/media/bimco/contracts-and-clauses/contracts/guidance/guidance-on-rules-for-the-use-of-force-ruf-2016-09.ashx> accessed 18 July 2021.

46 IMO, 'Piracy and Armed Robbery against Ships: Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships' (2019) MSC.1/Circ.1334, para 63 (use of privately contracted armed security personnel).

47 ibid.

48 Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 31 May 2001, entered into force 3 July 2005) 2362 UNTS 208 art 3(e).

UNCLOS provides that "seizure on account of piracy may be carried out only by warships or military craft or vessels clearly marked and identifiable as being on government service and authorised to that effect". Accordingly, under Articles 101 and 107, private security guards could be classified as suspected pirates if they took on the role of arresting pirates or seizing their ships.[49] Yet, it is unclear if this limitation extends to military personnel contracted as private security officials.

There is no international treaty on the immunity of the VPDs from prosecution by a third state, albeit the Arbitral Tribunal in the *Enrica Lexie* case has set a precedent on the immunity of military VPDs at sea.[50] Therefore, they are not subject to any other state's criminal or civil law. However, the private armed guards are not immune from criminal or civil liability. The immunity of VPDs might influence their acceptance as security guards of vessels transiting high-risk areas that constitute states' territorial seas/EEZ.

VI. International Human Rights Law

International human rights law applies during the arrest, detention, transfer or delivery of piracy suspects.[51] Suspected pirates are entitled to humane treatment, consisting of the absence of arbitrary detention, the right to be brought promptly before a judge, the right to a fair trial, freedom from transfer/delivery to a country that will apply the death penalty and conflict with fundamental human rights. Also, the seafarers, crew members and master of a ship are entitled to the right to life which creates an obligation on states to protect, respect and fulfil the right to life of persons within their jurisdiction. Furthermore, Article 98 UNCLOS recognises states' duty to assist persons in distress at sea. The duty of the coastal state is to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring states for this purpose".[52] One can construe the phrase "search and rescue services regarding safety on and over the sea" to apply to deal with piracy activities – that is, state coordinated operations to rescue seafarers and crew members of an attacked ship. Although this is an unexamined deduction, it is plausible because of the implicit link between Article 98 UNCLOS and the right to life, considering its primary object and purpose is to protect human lives at sea.

The presence of competing jurisdictions in anti-piracy operations also means various human rights law instruments are at play. Concerning counterpiracy activities at the GoG, the human rights instruments discussed below are the International Covenant on Civil and Political Rights (ICCPR),[53] the European Convention on Human Rights

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[49] Patrick Cullen and Claude Berube, *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (Taylor & Francis Group 2012).

[50] See Enrica Lexie Case (*The Italian Republic v the Republic of India*) (PCA Award) [2016] ICGJ 550 where two Italian marines providing government authorised Vessel Protection Detail (VPD) onboard the Italian tanker Enrica Lexie shot and killed two Indian fishermen. The two marines were subsequently arrested and detained by the Indian authorities. The Permanent Court of Arbitration (PCA) in the 2020 Award para 1094 decided that "Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines." <https://pcacases.com/web/sendAttach/13647> accessed 1 September 2021.

[51] Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill 2014) 157.

[52] UNCLOS (n 2) art 98(2).

[53] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

(ECHR),[54] and the African Charter on Human and Peoples Rights (ACHPR).[55] The discussion below looks at three perspectives: the suspected pirates, the victims and the state.

A. Maritime Enforcement Operations and Suspected Pirate's Right to liberty and security

Usually, the friction between human rights law and maritime enforcement operations flags concerns over state violations of human rights law. The problem emanates from interpreting the procedural rights and safeguards under the human rights framework and law enforcement operations at sea—specifically, the right to liberty and security.

The right to liberty and security is a fundamental right enshrined in various human rights instruments, national constitutions and domestic legislation.[56] This right entails the right to be brought promptly before a judge. For example, Article 5(3) ECHR provides that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to a release pending trial.[57]

The interpretation of the phrase "brought promptly before a judge" is beset with uncertainties when applied in the maritime context and is often violated by states during maritime law enforcement operations. For example, in *Ali Samatar and Others v. France,*[58] a dozen men armed with assault rifles and rocket launchers seized a cruise ship flying the French flag and took its crew hostage.[59] In reaction to this, the French Government obtained the consent of the Somali Transitional Federal Government (TFG) to enter into Somali territorial waters to take all necessary measures - including appropriate use of force.[60] The French Navy placed the applicants under their control before being put on a French military aircraft on 15th April, around 3 p.m. The plane landed in France on 16th April 2008, and the suspects were arraigned on 18th April 2008. The French Court held in favour of the French Government. However, the ECtHR overturned the judgment and held that the two days detention violated Article 5(3) ECHR. The Court ordered the release of the applicants, and the French Government had to pay damages.[61]

A similar situation happened in *Hassan and Others v. France.*[62] In this case, the ECHR unanimously held that there was a breach of Article 5(3), considering that the suspects were brought before a judge six days and sixteen hours after their detention in a Djibouti

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54 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 231.

55 African Charter on Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

56 See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 3; See also ICCPR (n 53) art 9; See also ECHR (n 54) art 5.

57 ECHR (n 54) art 5(3).

58 *Ali Samatar and Others v France* App no 17110/10 and 17301/10 (ECtHR, 04 December 2014).

59 ibid.

60 ibid.

61 ibid.

62 *Hassan and Others v France* App no 46695/10 and 54588/10 (ECtHR, 04 December 2014).

military base and subsequent transfer to France. Accordingly, the Court ordered the French Government to pay damages to the applicants.[63]

In *Rigopoulos v Spain*[64] and *Medvedyev v France,*[65] ships flying the Panamanian and the Cambodian flags, respectively, were intercepted on the high seas. In the *Rigopoulos* case, the Spanish Navy intercepted the Panamanian ship, while in the *Medvedyev* case, the Cambodian flagship was intercepted by the French Navy on suspicion of drug trafficking. In both cases, the Navy found vast quantities of drugs on board, some thrown overboard by the crew members. The crew members were taken into custody on the Navy ship, brought to a port of the arresting state, and later submitted to criminal proceedings. The time spent between boarding and arraignment before a judge was 16 days in the *Rigopoulos* case and 13 days in the *Medvedyev* case. In both cases, the crew members claimed that the state detaining them had violated Article 5(1) and Article 5(3) of the ECHR.[66]

In the above cases, the Court held a violation of Article 5(1) ECHR. In *Rigopoulos v Spain*, the Court stated that "the applicant was undoubtedly deprived of his liberty, since he was detained on a vessel belonging to the Spanish customs and that detention lasted for sixteen days."[67] In *Medvedyev v France,* the Court stated that:

> While it is true that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, so that there was a *de facto* restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage, the restrictions were relaxed. In the Court's view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces.[68]

However, in the above cases, the Court also held that there was no violation of Article 5(3) ECHR because it recognised in *Rigopoulous* and *Medvedyev* that only "exceptional circumstances" could justify such prolonged detention.[69] Therefore, the Court noted in the *Medvedyev* judgment that "it was materially impossible to bring the applicant "physically" before such authority any sooner."[70]

These cases demonstrate the relevance of the maritime environment in interpreting human rights. Nonetheless, these cases also highlight the possible challenges in harmonising human rights considerations with maritime law enforcement operations.[71] In *Medvedyev*, there are two parts of the dissenting opinion of the judges. In the first part: 7 out of the 17 judges jointly expressed the dissenting opinion that there was no violation of

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63 ibid.

64 *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999).

65 *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010).

66 ECHR (n 54) art 5(1) provides "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

67 *Rigopoulos v Spain* (n 64) para 9.

68 *Medvedyev v France* (n 65) paras 74-75.

69 ibid.

70 ibid para 67.

71 Brian Wilson, 'Human Rights and Maritime Law Enforcement' (2016) 52 Stanford Journal of International Law 243, 246.

Article 5(1) ECHR as there was a legal basis for the suspects' detention.[72] Article 5(1) (c) ECHR provides the legal basis for suspects' detention to bring them before the competent legal authority. But most of the Grand Chamber judges in *Medvedyev* held that the detained suspects' restriction on the arresting ship constituted a deprivation of liberty.[73]

In the second part: 8 out of 17 judges jointly expressed the dissenting opinion that there was a violation of Article 5(3) ECHR as "wholly exceptional circumstances" should not justify the unnecessary abridgement of fundamental human rights.[74] The main issue was that the phrase "wholly exceptional circumstances", similarly used in the *Rigopoulous* case, was too vague to form the basis for an exception. Moreover, this dissenting opinion did not recognise the maritime environment's nature as key in interpreting human rights at sea. Conversely, the remaining nine judges held a majority view: there was no violation of Article 5(3) ECHR.

In *Vassis and others v. France*, the issue was whether France violated the requirement of Article 5(3) ECHR based on the 18-day transit to the port and the following 48 hours upon arrival at the port. The French government submitted it was "materially impossible to physically bring the applicants before the judicial authority any more promptly", and upon arrival at the port, the delay was due to the "number of persons concerned and the need for interpreters for the different acts and steps in the proceedings."[75] The ECtHR held that the 18-day transit was not more than necessary. However, the 48 hours delay upon arrival was not justifiable. Based on this judgment, Wilson points out that the *Vassis* case creates a balance between human rights and maritime law enforcement because the Court took cognisance of the marine environment's nature.[76]

However, all these cases lay out how maritime enforcement operations can lead to a violation of Article 5(1) ECHR, the right to liberty– even though there is no violation of Article 5(3) ECHR.[77] In *Medvedyev,* even though the Government maintained that during the voyage, the restrictions on the suspects were relaxed, the Court found that "it does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces."[78] Similarly, in *Rigopoulous,* the Court held that the applicant was undoubtedly deprived of his liberty since he was detained on a vessel belonging to the Spanish customs and that detention lasted for sixteen days.[79] The former case was detention during a voyage to be brought before a judge, and the latter was detention upon a non-moving/subsequently moving vessel. In both cases, the detention was a problem.

The above raises a question concerning the arrest of the suspected pirates and their detention onboard a law enforcement vessel. Deprivation of liberty under the ECHR entails the spatial, coercion and time elements: when a state agent detains a piracy suspect on board a law enforcement vessel (spatial component), the suspect has no free will to leave

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[72] *Medvedyev v France* (n 65) joint partly dissenting opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou.

[73] ibid paras 74-75.

[74] ibid, joint partly dissenting opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi paras 5-7, expresses the view that the *Medvedyev* case is different from the *Rigopoulos* case as the circumstances of the case are different, as the delay explains the reason for the delay and does not justify it.

[75] *Vassis and others v France* App no 62736/09 (ECHR, 27 June 2013).

[76] Wilson (n 71) 267.

[77] Jim Murdoch and Ralph Roche, *The European Convention on Human Rights and Policing: A Handbook for Police Officers and other Law Enforcement Officials* (Council of Europe Publishing 2013), 48.

[78] *Medveyev v France* (n 65) para 74.

[79] *Rigopoulos v Spain* (n 64) para 8.

the ship (coercion element)[80] or when such a suspect is not brought promptly before the judge (time element).[81] Yet, it is not clear whether the existence of one element triggers deprivation of liberty, as seen in *Medvedyev*. State enforcement agents exercise a form of coercion to arrest the suspected pirates and detain the individuals to be brought before a judge onshore. Therefore, such operations might easily flout human rights requirements according to any or all the elements discussed. This deduction is not conclusive, seeing as the evaluation of deprivation is on a case-by-case basis. It only raises concerns over how best such operations can fulfil the procedural lawfulness of the right to liberty.

B. Arrest, Detention and Transfer of Piracy Suspect

Warships (the navy) or law enforcement vessels marked to conduct maritime enforcement operations carry out the arrest, detention and transfer of piracy suspects. Since piracy is a crime, criminal procedural laws are presumably applicable except otherwise provided in the individual states. For example, states in the GoG, such as Nigeria, have an administration of criminal justice laws (criminal procedural laws) that apply to the military. However, the criminal procedure law of countries like Denmark and Germany does not apply to their military.[82] Accordingly, such states participating in counter-piracy operations are not bound by their domestic criminal procedural laws. Although Criminal procedural law dictates the requirements for lawful deprivation of liberty such as arrest and detention, it is unclear if piracy laws meet such requirements under IHRL.

Article 105 UNCLOS gives all states the power to seize a pirate ship and arrest piracy suspects. Therefore, Article 105 UNCLOS provides a universal arrest warrant, although it is not clear if it fulfils the lawfulness of arrest for such counter-piracy operation. Article 107 UNCLOS gives the naval warships the power to conduct seizures on account of piracy, including the ability to board a vessel reasonably suspected of engaging in piracy.[83] Although reading all these provisions outlines the substantive lawfulness of the arrest, procedural legality is still needed as contained under human rights law. This need was the contention in *Medvedyev and others v France* where the Grand Chamber pointed out that none of the legal provisions relied on by the French Government afforded sufficient protection against the arbitrary violations of the right to liberty. The reasoning behind this was that "none of those provisions referred specifically to depriving the crew of the intercepted ship of their liberty or regulated the conditions of deprivation of liberty on board the ship."[84] This case relates to illegal drug trafficking, of which there is no universal jurisdiction compared to piracy at sea – thus, it arguably does not apply to counter-piracy operations. Though Article 105 of UNCLOS and various UNSC resolutions provide the legal authority to detain suspected pirates,[85] the lawfulness criteria relates to the "quality of the law" from an ECHR perspective.[86] According to the ECtHR, this includes "the existence of clear legal provisions for ordering detention, for extending detention, and for setting time limits for detention; and the existence of an effective remedy by which the

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80 Petrig (n 51) 157-165.

81 ibid 160-66; The concept of the time element is not settled but also regarded as relevant under the ECHR.

82 ibid 220-221.

83 UNCLOS (n 2) art 110.

84 *Medvedyev v France* (n 65) para 41.

85 Alice Priddy & Stuart Casey-Maslen, 'Counterpiracy under International Law' (Geneva Academy of International Humanitarian Law and Human Rights 2012) 34; The authors mention that "Article 105 of the LOS Convention, Article 19 of the High Seas Convention, and various UN Security Council resolutions provide the legal authority to detain suspected pirates."

86 *JN v The United Kingdom* App No 37289/12 (ECtHR, 19 May 2016) para 77.

applicant can contest the lawfulness and length of his continuing detention".[87] As a framework, UNCLOS does not state all these, but national laws or the operations' mandate should meet the criteria. Also, national laws authorising deprivation of liberty must be sufficiently accessible, precise and foreseeable in their application; otherwise, they are arbitrary.[88] Other components of the right to liberty and security under human rights law are the right to be informed at the time of arrest of the reasons for arrest; the right of detainees to be brought promptly before a judge or other judicial officers; and the right to be tried within a reasonable time.

Apart from aligning national piracy laws with human rights law, the counter-piracy operation's mandate must also align. An example is the notable EU Naval Force (EU NAVFOR) Somalia framework – Operation Atalanta (OA), the current military operation at sea conducted by the EU off the Horn of Africa and the Western Indian Ocean. The EU NAVFOR operation plan and the Council Joint Action (CJA) Operation Atalanta contains the OA's arrest and detention mandate- however, it is a non-public document.[89] Therefore, Petrig concluded that based on expert interviews, the CJA OA did not meet the lawfulness standard of Article 5 (1) of the ECHR and 9 (1) of the ICCPR.[90] Furthermore, as per the definition of transfer under Article 12 CJA OA regarding the detention and transfer of piracy suspects, persons "arrested and detained with a view of prosecution shall be transferred".[91] The wording "shall be transferred" implies that the suspects can be detained with a transfer in view but does not outline the procedural requirement for such detention.[92] Therefore, the legal basis for the lawfulness of a piracy detention pending transfer cannot be the CJA OA.

Even the Yaoundé Code of Conduct and the POMO Act addressing piracy in the GoG does not include provisions on the deprivation of liberty of piracy suspects. However, the HSOP, which coordinates maritime law enforcement in the Nigerian maritime domain and the GoG, has a human rights policy co-ordinating the arrest and detention of suspects. Paragraph 3 of the HSOP references the "procedural guarantees for investigation and prosecution", which includes "the right to be heard, the right to be informed of available remedies, the right of review by a competent authority, the right to representation by a legal practitioner of their choice, right to bail, and the right to appeal to a higher authority."[93] This provision appears to be a sufficient procedural basis in the context of "detention pending prosecution", looking at the deprivation of liberty in line with Article 9 ICCPR or Article 6 of the ACHPR. However, there is no mention of detention pending transfer of the suspect to a third country (the receiving state) – neither is there any mention of transfer proceedings. Moreover, the HSOP seems insufficient to provide such a justifiable basis as it is merely a "tool for administrative convenience".[94]

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87 ibid.

88 ibid, para 77; See *Nasrulloyev v Russia* App No 656/06 (ECtHR, 11 October 2007), para 71; See also *Khudoyorov v Russia* App No 6847/02 (ECtHR, 11 July 2005) para 125.

89 Petrig (n 51) 230.

90 ibid 233.

91 ibid.

92 ibid.

93 'Harmonized Standard Operating Procedures (HSOP) on Arrest, Detention and Prosecution of Vessels and Persons in Nigeria's Maritime Environment 2016' (January 2017) <https://www.naptip.gov.ng/wp-content/uploads/2017/05/Harmonized-SOP-on-Arrest-Detention-Prosecution-of-Vessels-Persons-in-Nigerias-Maritime-Environment-2016-1.pdf> accessed 19 July 2021.

94 Emeka Akabogu, Nigeria: Ship Detention Gone Rogue: A Critique of The "HSOP" For Ship Arrest And Detention (*Mondaq*, 22 February 2018) <https://www.mondaq.com/nigeria/marine-shipping/675910/ship-detention-gone-rogue-a-critique-of-the-hsop-for-ship-arrest-and-detention> accessed 19 July 2021.

Ultimately, the legal basis for the deprivation of liberty under the UNCLOS and SUA Convention does not meet the procedural requirements of lawful deprivation of liberty under the ICCPR, ECHR and ACHPR. However, due to piracy's dualistic nature, the international piracy law provides only the structure, while the national laws are the substantive/procedural legal basis for such arrest, detention and transfer. But some domestic legislation like the POMO Act does not provide for the detention pending transfer of piracy suspects to third states.

C. The Principle of Non-refoulement- Exception to Transfer, Delivery or Extradition of Piracy Suspects

The principle of non-refoulement prohibits removing a person to a state or territory where there are risks of facing torture, inhuman and degrading treatment.[95] Whether or not the reasonably expected risk of human rights violation occurs is irrelevant to this obligation on states.[96] Under international human rights law, neither the ICCPR, ACHPR nor the ECHR explicitly articulates this principle of non-refoulement. But the right to life and the prohibition of torture and other ill-treatment is often expanded to cover the *non-refoulement* obligation.[97] The scope and content of the *non-refoulement* duty in the human rights context are expressed as follows:

> No person shall be rejected, returned, or expelled in any manner whatever, where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows for no limitation or exception.[98]

Additionally, Article 3 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) provides that no state party shall "expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture".[99] This non-refoulement obligation applies irrespective of the offence a person has committed, i.e., no derogation is permitted – even for piracy suspects. [100]

In counter-piracy operations, the non-refoulement provisions apply extraterritorially based on the flag state principle (*de jure* jurisdiction) and when a suspect is on board a vessel in view of a decision to transfer or deliver him/her to a third state (*de facto* jurisdiction).[101] *Hirsi Jamaa v Italy* explains the scope of the non-refoulement obligation under the ECHR. In that case, the Court held that the Italian government's interception of migrants and immediately transferring them to Libya following a Memorandum of understanding (MOU) between both countries without assessing individual cases was a violation of the convention.[102] This case shows that individual assessment of each case is necessary before any form of transfer. Relating this to piracy cases, the validity of an

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95 Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 25.

96 ibid.

97 ICCPR (n 53) arts 6 and 7; See also ECHR (n 54) arts 2 and 3; See also ACHPR (n 55) arts 4 and 5.

98 Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Erika Feller et al (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 163.

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

100 Petrig (n 51) 321-29.

101 ibid 326; See also *Hirsi Jamaa and others v Italy* App No 27765/09 (ECtHR, 23 February 2012).

102 *Hirsi Jamaa and others v Italy* (n 101) paras 110-138.

immediate transfer decision is questionable, even if there is an existing MOU between those countries. Furthermore, the death penalty raises several serious human rights concerns and can be regarded as inhumane and degrading punishment. Although Article 6 (2) of the ICCPR allow for an exception for the death penalty in construing the right to life recognised by Article 3 of the 1948 Universal Declaration of Human Rights (UDHR), the death penalty should be only applied for the most severe crimes.

The extent of the application of the above instruments varies. On the one hand, the CAT does not apply to "surrender for prosecution" cases,[103] while the ICCPR and the ECHR do. On the other hand, even if the transfer is for prosecution, the transferring state must conduct a risk assessment of the detention center/ prison following the trial.[104] Also, looking at the ECtHR case law and recommendations from the Human Rights Committee (HRC), the transfer of piracy suspects by an ECHR state party to a country that punishes piracy with a death penalty or the risk of torture, ill-treatment etc., may be questionable given the risk of a human rights violation.[105]

State parties to the ECHR, ICCPR and ACHPR, guarantee upholding the rights of piracy suspects under their effective control during the time of arrest, detention and even transfer/delivery. However, the scope of jurisdiction varies from one human rights treaty to another. For example, in *Munaf v Romana*, the HRC observes that all that is necessary to prove jurisdiction is that the conduct which led to the violation was a "link in the causal chain".[106] Therefore, the ICCPR focuses on the state's conduct and its effect – meaning a decision to transfer will make the state transferring suspected pirates liable for human rights violation, even "post-removal" of the suspects.[107] This scope is similar to that of the ECHR− albeit the ECHR does not admit a cause-and-effect notion of jurisdiction like the ICCPR.[108]

D. Seafarers, Crew Members and Master of a Ship – The Right to Life

Article 4 ACHPR provides that every human being shall be entitled to respect for his life and his person's integrity. This right creates a positive obligation of state members to "deter the commission of offences against persons"[109] and updating laws and practices to conform with the international standard.[110] Consequently, African states must protect persons within their jurisdiction from piracy crimes according to international standards.

Article 6 (1) ICCPR provides that "every human being has the inherent right to life" - this right shall be protected by law - and no one shall be arbitrarily deprived of his life. The right to life requires states parties to "exercise due diligence to protect individuals' lives against deprivation caused by persons or entities, whose conduct is not attributable to the

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[103] Petrig (n 51) 338.

[104] ibid, 338-48.

[105] See *Soering v UK* App No 14038/88 (ECtHR, 7 July 1989); *Al-Saadoon and Mufdhi v the United Kingdom* App No 61498/08 (ECtHR, 2 March 2010); See also *Judge v Canada* Comm No. 829/1998 UN Doc CCPR/C/78/D/829/1998 (2003) para 10; HRC, 'General Comment No 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant' in 'Note by the Secretariat, Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9, para 12.

[106] *Munaf v Romania* Comm No. 1539/2006 UN Doc CCPR/C/96/D/1539/2006 (2009) paras 14.1-14.6.

[107] Petrig (n 51) 143.

[108] *Banković and others v Belgium and 16 other States* App No 52207/99 (ECtHR, 12 December 2001).

[109] Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009, para 147.

[110] General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia.

State".[111] This means states are required to take measures that protect people's lives within their jurisdiction from all "reasonably foreseeable threats".[112]

Similarly, Article 2(1) ECHR provides that "everyone's right to life shall be protected by law". In *Osman v United Kingdom,* the Court observed that:

> It must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[113]

The positive obligation is to protect people against reasonably expected risks from interpreting the right to life. Piracy is a "reasonably expected risk" in the GoG. Can the right to life create an obligation on states to protect seafarers, crew members and the master of a ship from deprivation to the enjoyment of their life by pirates?

On the one hand, piracy is a crime carried out on the high seas, and the flag state has exclusive jurisdiction on the high seas.[114] Accordingly, the flag state has *de jure* jurisdiction over the ship's affairs, including the duty to protect all the crew members' rights. However, piracy is a crime of universal jurisdiction – meaning every state can exercise their *de facto* jurisdiction (effective control) over persons and the situation. When states initiate the counter-piracy operation, they immediately exercise effective control over persons within their jurisdiction. It is unclear whether a distress call from a vessel that has been attacked by pirates creates a jurisdictional link between the persons in distress and the state (receiving the request).

On the other hand, piracy is an outward inward situation – for instance, piracy in the GoG.[115] Persons who are pirates on the high seas may be referred to as armed robbers in the territorial seas. The nature of the crime is the same, but the location differs. So, looking at Article 98 and 105 UNCLOS, it is arguable that the universal jurisdiction over the offence of piracy raises some form of obligation in protecting the lives of persons/ships at sea against pirates. Accordingly, protective measures need to be carried out throughout the navigation of a vessel. One such suggested measure is using private maritime security contractors to protect the unarmed civilians on board from pirates' whims and caprices.[116] Nonetheless, the issue of human rights at sea also views the phenomenon of private maritime security contractors as a "possible insecurity factor, leading to an increased level of violence and increased insecurity of people and goods at sea."[117]

The 2007 *Nisour Square* massacre incident provides a perspective for consideration. In this incident, a private military company (then known as Blackwater Security Consulting) contracted by the US government to protect US diplomats in Iraq was escorting a US embassy convoy, which led to the shooting of Iraqi civilians: killing 17 and

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111 HRC, 'General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018) UN Doc CCPR/C/GC/36, para 7.

112 ibid para 18.

113 *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) para 116.

114 UNCLOS (n 2) art 91.

115 Kamal-Deen Ali (n 7).

116 Williams and Pressly (n 14) 177.

117 Jasenko Marin et al, 'Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain' in Gemma Andreone (ed), *The Future of the Law of the Sea Bridging Gaps Between National, Individual and Common Interests* (Springer 2017) 192.

injuring 20 in *Nisour Square,* Baghdad.[118] These four security guards involved in the firefight were later convicted, one of first-degree murder and the other three for manslaughter.[119] In sum, the *Nisour Square* case shows the risk these private security agents pose to life, especially if not sufficiently regulated. Borrowing from Zedner's words, "this is not to say that private security provision can never conduce to the public good but alerts us to the ways in which private security activity alters, distorts, or transforms that public good".[120] Therefore, the international law regulating private security personnel needs to be further developed to clarify their roles, responsibilities and limitations.

Perhaps, the international community develops a special legal regime regulating private maritime security personnel. One can argue that Article 100 UNCLOS, which calls on all states to cooperate in the repression of piracy at sea in conjunction with the right to life, places the onus of protection on states to allow and facilitate private security services onboard. Such an argument seems plausible, but it is not conclusive because the *Enrica Lexie* case casts more doubts on private security safety. In that particular case, the Italian government submitted that the actions of the Indian authorities against the two Italian marines, whose duty was to authorise vessel protection detachments (VPD) onboard the Italian tanker *Enrica Lexie,* constituted a violation of their duty to cooperate in the repression of piracy under Article 100 UNCLOS.[121] The Arbitral Tribunal unanimously held that there was no such violation.[122] According to this decision, it appears that UNCLOS provisions alone are insufficient to act as a legal base to promote the protection of the right to life. Also, both parties before the International Tribunal on the Law of the Sea (ITLOS) put forward arguments on the consideration of humanity favouring their actions. There was no discussion about international human rights law, which would have given a detailed evaluation of the issue from a human rights perspective.[123] Perhaps, the outcome would have been different (not absolutely) if the right to life perspective was dealt with by ITLOS. Yet again, ITLOS or the Permanent Court of Arbitration (PCA) does not explicitly deal with human rights law as a basis for its jurisdiction. The other way to go about support for onboard armed security is using the flag state principle – the flag state must ensure the protection of every person's right to life onboard a vessel flying its flag. Yet, the practice of a flag of convenience makes it difficult for a state to guarantee protection to all ships flying its flag.[124]

VII. Building A Sustainable Approach to Piracy at Sea

A sustainable approach to piracy balances both right and security-based approaches. Such a view promotes the recognition of the rights of all persons under the law, i.e., the suspects, victims and state agents. Article 6 UDHR and Article 16 ICCPR provide that everyone has the right to be recognised as a person under the law. Looking at Article 16 ICCPR, the HRC has found that "intentionally removing a person from the protection of the law for a

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[118] Dara Lind, 'Why four Blackwater contractors were just now convicted of killing 17 Iraqi civilians in 2007' (*Vox*, 23 October 2014) <https://www.vox.com/2014/10/23/7047519/blackwater-trial-nisour-square-massacre-2007-guilty-convicted> accessed 19 July 2021.

[119] Dan Roberts, 'US jury convicts Blackwater guards in 2007 killing of Iraqi civilians' (*The Guardian*, 23 October 2014) <https://www.theguardian.com/us-news/2014/oct/22/us-jury-convicts-blackwater-security-guards-iraq> accessed 19 July 2021.

[120] Lucia Zedner, 'Too Much Security?' (2003) 31 International Journal of the Sociology of Law 155, 180.

[121] Enrica Lexie Case (n 50) paras 662, and 708-10.

[122] ibid para 1094 (B) (1) (d).

[123] *Enrica Lexie (Italy v India)* (Provisional Measures, Order of 25 August 2015) ITLOS Reports 2015, 182.

[124] Flag of convenience is a practice where ships fly the flags of other States which the ship owners register under to avoid financial charges or restrictive regulations.

prolonged period of time may constitute a refusal to recognise that person before the law."[125] Thus, not respecting the rights of every person, including piracy suspects rights, lead to more violation of human rights requirements. Therefore, Petrig argues that "the failure to perceive piracy suspects as subjects of the disposition procedure most notably in matters involving deprivation of liberty and their potential transfer for prosecution-amounts to a violation of various international individual rights with the procedural component."[126]

A comprehensive approach balances sovereignty, national security, and human rights law.[127] Experts in the field emphasised this need at the International Conference on Piracy in 2011 in relation to Somalian piracy, which is still relevant today.[128] They mentioned the need for an innovative global tool- such as an international court with a legal mandate on piracy- to deal with national boundaries and jurisdiction constraints. [129] In response to this suggestion, the Assembly of Heads of State and Government of the African Union on 27th June 2014 adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("Malabo Protocol"). The Malabo Protocol seeks to provide a tripartite jurisdiction over human rights, criminal and general matters within the remit of the proposed African Court of Justice and Human Rights (ACJHR). The Malabo protocol includes the crime of piracy within the jurisdiction of the ACJHR.[130] However, the Malabo protocol might be rendered ineffective due to the lack of capacity to maintain the Court and African states unwillingness to sign and ratify the instrument.[131]

Prosecution of piracy offences is currently only at the national level, meaning joint counter-piracy operations carried out by organisations such as North Atlantic Treaty Organization (NATO) still require transfers/delivery to prosecuting states. Thus, the operational framework of the NATO mission is criticised for following a "deter and disrupt strategy and operates a catch and release scheme".[132] Suppose states have no law to prosecute piracy offences. In that case, it leads to transfers during which states easily violate human rights law, making the courts question the legality of the whole maritime enforcement operation. Accordingly, another recommendation from the conference still relevant is the call for all states to fulfil their responsibility to successfully prosecute and

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[125] *Kimouche v Algeria* Comm No. 1328/2004, U.N. Doc. CCPR/C/90/D/1328/2004 (2007) para 7.8; See also *Grioua v Algeria* Comm No. 1327/2004, U.N. Doc. CCPR/C/90/D/1327/2004 (2007) para 7.8; See also *Aouabdia v Algeria* Comm No. 1780/2008, U.N Doc. CCPR/C/101/D/1780/2008 (2011) para 7.9.

[126] Petrig (n 51) 4.

[127] See UNSC Res 2383 (7 November 2017) UN Doc S/RES/2383 art 33, para 11 where the Secretary General points out that "the array of threats in the region makes clear the need for a comprehensive maritime security approach, and a key priority for the international community is to secure Somalia's maritime sovereignty and suppress piracy and other threats emanating from Somalia".

[128] Maximo Mejia et al, 'The Malmö Declaration: Calling for a Multi-Sectoral Response to Piracy' in Maximo Mejia et al (eds), *Piracy at Sea* (Springer 2013) 12.

[129] ibid.

[130] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July, 2008) (Malabo Protocol) art 28A(5) < https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf> accessed 1 September 2021.

[131] Sarah Nimigan, 'The Malabo Protocol, the ICC and the Idea of 'Regional Complementarity'' (2019) 17 Journal of International Criminal Justice 1005, 1028-1029.

[132] Petrig (n 51) 157; See also Frederick Lorenz and Laura Eshbach, 'Transfer of Suspected and Convicted Pirates' in Michael Scharf et al (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (Cambridge University Press 2015) 154.

punish the universal crime of piracy, regardless of where it is committed with due regard to international human rights law.

It is necessary to continually enhance cooperation between law enforcement and military services regionally and internationally from the operational perspective. For example, in the GoG, there should be a push for greater integration of independent and regional forces —including the basing of maritime patrol aircraft. The duty to rescue persons in distress under Article 98 UNCLOS weighs on all states and calls for a positive human rights obligation to protect persons in distress at sea. Although Article 101 UNCLOS limits piracy to an offence on the high seas and Article 92 (1) UNCLOS reserves exclusive jurisdiction on the flag state's high seas. In conjunction with the duty to cooperate to repress piracy under Article 100 UNCLOS and Article 98 UNCLOS shows that all states and institutions must curb piracy at sea. Accordingly, flag and coastal states need to fully cooperate with other industries to provide services like long-range identification and tracking details to law enforcement and promote/supervise the use of private maritime security contractors. Currently, flag states use military VPDs to protect vulnerable vessels against pirates at sea. However, there is no clear framework to regulate the use of force by VPDs yet.[133] Thus, challenges remain in clarifying the roles and limitations of VPDs operating aboard vessels, including whether the master of a ship remains in control when the VPDs are onboard. For this reason, coastal states such as states in the GoG interpret the presence of armed military personnel on privately owned and operated vessels as prejudicial to the merchant vessels' status under the regime of innocent passage. Therefore, there is a need for an international framework on the embarkation and activities of VPDs, including their relationship with the master of the commercial vessel.

VIII. Conclusion

Piracy as a maritime security challenge threatens the right to life of innocent civilians at sea and therefore seemingly requires a more securitised counter-piracy approach. This is mainly because the international community has always regarded pirates as the "enemy of mankind" – *hostis humani generis.*[134] Thus, international piracy law and state practice tilt towards a mainly repressive approach. Although the current approach has proved successful in countering piracy at sea, it still raises questions when looked at from a human rights perspective.

There are three questions observed and analysed in this paper. First, whether piracy law permitting the arrest, detention and transfer of piracy suspects has a conclusive justifiable basis under international human rights law concerning the deprivation of the right to liberty? The analysis of global, regional and domestic piracy laws shows that the legal framework is not detailed enough to fulfil the constituent elements for the deprivation of liberty at the international and regional levels. At the national level, piracy law interacts with other laws within the country. Therefore, one can only give a conclusive answer after evaluating all national laws and operational mandates tenable within the countries in the GoG, which is beyond the scope of this paper.

Another question is whether the states' positive obligation to protect civilians' lives at sea requires a higher proactiveness from states against piracy within the GoG? The obligation to protect lives applies extraterritorially to persons at sea, even on high seas, based on the *de jure* and *de facto* jurisdiction. Thus, states ought to be proactive in dealing with piracy which threatens the right to life of so many. Arguably, the use and allowance

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[133] For more on Military VPDs, see Kiara Neri, 'The Use of Force by Military Vessel Protection Detachment' (2012) 51 Military Law and Law of War Review 73.

[134] *The Lotus Case (France v Turkey*) (Dissenting Opinion by Judge M. Moore) PCIJ Series A No 10, 70.

of private maritime security contractors are requirements to protect the lives at sea. These same contractors can threaten the right to life if the law does not regulate them.

The last question is whether and how counter-piracy operations can be made more sustainable rather than merely repressive? This paper illustrates why the systemic integration between international piracy law and human rights law is necessary to promote a sustainable approach to combating piracy at sea. Building a sustainable approach that focuses on human protection rather than merely repressing piracy within the GoG is necessary. This approach strikes a balance between the rights and security-based approaches to dealing with maritime security challenges such as maritime piracy. Although it is beyond this paper's scope to deduce such a framework, it offers insight into such an approach's objectives. This author suggests that further research is needed to build a sustainable counter-piracy framework.

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Identity and Representation: Does 'Name' Matter As An Element of Statehood?

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CRITERIA OF STATEHOOD ; NAME OF STATE; IDENTITY; GREECE; MACEDONIA

Abstract

No state is born sans a name. The widely accepted view is that a state comprises its population, the geographical territory, the ruling government and capacity to enter into relations with other states. This paper argues that in addition to these traditionally recognised requirements, the name of a state, as the most suitable signifier of its identity, deserves to be recognised as an element of statehood. The reason for establishing a state is to create conditions as well as justification for exercising sovereign power, which *ipso facto* requires manifestation of its identity. This expected function seems impracticable at least in an international setting if a state does not have any name at all. The name of a state serves as the most efficacious vehicle for manifesting its identity as a legal entity. Moreover, practices concerning the name and naming of the prospective states show that it has been regarded as a crucial desideratum by the actors concerned in the course of attainment of statehood.

I. Introduction

Can we imagine a state without a name? There is not, and cannot be, an anonymous state. Undeniably, the name of a state, as long as the state exists, remains an inseparable part of its identity. On the other hand, the name and naming of a state or a prospective state seldom appears as a substantive legal issue in international law. In the past, there have emerged only a handful of cases of States having dissented over the issue of name, such as the change of name from German Austria (Deutschösterreich) to Austria[1] and the discontent between Ireland and the United Kingdom of Great Britain between 1937 and 1998 about their respective official designations.[2] The more recent instances of disputes over state titles include the non-usage of the name Myanmar[3] by the United States and some other countries; Greece's objection to the erstwhile title of North Macedonia[4], and the People's Republic of China's (China) opposition to Republic of

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1 Michael Ioannidis, 'Naming a State-Disputing over Symbols of Statehood at the Example of Macedonia' (2010) 14 MaxPlanckUNYB 538-545.

2 ibid 532-538.

3 Lowell Dittmer, 'Burma vs. Myanmar: What's in a Name?' in Lowell Dittmer (ed.), *Burma or Myanmar? The Struggle for National Identity* (World Scientific Publishing Co. Pte. Ltd. 2010) 2-120.

4 See Irena Stawowy-kawka and Tadeusz Stanek, 'The Greco-Macedonian Dispute Over the Name of The Republic of Macedonia' (2008) 10(1) Politeja 223-40.

China as the official designation of Taiwan[5]. Especially, the dispute between Greece and Macedonia over the latter's name in the first quarter of the 1990s constitutes a unique case in point. In the Greco-Macedonian name dispute, the refusal of the EC and Greece to grant recognition until replacement of the name Republic of Macedonia with some other 'acceptable' name verily points to the question: does the name really matter in connection with the emergence of new states? A moment's reflection makes it crystal clear that a state's name serves as the vehicle for manifesting its unique identity, and thus, helps it to function both internally and externally as a juristic person. If population, territory, government[6] and capacity to enter into relations with other states do qualify as elements of statehood[7] because they are the desiderata in absentia of which attainment of statehood remains incomplete and the state is rendered incapacitated to function, it also stands to reason that a state's name should be accorded similar status.

This article argues that in addition to population, territory, government and capacity to enter into relations with other states, the name of a state as the most suitable signifier of its identity deserves to be counted as an element of statehood, even if it has not been so recognised in any multilateral conventions or customary international law. A satisfactory vindication of the aforesaid proposition will require to establish that, from emergence to extinction, a state's identity or name remains an ineluctable feature of its legal personality. To that end, the following questions will be addressed: whether attainment of statehood could be said to have been complete in absence of any representative identity or name of the entity aspiring to become a state, and whether a state can do without any representation of its identity throughout its existence. At the very outset, we will see that in today's world of extremely complex international legal relationships, a state can barely thrive without manifesting its identity, and for the same reason it is impossible to obviate the importance of state name. We then examine practices concerning the name and naming of the prospective states, in order to illustrate the fact that the manifestation of the identity of a state through the adoption of a representative name has always been regarded as a crucial desideratum in the course of the creation of new states. Discussion on unilateral change of the state name as well as the extinction thereof will uphold the argument that a state during its lifetime simply cannot afford to dispense with the manifestation of its identity. Lastly, the article focuses on legal issues concerning the name and naming of states with particular reference to the Greco-Macedonian name dispute. The article concludes with the observation that in a world of multifarious relationships among states, the functionality of a state's identity or name is as important as the other elements of statehood recognized hitherto. In this article, the terms, 'identity' and 'name' will be used interchangeably.

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[5] Taiwan is also known as Chinese Taipei. See J Y, 'What is "Chinese Taipei"?' (*The Economist*, 9 April 2018) <https://www.economist.com/the-economist-explains/2018/04/09/what-is-chinese-taipei> accessed 16 August 2021.

[6] Although attainment of statehood requires the presence of an effective and independent government, a lack of government does not render legal existence of a state defunct. See Brad R Roth, *Governmental Illegitimacy in International Law* (OUP 1999) 130-131.

[7] Convention on Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) (hereinafter Montevideo Convention) art 1; For the purpose of this article, the author has used the terms State and Statehood alternatively. On statehood see generally James Crawford, 'The Criteria of Statehood in International Law' (1976) 48 British Yearbook of International law 93; Johan David Van der Vyver, 'Statehood in International Law' (1991) 5 Emory International Law Review 15; D J Devine, 'The Requirements of Statehood Re-examined' (1971) 34(4) Modern Law Review 410; Rosalyn Cohen, 'The Concept of Statehood in United Nations Practice' (1961) 109 University of Pennsylvania Law Review 1127; Ian Brownlie, *The Rule of Law in International Affairs* (Martinus Nijhoff Publishers 1998) 35-39.

II. Importance of State Name: Identity and Representation

The concept of statehood occupies a pivotal place in the study of international law. Although the elements of statehood as provided in the Montevideo Convention are generally acknowledged by the jurists, the contemporary textbooks on public international law seldom discuss why population, territory, government and capacity to enter into relations with other states should qualify as elements of statehood. Also noteworthy is the divergence of opinion among the scholars in this regard. According to one school of thought, the elements of statehood are strictly laid down by the law.[8] Conversely, in the opinion of Professor Ian Brownlie, the traditional elements of statehood should be regarded as nothing more than a mere basis for further investigation, and in any case, further elements must be employed to produce a working legal definition of statehood.[9] Other scholars opine that the Montevideo list is incomplete,[10] or that the relationship between factual and legal elements of statehood is a shifting one,[11] or that there is no generally accepted definition of statehood at all[12]. There is no gainsaying that this article takes cue from Professor Ian Brownlie's view in advocating its argument that a state's name, being the most suitable manifestation of its identity, deserves to be ranked as an element of statehood. The reason is not only that the actors concerned regarded identity or name of a state or prospective state as an important matter in the course of inception of new states, but also that a state's identity has certain other important bearings too, like other traditional elements of statehood. An obvious reason for having a state is to create conditions as well as justification for exercising sovereign power as a distinct member of the international community[13]. This very function is hard to come by without representation and exertion of the legal personality[14] of a state. And, needless to reiterate, representation of a state's legal personality requires an identity which is most conveniently and effectively manifested through its name.

As already indicated, a state's identity entails both practical and symbolic implications. Geographical location, language, historical past,[15] political ideology & system, religious faiths, cultural disposition of the inhabitants - all of these indefatigably and wholesomely contribute to the creation of the identity of a state. It is noticeable that these elements are more or less reflected in the name of a state. For instance, the presence of expressions such as Republic, People's Republic, Islamic Republic, Federal Republic, Democratic Republic, United Republic, United States, Emirate, Union, Duchy, Kingdom, United Kingdom, Empire, State, City State, Federated States, Independent State, Federation, Confederation, Dominion, Commonwealth, Principality etc. in the formal title of a state does convey quite a bit of information about that state. On a practical level, the traditionally recognised elements of statehood, namely, population, territory, government and capability to enter into relations with other states as well as their mutual complex relationship are identified with a state's name. Such as, a government exercises sovereign power in the name of state. In other words, the functions

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8 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 117.
9 Ian Brownlie, *Principles of Public International Law* (4th edn, OUP 1990, Reprint 1993) 72.
10 Jan Klabbers, *International Law* (2nd edn, CUP 2017) 75.
11 Malcom N Shaw, *International Law* (8th edn, CUP 2017) 157.
12 Karen Knop, 'Statehood: territory, people, government' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 95.
13 Antonio Cassese, *International Law* (2nd edn, OUP 2005) 22-44.
14 Brownlie (n 9) 36; Professor Ian Brownlie has proposed a number of indicators for legal personality of state.
15 Robert Redslob, 'The Problem of Nationalities' (1932) 17 Transactions of the Grotius Society 22-23; Redslob said that the remembrance of past time was a chief element for constituting a nation.

of a state are carried out in its name since a state can act only by and through its agents.[16] Furthermore, an individual sovereign while describing His or Her sovereign title usually makes reference to the official name of the state over which He or She claims to hold sway.[17] The importance of a state's identity or name makes even more sense for a government in exile, who claims to be the sole legitimate government of that state. In absence of any actual control over population and territory, the only way a government in exile can relate to the state it claims to represent is by identifying itself with the designation of such state.[18] In addition, the practice of adopting the geographical name of a territory as the name of state points to the identity issue. The concept of fixed-frontier state[19] could well be a reason for such practice. Again, creation of a state requires that there must be a reasonably stable political community in control of a given territory.[20] Nationality of the members of such political community is determined with reference to the identity and name of the state concerned. In fine, it can be restated that a state's name embodies all other elements of statehood and their mutual relationship in a single denomination and thus serves as the representative identity of a state.

The contemporary international legal orders are premised on the concept of the sovereignty of states. Meaningful engagement with the international community requires manifestation and representation of the identity of a state – which is most effectively served by its name. Attribution of state responsibility, exercise of jurisdiction, determination of nationality, diplomatic protection, signing treaties, succession to treaties, membership and representation in the international organizations, settlement of disputes by judicial means – all buttress the fact that every single state is absolutely required to possess representative identity for participation in the system of the present-day international community. In addition, the identity or name of a state or prospective state entails essential significance in the practice of recognition of the government and the state. It is quite unthinkable that a state, without even a name, would be able to discharge the aforesaid functions in an international setting.

Even, the putative identity or name of a prospective state bears considerable importance. The declaration of the prospective name of a state allows its founders to demonstrate publicly their political will to establish a state. Adoption of a name for a forthcoming state by an aspiring population may signify the initiation of a political process to that end. For instance, the name Pakistan was proposed for the envisaged sovereign state of the Muslim populace of the then Federation of India[21] long before its statehood had materialised.[22] At that time, the very proposition of the name Pakistan set the agenda for creating a separate political identity of the Muslim populations in India. In other cases, adoption of official name for the entity which is due to emerge as a state

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16 *Settlers of German Origin in Poland* (Advisory Opinion) 1923 PCIJ Series B No 6 [22].

17 For example, the royal style and title of King George V was as follows: 'George V. by the Grace of God of Great Britain, Ireland and of the British Dominions beyond the Seas King; Defender of the Faith, Emperor of India'. The London Gazette (13 May 1927).

18 There can be no government without the state which it claims to belong to, let alone a government in exile. See *Lighthouses in Crete and Samos* (Judgment) 8 October 1937 PCIJ Series A/B No. 71 [103].

19 The Peace of Westphalia of 1648 marked a crucial point towards creation of modern states based upon defined territorial units. See Arthur Nussbaum, *A Concise History of the Law of Nations* (The Macmillan Company 1954) 115-118.

20 Brownlie (n 9) 72-73.

21 The Government of India Act (1935) 26 Geo 5 Ch 2, s 5.

22 The Indian Independence Act (1947) 10 & 11 Geo 6 Ch 30, s 1. The name, Pakistan was proposed by Choudhary Rahmat Ali in 1933. See Choudhary Rahmat Ali, 'Now or Never: Are we to live or perish porever?' (1933) (The Pakistan Declaration) <http://www.columbia.edu/itc/mealac/pritchett/00islamlinks/txt_rahmatali_1933.html> accessed 5 August 2020.

may suggest that all the traditional elements of statehood have already been met. Such as, when the United Nations successfully concluded the transitional administration of East Timor, it was with the adoption of designation of the Democratic Republic of Timor-Leste, that the attainment of statehood became formally complete.[23]

In the end, it can be said that the name of a state or prospective state entails immense legal and political implications. While a state's name serves as the signifier of its identity as a sovereign entity, for a prospective state it serves, among others, as a metaphor for its actual or envisaged existence. History evinces that states rarely change their names although in theory they have the sovereign right to adopt any names anytime they think appropriate. Plausibly, the reason is that it takes the struggle of many generations to build a nation, construct a national identity and attain statehood. Thus, it explains why the identity or name matters both practically and symbolically in the course of creation of new states.

III. Practice concerning Name and Naming of the Prospective States

There is a wide range of practices concerning name and naming of the prospective states by different actors in different capacities. In this part, we shall examine them in order to show that public manifestation of a forthcoming state's identity through the adoption of a name is in fact regarded as crucial desiderata in the course of creation of new states. For example, a state or a sovereign may designate a certain name to any of its constituent units at the time of granting independence. Two or more states may adopt a new name while being unified into a single state. A constituent unit of a state, upon attaining independence, may adopt such a name as would indicate its newly acquired sovereign status. These are but some of the examples that depict practices concerning the naming of the prospective states in the exercise of sovereign capacity.

However, the above paradigms will not be able to shed light on the practices concerning adoption of a representative name for any prospective states by the non-sovereign actors pending attainment of statehood. For instance, the founders of a forthcoming state may pronounce its name quite ahead of the formal attainment of statehood. An aspiring political entity may develop into a state all by itself or may attain statehood by breaking away from an extant state or sovereign. A declaration of the would-be name of a state pending formal attainment of statehood in the aforesaid situations is a common practice. As opposed to the sovereign capacity, we shall characterise these examples as naming of the prospective states in the exercise of the constituent capacity.[24] The constituent capacity of a population aspiring to statehood can be represented by a political party or organisation, liberation force, provincial ruler or government, government in exile, any person, prince, leader or a collegial body etc.

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[23] See UNSC Presidential Statement (2002) UN Doc S/PRST/2002/13. On the same day, the Prime Minister of the Democratic Republic of East Timor submitted the application for admission to the UN. See UNSC 'Application of the Democratic Republic of East Timor for Admission to Membership in the United Nations' (2002) UN Doc A/56/953-S/2002/558 Annex; In the French version of the application the name of the applicant state was written as la République démocratique du Timor oriental.

[24] In this article, the political potential of a population to establish and maintain statehood is understood as the constituent capacity. It should be noted that the author has used the term 'constituent capacity' instead of 'constituent power'. For detail discussion about constituent power see Martin Loughlin, *The Idea of Public Law* (OUP 2009) 99-113.

The justification for any act done in exercise of the constituent capacity may be claimed to have been derived from a number of sources like *de facto* control, representation of the popular will, referendum, self-determination, recognition by the possessors of the sovereign capacity[25] and recognition by the international organizations[26] etc. The fact of the matter remains that the ultimate legitimacy of such acts done in the exercise of the constituent capacity would depend on the successful transformation of the possessors of the constituent capacity into the possessors of the sovereign capacity in a formal sense. An account of practices concerning name and naming of forthcoming states in the exercise of both the sovereign capacity and the constituent capacity will help illustrate the proposition of this article that adoption of name for a prospective state has been regarded as an important issue in the course of emergence of new states.

A. Designating a Forthcoming State's Name in Exercise of Sovereign Capacity

There are countless examples to testify that a state or a sovereign may grant independence to any of its territories, constituent units or dependencies under its control. Accordingly, identifying a constituent unit by name as an independent state by the extant state, or unification of two or more states into a single state and the consequent adoption of a new name entails exercise of sovereign capacity. The act of naming a forthcoming state in the exercise of sovereign capacity may come about in a number of ways that include legislation, international treaty, sovereign acts etc.

A state or a sovereign may identify by name any of its territories, parts, dependencies or constituent units as independent through legislative act or action. For example, the Indian Independence Act, 1947 provided, "As from the fifteenth day of August, nineteen hundred and forty seven, two independent dominions shall be set up in India to be known respectively as India and Pakistan".[27] The said Act further provided that His Majesty's Government in the United Kingdom would have no responsibility with respect to the government of any of the territories which, immediately before that day, were included in British India; the suzerainty of His Majesty over the Indian states would lapse.[28] Southern Rhodesia was declared independent under the name of Zimbabwe by virtue of the authority of the Zimbabwe Act 1979.[29] The Union of South Africa was the designation of the legislative union comprising the colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony.[30] The Statute of Westminster, 1931 extended the status of Dominion to the Union of South Africa[31] and this particular designation continued to be in use till 1961 in which year, the Union of South Africa became a republic and accordingly changed its name to the Republic of South Africa.[32] The formal name and style, the Republic of South Africa recurred in subsequent constitutions.[33]

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[25] According to the author, legal recognition of the possessors of the constituent capacity by any state or sovereign does not necessarily confer equal status on the former.

[26] For example, the Palestine Liberation Organization (PLO) was invited to participate in the UN as an observer. See UNGA Res 3237 (XXIX) (22 November 1974) UN Doc A/RES/3237 (XXIX) [3].

[27] The Indian Independence Act (n 22) s 1.

[28] ibid s 7.

[29] The Zimbabwe Act (1979) Elizabeth II Ch 60, s 1.

[30] The South Africa Act (1909) 9 Edw 7 Ch 9, ss 4, 6 & 7.

[31] The Statute of Westminster (1931) 22 Geo 5 Ch 4, s 4.

[32] See CEC and CMC, 'South Africa's Withdrawal and What It May Mean' (1961) 17(4) The World Today 135.

[33] See South African Constitution (1996) art 1. See also South Africa (Interim) Constitution (1993) art 1.

As mentioned above, a state or a sovereign may also identify by international treaty any of its dependencies or constituent units as an independent state. By the Paris Peace Treaty of 3rd September, 1783, the then King of Great Britain had recognized New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, collectively known as the United States, to be free sovereign and independent states.[34] A more complex example would be the Anglo-Irish Treaty.[35] *Poblacht na hÉireann*[36] or the Irish Republic was proclaimed in the island territory known as Ireland in 1916 by the nationalist rebels who launched the Easter Rising and were also eventually subdued.[37] The Irish Republic was construed to comprise the whole island of Ireland. On the other hand, the British Government passed the Government of Ireland Act, 1920 and partitioned Ireland into two territorial units named, Northern Ireland and Southern Ireland. Both the areas were declared to continue as parts of the United Kingdom.[38] In the Anglo-Irish Treaty, Ireland was granted the status of a dominion under the designation of Irish Free State[39] comprising both Northern Ireland and Southern Ireland. It also provided that Northern Ireland could opt out of the Irish Free State.[40] The Parliament of Northern Ireland resolved on 7th December 1922, that the powers of the Parliament and Government of the Irish Free State would not extend to Northern Ireland. The designation, Irish Free State, however, continued until 1937. The 1937 Constitution changed the name of the state to Éire or Ireland.[41]

The creation of independent states or recognition of sovereign status by multilateral treaty, especially in the course of peace settlement in the aftermath of great wars had been a time-honoured practice even until the middle of the twentieth century.[42] In such treaties, states which were sought to be created or recognised were identified by their respective names. For example, article I of the London Protocol of 3 February 1830 provided: "Greece shall form an independent State, and shall enjoy all the rights, political, administrative, and commercial, attached to complete independence."[43] In the

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[34] The Definitive Treaty of Peace Between the Kingdom of Great Britain and the United States of America (signed 3 September 1783) (Treaty of Paris) art 1 <http://avalon.law.yale.edu/18th_century/paris.asp.> accessed 02 March 2013.

[35] Officially known as the Articles of Agreement for a Treaty between Great Britain and Ireland <http://www.nationalarchives.ie/topics/anglo_irish/dfaexhib2.html> accessed 27 March 2013; The Anglo-Irish Treaty was signed in London on 6 December 1921.

[36] In 1916 the republic was described in Irish as *Poblacht* and on its re-proclamation in 1919 it was called *Saorstát*. See Michael Laffan, *The Resurrection of Ireland* (CUP 2004) 350.

[37] See David G Boyce, "'British Opinion, Ireland, and the War', 1916-1918" (1974) 17(3) The Historical Journal 578. See also John Newsinger, 'James Connolly and the Easter Rising' (1983) 47(2) Science & Society 173-177. See Paul Bew, 'Moderate Nationalism and the Irish Revolutions' (1999) 42(3) The Historical Journal 735; In the 1918 general election, Sinn Féin came out as overwhelmingly victorious. William H Kautt, *The Anglo-Irish War, 1916–1921: A People's War* (Praeger, 1999) 70-71.

[38] Kautt (n 37). See also the Government of Ireland Act (1920) 10 & 11 Geo 5 Ch 67, s 1 <http://www.legislation.gov.uk/ukpga/1920/67/pdfs/ukpga_19200067_en.pdf> accessed 14 July 2013.

[39] The Anglo-Irish Treaty (n 35); The term Irish Free State appeared in article 1 of the Treaty.

[40] ibid art 12.

[41] The 1937 Constitution changed the name of the state to Éire or Ireland. Article 5 of the Constitution provides, "Ireland is a sovereign, independent democratic state." See Mary E Daly, 'The Irish Free State/ Éire/Republic of Ireland/Ireland: "A Country by Any Other Name"?' (2007) 46 Journal of British Studies 76.

[42] See generally James Crawford, *The Creation of States in International Law* (OUP 2007) 504-522.

[43] 'Protocol of Conference between Great Britain, France, and Russia, Relative to the Independence of Greece' art 1 (signed 3 February 1830) reprinted in Sir Augustus Oakes and R B Mowat (eds), *The Great European Treaties of the Nineteenth Century* (OUP 1918) 120.

Congress of Berlin of 1878, the Great Powers referred to Montenegro, Serbia and Romania by name while dealing with the issue of their independence.[44]

Adoption of a new identity at the time of creation of a new state by the unification of two or more states signifies the exercise of sovereign capacity. The designation "United Republic of Tanganyika and Zanzibar" was attributed to the new state that emerged as a result of integration of the Republic of Tanganyika and the People's Republic of Zanzibar under the Articles of Union of 22 April 1964.[45] Initially, the Articles of Union referred to the forthcoming state as the United Republic.[46] In order to give effect to the Articles of Union, both the government of Tanganyika and the government of Zanzibar passed laws[47] providing that the Republic of Tanganyika and the People's Republic of Zanzibar would merge into one sovereign republic by the name of the United Republic of Tanganyika and Zanzibar.[48] The adoption of the name the United Arab Republic (U.A.R.)[49] for the single state created as a result of the unification of the Syrian Arab Republic[50] and Egypt in 1958[51] constitutes another example.[52] Other examples include the name the Republic of Yemen for the single state that the People's Democratic Republic of Yemen[53]and Yemen Arab republic[54] have brought forth by their merging with each other.[55]

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[44] Article XXVI, XXXIV and XLIII of the Treaty of 13 July 1878 respectively recognised independence of Montenegro, Serbia and Romania. The spelling of Serbia and Romania appeared as Servia and Roumania respectively. See 'Treaty between Great Britain, Germany, Austria, France, Italy, Russia, and Turkey for the Settlement of Affairs in the East' (signed 13 July 1878) reprinted in (1908) 2(4) AJIL 401-424.

[45] See Articles of Union between the Republic of Tanganyika and the People's Republic of Zanzibar (signed 22 April 1964) art (i) reprinted in 3 ILM (1964) 768.

[46] ibid art (ii).

[47] The People's Republic of Zanzibar on 25 April 1964 passed the Union of Zanzibar and Tanganyika Law, 1964; Ibid 763-768; On the same day, the Republic of Tanganyika passed the Union of Tanganyika and Zanzibar Act (1964) <http://www.wipo.int/wipolex/en/text.jsp?file_id=245022> accessed 14 August 2013.

[48] See the Union of Zanzibar and Tanganyika Law (1964) ss 2 & 4; the Union of Tanganyika and Zanzibar Act, 1964, ss 2 & 4. See also Interim Constitution Decree (26 April 1964) reprinted in 3 ILM (1964) 772.

[49] See Proclamation of the United Arab Republic (signed 1 February 1958), reprinted in (1959) 8 ICLQ 372-373.

[50] The Syrian Arab Republic was an original member of the United Nations; see UN Documentation Search Guide, 'Founding Members' <https://research.un.org/en/unmembers/founders> accessed 16 August 2021.

[51] The process of unification started with a number of resolutions passed by the Syrian political parties as well as the Syrian parliament calling for Arab unity and union of Egypt and Syria. See Monte Palmar, 'The United Arab Republic: An Assessment of its Failure' (1966) 20 Middle East Journal 50-51.

[52] The Government of the United Arab Republic declared that the Union henceforth would be a single member of the United Nations. See UNSC 'Note Verbale dated 7 March 1958 from the Secretary-General to the President of the Security Council' (7 March 1958) UN Doc S/3976 Annex A.

[53] The People's Democratic Republic of Yemen was admitted to the UN under the name of the People's Republic of Southern Yemen. See UNGA Res 2310 (XXII) (14 December 1967) UN Doc A/RES/2310 (XXII).

[54] Yemen Arab Republic was admitted to the UN under the name of Yemen. UNGA Res 109 (II) (30 September 1947) UN Doc A/RES/108 (II). See also UNSC Res 29(1947) (12 August 1947) UN Doc S/RES/29(1947).

[55] By a letter dated 19 May 1990 the People's Democratic Republic of Yemen and the Yemen Arab Republic jointly informed the UN Secretary-General that they would merge in a single sovereign state to be called the Republic of Yemen as of 22 May 1990 with the resultant effect that the Republic of Yemen would have single membership in the UN. See UNGA 'Note Verbale dated May 21, 1990 from the Secretary General to the Permanent Representative of Member States' (22 May 1990) UN Doc A/44/946; For a background picture of the unification, see Robert D Burrowes, 'Prelude to

B. Designating a Forthcoming State's Name in Exercise of Constituent Capacity

In addition to the foregoing, the emergence of new states may also come about in a number of ways, such as, unilateral establishment of state, secession,[56] voluntary separation, etc. There are examples that in the aforementioned situations the founders generally declare independence in the name of a forthcoming state even before it has formally come into existence. Pending a prospective state's coming into formal legal existence, such act of naming signifies nothing but the constituent capacity of the founders of such forthcoming states. Evidently, the possessors of the constituent capacity, while seeking to establish a state often adopt such a name or manifest the prospective state's identity in such a manner as would signify their political objectives. Although it is not possible to attain formal statehood by a mere unilateral declaration of independence or pronouncement of the name of a prospective state, it has, nevertheless, been regarded as an important step in the process of creation of new states. For instance, the Jewish People's Council[57] on 14 May 1948 proclaimed a new state named, the State of Israel in the territory called *Eretz-Israel*.[58] In the Declaration, the term *Eretz-Israel* referred to the territory comprising the Mandate of Palestine.[59] It is to be noted that, on 15th November, 1988, the Palestine National Council (PNC) acknowledged establishment of the State of Palestine in the same territory with its capital at Jerusalem.[60]

The declaration of the name of a state pending formal attainment of statehood is a common practice especially in the cases of secession. A seceding unit's adoption of any name, designation or title in furtherance of attainment of statehood conveys the intention of establishing a new state. The secession of the 13 colonies from Great Britain under the name, the United States of America[61] is an example of this kind of practice.[62] On 4 July

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Unification: The Yemen Arab Republic, 1962-1990' (1991) 23(4) International Journal of Middle Eastern Studies 483.

56 See generally Allen Buchanan, 'Theories of Secession' (1997) 26 Philosophy & Public Affairs 31.

57 David Ben Gurion, the Chairman of the People's Council read out the Declaration of the Establishment of the State of Israel in the Hall of the Tel-Aviv Museum; See Samuel Sager, 'Israel's Provisional State Council and Government' (1978) 14 Middle Eastern Studies 91. See also Tuvia Friling and S Ilan Troen, 'Proclaiming Independence: Five Days in May from Ben-Gurion's Diary' (1998) 3 Israel Studies 170.

58 See the Declaration of the Establishment of the State of Israel, available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> accessed 19 March 2013; The USA recognized the provisional Jewish government as *de facto* authority of the Jewish state immediately after the Declaration. D*e jure* recognition was extended on 31 January 1949. The British Mandate over Palestine expired on 14 May 1948.

59 The word Palestine or Palaistinē (in Greek) was derived from Philistine – a term which denoted coastal region north and south of Gaza. The region was known as Purusati in Egyptian, as Palastu in Assyrian and as Pelëshet in Hebrew Bible. The Jews called the country *Eretz Israel*, the land of Israel. The first known occurrence of the Greek word Palaistinē occurred in the Histories written by Herodotus near the mid-fifth century BC. See David M Jacobson, 'Palestine and Israel' (1999) 313 Bulletin of the American Schools of Oriental Research 65; Bernard Lewis, 'Palestine: On the History and Geography of a Name' (1980) 2 International Historical Review 1.

60 The Declaration of Independence was adopted by the Palestinian National Council, the legislative body of the Palestinian Liberation Organization (PLO), in Algiers on 15th November 1988. For the text of the Declaration see UNGA 'Declaration of Independence, in Letter dated November 18, 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General' (18 November 1988) UN Doc A/43/827-S20278 Annex III 13-16.

61 See Edmund C Burnett, 'The Name "United States of America"' (1925) 31 American Historical Review 79.The name, United States of America, appears to have been used for the first time in the Declaration of Independence. It should be mentioned that the while finalizing the Declaration of Independence, the

1776, the 13 American colonies declared independence from Great Britain collectively coining themselves as the United States of America.[63] Another example is the proclamation of independence by East Pakistan in 1971 assuming the title 'Bangladesh'.[64] The disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) and the consequent emergence of its constituent republics as sovereign states under different designations constitute a few more recent examples of practices concerning adoption of the official name by the seceding units. Of the constituent republics of SFRY,[65] the Socialist Republic of Slovenia, the Socialist Republic of Croatia, the Socialist Republic of Macedonia and the Socialist Republic of Bosnia and Herzegovina between 1991 and 1992 all proclaimed independence between 1991 and 1992, adopting official designations namely, the Republic of Slovenia[66], the Republic of Croatia,[67] the Republic of Macedonia[68] and the Republic of Bosnia and Herzegovina[69] respectively – which better corresponded to their new identity as sovereign states. The remaining constituent republics of SFRY, namely, the Socialist Republic of Montenegro and the Socialist Republic of Serbia, on the other hand, claimed continuation of the international legal personality of SFRY under the designation of the Federal Republic of Yugoslavia (FRY).[70] However, both the European Community[71] and the United Nations[72] were of

word 'States' was substituted for 'Colonies'. Later, the name, 'United States of America' was confirmed in Articles of Confederation as well as in the Constitution of the USA.

62 David Armitage, 'The Declaration of Independence and International Law' (2002) 59(1) The William and Mary Quarterly 39.

63 See Mark Tushnet, *The Constitution of the United States of America. A Contextual Analysis* (Hart Publishing 2009) 9-10.

64 Sheikh Mujibur Rahman declared Independence of Bangladesh on 26 March 1971. The Proclamation of Independence which was later adopted on 10 April 1971 reaffirmed Sheikh Mujibur Rahman's declaration of independence. See the Proclamation of Independence of Bangladesh (10 April 1971) reprinted in the Constitution of the People's Republic of Bangladesh (Government of the People's Republic of Bangladesh 2011) 79-80.

65 The constituent republics of the SFRY were the Socialist Republic of Bosnia and Herzegovina, the Socialist Republic of Croatia, the Socialist Republic of Macedonia, the Socialist Republic of Montenegro, the Socialist Republic of Serbia and the Socialist Republic of Slovenia. See the Constitution of Socialist Federal Republic of Yugoslavia (21 February1974) art 2 reprinted in Snežana Trifunovska (ed), *Yugoslavia Through Documents: From Its Creation to Its Dissolution* (Martinus Nijhoff Publishers 1994) 225.

66 UNSC 'Application of the Republic of Slovenia for Admission to Membership in the United Nations: note by the Secretary-General' (7 May 1992) UN Doc A/46/913-S/23885.

67 UNSC 'Application of the Republic of Croatia for Admission to Membership in the United Nations: note by the Secretary-General' (7 May 1992) UN Doc A/46/912-S/23884 Annex.

68 In view of differences between Greece and the Republic of Macedonia over the latter's name, the General Assembly decided that the latter would be referred to as 'the former Yugoslav Republic of Macedonia' for all purposes within the United Nations until resolution of the said differences. See UNGA Res 47/225 (8 April 1993) UN Doc A/RES/47/225.

69 UNSC 'Application of the Republic of Bosnia and Herzegovina for Admission to Membership in the United Nations: note by the Secretary-General' (19 May 1992) UN Doc A/46/921-S/23971.

70 Declaration of the Representatives of the people of the Republic of Serbia and the People of the Republic of Montenegro, in UNSC 'Letter dated 27 April 1992 from the Charge D'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council' (5 May 1992) UN Doc S/23877 Annex.

71 The EC referred the matter to the Badinter Commission which came to the view that the process of dissolution of the SFRY had been completed and SFRY no longer existed; See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No.8 (4 July 1992) 31 ILM (1992) 1488, 1521-1523; See also Danilo Türk, 'Recognition of States: A Comment' (1993) 4 EJIL 87-88; Alain Pellet, 'The Opinions of the Badinter Arbitration: A Second Breath for the Self-Determination of Peoples' (1993) 3 EJIL 178.

72 See UNSC Res 777(1992) (19 September 1992) UN Doc S/RES/777 [1]; UNGA Res 47/1 (22 September 1992) UN Doc A/RES/47/1.

the view that SFRY did no longer exist and its membership would be *ipso facto* rescinded as null and void.[73]

Adoption of a state name or analogous identity is commonplace when a constituent unit decides to break away from the parent state either in the exercise of constitutional right or through a mutually agreed political process. For instance, Montenegro declared independence on 3rd June, 2006, under the name of the Republic of Montenegro following the results of the referendum held on 21st May, 2006 in accordance with article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro.[74] The adoption of names such as Czech Republic and Slovak Republic following the break-up of Czechoslovakia constitutes another example of this kind of practice.[75] The disbandment of the Union of Soviet Socialist Republics (USSR) deserves special mention in this regard.[76] The USSR comprised fifteen federating units[77] which were commonly known as the Republics of the Soviet Union or the Union Republics.[78] In between 1990 and 1991, all the constituent republics of the USSR proclaimed independence, one after the other.[79] The leaders of the present Russian Federation, Ukraine and the Republic of Belarus convened in a meeting at Minsk on 8th December, 1991 and made a joint declaration on establishing a Commonwealth of Independent States stating that the *de facto* process of withdrawal of republics from the Union of Soviet Socialist Republics and the formation of independent States had become a reality.[80] From the legal point of view, the USSR ceased to exist with the establishment of the Commonwealth of Independent States.[81] From the Declaration by the Heads of the State on 8th December, 1991, it appears that the Ukrainian Soviet Socialist Republic and Byelorussian Soviet Socialist Republic respectively adopted new designations befitting their newly acquired status and identity, such as, Ukraine and the Republic of Belarus, and Russian Soviet Federative Socialist Republic was referred to by its abbreviated form of name, RSFSR. Moreover, on the very same day, the Russian Soviet Federative Socialist Republic changed its name to Russian Federation (RSFSR) in the Agreement Establishing the Commonwealth of

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[73] See Yehuda Z Blum, 'UN Membership of the "New" Yugoslavia: Continuity or Break?' (1992) 86 AJIL 830.

[74] UNSC 'Letter dated 24 May 2006 from the Permanent Representative of Austria to the U.N. Secretary-General' (26 May 2006) UN Doc S/2006/335 Annex; UNSC 'Letter dated 7 June 2006 from the Permanent Representative of Austria to the U.N. Secretary-General' (16 June 2006) UN Doc S/2006/412 Annex.

[75] Czechoslovakia was an original Member of the United Nations from 24 October 1945. See UN, the Yearbook of the United Nations (1993) 1334 <https://unyearbook.un.org/>.

[76] The Treaty of Union was concluded between the Russian Socialist Federated Soviet Republic, the Socialist Soviet Republic of the Ukraine, the Socialist Soviet Republic of Belorussia, and the Socialist Soviet Republic of Transcaucasia (comprising the Socialist Soviet Republic of Azerbaijan, the Socialist Soviet Republic of Georgia, and the Socialist Soviet Republic of Armenia) for creating a single federal State. See Richard Sakwa, *The Rise and Fall of the Soviet Union, 1917–1991* (Routledge 1999) 138.

[77] See Yehuda Z Blum, 'Russia Takes over the Soviet Union's Seat at the United Nations' (1992) 3 EJIL 354.

[78] Under the Treaty of Union, the constituent member republics were allowed to retain the right to withdraw freely from the USSR. The right to withdraw from the Union was further incorporated in the 1924 USSR Constitution. See Sakwa (n 76) 139.

[79] Blum (n 77) 355. See also Rein Mullerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42 ICLQ 480-483.

[80] See Declaration by the Heads of State of Belarus, Russia and Ukraine (8 December 1991) 31 ILM (1992) 142.

[81] The Alma-Ata Declaration stated that with the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceased to exist. See Alma Ata Declaration (December 21, 1991) reprinted in 31 ILM (1992) 148-149.

Independent States.[82]

The following example shows how the possessors of the constituent capacity and the possessors of the sovereign capacity can mutually settle the issue of identity of a forthcoming state in the course of their negotiation over the terms of creation of a new state. The Sudan People's Liberation Movement (SPLM)/Sudan People's Liberation Army and the Government of the Republic of the Sudan signed the Comprehensive Peace Agreement on 9th January, 2005 with a view to bringing 21 years of conflict to a denouement.[83] Although the term 'Southern Sudan' appeared in the Chapeau of the Comprehensive Peace Agreement so as to denote the then Sudanese regions meant to be represented by the Sudan People's Liberation Movement[84], in the Machakos Protocol and other associated instruments appeared the term 'South Sudan' instead. Finally, the Comprehensive Peace Agreement notes that Southern Sudan should be changed to South Sudan in all the Protocols and Agreements.[85] The ruling Sudan People's Liberation Movement officially adopted the name, the Republic of South Sudan for the newly established state which formally came into existence on 9th July, 2011.[86]

The foregoing discussion elucidates that the founders as well as states or sovereigns viewed the issue of name and naming of prospective states with paramount importance. In most of the cases, a prospective state's name continues as the official identity even after formal ordination into statehood. The fact that prospective states adopt names to manifest their identities well indicates that, alongside population, territory, government and capacity to enter into relations with other states, the *nom de guerre* deserves to be counted and equally ranked as a constituent element of statehood.

IV. Replacement and Extinction of State Name

It has already been discussed that public manifestation of a prospective state's identity through a representative name has been regarded as a crucial desideratum in connection with the creation of new states. This part will provide an account of practices concerning the replacement of state name and other related issues. The discussion in this part underlines the fact that although a state may change its name whenever it may deem appropriate, it simply cannot do without a name until the extinction of its legal personality. Theoretically, after coming into formal existence, a state is formally vested with the sovereign right to determine its own name, just as it is to choose its national flag, and national anthem.[87] Some scholars regard it as either a simple corollary of

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[82] See the Agreement Establishing the Commonwealth of Independent States (8 December 1991) reprinted in 31 ILM (1992) 143-146.

[83] See UNSC 'Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/ Sudan People's Liberation Army, in Letter dated 8 February 2005 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council' (10 February 2005) UN Doc S/2005/78 iii.

[84] ibid xi-xii.

[85] ibid 233; The General Provisions in List of Corrections in the Protocols and Agreements (signed on 31 December 2004) clause 1.1.

[86] See ST, 'SPLM adopts South Sudan name, untangles its northern sector' (*Suan Tribune*, 13 February 2011) <http://www.sudantribune.com/SPLM-adopts-South-Sudan-name,37985> accessed 01 December 2012. The President, Mr. Salva Kiir Mayardit, on the same date applied to the UN for admission to membership on behalf of the Republic of South Sudan. See UNGA 'Application of the Republic of South Sudan for Admission to Membership in the United Nations' (9 July 2011) UN Doc A/65/900-S/2011/418 Annex.

[87] James Crawford as a Senior Counsel and Advocate of Greece put forward this argument in the case concerning Application of the Interim Accord of 13 September 1995 (*the former Yugoslav Republic of Macedonia v Greece*). See *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of*

sovereignty, or as part of basic self-preservation principles.[88] In a similar vein, it can also be argued that it is the corollary of sovereignty that a state can dispose of its territory, change the form of government, determine the conditions of nationality and even compromise its sovereign power by treaty or otherwise. However, just as a state cannot strip itself of any or all of the traditionally recognised elements of statehood for good (if it wants to continue its statehood), it cannot dispense with its name altogether.

Additionally, the change of name is indubitably intertwined with change in identity of a state. A state's identity can never be static, as that would engender absolute thwarting of progress. It evolves, transforms and changes over time. Change in identity of a state may occur for a variety of reasons such as changes in social, religious or political system, territorial redistribution, disintegration of statehood, unification of states etc. For example, three regions under Austro-Hungarian rule, namely, Serbia, Croatia, and Slovenia, began to crave for independence and for a union of Slavic peoples particularly before and during World War I. The Kingdom of Serbs, Croats, and Slovenes was proclaimed on 1st December, 1918 following a series of initiatives including the 1917 Declaration of Corfu,[89] the Geneva Declaration of 9th November, 1918,[90] and so on.[91] The state was further renamed Kingdom of Yugoslavia in 1929.[92] Since then the appellation Yugoslavia has been further qualified with the words, Democratic Federal,[93] Federal Peoples Republic of,[94] and Socialist Federal Republic of[95] from time to time. The case of Myanmar may be cited as one of the recent examples. By a treaty signed in London on 17th October, 1947, the United Kingdom recognised the Republic of the Union of Burma as a fully independent sovereign state.[96] Shortly thereafter, the Ambassador of Burma on behalf of his government applied for membership of the UN intimating the Secretary-General of the UN that sovereignty over Burma had passed from the British Crown to the Burmese people on 4th January, 1948. The Ambassador, however, in his letter referred to the applicant state as Union of Burma and described his designation as the Ambassador of Burma.[97] The UN approved the membership of the aforesaid applicant state by the name, the Union of Burma[98] which later adopted the

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Macedonia v Greece) (Verbatim Record of Oral Proceedings 30 March 2011) ICJ CR 2011/12 32 <http://www.icj-cij.org/docket/files/142/16390.pdf> accessed 17 August 2013.

88 See Francesco Messineo, 'Maps of Ephemeral Empires: The ICJ and the Macedonian Name Dispute' (2012) 1 Cambridge Journal of International & Comparative Law 175.

89 Trifunovska (n 65) 141-142.

90 Geneva Declaration, 9 November 1918; Trifunovska (n 89) 149-150.

91 See Proclamation of the Kingdom of Serbs, Croats, and Slovenes (1 December 1918). Trifunovska (n 89) 157-158.

92 King Alexander made announced the change of name on 3 October 1929; See Anonymous, 'Kingdom of Yugoslavia' (1929) 91(6) Advocate of Peace through Justice 355. See also Henry Baerlein, *The Birth of Yugoslavia* (London Parsons 1922) 271.

93 This particular style of name appeared in the 1943 Declaration of Anti-Fascist Council of the People's Republic of Yugoslavia and other related documents issued on 29 November 1943. See Trifunovska (n 65) 202-210.

94 The Constitution of the Federal People's Republic of Yugoslavia, 31 January 1946; Trifunovska (n 65) 212.

95 Trifunovska (n 65) 224.

96 See the Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of Burma Regarding the Recognition of Burmese Independence and Related Matters (1948) 2(3) CUP 183-184.

97 UNGA 'Letter from the Ambassador of Burma Addressed to the Secretary-General, dated February 27, 1948, Concerning the Application of Burma for Membership in the United Nations' (28 February 1947) UN Doc S/687.

98 UNSC Res 45(1948) (10 April 1948) UN Doc S/RES/45(1948); UNGA Res 188(S-2) (19 April 1948) UN Doc A/RES/188(S-2); UNSC 'Report to the Security Council by the Committee on the Admission

following names such as, Socialist Republic of the Union of Burma on 4th January, 1974, before reverting to the Union of Burma again on 23rd September, 1988. On 18th June, 1989, the State Law and Order Restoration Council adopted the name Union of Myanmar.[99] The official name of the said country since 30th March, 2011 is the Republic of the Union of Myanmar.[100] Likewise, the Democratic Republic of the Congo at the time of gaining independence was known as the Republic of Congo.[101] The Democratic Republic of the Congo changed its name to the Republic of Zaire on 27th October, 1971.[102] Thereafter, the name, the Republic of Zaire was replaced with the Democratic Republic of the Congo in 1997.[103] On the other hand, Congo-Brazzaville adopted the name the Republic of the Congo immediately upon gaining independence.[104] Later, the Republic of the Congo changed its name to Congo (People's Republic of) in 1971.[105] Likewise, the Union of India adopted *Bharat* as an alternative name while adopting its Constitution.[106] In 1949, Ireland was declared a republic with a new designation namely, Republic of Ireland. The United Republic of Tanganyika and Zanzibar adopted the name, United Republic of Tanzania.[107] Ceylon changed its name to the Republic of Sri Lanka in 1972.[108] The name United Arab Republic was changed to Arab Republic of Egypt in 1971.[109] The People's Democratic Republic of Yemen was successively listed as Southern Yemen, People's Republic of Southern Yemen, People's Democratic Republic of Yemen and Democratic Republic of Yemen before merging with Yemen Arab Republic to form the Republic of Yemen.[110]

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of New Members Concerning the Application of the Union of Burma for Membership in the United Nations' (30 March 1948) UN Doc S/706.

99 See the Yearbook of the United Nations (1989) 972.

100 Article 2 of the Myanmar Constitution provides that the State is officially known as the Republic of the Union of Myanmar. See The Constitution of the Republic of the Union of Myanmar, art 2 <https://treaties.un.org/Pages/HistoricalInfo.aspx#Myanmar> accessed 31 August 2021.

101 The application of the Republic of Congo's for admission to the UN was submitted under the signature of Patrice Lumumba who described himself as Prime Minister of the Government of the Republic of Congo. See UNSC 'Cable dated 1 July 1960 from the Prime Minister of the Government of the Republic of Congo Addressed to the U.N. Secretary-General' (1 July 1960) UN Doc S/4361. The Republic of Congo was nonetheless referred to as 'the Republic of the Congo' and 'the Republic of Congo (Leopoldville)' respectively in the Security Council and the General Assembly resolutions concerning its admission to the UN. See UNGA Res 1480 (XV) (20 September 1960) UN Doc A/RES/1480(XV); UNSC Res 142 (7 July 1960) UN Doc S/RES/142.

102 See the Yearbook of the United Nations (1971) 766; In the 1964 Yearbook of the United Nations, the Republic of Congo was referred to as Democratic Republic of Congo. In the 1965 Yearbook of the United Nations, the Republic of Congo was referred to as Democratic Republic of the Congo. In the earlier UN Yearbooks from 1961-1963, the Republic of Congo was referred to as Congo (Leopoldville).

103 The change was made on 17 May 1997. See the Yearbook of the United Nations (1997) 1574.

104 The only difference between names of the two states once appeared to be an extra 'the' before 'Congo'. cf UNSC 'Cable dated 15 August 1960 from the Head of State of the Republic of the Congo Addressed to the U.N. Secretary-General' (15 August 1960) UN Doc S/4433 and UNSC 'Cable dated 1 July 1960 from the Prime Minister of the Government of the Republic of Congo Addressed to the U.N. Secretary-General' (1 July 1960) UN Doc S/4361.

105 The Yearbook of the United Nations 1971 (n 102) 766.

106 Constitution of India (1949) art 1.

107 In a communication addressed to the UN Secretary-General on 2 November 1964, the Permanent Mission of the United Republic of Tanganyika and Zanzibar informed that the country would be known as the United Republic of Tanzania with immediate effect. See the Yearbook of the United Nations (1964) 580.

108 See the Yearbook of the United Nations (1972) 824, Sri Lanka was admitted to the UN under the name, Ceylon. See also UNGA Res 995(X) (14 December 1955) UN Doc A/RES/995(X).

109 The Yearbook of the United Nations 1971, (n 102) 766.

110 United Nations Treaty Collection <http://treaties.un.org/Pages/HistoricalInfo.aspx?#"Yemen"> accessed 16 August 2021.

Needless to say, the corollary of adoption of a new name by a state is that the new name will supersede the earlier one. The previous name may either fall into disuse or continue as the municipal name, as the case may be. For example, when two or more states unify themselves into a new state, adoption of a new designation for the new state may have the effect that the names of the conjoining states will lose their status as state names and relegate to municipal names (the reason being that the conjoining states in such cases will become the municipal units of the new state). As discussed earlier, the denominations such as, Egypt and Syria had had similar consequence while forming the United Arab Republic. The provisional Constitution of the United Arab Republic (U.A.R.) provided that the new state would consist of two regions namely, Egypt and Syria.[111] In comparison to the above examples, the withdrawal of the then Syrian region from the United Arab Republic (U.A.R.) and the subsequent use of the name, Syrian Arab Republic show that a federating unit may adopt its former designation after reverting to its previous identity as a sovereign state.[112] Similarly, in the case of annexation, the name of the annexed state may become a municipal name or be faced with extinction depending on the circumstances since the annexed state may continue as a municipal unit or lose its political or administrative existence altogether. A notable example is the annexation of Korea by Japan.[113] Evidently, in any of the aforesaid situations, the current or previous name of a former state may not be altogether bereft of historical or referential value.

The name of a state may fall into disuse in consequence of the cessation of the legal personality of the state concerned. Generally, the legal personality of a state ceases to exist as an *ipso facto* corollary of either disintegration of a state or unification or merging of several states. In this article, the disuse of the name of a state in consequence of cessation of statehood is termed the extinction of a state name. The dismemberment of Czechoslovakia and the Union of Soviet Socialist Republics (USSR), along with the consequent abandonment of these designations, are the examples of disintegration paradigm. In contrast, the absorption of German Democratic Republic into Federal Republic of Germany with the resultant effect of the dissolution of the former's statehood and abolition of its name may serve as an example of the latter.[114] The German Democratic Republic acceded to Federal Republic of Germany on 3rd October, 1990[115] in furtherance of the Unification Treaty of 31st August, 1990.[116] With the accession of the

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[111] The Provisional Constitution of the United Arab Republic (5 March 1958) art 58. It may be noted that the way Egypt and Syria were mentioned in Article 58 of the aforesaid Provisional Constitution sufficiently indicates that their status as sovereign states had changed to municipal unit.

[112] See UNSC 'Cable dated 8 October 1961 from the Prime Minister and Minister for Foreign Affairs of the Syrian Arab Republic addressed to the President of the General Assembly' (9 October 1961) UN Doc A/4914-S/4958. See also UNSC 'Cable dated 30 September 1961 from the Prime Minister and Minister for Foreign Affairs of the Syrian Arab Republic addressed to the President of the General Assembly' (9 October 1961) UN Doc A/4913-S/4957.

[113] See Treaty Annexing Korea to Japan (29 August 1910) 282-283. See also Editorial Comment, 'The Annexation of Korea to Japan' (1910) 4 AJIL 923-925.

[114] About the admission of the German Democratic Republic and Federal Republic of Germany to the UN, see UNSC Res 335 (22 June 1973) UN Doc S/RES/335. See also UNGA Res 3050(XXVIII) (18 September 1973) UN Doc A/RES/3050(XXVIII).

[115] The then Prime Minister of German Democratic Republic by a letter to the UN Secretary-General informed that with this accession, the membership of German Democratic Republic in the UN and other intergovernmental organizations would cease forthwith. See UNGA 'Letter dated 27 September 1990 from the Prime Minister of the German Democratic Republic to the U.N. Secretary-General' (28 September 1990) UN Doc A/45/557 Annex.

[116] The Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty) (31 August 1990) art 1.

German Democratic Republic to Federal Republic of Germany, the two German States had merged to form one state as a single member of the United Nations. It was also decided that from the date of unification, the Federal Republic of Germany would function in the United Nations under the title of Germany.[117]

In international law, there appears to be no prohibition against the use of an extinct state's name by another state. However, that does not mean that an adopting state can overlook the nexus between its identity and the official denomination while using an extinct state's name. The case of the Federal Republic of Yugoslavia presents an interesting case in point in this regard. In the course of dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), Montenegro and Serbia claimed continuation of the international legal personality of SFRY under the name of the Federal Republic of Yugoslavia (FRY). However, the European Community[118] as well as the United Nations[119] was of the view that SFRY had ceased to exist and therefore, FRY would not automatically continue the membership of SFRY. Under the circumstances, FRY applied afresh in 2000 for admission to membership of the UN in compliance with the Security Council Resolution 777 (1992).[120] In 2003, the name, FRY was further changed to Serbia and Montenegro.[121] It may be noticed that the name, FRY was adopted when the state concerned claimed succession to SFRY. Later, the name, Serbia and Montenegro was adopted, perhaps because FRY could no longer serve as the appropriate denomination of the said state's identity.[122]

The fact that a state cannot afford to dispense with its name does not mean that it must adopt a unique designation. Hence, commonality of name among two or more states is not quite uncommon, although, ironically, in most of such cases, states sharing the commonality of name have strained relationships. It is generally accepted as sufficient, if any prefix or suffix which complements such common denomination makes their respective names as a whole identifiably different. The bottom line is that unique or not, a state must have a name.

V. Dispute over State Name: A Case Study

By now it is evidently clear that the identity or name of any state or prospective state can be the subject matter of intriguing issues. For example, if a state has absolute autonomy

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[117] UNGA 'Note Verbale dated 3 October 1990 from the Secretary General to the Permanent Representative of Member States' (3 October 1990) UN Doc A/45/567; According to Professor James Crawford, the identity and legal personality of German Democratic Republic as a separate state had been dissolved into the identity and legal personality of Federal Republic of Germany as a result of the unity; Crawford (n 42) 705.

[118] Conference on Yugoslavia Arbitration Commission (n 71).

[119] UNSC Res 777(1992) (19 September 1992) UN Doc S/RES/777.

[120] UNGA 'Application of the Federal Republic of Yugoslavia for Admission to Membership in the United Nations: note by the Secretary-General' (30 October 2000) UN Doc A/55/528-S/2000/1043. See also UNGA Red 55/12 (10 November 2000) UN Doc A/RES/55/12; UNSC Res 1326 (31 October 2000) UN Doc S/RES/1326(2000).

[121] The change of name became effective following adoption of the Constitutional Charter of Serbia and Montenegro on 4 February 2003. See UNGA 'Letter dated 4 February 2003 from the Permanent Representative of Serbia and Montenegro to the U.N. Secretary-General' (10 February 2003) UN Doc A/57/728-S/2003/170; Serbia and Montenegro again broke up in 2006 as Montenegro declared itself an independent state under the name of the Republic of Montenegro; UNSC 'Letter dated 7 June 2006 from the Permanent Representative of Austria to the U.N. Secretary-General' (n 74).

[122] In the author's opinion, the appellation, Yugoslavia thus got altogether removed from the official titles of the former constituent republics of SFRY. Nevertheless, the Former Yugoslav Republic of Macedonia continued to be used within the UN–which, however, was not the official name of the then Republic of Macedonia.

to adopt any name whatsoever, or conversely; if a state's name should reflect its purported identity; if a state has the right to be addressed by other states by the name it has chosen for itself, or, putting it differently, if a state, by adopting a name, creates an obligation on other states to call it by the name it has chosen for itself; if an international organisation has the authority to apply such denomination to any of its member states, which is different from the official title of the state concerned etc.

The dispute over name between Greece and the then Republic of Macedonia illustrates all of the above-mentioned issues. In the aftermath of the break-up of Yugoslavia, the Assembly of the Socialist Republic of Macedonia adopted the Declaration on the Sovereignty of the Socialist Republic of Macedonia on 25 January 1991. On 7 June 1991, the said Assembly enacted a constitutional amendment, changing the name from Socialist Republic of Macedonia to the Republic of Macedonia. The Assembly then adopted a declaration asserting the sovereignty and independence of the new state and sought international recognition.[123] The then Republic of Macedonia's request for EC recognition was considered by the Badinter Commission in the light of the EC's 16 December Guidelines and its Declaration on Yugoslavia which included among others the condition that a Yugoslav Republic would refrain from using such denomination as this would imply territorial claims towards a neighbouring state.[124] The Badinter Commission finally decided that Macedonia satisfied all the tests for recognition and that the use of the name 'Macedonia' did not imply any territorial claim against another state.[125] However, the EC eventually declined to accord recognition to the Republic of Macedonia. The EC expressed that they were willing to recognize Macedonia as a sovereign and independent state within its existing borders but under a name that would be accepted by all the parties concerned. In its statement, the EC addressed the Republic of Macedonia as the Former Yugoslav Republic of Macedonia.[126] At the EC Lisbon Summit of 26-27 June of 1992, the EC again expressed its willingness to extend recognition to Macedonia if under a name that would not include the term Macedonia.[127]

In January of 1993, the then Republic of Macedonia applied for membership in the UN.[128] Addressing the applicant state as the Former Yugoslav Republic of Macedonia, Greece registered a prompt reaction.[129] Greece contended that admission of the applicant state to UN membership prior to meeting the necessary prerequisites- in particular abandoning the use of the denomination Republic of Macedonia- would not be conducive to peace and stability in that region.[130] Greece argued that the adoption of the

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123 See *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 1026 [15] <http://www.icj-cij.org/docket/files/142/16827.pdf> accessed 14 August 2013.

124 Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, reprinted in 31 ILM (1992) 1485-1487. See also Roland Rich, 'Recognition of States: The collapse of Yugoslavia and the Soviet Union' (1993) 4 EJIL 51-53.

125 Rich (n 124) 52.

126 ibid.

127 Presidency Conclusions, at 42, Lisbon European Council (26-27 June 1992), available at <http://www.europarl.europa.eu/summits/lisbon/li2_en.pdf> accessed 15 August 2013.

128 UNGA 'President of the Republic of Macedonia to the U.N. Secretary-General, Letter dated 30 July 1992 from the President of the Republic of Macedonia addressed to the U.N. Secretary-General: note by Secretary General' (22 January 1993) UN Doc A/47/876-S/25147 Annex.

129 UNGA 'Memorandum from the Minister for Foreign Affairs of Greece, Concerning the Application of the former Yugoslav Republic of Macedonia for admission to the United Nations, in Letter dated 25 January 1993 from the Permanent Representative of Greece to the United Nations addressed to the Secretary-General' (25 January 1993) UN Doc A/47/877-S/25158 Appendix [1].

130 ibid [5-8].

name Republic of Macedonia in a way represented the differences between two states.[131] The Committee on the Admission of the New Members in its proposed draft resolution omitted to refer the applicant state by name. Rather the draft resolution addressed the Republic of Macedonia as *the State whose application is contained in document S/25147* and also recommended that it should be referred to as *the Former Yugoslav Republic of Macedonia* for all purposes within the United Nations pending settlement of differences over name.[132] Greece noted with satisfaction that admission of the applicant state under such a provisional name would be an acceptable measure that could help resolve the differences between two states.[133] Accordingly, the Security Council passed a resolution recommending for admission of the applicant state.[134] The President of the Security Council clarified that the term, the Former Yugoslav Republic would carry no implication that the state concerned had had any connection with the Federal Republic of Yugoslavia (Serbia and Montenegro).[135] The General Assembly passed its respective resolution in line with the Security Council resolution.[136] Mr. Kiro Gligorov, the then President of Macedonia, in his address to the General Assembly, referred to his country by its constitutional name, the Republic of Macedonia, while all other states, including Greece, referred to the new member state as the Former Yugoslav Republic of Macedonia.[137] On 18th June 1993, the Security Council passed Resolution 845 (1993) urging the two states to continue their efforts under the auspices of the Secretary-General to arrive at a speedy settlement of the remaining issues between them.[138] Against this backdrop, Greece and Macedonia signed an Interim Accord on 13th September 1995 providing for the establishment of diplomatic relations between them and addressing other related issues.[139] The Interim Accord referred to Greece as 'Party of the First Part' and Macedonia as 'Party of the Second Part' so as to avoid using the respective names of the state parties. In April 2008, Macedonia's candidacy for NATO was considered in a meeting of NATO member states in Bucharest. The communiqué issued at the end of the Summit stated that an invitation would be extended to the applicant state as soon as a mutually acceptable solution to the name issue would have been reached.[140] This led Macedonia to bring a case to the International Court of Justice against Greece for breach of the Interim Accord.[141] Eventually, in 2019, the two countries resolved their dispute over the name, after almost three decades, by concluding an agreement to the effect that

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131 Greece threatened that it would not recognize Macedonia if its contentions were not addressed; ibid [15]; In the meantime, Macedonia objected to the designation the former Yugoslav Republic of Macedonia. See UNSC 'Letter dated March 24, 1993 from the Republic of Macedonia Government: note by UN President of the Security Council' (6 April 1993) UN Doc S/25541 Annex.

132 UNSC 'Report of the Committee on the Admission of New Members Concerning the Application for Admission to Membership in the United Nations Contained in Document S/25147' (7 April 1993) UN Doc S/25544.

133 UNSC 'Letter dated April 6, 1993 from the Permanent Representative of Greece to the United Nations addressed to the President of the Security Council' (6 April 1993) S/25543 Annex.

134 UNSC Res 817(1993) (7 April 1993) UN Doc S/RES/817(1993).

135 UNSC 'Note by the President of the Security Council' (7 April 1993) UN Doc S/25545.

136 UNGA Res 47/225 (8 April 1993) UN Doc A/RES/47/225. Greece was among the states that sponsored the draft General Assembly resolution on admission of Macedonia to UN membership. See Draft UN Doc A/47/L.54 (7 April 1993).

137 UNGA Res 47/225 GAOR 98th Plenary Session (13 April 1993) UN Doc A/47/PV.98.

138 UNSC Res 845(1993) (18 June 1993) UN Doc S/RES/845.

139 UNSC 'Interim Accord, in Letter dated 13 September 1995 from the Secretary-General Addressed to the President of the Security Council' (14 September 1995) UN Doc S/1995/794 Annex-I.

140 *The former Yugoslavia Republic of Macedonia v Greece* (n 123) [22].

141 The Court found that Greece by objecting to admission of the Former Yugoslav Republic of Macedonia to NATO breached its obligation under article 11 of the Interim Accord of 13 September 1995; ibid [169-170].

the Republic of Macedonia would change its name to the Republic of North Macedonia.[142] As a result, North Macedonia was able to join NATO.[143]

In this dispute, the main concern of Greece was that the name, Macedonia, referred to a wider geographical region, extending over four neighboring countries, with only 38.5% within its existing borders. The exclusive use of Macedonia as the state's official name, in the opinion of Greece, could become a reason for its expansionist claims in the future.[144] Basically, Greece's concern was that the name, Macedonia, did not reflect the actual identity of the state which adopted it. Consequently, Greece demanded that the name Republic of Macedonia should be abandoned to mitigate tension in that region.[145] What actually transpired from Greece's position was that Greece had identified its concern over the supposed expansionist ambition of Macedonia with the latter's official name. Arguably, if Macedonia really wanted to pursue its territorial claim against Greece, the change of Macedonia's official name at the behest of Greece would not be enough to deter it from doing so, nor would it signify relinquishment of the country's supposed territorial claim against Greece.[146] The Greco-Macedonian name dispute has shown that a state's name needs to be appropriately aligned with its identity, failing which difference can arise and develop into full-scale international disputes.[147] What it further elucidates is that, although it is the general practice that states address each other by the names they have respectively chosen for themselves, a state may object to the adoption of a certain name by another state and refrain from using the same if and when the circumstances warrant.

The extent of authority of an international organization to deal with situations concerning differences between member states over their names, as may be argued, should be determined in accordance with the instrument by which the international organisation has come into being. Such authority, if there exists any, should be applicable only to the member states of the concerned international organisation. It may be noted that although the Security Council omitted to address Macedonia by name, it recommended to the General Assembly to refer the applicant state as 'The Former Yugoslav Republic of Macedonia' for all purposes within the United Nations till settlement of difference over its name.[148] The General Assembly admitted Macedonia to membership first and then determined to address it as the Former Yugoslav Republic of Macedonia following orders from the Security Council.[149] From the legal point of view, one may legitimately question whether the General Assembly and the Security Council

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[142] See Article 1 of the Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council resolutions 817 (1993) and 845 (1993), the Termination of the Interim Accord of 1995, and the Establishment of a Strategic Partnership between the Parties, in Identical letters dated 13 February 2019 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council (14 February 2019) UN Doc A/73/745–S/2019/139 Annex-I. With the Final Agreement's entry into force, the Interim Accord of 1995 terminated.

[143] Helena Smith, 'Macedonia Officially Changes its Name to North Macedonia' (*The Guardian*, 2019) <https://www.theguardian.com/world/2019/feb/12/nato-flag-raised-ahead-of-north-macedonias-prospective-accession> accessed 30 July 2020.

[144] UN Doc A/47/877-S/25158 Appendix (n 129) [10].

[145] ibid [15].

[146] For an opposite view, see Dean M Poulakidas, 'Macedonia: Far More Than a Name to Greece' (1995) 18(2) HastingsIntl&CompLRev 397.

[147] In the author's view, the difference over name between Greece and Macedonia, having regard to the fact that only Greece raised objection in this regard, is a bilateral one–which Greece could have given a multilateral diffusion. See also Matthew CR Craven, 'What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood' (1995) 16 AustYBIL 199.

[148] UN Doc S/RES/817(1993) (n 134) para 2.

[149] UN Doc A/RES/47/225 (n 136).

acted within their respective boundaries of jurisdiction by deciding that a member state would be referred to by a designation which is different from the officially accepted one.

The Greco-Macedonian name dispute clearly delineates why it makes sense for a state to denominate its identity appropriately. It also epitomises the importance of name as the most suitable conveyor of a state's identity as a member of international community. The importance of a state's name is so fundamental that if an entity or a state does not want to address another state by the name the latter has chosen for itself, it will have to invent a name or designation to address such state whose name is being so disputed. Presumably, the Security Council understood the problem of not referring a state by any name at all and, therefore, took the practical decision to call the applicant state by a provisional name such as, 'The Former Yugoslav Republic of Macedonia'.[150] Additionally, the EC's response to Macedonia's request for recognition shows that the whole idea and purpose of recognition will be rendered futile if states do not have distinguishable identities, for the recognition of one state by another is essentially premised on the concept of separate identity of states. In fine, the Greco-Macedonian name dispute perfectly portrays the importance of name as an attribute of statehood.

VI. Conclusion

It could be gleaned from the previous discussion that a state's name is the most crucial instrument for manifesting its identity. Metaphorically speaking, the name of a state is the genetic code in which is encrypted the genesis of a people and their evolution into a state. Therefore, choosing a state's name has never been considered a free ride, nor does a state change its name randomly at will. This also explains why a state's name is chosen before formal attainment of statehood and it continues as the official designation afterwards. The claim that the name of a state can be regarded as an element of statehood becomes clear if considered from this point of view.

We now live in a world where states are increasingly engaging in more diverse international activities than ever before. Since states are identifying more and more common areas of interests and cooperation, multilateralism and collective cooperation in international relations have become the reality of today's international community life. Collective recognition of states, membership in international organizations, multilateral treaties, multilateral trade and resolution of disputes by judicial means, permanent diplomatic missions abroad, etc. have become the be-all and end-all of international community life, and it requires representation of the legal personalities of states more frequently than ever. How can it be possible for states to engage in these activities without manifesting their representative identities? This shows that the importance of a state's name, in the contemporary world of ubiquitous multilateral legal relationships, cannot be overemphasised. Hence, although no international custom or treaty has yet recognised a state's name as an element of statehood, the fact remains that a state, from its emergence to extinction, must have a name.

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[150] UN Doc S/RES/817(1993) (n 134).

International Crimes in the Digital Age: Challenges and Opportunities Shaped by Social Media

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Abstract

Due to the growing influence of social media on the dynamics of international criminal law, the investigation and prosecution of international crimes have taken an entirely new dimension. Particularly, the increasing use of these platforms has led to the rise of new types of evidence, namely user-generated evidence thus creating considerable opportunities, but also unique legal challenges. Indeed, while social media became a source of evidence for public authorities, these same platforms are used to fuel offline brutality and atrocities. This article thus provides a comprehensive insight into the advantages and disadvantages produced by the growth of user-generated evidence. It also calls for a necessary legal change to accommodate the digital age. Indeed, it is imperative to adjust the existing legal framework in order to contain the downsides of user-generated evidence on the one hand, and promote their effective use in the International Criminal Court to promote justice and transform UGE in the much needed mine of evidence.

I. Introduction

The cyber age we are witnessing has prompted the digitalization process at an exponential pace and has largely contributed to the astonishing popularization of social media.[1] It is no exaggeration to assert that the latter forms an integral part of individuals daily activities and thus produces an unprecedented global interconnectedness.[2] The rise of these social networks and their ever growing popularity has tremendously altered not only the individuals' private sphere but also the public domain. Indeed, social media is substantially affecting the world′s dynamics and proves to be particularly true when it comes to the legal realm.[3] As a matter of fact, in this digital era, these massive online platforms give rise to new challenges and opportunities in relation to the existing framework of international criminal law (hereinafter ′ICL′). Hence, due to the new aspects it must incorporate in the investigative processes, the prosecution of international crimes is gaining greater complexity.[4] In this context, it is noteworthy that this development produces both advantageous consequences and significant harm simultaneously. Indeed, on the one hand, an important aspect of social media is the fact

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1 Mylona Ifigeneia and Amanatidis Dimitrios, ′Globalization, Social Media and Public Relations: A Necessary Relationship for the Future?' in Persefoni Polychronidou and Anastasios Karasavvoglou (eds) *The Economies of the Balkan and the Eastern European Countries in the changing World* (KnE Social Sciences 2018) 309–320.

2 ibid.

3 Jeremy Harris Lipschultz, *Social Media Communication: Concepts, Practices, Data, Law and Ethics* (2nd edn, Routledge 2018) 233-260.

4 Isabella Bank, 'International Criminal Liability in the Age of Social Media: Facebook's Role in Myanmar (*PILPG*, 13 February 2019) <www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2019/2/13/international-criminal-liability-in-the-age-of-social-media-facebooks-role-in-myanmar> accessed 1 July 2021.

that it constitutes a worldwide accessible platform for the documentation of human rights violations and atrocities perpetrated.[5] Indeed, online wars and brutality that materialize find their roots in social media which implies that the latter represents an open source for evidence. Thus, the digital ecosystem is transformed into a precious information database for the investigative process. The proliferation and growing use of such evidence delineates how social media is revamping the paradigm of ICL.[6] Nonetheless, the reliance on user-generated evidence (hereinafter 'UGE') derived from online platforms remains all the more controversial mainly due to issues of credibility, fairness and reliability. Such issues urge the development of a binding framework to govern UGE and eventually fill in the legal lacuna. On the other hand, it is evident that social media, such as Facebook and Twitter, have been instrumentally used by legal or natural persons for hate propaganda and disinformation.[7] Many governments' campaigns, for instance, revolve around sharing inflammatory posts, fake news and hatred.[8] Accordingly, they establish a climate of hate and animosity and constantly nourish it to pursue their political objectives to the detriment of international peace and security. This phenomenon has been coined as 'the weaponization of social media', which results in the practice of widespread brainwashing and indoctrination of States' populations.[9] Accordingly, these channels of communication and information exchange set the ground for the commission of international crimes and play a significant role in fuelling atrocities.[10] This phenomenon drew the attention of the international community and raised the issue of what it could entail in terms of individual criminal responsibility (hereinafter 'ICR') under ICL.[11]

Accordingly, this article seeks to study the rise of this new type of evidence and highlight its implications for the legal realm. It will answer the following question: what are the positive and negative impacts of social media on the realm of ICL, and in particular, the investigation and prosecution of international crimes?

II. Setting the Context: The ICC, Evidence Gathering and Social Media

The ICC is an intergovernmental organization and the first permanent international court, established by the Rome Statute of the International Criminal Court (hereinafter 'RS') upon its ratification by 60 States in 2002.[12] The ICC today counts 123 State Parties (hereinafter 'SP') and sits in The Hague, in the Netherlands.[13] Its mandate consists of investigating and prosecuting

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5 Human Rights Watch, 'Social Media's Moral Reckoning' (*Human Rights Watch*, 21 December 2018) <www.hrw.org/news/2018/12/21/social-medias-moral-reckoning> accessed 1 July 2021.

6 Rosine Faucher, 'Social Media and Change in International Humanitarian Law Dynamics' (2019) 2(1) Inter Gentes 48, 51.

7 Zachary Laub, 'Hate Speech on Social Media: Global Comparison' *(Council on Foreign Relations*, 7 June 2019) <www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons> accessed 1 July 2020.

8 ibid.

9 For example, see Alexander Tsesis, 'Social Media Accountability for Terrorist Propaganda (2017) 86(2) Fordham Law Review 605, 605-613.

10 Zachary Laub (n 7).

11 Talita de Suza Dias, 'Propaganda and Accountability for International Crimes in the Age of Social Media: Revisiting Accomplice Liability in International Criminal Law (*OpinioJuris*, 4 April 2018) <http://opiniojuris.org/2018/04/04/propaganda-and-accountability-for-international-crimes-in-the-age-of-social-media-revisiting-accomplice-liability-in-international-criminal-law/> accessed 1 July 2021.

12 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 1.

13 ibid art 3.

serious international crimes,[14] and when possible, trying suspects.[15] The Court seeks to end the culture of impunity by holding individuals accountable for their crimes and have a preventive and deterrent effect in order to reach international peace and stability around the world, and in particular, in post-conflict areas.[16] The ICC′s governing legal instrument, the RS, is a multilateral international treaty that grants it jurisdiction over four crimes: genocide, crimes against humanity, war crimes and the crime of aggression.[17] The temporal and territorial jurisdiction of the ICC extends over crimes committed after July 2002 or the date on which a State ratified the RS[18] on the territory of an SP or a third State that has accepted the ICC′s jurisdiction.[19] The personal jurisdiction of the ICC covers crimes committed by the nationals of an SP or a third State that accepted the ICC′s jurisdiction.[20]

The ICC′s jurisdiction can be triggered by three mechanisms: a referral by an SP,[21] an investigation initiated by the Prosecutor[22] or a referral by the United Nations (hereinafter ′UN′) Security Council.[23] Indeed, even though the ICC is not a UN organization, it maintains close relations with this international body[24] that has the power to grant it jurisdiction over a situation via a resolution adopted under Chapter VII of the UN Charter. However, it is important to point out that the ICC is a court of last resort that complements national courts and thus can only take over cases if States are unwilling or genuinely unable to do so.[25] Additionally, it is imperative that the crime is of sufficient gravity[26] and that its investigation serves the interests of justice.[27] Moreover, as the ICC does not have its own police force or enforcement body, it relies on States' cooperation to give effect to the arrest warrants it issues by arresting and transferring the suspects, and by enforcing the sentences.

Once jurisdiction is established, investigation, prosecution and trial can eventually lead to ICR. ICR for crimes within the jurisdiction of the ICC is defined by article 25[28] which reiterates that the Court has the legal capacity to exert its jurisdiction exclusively over natural persons as opposed to legal persons and States.[29] It further outlines in a hierarchical manner different modes of participation that trigger ICR for the crimes listed in article 5 of the RS,[30] namely commission, ordering, instigating and, aiding and abetting.[31] ICR entails liability for punishment[32] in the nature of imprisonment, sometimes accompanied by a fine and/or forfeiture of proceeds, property and assets.[33] However, the path for ICR is long and complex: it comprises lengthy

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14 ibid part 5.
15 ibid part 6.
16 ibid Preamble.
17 ibid arts 1, 5-8.
18 ibid art 11.
19 ibid art 4.
20 ibid art 12.
21 ibid arts 13(a) and 14.
22 ibid arts 13(c) and 15.
23 ibid art 13(b).
24 ibid art 2.
25 ibid Preamble, arts 17(1)(a)(b), 17(2) and 17(3).
26 ibid art 17(1)(d).
27 ibid art 53(1)(c); Office of the Public Prosecutor, *Policy Paper on the Interests of Justice* (International Criminal Court 2007) 1-2.
28 Rome Statute (n 12) art 25.
29 ibid art 25(1).
30 ibid art 25(2).
31 Rome Statute (n 12) art 25(3); Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 Journal of International Criminal Justice 953, 955.
32 Rome Statute (n 12) art 25(2).
33 ibid art 77.

investigations and requires a strong evidentiary basis coupled with international cooperation.[34] In this regard, evidence gathering is a crucial step in the prosecution of international crimes and is governed by the RS in conjunction with 'The Rules of Procedure and Evidence'.[35] This legal framework establishes the standards for the collection, management, presentation, admission and evaluation of evidence.[36] The Investigation Division of the Office of the Prosecutor is in charge of evidence gathering on the territory where crimes have allegedly been committed.[37] The investigators have the duty to investigate both incriminating and exonerating situations equally in line with the truth-telling objective of the ICC.[38] Again, the ICC expects the cooperation of SPs[39] as they play a pivotal role in easing access to evidence, providing assistance and facilitating witness appearance. The gathered evidence can take various forms such as documents, objects, witness statements and testimonies, and is subject to an authoritative assessment by the judges who enjoy the discretion to evaluate their relevance and admissibility.[40]

Nevertheless, it is apparent that the foregoing procedural and substantive framework of the ICC is facing numerous challenges and reforms in the digital era.[41] Indeed, the popularization of the Internet coupled with a widespread use of various communication technologies, in particular smartphones, have led to important developments in the prosecution process of international crimes.[42] At the heart of these developments, one can identify a catalyst as powerful as it is interesting from a legal perspective: social media. The latter 'refers to websites and applications that are designed to allow people to share content quickly, efficiently, and in real-time'.[43] Accordingly, the main point of social media is digital content creation by its users, which varies from pictures and videos to texts and messages, shared publicly on platforms such as Facebook, Instagram and YouTube.[44] User-generated content is, however, gaining importance over time and nowadays carries significant legal implications.[45] In fact, social media brings a fruitful contribution to the body of ICL through the content it displays but also represents a dangerous weapon in the wrong hands. These two phenomena are two sides of the same coin and have largely contributed to the alteration of the legal landscape as will be shown and critically assessed in the following two sections.

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34 ibid art 69, parts 5 and 9.

35 ibid arts 21, 51 and 69; International Criminal Court, *The Rules of Procedure and Evidence* (2nd edn, Enschede 2013) rules 63.

36 Rules of Procedure and Evidence (n 35) rules 63-75.

37 The Human Rights Center, 'Digital Fingerprints. Using Electronic Evidence to Advance Prosecutions at the International Criminal Court' (2014) UC Berkley School of Law 4.

38 Rome Statute (n 12) art 54(1)(a).

39 ibid art 86.

40 Alexa Koenig et al, 'Open Source Fact-Finding in Preliminary Examinations' in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 2* (Torkel Opsahl Academic EPublisher 2018) 705; Mark Kersten, 'Challenges and Opportunities: Audio-Visual Evidence in International Criminal Proceedings' (*Justice in Conflict*, 4 March 2020) <https://justiceinconflict.org/2020/03/04/challenges-and-opportunities-audio-visual-evidence-in-international-criminal-proceedings/> accessed 1 July 2021.

41 Marta Poblet and Jonathan Kolieb, 'Responding to Human Rights Abuses in the Digital Era: New Tools, Old Challenges' (2018) 54(2) Stanford Journal of International Law 277-281.

42 Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2018) 41(2) Fordham International Law Journal 287-288.

43 Matthew Hudson, 'What is social media?' (*The Balance Small Business*, 8 May 2019) <www.thebalancesmb.com/what-is-social-media-2890301> accessed 1 July 2021.

44 Law Insider, 'Definition of social media' (*Law Insider*, 2020) <www.lawinsider.com/dictionary/social-media> accessed 22 April 2020.

45 Isabella Regan, 'Citizen digital evidence and international crimes' (*Center for International Criminal Justice*, 2020) <https://cicj.org/research/citizen-digital-evidence-and-international-crimes/> accessed 1 July 2021.

III. UGE Paving the Road to Individual Criminal Responsibility

A. A Panacea for the Inherent Procedural Weaknesses of the ICC

In this digital era, it is apparent that the proliferation of social media activity has particularly revolutionized the perspective on evidence so as to encompass UGE. Indeed, at the intersection of user-generated content and ICL, we find a plethora of UGE flooding social media and calling for the international community's attention. In this context, it is important to point out that the qualification as 'user' refers to an ordinary natural or legal person as opposed to traditional evidence providers such as investigation agents, experts or authorities.[46] Consequently, the role of these users is becoming a pivotal addition in building an evidentiary basis for various crimes[47] and bringing new challenges in courtrooms as will be discussed later in this article. Similarly, there is a growing reliance on open source evidence which represents any information retrieved from sources accessible to the general public.[48] Accordingly, the focus will be on digital and technologically-derived open source evidence generated by social media users.[49] The explosive increase of this category of evidence and its prevalence is ushering in a new era of online investigation and prompting a swift response from the ICC as to its use.[50]

It is arguable that the ICC is deploying efforts by broadening its horizons when it comes to evidence gathering. Its endeavour to integrate UGE is apparent from the '2016-2018 Strategic Plan of the Office of the Prosecutor'.' This plan reveals how helpful technology is in facilitating its monitoring role and alleviating the burden of proof.[51] Moreover, it stresses the urgent need of the ICC to keep up with the latest technological developments. The suggested measures are staff training and hiring cyber-investigators and analysts in order to identify, collect and process UGE.[52] These efforts stem from the procedural bars interfering with the proper functioning of the Court and the administration of justice faced by the ICC. Accordingly, the introduction of UGE brings about unique opportunities. This is due to the fact that UGE carries the potential of solving various procedural problems and enhances the ICC's effectiveness in fighting impunity. Indeed, the ICC has long been criticized for a lack of reactivity and relatively slow-paced procedures and investigations which jeopardize its efficiency in combating international crimes.[53] This is mainly due to the complex nature of the atrocities investigated and the difficulty in collecting the required evidence.[54] As a matter of fact, in most instances, investigations are compromised by the volatile political situation and lack of security in conflict areas.[55] Moreover,

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46 Carlisle George and Jackie Scerri, 'Web 2.0 and User-Generated Content: legal challenges in the new frontier' (2007) 2 Journal of Information, Law and Technology 4.

47 Nikita Mehandru and Alexa Koenig, 'ICTS, Social Media, & the Future of Human Rights' (2019) 17(1) Duke Law & Technology Review 129, 129.

48 Nikita Mehandru and Alexa Koenig, 'Open Source Evidence and the International Criminal Court' 2019 Harvard Human Rights Journal <https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/> accessed 1 July 2021.

49 The International Bar Association, 'Evidence Matters in ICC Trials: An International Bar Association, International Criminal Court & International Criminal Law programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice' (2016) IBA ICL Perspectives 19.

50 Aida Ashouri et al, 'An overview of the use of digital evidence in international criminal courts' (2014) 11 Digital Evidence and Electronic Signature Law Review 115.

51 The Office of the Prosecutor, 'Strategic Plan 2016-2018' (2015) International Criminal Court, para 58.

52 ibid paras 59-62.

53 The International Bar Association (n 49).

54 Hans-Peter Kaul, 'The International Criminal Court – Current Challenges and Perspectives' (2011) Keynote for the Salzburg Law School on International Criminal Law 9.

55 Isabella Regan (n 45).

UGE plays an imperative gap-filling role as it complements traditional evidence and is used to support the statements of witnesses.[56] Accordingly, retrieving social media evidence creates a unique opportunity to boost the Court′s efficiency.[57] The ICC can only benefit from collective input[58] to lower the evidentiary burden.[59] It is furthermore essential to discuss the ICC′s Achilles heel: it has neither an executive power nor an ′independent authority to compel the production of evidence′.[60] One of the major weaknesses of the ICC is its absolute dependency on the sincere cooperation of SPs. Investigators and prosecutors have their hands tied without prior permission by these States and can only count on their national mechanisms to proceed with evidence gathering.[61] It is thus indisputable that if UGE is judged to be sufficiently relevant and admissible, it may remedy the lack of evidence and resources, and therefore, it can bypass procedural issues. In addition, digital evidence available on social media, such as videos and images, can be an asset as they provide a perspective on the circumstances of an event and the location that can slip someone′s mind.[62] This category of evidence can be more faithful than the testimonies of witnesses whose memory cannot always be accurate.[63] Moreover, the increasing reliance on digital evidence by criminal courts such as the ICC takes civil society′s initiatives beyond naming and shaming, and gives effect to its efforts of public condemnation. The fact that exposure on social media has legal implications and opens the doors of the courtroom, slowly but surely, grants UGE the status of ′inevitable component′.[64] This status implies that legal bodies have arrived at a point in which disregarding such digital evidence is controversial from the society′s standpoint. Indeed, society might perceive the exclusion of this evidence as unfair and as misadministration of justice. Accordingly, its use is inescapable, and even necessary, in this digital context to cope with the new reality.[65] It is nevertheless important to point out that even though UGE seems to be a solution to major procedural problems, it requires strict regulation due to the risks it brings.

B. UGE: A Threat or a Blessing?

As mentioned above, it is undeniable that UGE provides immense support for human rights advocacy and the condemnation of atrocities. However, it is equally apparent that UGE carry various limitations that undermine their power, value and influence. UGE, whether intentionally uploaded to denounce a crime or not, have a capacity of swift dissemination and add credence to existing evidence.[66] Nonetheless, from a legal perspective, it inspires reluctance to a certain extent as even though it is an important source of evidence, it is not a miraculous remedy for the inherent procedural weaknesses of the ICC. In fact, the accuracy and authenticity of UGE is problematic as a video or an image can be taken from specific points of view and is

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56 Alexa Koenig, "′Half the Truth is Often a Great Lie": Deep Fakes, Open Source Information and International Criminal Law (2019) 113 AJIL Unbound 250, 252.

57 The International Bar Association (n 49) 20.

58 ibid.

59 Lindsay Freeman (n 42).

60 Hans-Peter Kaul (n 54).

61 Alex Whiting, ′The ICC′s New Libya Case: Extraterritorial Evidence for an Extraterritorial Court' (Just Security, 23 August 2017) <https://perma.cc/3963-2JGB> accessed 1 July 2021.

62 Mark Kersten (n 40).

63 The International Bar Association (n 50).

64 ibid.

65 Aida Ashouri et al (n 50).

66 Jelia Sane and Chiara Gabriele, ′Challenges and Opportunities: Audio-Visual Evidence in International Criminal Proceedings' (Justice in conflict, 4 March 2020) <https://justiceinconflict.org/2020/03/04/challenges-and-opportunities-audio-visual-evidence-in-international-criminal-proceedings/> accessed 1 July 2021.

selective in what it shows.[67] Additionally, graphic evidence may frequently and deliberately be staged by faking the occurrence of a certain event, photoshopped or wrongly attributed to an individual. One can also witness the rise of a phenomenon coined as the 'recycling of content' which consists of reusing old videos or images and putting a wrong date, time and location to generate rumours or aliment existing conflicts.[68] Moreover, the context of such evidence is missing so suspects can offer an alternative explanation to exonerate themselves or justify their acts on the grounds of state of emergency or national security. Therefore, evidence can be manipulated for the purpose of conveying an erroneous message and can thus be biased and misleading. Furthermore, the creation of fake accounts, media falsification and defamation have the power to deprive UGE of any legitimacy.[69] It is also important to keep in mind that, even though there is a widespread use of smartphones, these devices are still unevenly distributed, which makes UGE an inaccurate representation of reality.[70] Issues of credibility are reinforced when the evidence is published or sent anonymously. In such cases, it is difficult to determine the provenance and reliability of such evidence.[71]

From a social perspective, this category of evidence represents a danger for both active generators of UGE and for passive consumers of UGE.[72] Concerning the latter, an extensive exposition to evidence of horrendous crimes may engender a desensitization. In addition, too much information can have a counterproductive effect. Accordingly, repeated visualization of graphic content of heinous crimes banalizes atrocities and has a detrimental effect on society.[73] When it comes to the former, the users of social media can face serious danger and in the worst cases their lives are threatened. Collecting and posting evidence is surely perilous and risky, especially, when the individual is not an expert or does not benefit from the protection of an authority.[74] The more ordinary citizens engage with crime documentation on social media, the more they run the risk of retaliation and revenge orchestrated by persons they denounce.[75] According to the foregoing, an extensive and far-reaching legal framework is necessary to regulate the identification, collection, processing and admissibility of UGE by well-established authorities and experts. It is moreover important to protect all the providers of information from retaliation and ensure a fair trial for the suspects whose cases are UGE-based.

The ICC, for instance, has enacted an e-court protocol[76] where it specifies the measures it takes 'to ensure authenticity, accuracy, confidentiality and preservation of the record of

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67 The International Bar Association (n 49) 24-3.

68 Nikita Mehandru and Alexa Koenig (n 48) 135.

69 Lindsay Freeman (n 42) 319.

70 Rebecca Hamilton, 'New Technologies in International Criminal Investigations' (2018) 112 Proceedings at the ASIL Annual Meeting 131, 131-133; Yvonne McDermott et al, 'Digital Accountability Symposium: Whose Stories Get Told, and by Whom? Representativeness in Open Source Human Rights Investigations' <http://opiniojuris.org/2019/12/19/digital-accountability-symposium-whose-stories-get-told-and-by-whom-representativeness-in-open-source-human-rights-investigations/> accessed 1 July 2021.

71 Mark Kersten (n 40).

72 Rebecca Hamilton, 'The Hidden Danger of User-Generated Evidence for International Criminal Justice' (Just Security, 23 January 2019) <www.justsecurity.org/62339/hidden-danger-user-generated-evidence-international-criminal-justice/> accessed 1 July 2021; The Human Rights Center (n 37) 4.

73 Jay Aronson, 'The Utility of User-Generated Content in Human Rights Investigations' in Molly Land and Jay Aronson (eds), *New Technologies for Human Rights Law and Practice* (CUP 2018) 129-148.

74 Rebecca Hamilton (n 70) 133.

75 Rebecca Hamilton (n 72); The Human Rights Center (n 37) 4; Rebecca Hamilton, 'User-Generated Evidence' (2018) 57(1) Colombia Journal of Transnational Law 1, 35-6.

76 International Criminal Court, *Technical protocol for the provision of evidence, material witness and victims information in electronic form for their presentation during the Trial* (International Criminal Court, 2008).

proceedings'.[77] It furthermore sets formatting requirements, imaging and data standards and a specific numbering regime. Moreover, evidence retrieved from social media has to go through authentication and verification with the utmost precaution to ensure the legitimacy of the data. Accordingly, if meticulously regulated and vigorously taken into consideration, UGE alleviates the burden of proof.[78] Therefore, to some extent UGE offers a way out from the impasses the ICC frequently faces. In addition, the right to a fair trial for the defendants is another important point at the heart of the administration of justice worth discussing.[79] This right entails the duty of the ICC to ensure that the trial is 'fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses' as outlined in article 64(2) of the RS. The protection of this right gets trickier in the digital era, especially in relation to equality of arms. This principle entails that a defendant must not be put in a disadvantageous situation *vis-à-vis* the prosecutor. As the focus in UGE gathering is more on incriminatory rather than exculpatory evidence, one would not have the full array of information. This phenomenon is directly linked to the very nature of social media as a denunciation and condemnation tool. Accordingly, in most instances, UGE exclusively serves the prosecution side and this creates a clear disparity between the two opponents. This is surely a problem encountered in proceedings not involving UGE, however, it is undeniable that this aspect is exacerbated by the character of digital evidence. Moreover, UGE produces an inherent cognitive bias for judges and prosecutors because graphic material can be very compelling and carries heavy consequences regarding their judgment.[80] This surely intensifies the potential breach of equality of arms and invites legal bodies to double their efforts in protecting the right to a fair trial.

Accordingly, UGE can be considered as a blessing if, and only if, it is governed by a body of rules that combine strict regulation as to the collection and verification of UGE, the protection of producers and consumers of UGE and, the safeguard of the right to a fair trial for accused individuals. The international community ought to enact such a treaty or a protocol annexed to the RS to set a worldwide standard when it comes to UGE. This would maximize the benefits of UGE and monitor its use; otherwise, it might still be considered as a major threat.

C. From Theory to Practice: ICC Arrest Warrant against Al-Werfalli

Undoubtedly, it is necessary to see how the theory is put into practice. Indeed, an emblematic instance that illustrates the imperative role UGE can play in international crime prosecution is the issuance of an ICC arrest warrant against the Libyan national Al-Werfalli. After the fall of Muammar Gaddafi's regime, the situation in Libya escalated and swiftly shifted from hostilities between governmental forces and rebel groups during the 2011 uprising, to a non-international armed conflict among the rebel groups themselves.[81] The Libyan National Army (hereinafter 'LNA'), a coalition of army units operating in Benghazi, is one of the predominant armed groups that largely contributed to a virulent spread of violence. It launched the 'Dignity Operation'

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77 International Criminal Court, *Regulation of the court* (International Criminal Court, 2018) regulation 26.

78 Rebecca Hamilton (n 72) 27.

79 James Stewart, 'Fair Trial Rights under the Rome Statute from a Prosecution Perspective' (2014) ICTR Symposium.

80 Hamilton (n 72); Hamiltion (n 75) 133.

81 Geneva Academy, 'Non-international armed conflicts in Libya (Geneva Academy, 2020) <www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-libya> accessed 1 July 2021.

aimed at combating terrorist groups, mainly the Shura Council of Benghazi Revolutionaries,[82] in which the elite forces unit ′Al-Saiqa Brigade' participated.[83]

The situation was referred to the ICC in 2011 by the UN Security Council acting under Chapter VII of the UN Charter[84] in line with article 13(b) of the RS[85] via Resolution 1970.[86] The office of the prosecutor deems that this referral extends the ICC′s jurisdiction beyond the 2011 Libyan civil war and covers all subsequent atrocities including the ongoing armed conflict.[87] Due to the ′Al-Saiqa Brigade′s' involvement in this conflict, the ICC issued two complementary arrest warrants, respectively on the 15th of August 2017[88] and the 4th of July 2018,[89] for Al-Werfalli, an Axes Commander in the Brigade. He is accused of having personally murdered and ordered the execution of a total of forty-three persons in eight different incidents in the context of the ′Dignity Operation′.[90] Al-Werfalli thus faces charges of ICR pursuant to article 25(2)(a) and (b) of the RS[91] for committing the war crime of murder as delineated in article 8(2)(c)(i) of the RS.[92]

At first sight, the arrest warrant follows the traditional ICC practice, however, its outstanding character stems from the fact that it is principally based on evidence retrieved from social media.[93] The extra-judicial killings of LNA prisoners, either committed or ordered by Al-Werfalli, have been recorded in eight videos and disseminated on Facebook and other social media platforms.[94] The videos of the murders, their transcripts and several social posts by the Media Centre of the ′Al-Saiqa Brigade' itself formed the warrant′s evidentiary basis.[95] This arrest warrant is a milestone in the ICC′s history and carries crucial legal implications for the international community. More precisely, it raises two remarkable aspects. Firstly, this unprecedented, but inevitable, move of the ICC is a significant step in its effort to accommodate conflicts in the digital age.[96] Indeed, the ICC did not hesitate to break with its traditional evidentiary basis, investigation techniques and patterns to adapt to today′s realities.[97] By taking the plunge, the ICC clearly proves that it is abreast of technological developments and aware of their correlation with international crimes. Through this warrant, the ICC puts theory into practice and firmly acknowledges that the ever-growing interconnectivity urges the incorporation of open-source investigation. It thus demonstrates a general acceptance of UGE

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82 Kevin Truitte, ′The Derna Mujahideen Shura Council: A Revolutionary Islamist Coalition in Libya (2018) 12(5) Perspectives on Terrorism 4, 4 and 5.

83 Camille Tawil, ′Operation Dignity: General Haftar′s Latest Battle May Decide Libya′s Future (2014) 12(11) Terrorism Monitor 8, 8-11.

84 United Nations Charter (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), ch VII.

85 Rome Statute, art 13(b).

86 UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

87 ibid para 23.

88 Arrest Warrant 15 August 2017.

89 Arrest Warrant 4 July 2018.

90 Arrest Warrant 15 August 2017, paras 11-22; ibid para 17.

91 Rome Statute, art 25(2)(a)(b).

92 Rome Statute, art 8(2)(c)(i).

93 Rebecca Hamilton (n 72); The Human Rights Center (n 37) 4.

94 Arrest Warrant 15 August 2017.

95 ibid paras 11-21.

96 Emma Irving, ′And So It Begins… Social Media Evidence In An ICC Arrest Warrant' (*Opinio Juris*, 17 August 2017) <http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/> accessed 1 July 2021; Alison Cole, 'Technology for Truth: The Next Generation of Evidence' (*International Justice Monitor*, 18 March 2015) <www.ijmonitor.org/2015/03/technology-for-truth-the-next-generation-of-evidence/> accessed 1 July 2021.

97 Emma Irving (n 96).

and attaches to it considerable weight in legal practice.[98] Secondly, and most importantly, by concretely embracing social media as a mine of evidence, the ICC sets a precedent and generates a strong incentive for future open-source investigations.[99] Beyond an incentive, this emerging practice suggests a potential commitment to dive into the brutal crimes and gross human rights violations flooding the Internet.[100] Consequently, pulling evidence from social media is a decisive stride towards enhancing the probative value of UGE and ′has tremendous promise for helping to build international criminal cases′.[101] This arrest warrant offers a ray of hope for ongoing virulent conflicts around the world such as Syria[102] and Yemen[103] where UGE are overwhelmingly flowing and restores faith in legal bodies. Accordingly, as long as the ICC keeps up with these developments, one can assert that UGE plays a decisive role in paving the road to ICR. However, as rightly pointed out by Emma Irving, ′the warrant for Mr. Al-Werfalli is just the beginning of what will be a long, and likely complex, relationship between open source evidence and international criminal justice′.[104] This is due to the fact that with great opportunities come great risks, and therefore, the future of UGE will be shaped by a close interaction between technological development and the legal realm. The international community has the obligation to set a clear balance between the advantageous aspects of UGE in matters of facilitating prosecution and the regulation around UGE, the protection of stakeholders. Finding such an equilibrium is quite a challenging mission for the international community, but a necessary one in order to maximize the good administration of justice.

Overall, the international community is witnessing the rise of ′a new and fruitful body of potential evidence′,[105] namely UGE, that ought to be exploited, as done in the Arrest Warrant against Al-Werfalli, to tackle the widespread atrocities abundantly documented on social media. Accordingly, despite being beyond the ICC′s reach, these atrocities finally and legitimately enter the courtroom. Nonetheless, even though UGE alleviates the pressure exerted on the ICC when it comes to evidence gathering and prosecution, some negative aspects related to reliability, security and fair trial arise. Such issues ought to be seriously examined and taken into account when establishing a comprehensive legal framework. Therefore, if correctly regulated and monitored UGE on social media is a practical addition to the legal body. However, social media, despite the advantages it offers for criminal prosecution, can produce significant harm as will be seen in the next section.

IV. An Ever Growing Role of Social Media in Fueling Mass Atrocities

A. Instrumental Use of Media for the Commission of International Crimes

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98 Christoph Koettl et al, ′Open Source Investigation for Human Rights Reporting in Digital Witness: A Brief History' in Sam Dubberley et al (eds), *Digital Witness: Using Open Source Information for Human Rights Investigation, Documentation, and Accountability* (OUP 2020) 27-28.

99 Emma Irving (n 96).

100 ibid.

101 Alexa Koenig (n 40).

102 Mark Kersten (n 40).

103 Dearbhla Minogue and Ruwadzano Makumbe, 'Digital Accountability Symposium: Harnessing User-Generated Content in Accountability Efforts for International Law Violations in Yemen' (*OpinioJuris*, 18 December 2019) <http://opiniojuris.org/2019/12/18/digital-accountability-symposium-harnessing-user-generated-content-in-accountability-efforts-for-international-law-violations-in-yemen/> accessed 29 July 2021.

104 Emma Irving (n 96).

105 Lindsay Freeman (n 42) 329.

Starting from the Nazi weekly newspaper Der Sturmer[106] to the Reichs-Rundfunk-Gesellschaft Nazi radio propaganda in 1923 prompting the Holocaust,[107] a multitude of types of media took over the phenomenon of media weaponization.[108] Indeed, a more recent striking example of a radio openly promoting hatred and contributing to the spread of hostility is the Radio Télévision Libre des Mille Collines (hereinafter 'RTLM'). The RTLM is a Rwandan government-sponsored radio channel also known as 'hate radio or 'the machete radio' that began broadcasting in August 1993 and opened the floodgates to the Rwandan Genocide.[109] The RTLM was informally linked to militias and government officials and thus indirectly broadcasted the government's voice, a voice that progressively entered the Rwandan homes as popular entertainment for all social classes. However, the hidden, but primary, goal of this radio channel was to aliment the long-standing tensions between the Tutsis and their supporters, and the Hutus in Rwanda.[110] The hate between these communities dates back to colonial historiography that portrayed them as two distinct races and ethnic groups. The Tutsis were depicted as having more in common with Europeans than Africans and thus hierarchically 'superior'.[111] With time and political events, this separation became more rigid and intense, and eventually resulted in a deep-rooted animosity. In this context, the RTLM broadcasts a deluge of disinformation and hate speech against the Tutsis to mobilize civil society and promote the government's anti-Tutsi agenda.[112] The government's strategy to ensure the participation of the Rwandans in the extermination of the Tutsis consisted in generating a widespread feeling of fear of the Tutsis. The latter were portrayed as a serious danger and a threat to national security and unity.[113] The demonization of the Tutsis coupled with an intense brainwashing translated into a wave of brutality and atrocities on the Rwandan territory.[114] To further encourage the citizens to take part in this ethnic cleansing, the radio not only incited murder and issued directives on how to kill, but it also praised the murderers by qualifying them as the Rwandan heroes.[115] Moreover, the radio station helped track individuals by providing information for the militia and security forces about the identity and location of the targets for extermination.[116]

These events ushered in a large-scale massacre resulting in a death toll ranging between 500,000 to 1 million persons in 1994.[117] The perpetrators have since been brought to justice by

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[106] United States Holocaust Memorial Museum, 'Writing the News' (*United States Holocaust Memorial Museum*) <https://encyclopedia.ushmm.org/content/en/article/writing-the-news> accessed 29th July 2021.

[107] Maja Adena et al, 'Radio and the Rise of the Nazis in Prewar Germany' (2013) <https://halshs.archives-ouvertes.fr/halshs-00858992/document> accessed 1 July 2021.

[108] Simon Adams, 'Hate Speech and Social Media: Preventing Atrocities and Protecting Human Rights Online (*Global Centre for the Responsibility to Protect,* 16 February 2020) <https://www.globalr2p.org/publications/hate-speech-and-social-media-preventing-atrocities-and-protecting-human-rights-online/> accessed 1 July 2021.

[109] Hannah Richards et al, 'Studying "Radio Machete": Towards a Robust Research Programme' (2019) 21(4) Journal of Genocide Research 525, 525-527.

[110] BBC News, 'Rwanda: How the genocide happened' (*BBC News*, 17 May 2011) <https://www.bbc.com/news/world-africa-13431486> accessed 1 July 2021.

[111] ibid.

[112] Jamie Metzl, 'Rwandan Genocide and the International Law of Radio Jamming' (1997) 91(4) The American Journal of International Law 628, 631-633.

[113] Scott Straus, 'What Is the Relationship between Hate Radio and Violence? Rethinking Rwanda's "Radio Machete (2007) 35(4) Politics and Society 609, 612-613.

[114] Jamie Metzl (n 112).

[115] Jamie Metzl (n 112) 630.

[116] Jamie Metzl (n 112) 631.

[117] Linda Melvern, 'Missing the Story: the Media and the Rwanda Genocide' in Allan Thompson (ed), *The Media and the Rwanda Genocide* (Pluto Press 2007) 198.

different judicial bodies, namely by conventional Rwandan courts, Gacacas,[118] foreign national courts and the International Criminal Tribunal for Rwanda (hereinafter 'ICTR', 'the tribunal'). The ICTR was set by the UN Security Council in 1994 via Resolution 955.[119] The mandate of this tribunal is to prosecute persons responsible for genocide and serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994.[120] Even-though the ICTR has indicted 93 individuals and successfully sentenced 62 of them, the focus will be on *the Prosecutor v Nahimana, Barayagwiza and Ngeze* case,[121] best known as the 'media case', a cornerstone in ICL's history. This was a landmark case as it was the first one that an international judicial body had held individuals criminally responsible for inciting civil society to commit international crimes via media. It thus highlights the pervasive and pernicious impact of media. Ferdinand Nahimara and Jean-Bosco Barayagwiza, respectively founder and high ranking member of the RTLM, have been judged for their behaviour during the Rwandan Genocide. The tribunal found that RTLM broadcasts qualified as a channel that conveyed hatred and an explicit call for the extermination of the Tutsi.[122] The nature of the media and its obvious instrumental use led the tribunal to establish the causal link between what the radio diffused and the genocide on the grounds of ethnicity.[123] Additionally, conclusive evidence of genocidal intent has been identified in the acts and sayings of both the masterminds behind RTLM and the speakers.[124] According to the verdict of the ICTR, and in relation to the weaponization of the RTLM, both Barayagwiza and Nahimana, were found guilty of conspiracy to commit genocide, direct and public incitement to commit genocide, and genocide under article 2 (3)(a-c) of the Statute of the International Tribunal for Rwanda (hereinafter, "Statute"),[125] and crimes against humanity, more precisely, extermination and persecution under article 3 (b)(h) of the Statute.[126] However, after appeal,[127] the Appeals Chamber decided that Nahimana was guilty of direct and public incitement to commit genocide and persecution as a crime against humanity.[128] Barayagwiza was guilty of genocide under the mode of responsibility, extermination and persecution as a crime against humanity under the mode of responsibility of instigation and planning.[129] Even-though the two convicted individuals managed to mitigate their charges by appealing, this case is still a success in the history of ICL due to the implications it has for future similar cases.

Accordingly, the Rwandan Genocide is an instance of routinization of hatred through media. It illustrates the weaponization of a radio station widely and openly advocating for genocide as a national duty. However, it is crucial to emphasize that the case law the 'media case' prompted[130] is a turning point in ICL as it changed the perception on the role of media and affirmed that its

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[118] Human Rights Watch, 'Justice Compromised The Legacy of Rwanda's Community-based Gacaca Court' (*Human Rights Watch*, 31 May 2011) <www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> accessed 1 July 2021.

[119] UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (1994) para 1.

[120] ibid para 1.

[121] *The Prosecutor v Feidinand Nahamina, Jean-Bosco Barayagwiaz and Hassan Ngeze* (Sentence and Judgement) ICTR-99-51-T 3 December 2003.

[122] ibid para 226.

[123] ibid para 969.

[124] ibid paras 957-969.

[125] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)* 8 November 1994, art 2(3)(a-c).

[126] ibid 3(b)(h).

[127] *Feidinand Nahamina, Jean-Bosco Barayagwiaz and Hassan Ngeze v The Prosecutor* (Appeal) ICTR-99-52-A 28 November 2007.

[128] ibid paras 1044-1052.

[129] ibid paras 1053-1094.

[130] *The Prosecutor v Feidinand Nahamina, Jean-Bosco Barayagwiaz and Hassan Ngeze* (n 121).

misuse can trigger ICR. Accordingly, this case set an interesting precedent, succeeded in captivating the attention of the international community and encouraged proactive intervention. The lessons learned from the Rwandan Genocide are certainly key elements for understanding the evolution of this phenomena in a different context, namely the digital era.

B. The Rohingya case: A Facebook-Fueled Ethnic Cleansing

In the digital era, one can observe the same pattern of hate propaganda as during the Rwandan Genocide, however, through a different type of media: social media platforms. An emblematic illustration of the danger of social media and their role in fuelling atrocities is undeniably the Rohingya crisis.

Firstly, it is necessary to shed light on the political, economic and social background in Myanmar to gain a better understanding of why, and how, Facebook dominated the country and turned into a powerful weapon at an astonishing speed. The ubiquity of Facebook and its huge political impact are directly linked to a peculiar combination of factors. Politically, Myanmar has witnessed a sensitive and volatile situation marked by the transition from 26 years of military dictatorship to democracy and the rise to power of civilian governments since 2011.[131] The subsequent drastic change in the political landscape prompted the liberalization of the telecommunication sector in 2013 which was otherwise tightly monitored under military rule.[132] This liberalization had a domino effect. Indeed, it led to a chain of consequences that defined and shaped the current power and influence of Facebook in Myanmar.[133] As soon as the telecommunication sector was liberalized, the prices of SIM cards swiftly came down, smartphones became affordable, and 4G networks became easily and speedily accessible.[134] Moreover, most smartphones were preloaded with the Facebook app and mobile phone operators set special offers enabling the use of Facebook without data charges.[135] This initiative has also been taken by Mark Zuckerberg, the CEO of Facebook, who launched 'Internet.org' aiming to provide developing countries with the Internet. As part of this 'humanitarian' project, the app 'Free Basics' has been developed to subsidize the use of Facebook on smartphones. As Myanmar is an economically weak country with a particularly poor population, especially in rural areas, such offers could only be attractive and promote the popularization of Facebook.[136] Socially, Myanmar's population had been totally disconnected, marginalized from the online world and isolated under the dome of the military junta until 2011.[137] Additionally, there are inherent religious and ethnic tensions between the Rakhine Buddhists and the Rohingya Muslims in Myanmar.[138] Accordingly, the deadly combination of an authoritative government in disguise, an unprecedented booming market of mobile connectivity and ethno-religious

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131 Ronan Lee, 'Extreme Speech in Myanmar: The Role of State Media in the Rohingya Forced Migration Crisis' (2019) 13 International Journal of Communication 3203, 3208.

132 ibid 3207.

133 ibid 3208-3211.

134 Lisa Brooten, 'When Media Fuel the Crisis: Fighting Hate Speech and Communal Violence in Myanmar' in Jamie Matthews and Einar Thorsen (eds), *Media, Journalism and Disaster Communities* (Springer 2020) 217-9.

135 Christina Fink, 'Dangerous Speech, Anti-Muslim violence, and Facebook in Myanmar' (2018) 71 Journal of International Affairs 43, 44.

136 The World Bank, 'Poverty Report- Myanmar Living Conditions Survey 2017' (*The World Bank*, 26 June 2019) <www.worldbank.org/en/country/myanmar/publication/poverty-report-myanmar-living-conditions-survey-2017> accessed 1 July 2021.

137 Lisa Brooten et al, 'Traumatized victims and mutilated bodies: Human rights and the "politics of immediation" in the Rohingya crisis of Burma/Myanmar' (2015) 77(8) The International Communication Gazette 718, 718.

138 BBC News, 'Why is there communal violence in Myanmar?' (*BBC News*, 3 July 2014) <https://www.bbc.com/news/world-asia-18395788> accessed 1 July 2021.

tensions turned Facebook into an instrument of hate propaganda. It is predictable that the swift rise of transnational media giants such as Facebook coupled with an abrupt rollback of censorship is dangerous. This is especially the case due to the sudden access to an enormous flow of information, and misinformation. Even more alarming is Myanmar's perception of the platform: Facebook *is* the Internet. It is considered as the exclusive authoritative source of news and information. The information displayed on Facebook is never critically processed, evaluated or questioned by its recipients which reinforces the non-existent distinction between the social media platform and the Internet as a whole.[139]

This situation played in favour of Myanmar military personnel[140] and ultranationalist Buddhists.[141] They promoted an online campaign of hate and incitement for rape and murder targeting the Muslim community.[142] The exact same pattern that was employed during the Rwandan Genocide by the government can also be observed in the Rohingya crisis even though via a different instrument. The military gave an erroneous image of the Muslim community and presented it as a threat to national unity and culture. They argued that the community is planning on taking over the country through economic domination and increased birth rates to expand the community.[143] Disinformation campaigns started unfolding and exacerbated the wave of Facebook-enhanced atrocities.[144] An example of how disinformation can cause brutality offline is certainly the horrendous incident in 2014. A Buddhist monk posted on his Facebook account that a Muslim shop owner raped a Buddhist employee which was interpreted as a call to fight by the Buddhist community.[145] Obviously, a conflict erupted that resulted into two deaths, a Muslim and a Buddhist. At the end, it turned out that the rape allegation was false.[146] This is just one of many examples of incidents that have sparked in Myanmar and resulted in over 24.000 deaths and a huge refugee crisis in neighbouring countries.[147] Villages were razed to the ground, women and girls were raped and killed. Many Rohingyas were tortured to death or burned alive in their houses.[148] The Rohingya crisis therefore emphasizes the extent to which what happens on social media is manifested in real life and how far-reaching the consequences can be.
Overall, media plays a pivotal role in fuelling atrocities through the course of history, beginning with newspapers in the Nazi era and radio during the Rwandan Genocide, and ending with

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139 Libby Hogan and Michael Safi, 'Revealed: Facebook hate speech exploded in Myanmar during Rohingya crisis' (*The Guardian*, 3 April 2018) <https://www.theguardian.com/world/2018/apr/03/revealed-facebook-hate-speech-exploded-in-myanmar-during-rohingya-crisis> accessed 1 July 2021.

140 Paul Mozur, 'A Genocide Incited on Facebook, With Posts From Myanmar's Military' (*The New York Times*, 15 October 2018) <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> accessed 1 July 2021.

141 Christina Fink (n 135) 44.

142 Steve Stecklow, 'Why is Facebook losing the war on hate speech in Myanmar' *(Reuters Investigates,* 15 August 2018*)* <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/> accessed 1 July 2021.

143 Gabriele Cosentino, *Social Media and the Post-Truth World Order The Global Dynamics of Disinformation* (Palgrave Mcmillan 2020) 199.

144 Lisa Brooten et al (n 137) 718.

145 Gabriele Cosentino (n 143) 120.

146 Christina Fink (n 135) 46.

147 UNHCR, 'United Nations seeks US$920 million for Rohingya humanitarian crisis in 2019 (*UNHCR*, 15 February 2019) <www.unhcr.org/en-us/news/press/2019/2/5c667ecf4/united-nations-seeks-us920-million-rohingya-humanitarian-crisis-2019.html> accessed 1 July 2021.

148 *Republic of The Gambia v Republic of the Union of Myanmar* (Application instituting proceedings and Request for the indication of provisional measures) [2019] ICJ <https://jusmundi.com/en/document/pdf/other/en-proceedings-instituted-by-the-republic-of-the-gambia-against-the-republic-of-the-union-of-myanmar-on-11-november-2019-application-instituting-proceedings-and-request-for-the-indication-of-provisional-measures-monday-11th-november-2019> accessed 1 July 2021, paras 9-15; Sigal Samuel, 'Facebook is reckoning with its role in a textbook example of ethnic cleansing'(*Vox*, 7 February 2019) <https://www.vox.com/future-perfect/2019/2/7/18214351/facebook-myanmar-rohingya-muslims> accessed 1 July 2021.

Facebook in the Rohingya crisis. The common denominator is certainly the instrumentalization and weaponization of media. It is a strategy to mobilize civil society via online hate speech and incite the commission of international crimes. Due to the serious and critical character of such phenomena, one can only reflect upon the international response and scrutinize it. The questions of whether these tragic events triggered a reaction and which legal implications it entails may also arise. The following section will be devoted to answering these two crucial questions and eventually offer an insight in a possible future.

C. The Response of the International Community: Too Little Too Late?

The Rohingya crisis captured the attention of the international community[149] and, in particular, the UN. It asserted in its ′2018 Report of the Independent International Fact-Finding Mission on Myanmar' that Facebook played a pivotal role in the spread of hate resulting in real-world atrocity.[150] The High Commissioner for Human Rights qualified the crisis as ′a textbook example of ethnic cleansing′.[151] Moreover, the Gambia filed a case against Myanmar at the International Court of Justice (hereinafter ′ICJ′) under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter ′the Convention′) in relation to the Rohingya minority.[152] The Gambia claimed that Myanmar violated its obligations under the Convention and in particular, but not restricted to, articles I, III, IV, V and VI.[153] The Gambia collected voluminous evidence and asked the ICJ to declare that Myanmar has indeed breached multiple obligations under the Convention. It also requested the ICJ to order Myanmar to cease its wrongful acts, punish the perpetrators before a competent tribunal, make reparations to the victims and offer a guarantee of non-repetition.[154] The Gambia further requested provisional measures[155] to avoid further harm, in line with Article 41 of the RS,[156] and Articles 73, 74 and 75 of the Rules of Court.[157] The response of the international community was tardive as the crisis officially started in May 2015 and only got worthwhile attention in November 2019. However, it seems to bear fruit as the request of the Gambia for provisional measures was successful. The ICJ issued an order on January 2020 ordering the State of Myanmar to take all measures in order to protect the Rohingya vulnerable group, cease all violence and killings and, comply with its obligations under the Convention[158] in a time frame not exceeding four months from the issuance of the order.[159]

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149 Yanghee Lee, ′Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 37th session of the Human Rights Council' (United Nations Human Rights Office of the High Commissioner, 12 March 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22806&LangID=E> accessed 1 July 2021.

150 Human Rights Council, ′Report of the independent international fact-finding mission on Myanmar' (10–28 September 2018) A/HRC/39/64, para 74.

151 UN, ′UN human rights chief points to "textbook example of ethnic cleansing" in Myanmar' (*UN News*, 11 September 2017) <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar> accessed 1 July 2021.

152 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (order) [2020] General List No 178.

153 *The Gambia v Myanmar*, para 111.

154 *The Gambia v Myanmar*, para 112.

155 *The Gambia v Myanmar*, para 113.

156 Rome Statute (n 12) art 41.

157 International Criminal Court (n 77) regulations 73-75.

158 *The Gambia v Myanmar*, para 120.

159 *The Gambia v Myanmar*, para 5.

In general, strict action and, especially regulation, are urgently required when it comes to the use of social media as a tool for the commission of international crimes. Apart from the significant, but not so swift, reaction of the Gambia, what we have seen for now is too little too late, especially from Facebook′s side.[160] Indeed, it is only in August 2018 that Facebook started taking action by removing the main Facebook and Instagram accounts responsible for the hate propaganda even though the horrific events erupted in 2015. If Facebook would have been more reactive to some activists and journalists desperate call for help, it could probably have averted a lot of harm. Its slow reaction is an emblematic and dramatic instance of a wave of hate speech not properly accounted for. One must nevertheless admit its efforts to put an end to its misuse. Indeed, a human rights Impact Assessment with the title 'Facebook in Myanmar' by Business for Social Responsibility has been carried out.[161]It is an advisory non-profit organization that carries out human rights checks in line with the UN Guiding Principles on Business and human rights.[162] Even though at the beginning of the report, the blame is put exclusively on the socio-political situation in Myanmar to mitigate the link with the atrocities, it ends with an acknowledgement that the platform did play a critical role.[163] Moreover, it finally states that there is a pressing need for hiring local staff . This is crucial as locals have an insightful knowledge of the situation in Myanmar and can ensure an effective and detail-oriented monitoring of Facebook posts.[164] Additionally, Facebook employees are working on removing all the posts that go against the Community standards of Facebook, identifying and eliminating fake accounts and inflammatory posts. It is undeniable that, due to external pressure, Facebook is trying to comply with its responsibilities seriously and implement solutions. However, the situation should be taken on a more serious level. Indeed, comprehensive regulation is indispensable and pressing. In this regard, ′The New Forensics: Using Open Source Information to Investigate Grave Crimes report, also known as the ′Bellagio report′, is an important report. It is based on the first workshop diving into ′the probative power and potential of open source investigations for legal accountability′. [165] This report ought to be interpreted as a recommendation and a leading inspiration for the international community. It should be implemented in the form of a treaty, an annexed protocol to the RS or an RS amendment and then swiftly operationalized.

One of its guiding principles is consistency on all levels: terminology, definitions, standards and guidelines.[166] Such a unified legal framework would definitively, and in an organized manner, incorporate social media dimensions to serve the proper administration of justice at the international level. Moreover, this thematic begs the question of which options of ICR would be available in instances where a certain social media platform has its part of responsibility in fuelling atrocities. One could argue that the executives of social media companies can be responsible for facilitating or aiding and abetting for the commission of a crime under article 25(3)(c) of the RS. Others may advocate that they are guilty of omission as they did not exert

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[160] Julia Wong, 'Overreacting to failure: Facebook's new Myanmar strategy baffles local activists' (*The Guardian*, 7 February 2019) <https://www.theguardian.com/technology/2019/feb/07/facebook-myanmar-genocide-violence-hate-speech> accessed 1 July 2021.

[161] Alexa Warovka, ′An Independent Assessment of the Human Rights Impact of Facebook in Myanmar' (*Facebook*, 5 November 2018) <https://about.fb.com/news/2018/11/myanmar-hria/> accessed 1 July 2021.

[162] UNHCR Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (7 April 2008) A/HRC/8/5.

[163] Business for Social Responsibility, *Human Rights Impact Assessment: Facebook in Myanmar* (2018) 23-24, 30; Alexandra Stevenson, ′Facebook Admits It Was Used to Incite Violence in Myanmar' (*The New York Times*, 6 November 2018) <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html> accessed 1 July 2021.

[164] Business for Social Responsibility (n 163) 26.

[165] The Human Rights Center (n 37) 13.

[166] ibid 15–17, 19; Nikita Mehandru and Alexa Koenig (n 47) 139.

any monitoring or filtering on the content displayed on their platforms. However, the *mens rea* to do so is obviously complex to establish due to the difficulty of proving in practice the correlation between the crime and the social media platform. It is nevertheless a hot topic that ought to be looked into by the international community.

When it comes to recommendations, due to the weaponization of social media, the international community should consider establishing a special chamber in the ICC to tackle all conflicts inflamed by social media. This chamber would mainly deal with ICR triggered by social media content and so develop expertise in handling cases primarily based on digital evidence. Additionally, it is a considerable step in adapting the concept of ICR to the reality of many atrocities in the digital era. It offers the possibility to punish not only individuals on the basis of their heinous activities, but also the high-ranked individuals behind social media companies for their passivity vis-à-vis the misuse of their platforms. Of course, a legal basis is necessary for such reforms and it may take various forms: a multilateral treaty, a special protocol annexed to the RS or an amendment of the RS. Any of these measures would preferably build on the 'Bellagio Report' and provide a guideline for prosecution. It needs to include the challenges and issues raised by social media and ensure fairness, impartiality and legitimacy. Over time, and with the development of a comprehensive body of case law, the international community will count more experts in issues at the intersection of technological development and the administration of criminal justice. This can only serve to accommodate the digital era and fill in the legal lacuna. Most importantly, there is general consensus that the body of ICL ought to evolve in the sense of enhancing ICR for the purpose of ending impunity and promoting a culture of responsibility. Overall, to date, social media is half-way between a threat and a blessing and requires strict regulation to turn into a valuable asset in the realm of ICL.

V. Conclusion

This article highlighted the astonishingly growing impact of social media on the legal sphere and in particular the domain of ICL. Indeed, it has an effect on various stages of criminal proceedings, namely evidence gathering, investigation and prosecution that can eventually lead to ICR. The prominence of UGE on social media has led to both positive and negative implications on the ICL sphere. Clearly, this type of evidence is a double-edged sword. On the one hand, it had a significant impact on evidence gathering as it opened the door for a flow of new evidence. As highlighted by the example of the Arrest Warrant issued by the ICC against Al-Werfelli on a digital evidentiary basis, UGE is being exploited in practice and is bearing fruits. Nevertheless, these developments also bring along unique legal challenges. Such challenges are linked to issues of reliability, accuracy, credibility, authenticity, bias[167] and fair trial. Moreover, it has considerable downsides when it comes to the security of individuals and the protection of their rights. As a matter of fact, this type of evidence turns out to be life-threatening for its producers and harmful for society at large due to the compelling graphic content. Accordingly, it can only be counted as a blessing if it is strictly regulated, ensures the protection of both producers and consumers of UGE, and respects the right to a fair trial of a defendant whose case is based on UGE. On the other hand, the phenomenon of weaponization of social media does not go unnoticed. In the past, media has already been instrumental in and misused for fuelling international crimes, in particular during the Rwandan Genocide. The amplification of this phenomena in today's context is no surprise due to the swift development of online platforms and their widespread use as illustrated by the Rohingya crisis. No matter which type of media is utilized, radio or social media, a distinct pattern is followed by legal or natural persons to spread hate, materializing in horrendous offline brutality. One can therefore hope that the latter case will trigger ICR by taking the example of the conviction of two individuals responsible for hate

[167] Mark Kersten (n 40).

propaganda in the 'media case'. However, in order to obtain such a result, it is imperative that the existing legal framework is strengthened and updated in order to encompass evidence collection, examination, processing and preservation in the digital era. In this sense, the establishment of a special chamber within the ICC with a specific and exhaustive protocol might be a stepping stone for the evolution of the legal framework and fulfilment of the existing legal lacuna. This Chamber would find the legal basis for its powers in a binding legal document regulating all the discussed aspects of social media in relation with ICL. Regulation is key in order to contain the disadvantageous sides of most recent developments, and avoid horror, and enhance the more advantageous one with a vision to promote justice and transform UGE in the much needed mine of evidence.

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Exploitation of Antarctic Iced Freshwater: A Call To Unfreeze Legal Discourse

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Keywords:
ANTARCTIC TREATY SYSTEM; ICED FRESHWATER RESOURCES; ICEBERG HARVESTING; MADRID PROTOCOL; ENVIRONMENTAL IMPACT ASSESSMENT

Abstract

While discussed within the Antarctic Treaty System during the 1970s-1980s, the idea of iceberg harvesting was laid on ice due to the lack of adequate technologies and scientific knowledge on the potential environmental implications. However, the State Parties to the ATS envisioned the possibility of reopening the legal discourse. For that purpose, iced freshwater resources exploitation was excluded from the scope of the Madrid Protocol containing a ban on all mineral mining activities within the scope *ratione loci* of the ATS. However, during the negotiations, it was agreed that if the prospect of iceberg harvesting was ever to be realised, the environmental protection provisions under the Madrid Protocol should apply. The present paper provides an analysis of whether the potential exploitation of iced freshwater resources proves realistic within the existing legal framework under the Antarctic Treaty System and the United Nations Convention on the Law of the Sea and discusses which rules States would need to adhere to when engaging in such activities. It arrives at the conclusion that, as to now, there is no prohibition of iceberg harvesting for freshwater use under international law. Nevertheless, both within the scope of the ATS and in the high seas, environmental regulations restrict the implementation of the activity and, therefore, require comprehensive environmental impact assessments to be conducted before the commencement of the activity. Furthermore, as ownership allocation of icebergs is not regulated under the relevant treaties, the present paper examines two legal regimes that may potentially govern iceberg acquisition in the high seas, namely, res nullius and res communis. Finally, as private efforts have become more far-reaching in the recent decades, an overview of the current state of practice is presented, highlighting the observed advantages and potential drawbacks. Conclusively, the present paper advocates for the reopening of the legal discourse on the subject matter before the commencement of exploitation activities so as to ensure that the fragile Antarctic environment is protected and preserved for the benefit of all humankind in accordance with the object and purpose of the ATS.

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I. Introduction: Can Antarctic icebergs solve the problem of freshwater scarcity?

Today, the problem of freshwater scarcity and, particularly, the lack of drinking water affects every continent and is increasingly exacerbated by climate change.[1] According to the United Nations Sustainable Development Goal 6 Synthesis Report on Water and Sanitation, about 2.1 billion people lack safely managed drinking water,[2] while 4 billion 'experience severe water scarcity during at least one month of the year'.[3] On the other hand, the human right to water, derived from articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ratified by 171 States),[4] 'entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[5] Thus, the rapidly deteriorating freshwater scarcity is a serious and multidimensional issue that requires prompt action for long-term solutions.

One ambitious solution that has been frequently proposed in the context of water crises throughout the world presupposes using icebergs as the source for freshwater by towing them to the shore. The idea of iceberg harvesting is not a novel one. Whereas there are records of glacier ice being towed for drinking water as early as 1852-53,[6] the debate surrounding the achievability of towing of icebergs for drinking water gained traction among scientists in the 1970s. It is yet to proceed beyond the theorising phase; however, with modern technological progress, iceberg harvesting may become a viable solution in the near future.[7] The prospect of exploiting icebergs in order to satisfy rising freshwater demand (estimated to exceed supply by 40% in 2030)[8] means that all eyes will turn to Antarctica, as its icebergs contain enough freshwater to satisfy the annual needs of 5 billion people.[9] Antarctic icebergs have a tabular shape, rendering them easier to tow than Arctic icebergs, for example, which are generally considered 'unstable' and thus unsuitable for transport.[10] Interestingly, several 'mega-icebergs' have recently been spotted calving off and drifting away from the Antarctic shore, with the

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1 UN Water, 'Water Scarcity' (*UN Water*) <www.unwater.org/water-facts/scarcity/> accessed 26 November 2020.

2 UN Water, 'SDG 6 Synthesis Report 2018 on Water and Sanitation' (*UN Water*, 2018) 13.

3 UN Water, 'UN World Water Development Report: Leaving No One Behind' (*UN Water*, 2019) 14.

4 See Office of the High Commissioner for Human Rights, 'Status of Ratification Interactive Dashboard: International Covenant on Economic, Social and Cultural Rights' (*OHCHR*, 29 September 2020) <https://indicators.ohchr.org/> accessed 27 November 2020.

5 CESCR 'General Comment No 15 (2002): The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights' (20 January 2003) UN Doc E/C.12/2002/11, paras 2,3.

6 Wilford F Weeks and William J Campbell, 'Icebergs as a Fresh-Water Source: An Appraisal' (1973) 12(65) Journal of Glaciology 207, 209.

7 See Bryan S Geon, 'A Right to Ice?: The application of international and national water laws to the acquisition of iceberg rights' (1997) 19(1) Michigan Journal of International Law 277, 279-81.

8 C Winter, 'Towing an Iceberg: One Captain's Plan to Bring Drinking Water to 4 Million People' *Bloomberg Green* (New York, 6 June 2019) <bloomberg.com/news/features/2019-06-06/towing-an-iceberg-one-captain-s-plan-to-bring-drinking-water-to-4-million-people> accessed 26 November 2020.

9 Cory J Lewis, 'Iceberg Harvesting: Suggesting a Federal Regulatory Regime for a New Freshwater Resource' (2015) 42 IELR 439, 443.

10 Tim Smedley, 'The Outrageous Plan to Haul Icebergs to Africa' *BBC* (London, 21 September 2018) <www.bbc.com/future/article/20180918-the-outrageous-plan-to-haul-icebergs-to-africa> accessed 26 November 2020.

world's largest iceberg—A-76—breaking off Antarctica's Renn Ice Shelf at the end of May.[11] Scientists raised concerns over the potential implications that the drifting icebergs could have on the marine ecosystems they would be passing through.[12] Such concerns and the attention generated by the recently increasing calving of 'mega-icebergs', as well as the pressing impending freshwater crisis, illustrate the necessity of reviving the legal discussion on Antarctic iceberg harvesting, particularly as the majority of the literature on this subject dates back to 20-30 years ago.

Therefore, the present paper aims at providing a comprehensive analysis of the legal regimes currently governing the possibility of harvesting iced freshwater resources (IFR) in the South Polar Region. It points to the controversial aspects and legal gaps connected to the harvesting of Antarctic icebergs and explores possibilities to fill these gaps. Finally, we argue that given the rapid technological developments and the aggravation of the global water scarcity situation, States need to readdress the question of IFR exploitation with a view to ensuring the highest degree of protection of the Antarctic environment.

II. Overview of the Legal Framework: The Antarctic Treaty System

A. The Antarctic Treaty

In the first half of the 20th century, heated discussion ensued over an icy continent, with numerous States advancing rivalling interests in Antarctica. For Australia, New Zealand, France, Norway, the United Kingdom, Chile, and Argentina, these interests consisted of territorial sovereignty claims.[13] Whereas the claims of the States from the South American and Oceanian regions are related to their geographical proximity to Antarctica, Norway had interests in whaling and sealing, and the other two European States wanted to protect their explorative and scientific endeavours.[14] The main concern of the USA and USSR, on the other hand, was the non-recognition of the aforementioned sovereignty claims – whilst nevertheless desiring to reserve their own rights to make sovereignty claims in the future.[15] In spite of previously failed negotiation attempts, the International Geophysical Year (1957-58) showed the aforementioned States and three others involved in scientific endeavours – Belgium, South Africa, and Japan – that fruitful international cooperation in science is possible even in times of political disagreement.[16] Thus, with the aim of continuing mutually beneficial cooperative efforts in science and, importantly, maintaining peace, twelve States came together to prevent an escalation of their rivalling interests in the Antarctic region and concluded the Antarctic Treaty on 1 December 1959.[17] This undertaking was, and remains, successful as a result of a crucial provision: a moratorium on State Parties' sovereignty claims. This 'freeze' is four-fold,

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[11] Jonathan Amos, 'Radar images capture new Antarctic mega-iceberg' *BBC News* (London, 1 March 2021) <https://www.bbc.com/news/science-environment-56241503> accessed 14 March 2021. See also 'Huge Antarctic Iceberg headed towards South Georgia breaks in two' *The Guardian* (London, 18 December 2020) <https://www.theguardian.com/world/2020/dec/18/massive> accessed 14 March 2021; Claire Fahy, 'Iceberg Splits From Antarctica, Becoming World's Largest' *New York Times* (New York, 22 May 2021) <www.nytimes.com/2021/05/20/world/iceberg-antarctica-ronne-a76.html> accessed 3 June 2021.

[12] Amos (n 11).

[13] Rolph Trolle-Anderson, 'The Antarctic scene: legal and political facts' in *The Antarctic Treaty Regime* (CUP 1987) 57.

[14] Gillian D Triggs, 'Introduction' *The Antarctic Treaty Regime* (CUP 1987) 52.

[15] Trolle-Anderson (n 13) 58.

[16] ibid 58-59.

[17] ibid 59.

in that it provides that nothing under the Antarctic Treaty shall be interpreted as (1) a renunciation or diminution of any previous claims or bases for claims (based on activities undertaken in the region) of a State Party, (2) recognition or non-recognition of any other State's claim or basis of claim, (3) 'a basis for asserting, supporting or denying a claim', and (4) no new claims or enlargement of existing claims may be made for the duration of the treaty.[18]

Today, there are 29 consultative members and 25 non-consultative members of the Antarctic Treaty.[19] Whereas consultative members have the right to vote during meetings of the State Parties, non-consultative members may only attend without a right to vote. While the Antarctic Treaty is generally open for accession to any United Nations Member State or any other State invited with the consent of all consultative members,[20] a State may only become a consultative member if it has demonstrated a significant research activity in the Antarctic.[21] In the last six decades, the State Parties to the Antarctic Treaty have allowed the fundamental regime to evolve into the comprehensive Antarctic Treaty System (ATS), which additionally entails the 1972 Antarctic Seals Convention,[22] the 1980 Convention on the conservation of Antarctic marine living resources (CCAMLR),[23] the 1991 Madrid Protocol on Environmental Protection in the Antarctic Treaty,[24] and theoretically – although not in force – the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).[25] This regime is refined and kept up to date via recommendations and measures adopted by the consultative members and several established treaty bodies.[26] Additionally, other treaties, such as the United Nations Convention on the Law of the Sea (UNCLOS)[27] and the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (MARPOL),[28] for example, may apply to the region, defined in the Antarctic Treaty as the area south of 60° South Latitude, including all ice shelves.[29] This is the case particularly with regard to the high seas in the area, as article VI Antarctic Treaty provides that nothing therein 'shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area'.[30] This reference to the high seas specifically, rather than other notions of the law of the sea, is relevant

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18 The Antarctic Treaty (concluded 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (Antarctic Treaty) art IV.

19 Secretariat of the Antarctic Treaty, 'Parties' (*Antarctic Treaty*, 2021) <https://www.ats.aq/devAS/Parties?lang=e> accessed 14 March 2021.

20 Antarctic Treaty (n 20) art XIII.

21 ibid art IX(2).

22 Convention for the Conservation of Antarctic Seals (concluded 1 June 1972, entered into force 11 March 1978) 1080 UNTS 175.

23 Convention on the Conservation of Antarctic Marine Living Resources (concluded 20 May 1980, entered into force 7 April 1982) 1329 UNTS 47 (CCAMLR).

24 Protocol on Environmental Protection in the Antarctic Treaty (concluded 4 October 1991, entered into force 14 January 1998) 2941 UNTS 1 (Madrid Protocol).

25 Convention on the Regulation of Antarctic Mineral Resource Activities (concluded 2 June 1988) <https://documents.ats.aq/recatt/att311_e.pdf> (CRAMRA).

26 See Madrid Protocol (n 24) art 1(e).

27 United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

28 Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (concluded 17 February 1978, entered into force 19 October 1983) 1341 UNTS 3 (MARPOL).

29 Antarctic Treaty (n 18) art VI.

30 ibid art 4.

as a result of the moratorium on sovereignty claims, which precludes the existence of territorial seas or exclusive economic zones around Antarctica.[31] Thus, all waters around the Antarctic are considered high seas.[32] When the Antarctic Treaty was concluded, UNCLOS had not yet been adopted, meaning that the concept of exclusive economic zones did not exist yet. However, should the sovereignty claims ever be unfrozen, the respective States could and would most likely claim both territorial seas and exclusive economic zones.

B. The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities

Whereas the Antarctic Treaty codified State Parties' agreement to 'freeze' claims of national sovereignty and designated Antarctica as a region intended for peace and international scientific cooperation,[33] it remained silent on the topic of resource exploration and exploitation. This lack of regulatory provisions is largely owed to the fact that in 1959 – at the time of the conclusion of the Antarctic Treaty – the prospect of exploitation activities on the continent seemed unfeasible due to its harsh climatic conditions and the absence of the required technological equipment. Moreover, since the exploitation of natural resources is closely linked to State sovereignty, this subject was avoided due to its high political sensitivity.[34] However, the desire to exploit Antarctica's mineral wealth was nevertheless present, reinforced by the 1973 oil crisis.[35]

In 1988, following multiple rounds of negotiations, CRAMRA was concluded. Laying down an extensive regime of mineral exploitation complemented by a system of strong environmental protection mechanisms, CRAMRA was the first attempt of State Parties to open up Antarctica to human activities beyond scientific research. Importantly, while hydrocarbons and other mineral resources would fall under the scope *ratione materiae* of CRAMRA, the treaty's scope excluded the exploitation of IFR.[36] When negotiating CRAMRA, State Parties explicitly stated that 'mineral resources, as defined in Article 1(6) of the Convention, do not include ice'.[37] The possibility of the 'harvesting of ice, including icebergs' was acknowledged, although concerns were raised as to the adverse impacts of such activities 'on the Antarctic environment'.[38] However, following a passionate lobbying campaign by environmental NGOs and the refusal of Australia and France to ratify the treaty, CRAMRA never entered into force. Apart from political concerns over the mining regime

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31 The notions of territorial seas and exclusive economic zones are dependent on the existence of a coastal State. See UNCLOS (n 27) arts 2 and 55 respectively.

32 See UNCLOS (n 27) art 86; See also JE Viñuales, 'Iced Freshwater Resources: A Legal Exploration' (2009) 20(1) Yearbook of International Environmental Law 188, 191.

33 UNCLOS (n 27) arts 1, 3.

34 Emil A Zuccaro, 'Iceberg Appropriation and the Antarctic's Gordian Knot' (1979) 9(2) California Western international Law Journal 405, 409; For an extensive discussion of the difficulties faced by States during the negotiations of the Antarctic Treaty, see John Hanessian, 'The Antarctic Treaty 1959' (1960) 9(3) International and Comparative Law Quarterly 436.

35 Doaa Abdel-Motaal, *Antarctica: The Battle for the Seventh Continent* (Praeger Press 2016) 85.

36 CRAMRA (n 25) art 1(6).

37 ATCM, 'Final Act of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Resources' (1988), para 8.

38 ibid.

potentially prejudicing sovereignty claims,[39] the lack of an authorisation requirement for minerals prospecting was deemed to pose a threat to the fragile Antarctic ecosystem.[40]

C. The 1998 Madrid Protocol

Consequently, with the aim of creating an environmental regime more stringent than CRAMRA, [41] the Madrid Protocol was negotiated and entered into force in 1998.[42] Designating the continent as a 'natural reserve',[43] the core of this instrument lies in its article 7, which prohibits 'any activity relating to mineral resources, other than scientific research'.[44] The protocol underlines and supports the general purpose of the ATS, which devotes the Antarctic to 'peace and science', with activities limited to those 'in the interest of mankind as a whole'.[45] To this effect, it lays down that priority is to be accorded to scientific research and to Antarctica's value for this purpose.[46]

In order to limit adverse impacts on the environment, it sets out the following requirements, applicable 'in the planning and conduct of all activities' within the ATS' territorial scope so as to avoid

> *(i) adverse effects on climate or weather patterns; (ii) significant adverse effects on air or water quality; (iii) significant changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments; (iv) detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora; (v) further jeopardy to endangered or threatened species or populations of such species; or (vi) degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance*.[47]

Where 'impacts upon the Antarctic environment or dependent or associated ecosystems' contrary to these 'principles' cannot be avoided with certainty, any expeditions to and within Antarctica shall be 'modified, suspended or cancelled'.[48] Although the choice of the word 'principles' appears to be lacking stringency – 'requirements', 'rules' or 'standards' might have offered a clearer obligation – the Madrid Protocol sets out a strict precautionary approach. Crucially, the Protocol details all elements of information which environmental impact assessments (EIAs) need to include to ensure compliance with these conditions.[49] The procedures and requirements concerning such EIAs are laid down in Annex I to the Madrid Protocol. Annex I differentiates between activities having *less* than a minor or transitory impact, those *with* a minor or transitory impact, and those having *more* than a minor or

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39 Abdel-Motaal (n 35) 85.
40 CRAMRA (n 25) art 10; Abdel-Motaal (n 35) 102, 104.
41 ibid; Samuel Kwaw Nyameke Blay, 'New Trends in the Protection of the Antarctic Environment: 1991 Madrid Protocol' (1992) 86 American Journal of International Law 377, 399; The Madrid Protocol is supplemented by six annexes on EIA, Fauna and Flora, Waste Disposal, Marine Pollution, Protected Areas, and Liability.
42 Philippe Sands, *Principles of International Environmental Law* (CUP 2003) 716, 722.
43 Madrid Protocol (n 24) art 2.
44 ibid art 7.
45 ibid preamble, arts 2-5.
46 ibid art 3(3).
47 ibid art 3(1),(2)(a),(b).
48 ibid art 3(4)(b); ATS, art VII(5).
49 Madrid Protocol (n 24) art 3(2)(c).

transitory impact.[50] Activities with an impact that is less than minor or transitory, such as, for instance, annual or educational expeditions, must only undergo a Preliminary Assessment.[51] With regard to this category, the evaluation process is usually left at the discretion of the national authorities responsible for overseeing Antarctic environmental affairs.[52] Where an activity is determined to have a minor or transitory impact, such as touristic activities, an Initial Environmental Evaluation needs to be conducted. [53] In cases where this assessment or another source indicate that the impact will exceed the threshold of minor or transitory, such as in cases of construction or drilling activities, a Comprehensive Environmental Evaluation must be conducted.[54] Accordingly, activities with a minor or transitory impact may proceed being subjected to continued assessment, e.g. via monitoring. Activities with a more significant impact, conversely, are subject to rigorous scrutiny and decision-making processes by the Committee for Environmental Protection (Committee) and the Antarctic Treaty Consultative Meeting (ATCM).[55]

III. Exploitation of Iced Freshwater Resources under the Antarctic Treaty System

A. Iced Freshwater Resources under ATS Measures

When negotiating the Madrid Protocol, the Parties consciously chose to reserve the possibility of IFR exploitation within the ATS. In this context, Recommendation XV-21 was adopted, in which the representatives '[noted that] technological developments might one day make it possible to utilise icebergs detached from the continent for freshwater requirements, especially in coastal areas'.[56] Importantly, the consultative Parties acknowledged that this could have negative impacts on the unique Antarctic environment and ecosystems if executed in an unregulated manner, especially if land-based installations were to be used for this purpose.[57] Whereas the representatives emphasised the effectiveness of the ATS in promoting peace, scientific cooperation, and protecting the environment, they also highlighted the lack of sufficient information on the environmental and climatic impacts of the exploitation of floating icebergs.[58] Thus, recognising that commercial exploitation should not be engaged in before the potential environmental impacts thereof would be appropriately examined,[59] the ATCM recommended to its governments that they 'exchange information on the feasibility

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50 See Annex I to the Protocol on Environmental Protection the Antarctic Treaty (Annex I) arts 1-3.

51 ibid art 1(2). See also ATCM/SP, 'Annual list of Initial Environmental Evaluations (IEE) and Comprehensive Environmental Evaluations (CEE)' (2008) XXXI ATCM.

52 Sergey Tarasenko, 'Environmental impact assessment in Antarctica: application of the "minor or transitory impact" criterion' (PGCertAntaStud, University of Canterbury 2009).

53 Annex I (n 50) art 2(1). See also Ricardo Roura and Kees Bastmeijer, 'Environmental Impact Assessment in Antarctica' in Kees Bastmeijer and Timo Koivurova (eds), *Theory and Practice of Transboundary Environmental Impact Assessment* (Brill/Martinus Nijhoff Publishers 2008), 189.

54 ibid art 3. See also Alan D Hemmings and Lorne K Kriwoken, 'High level Antarctic EIA under the Madrid Protocol: state practice and the effectiveness of the Comprehensive Environmental Evaluation process' (2010) 10 Int Environ Agreements 187, 194-195.

55 ibid arts 2(2), 3.

56 ATCM, 'Recommendation XV-21' (1989) ATCM XV, preamble recital 2.

57 ibid preamble recitals 5, 7.

58 ibid preamble recitals 4, 6, 8.

59 ibid preamble recital 9.

of commercial exploitation of icebergs, relevant technologies and possible environmental impacts'.[60] However, it appears that the exploitation of Antarctic ice as a source of freshwater has not been discussed further since.[61]

Nevertheless, Recommendation XV-21, effective since 2004,[62] is of paramount importance with a view to interpreting the ATS concerning the possibility of exploiting IFR. Whereas it was up to each State to decide for itself how to implement recommendations under article IX Antarctic Treaty domestically, all but two Consultative Parties – Japan and France – considered them to be binding in themselves upon approval, while the latter two required domestic implementing measures for these instruments to become binding.[63] In any case, recommendations under article IX of the Antarctic Treaty also represent a form of subsequent agreement of the Parties on the evolution of the ATS so as to serve as interpretative tools for the Antarctic Treaty and the Madrid Protocol in accordance with the customary rule of interpretation enshrined in article 31(3)(a) VCLT.[64] Thus, having regard to Recommendation XV-21, as well as the Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting (ATSCM), a fairly clear picture of the current legal situation under the ATS develops. The recommendation clearly points to the caveats concerning the harvesting of icebergs at the time and further indicates a potential framework and steps to be taken in this respect, outlining States' precautionary approach that is apparent from the desire to postpone any commercial exploitation until more information is available.[65] In its Final Act, the Eleventh ATSCM explicitly pointed out that the prohibition on 'mineral resource activity' to be adopted in the Madrid Protocol did not apply to the harvesting of ice, which should, as understood by the Parties, be governed by the remainder of the Madrid Protocol once it became technologically possible.[66] This appears to indicate the Parties' belief that the ATS, as it is now (with the Madrid Protocol in force), provides an adequate legal framework to govern the exploitation of icebergs. This apparent belief is reinforced by the reference to the ATS as 'the most appropriate framework for fostering international efforts to guarantee the protection of the environment' in Recommendation XV-21.[67]

B. Iced Freshwater Resources under the Madrid Protocol

It appears from the EIA database of the ATS and anecdotal evidence that, following the suspension of discussion on the topic, no (public) EIA concerning the exploitation of icebergs has been conducted either.[68] Thus, one can merely speculate whether permission for IFR

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60 ibid para 1.

61 No mention has been made of this issue in any documents in the ATS database since the XI ATSCM.

62 See Secretariat of the Antarctic Treaty, 'Recommendation XV-21 (ATCM XV - Paris, 1989)' (*ATS*, 2020) <www.ats.aq/devAS/Meetings/Measure/190> accessed 26 November 2020 and art IX(4) Antarctic Treaty.

63 Christopher C Joyner, 'Recommended Measures Under the Antarctic Treaty: Hardening Compliance with Soft International Law' (1998) 19(2) Michigan Journal of International Law 401, 422-26.

64 See Antarctic Treaty (n 20) art IX(1),(4); Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 (VCLT), art 31.

65 cf Viñuales (n 32), 195.

66 ATSCM, 'Final Act of the Eleventh Antarctic Treaty Special Consultative Meeting' (1991) XI ATSCM, para 6.

67 Recommendation XV-21 (n 56) preamble recital 8.

68 See Secretariat of the Antarctic Treaty, 'EIA Database' (*ATS*, 2020) <www.ats.aq/devAS/EP/EIAList?lang=e> accessed 26 November 2020; MH Birkhold, '$166 Water Could Dictate International Iceberg Law' (*The Atlantic*, 31 October 2019)

harvesting could be granted under the ATS. Without being particularly well-versed in climate science or marine biology, the present authors assume that such endeavours could likely cause 'adverse effects on climate and weather patterns'; 'significant adverse effects on air or water quality' (especially the latter); 'significant changes in terrestrial (including aquatic), glacial or marine environments'; or the degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance'.[69] The applicable rules under the Madrid Protocol certainly seem to outrule the harvesting of IFR *still attached* to the Antarctic continent, since this would mean active, significant changes to the Antarctic environment, including potential degradation of the aforementioned areas of significance or even detriment to local fauna and flora.[70] In any case, the Committee only ever considered 'icebergs detached from the continent' in its Recommendation XV-21.[71] However, even the removal of icebergs floating at sea which one might consider to be of minor impact as they would melt regardless, could have significant environmental impacts, as their presence or removal will naturally affect water temperatures and salinity, i.e. water quality.[72] In this respect, some experts have found that the development of krill, for example, 'a key organism in Antarctic ecosystems', is highly dependent on these factors.[73] With a view to these potential effects, the impact of harvesting icebergs would certainly not be below the threshold of minor or transitory, meaning that at least an Initial Environmental Evaluation but most likely a Comprehensive Environmental Evaluation would be required under the Madrid Protocol. The persistent uncertainty surrounding the environmental impact of iceberg harvesting indicates the need to reopen the discussion on this matter within the ATS, both scientifically and legally, as initially recommended by the Committee over three decades ago.

C. Iced Freshwater Resources under UNCLOS

In light of the fact that icebergs do not simply remain in one place, another acute question is which rules would apply to icebergs that do not fall inside the scope *ratione loci* of the ATS,[74] that is, if an iceberg which has drifted out of the Antarctic region is 'found' at sea. Without much doubt, States would be allowed to harvest icebergs that drift into their territorial sea or their exclusive economic zone, since States have sovereignty over the former, and UNCLOS provides for the exercise of sovereign rights for the purposes of exploiting non-living natural resources in the latter (subject to the limits of UNCLOS and other applicable provisions of international law).[75] The issue becomes tainted with lack of clarity when one considers an iceberg drifting in the high seas. As under the ATS, the law of the sea does not entail any

<www.theatlantic.com/science/archive/2019/10/iceberg-water-and-race-exploit-arctic/601147/> accessed 26 November 2020.

69 Madrid Protocol (n 24) arts 3(2)(b)(i-iii, vi).

70 ibid art 3(2)(iii, iv, vi).

71 Recommendation XV-21 (n 56) preamble recital 2.

72 For studies assessing the environmental and climatic impact of drifting icebergs, see Julie Dinasquet and others, 'Mixing of water masses caused by a drifting iceberg affects bacterial activity, community composition and substrate utilization capability in the Southern Ocean' (2017) 19(6) Environmental Microbiology 2453; Mark J Hopwood and others, 'Highly variable iron content modulates iceberg-ocean fertilisation and potential carbon export' Nature Communications 10, 5261 (2019) <https://doi.org/10.1038/s41467-019-13231-0>.

73 see Viñuales (n 32) 196.

74 ibid 197.

75 UNCLOS (n 27) arts 2 and 56(1)(a), (2) respectively; see also Geon (n 7), 283.

prohibition of iceberg harvesting, but UNCLOS provides an array of environmental protection provisions to be taken into account when engaging in such activities. Like the Antarctic region, the high seas may only be used for peaceful purposes (and no sovereignty claims may be made either).[76] Furthermore, States have a duty to take measures, and cooperate with other States in doing so, as may be necessary for the conservation of the living resources of the high seas.[77] Although, this duty is normally read in the context of exploiting living resources, it could be pertinent to iceberg harvesting given the latter's potential effects on marine life (e.g. on krill) as mentioned in section III.B above. The relevance of this issue is reinforced by article 194(5) UNCLOS, which provides that the obligation to take measures in accordance with Part XII UNCLOS 'shall include those [measures] necessary to protect and preserve rare or fragile ecosystems'.[78] Part XII further lays down States' obligations with respect to specific forms of pollution potentially applicable to iceberg harvesting, including greenhouse gas emissions from iceberg transport, discussed in section V.C below.[79] Thus, although UNCLOS does not contemplate iceberg harvesting, the existing framework provides a level of protection similar to that of the ATS.[80]

D. Analysis: *Communis Opinio* and Controversial Matters

The above sections illustrate that, in spite of the strong precautionary approach adopted by the ATCM in Recommendation XV-21, the current international legal framework does not *per se* prohibit the exploitation of Antarctic IFR, regardless of whether harvesting would take place within the geographical scope of the ATS or UNCLOS. On the contrary, a necessary legal *lacuna* has been left in the anticipation of iceberg harvesting becoming more plausible in light of technological progress and increasing scientific insight. Until now, protection of the Antarctic environment has remained the top priority, as State Parties suspended any IFR-related activities until more information on its environmental impacts would be available. Therefore, no attempts to establish a clear legal regime governing IFR have been undertaken. In the absence of a specialised treaty, iceberg harvesting if ever engaged in, will be regulated by the Madrid Protocol within the geographical scope of the ATS and therefore subject to its environmental protection restrictions, including the duty to conduct EIAs. Its applicability begs the question of whether the Protocol offers sufficient protection from potential adverse environmental consequences of iceberg harvesting. While declared the 'most comprehensive and stringent regime of environmental protection' by some scholars,[81] the Madrid Protocol has also been heavily criticised for having a weak implementation and enforcement system, thus creating but 'an illusion of strong environmental protection in Antarctica'.[82] How effective its framework and enforcement could prove also depends on how entities would acquire icebergs.

Thus, a crucial question is under what type of appropriation regime harvesters would obtain an iceberg. While ATS consultative members envisioned IFR harvesting to be governed

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[76] ibid arts 88, 89.
[77] ibid art 117 (et seq).
[78] ibid arts 192, 194(5).
[79] see ibid arts 194, 196, 211.
[80] see UNCLOS (n 27) Parts VII and XII; Madrid Protocol (n 27) and its Annex I (n 50).
[81] Sands (n 43) 722.
[82] Abdel-Motaal (n 35) 245. For more extensive criticism of the Madrid Protocol see Abdel-Motaal and ibid 726.

by the ATS, particularly the Madrid Protocol, as 'the most appropriate framework (…) to guarantee the protection of the environment', this does not purport any sort of appropriation regime that would be applicable to icebergs.[83] Due to the moratorium on sovereignty claims in the Antarctic, one is left with somewhat of a *carte blanche* in this regard. The current situation as elaborated above may allude to a *res nullius* situation, as has also been anticipated by many authors. Another possibility, which has been advocated by a number of States, could be a 'common heritage of humankind' approach. These two possible regimes for the appropriation of icebergs for the purposes of harvesting their freshwater will be explored in the following two sections.

IV. Allocation of Property Rights for Icebergs

Over the years, legal scholars have suggested several regimes of iceberg acquisition, effectively summarised by Lewis into three main categories.[84] The first one presupposes treating icebergs as *res nullius* in light of ATS and UNCLOS; under the second regime icebergs were proposed to be viewed as common heritage of humankind or *res communis*; finally, the third approach would be based upon sovereignty claims over Antarctica and, thus, property rights.[85] Although property rights by virtue of sovereignty are normally the first type of regime to come to mind, this is not feasible under the current regime governing the Antarctic. Given that all territorial claims over Antarctica remain frozen, none of the claimant States would be able to exercise property rights over icebergs. Therefore, the present paper will focus on the remaining two regimes: icebergs as *res nullius* and *res communis*.

A. *Res Nullius*

As discussed above, two treaties are prevalently relevant when it comes to the exploitation of Antarctic icebergs: ATS and UNCLOS. The latter divides the sea into several zones, including territorial waters, where States exercise full jurisdiction, and the high seas, open for all States. As there is no State territory Antarctica, it follows that no State Party to the ATS can claim territorial waters or an exclusive economic zone around it.[86] Consequently, the waters around Antarctica constitute high seas. This is reinforced by art VI of the Antarctic Treaty on the treaty's scope *ratione loci* which states that nothing therein 'shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area'.[87] Consequently, if waters around Antarctica form part of the high seas, then Antarctic icebergs, not specifically regulated under UNCLOS and, thus, floating freely therein, may be deemed 'solidified high seas'[88] and, therefore, *res nullius*.[89] Zuccaro, on the other hand, has suggested that icebergs may fall under the doctrine of erosion, meaning

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83 Recommendation XV-21 (n 56).
84 Lewis (n 9) 452.
85 ibid.
86 Lewis (n 9) 452. See also Christopher C Joyner, 'Ice-Covered Regions in International Law' (1991) 31 The International Law of the Hydrologic Cycle 213, 234-235.
87 Antarctic Treaty (n 20) art VI.
88 Joyner (n 86) 235.
89 Lewis (n 9) 452. See also Joyner (n 87) 234-235; Thomas R Lundquist, 'The Iceberg Cometh?: International Law Relating to Antarctic Iceberg Exploitation' (1977) 17 Natural Resources Journal 1, 21-26.

that even if ice shelves fell under a State's jurisdiction while still attached to the continent, property rights would extinguish once an iceberg has separated, rendering it *res nullius*.[90]

The status of *res nullius*, however, does not mean unregulated access to Antarctic icebergs. It is largely accepted that due to the novelty of the activity and the scientific uncertainty of its potential implications, iceberg harvesting must prove 'consistent with general principles of high seas freedoms' in order to be compliant with UNCLOS.[91] In particular, it needs to comply with the 'fundamental test of rational use', as suggested by Joyner, which would ascertain whether IFR exploitation 'can be integrated into the established law of the sea without impinging on fundamental norms'—an idea supported by other scholars in the field.[92] In essence, iceberg harvesting would need to prove compatible with the freedoms of the high seas and the fundamental rules governing them, including 'international environmental legal standards meant to preserve the ocean's ecological health and to deter marine pollution'.[93] Apart from this, however, icebergs having the status of *res nullius* would entail the freedom of any State or private entity to engage in iceberg harvesting in the high seas. From here, each State would be free to lay down the legal framework regulating the activity, including the system of rights allocation under national law. Thus, States could opt for existing legal regimes, including natural resources law or water law; conversely, a new legal act aimed explicitly at iceberg harvesting may be passed.

While the environmental regulations addressed in section 3 would be applicable to icebergs even when they are considered *res nullius*, it may be presumed that no entity would check whether these requirements would, in fact, be complied with and enforce them, if all States are free to appropriate icebergs drifting on the high seas. Another prevalent concern regarding icebergs being seen as *res nullius* is the uneven access the regime may create. While the status of *res nullius* would essentially ensure *free* access to the icebergs for any entity compliant with national laws and environmental requirements under UNCLOS and ATS, it does not guarantee *equal* access.

Importantly, concerns exist as to whether the lack of an international legal framework governing the acquisition of icebergs will not result in the global legal discourse being deflected by a selected group of nations. As noted by Lundquist, iceberg harvesting by one State 'must be reasonable in relation to the harvesting needs and capabilities of other countries'.[94] Conflicting with this is the suggestion of Lewis—a strong proponent of the *res nullius* regime—that the United States must act independently in the nearest future and then steer the international legal debate such as to accommodate their own needs and reflect their national legal framework.[95] These considerations largely mirror those relating to the exclusivity of the regime governing Antarctica and, in essence, raise the question of accessibility of icebergs for all Parties. Importantly, many countries that are under high risk of freshwater scarcity, such as most Middle Eastern and African States, lack the weight associated with Western powers when it comes to international legal discourse, as well as the necessary technological and financial means to harvest icebergs, ultimately indicating that the *res nullius* approach would hinder their equal participation in the global debate and undermine their access to IFR.

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[90] Zuccaro (n 34) 419.
[91] Joyner (n 86) 235.
[92] ibid. See also Lewis (n 9) 457.
[93] Lewis (n 11) 457. See also UNCLOS (n 29) Part XI.
[94] Lundquist (n 89) 25.
[95] Lewis (n 9) 458.

On the other hand, the chances of acceptance are significantly higher with regard to the *res nullius* regime than the common heritage of humankind approach. Proposed back in the late 1970s, the regime remains largely supported by legal scholars to this day. If accepted, it would guarantee free access to Antarctic icebergs instead of confining them to the authority of ATS State Parties or any particular international institution. Finally, States are likely to be in favour of the *res nullius* regime as it entails almost no additional burden, both on the international and national levels.

Nevertheless, given the worrying considerations connected to the inequality of access under the proposed regime and having in mind that 'uncontrolled activities relating to the exploitation of Antarctic icebergs could also have an adverse effect on the unique Antarctic environment and its dependent and associated ecosystems',[96] another option to be considered is proclaiming icebergs 'common heritage of humankind', which will be discussed below.

B. Common Heritage of Humankind

The idea for a 'common heritage of humankind' approach stems from the law of the sea. More specifically, UNCLOS designated the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, known as 'the area', to be common heritage of humankind.[97] This means that it must only be explored and exploited for the benefit of humankind as a whole, 'irrespective of the geographical location of States'.[98] The explicit disregard for States' location already proves an indication as to why such a regime would be favourable for the Antarctic - it would allow universal access to its resources, irrespective of any potential sovereignty claims prone to cause conflicts in the Antarctic, and without favouring ATS members. Moreover, since an iceberg drifting on the high seas—free from any jurisdiction—cannot be linked to any particular State, a system recognising this appears most equitable.

In fact, the United Nations General Assembly (UNGA), in addressing the 'Question of Antarctica', has on multiple previous occasions sought a common heritage of humankind approach. In the wake of negotiations concerning the exploitation of mineral resources in the early 1980s, prior to the adoption of the Madrid Protocol, the UNGA had stated that

> *any exploitation of the resources of Antarctica should ensure the maintenance of international peace and security in Antarctica, the protection of its environment, the non-appropriation and conservation of its resources and the international management and equitable sharing of the benefits of such exploitation*.[99]

In Resolution A/RES/49/80, it reaffirmed 'that the management and use of Antarctica should be conducted (...) in the interest of (...) *promoting international cooperation for the benefit of mankind as a whole'*.[100] The former affirmation by the UNGA illustrates the advantages that a *res communis* approach may have over a *res nullius* approach, provided it would be modelled on the regime governing the 'area' under UNCLOS. Since an authority acting on behalf of all humankind would be vested with all rights over icebergs that have calved from Antarctic ice

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96 Recommendation XV-21 (n 56) preamble recital 5.
97 UNCLOS (n 27) arts 1(1) 136.
98 ibid preamble recital 6, art 140.
99 UNGA Res 41/88 B (4 December 1986) UN Doc A/RES/41/88 B, para 1.
100 ibid preamble recital 6 (emphasis added).

shelves,[101] immediate conflict over the icebergs would hardly ensue, allowing international peace and security to be maintained. In granting authorisations for harvesting IFR from icebergs to Parties, the authority would have to act in a non-discriminatory manner and, importantly, nevertheless afford special consideration to developing States.[102] Furthermore, developing States would benefit from obligatory transfers of the necessary technology and scientific knowledge by the authority.[103] This would allow for the prioritisation of access for those States most in need of drinking water, which is hardly possible under a *res nullius* approach, as the latter favours States with the most resources and advanced technology. Moreover, the common heritage regime under UNCLOS prescribes that States are responsible for ensuring that activities carried out by them or entities under their effective control are in compliance with all applicable rules.[104] Crucially, State Parties or international organisations are liable for any damage caused by failing to adhere to these responsibilities.[105] An enforcement system of this nature could facilitate the necessary compliance with the legal prerequisites for IFR exploitation under the Madrid Protocol and UNCLOS as illustrated in sections 3.2 and 3.3. above, allowing for the protection of the Antarctic environment and its dependent or associated ecosystems.

Based on the premise that Antarctica 'has no rightful sovereign owner', Joyner swiftly concluded that Antarctica should be declared *res communis*, rendering icebergs that have calved from it a part of the common heritage of humankind.[106] However, the original ATS members agreed to have their sovereignty claims frozen - not set aside. While New Zealand was (at the time of negotiation of the Antarctic Treaty) willing to forgo its claim for the sake of a strong international governance system, this was not the case for the other Parties.[107] Although more than half a century could have seen States changing their mind, it is highly unlikely that all States who had made sovereignty claims would be willing to surrender them, especially now that more is known about mineral resources resting on the continent. Similarly, even ATS consultative members without sovereignty claims would likely not be keen on abandoning their privileged say in Antarctic matters. Whereas the UN already called for a *res communis* approach when ATS members were discussing the exploitation of mineral resources,[108] the latter States nevertheless proceeded to conclude CRAMRA in 1988 without concern for the remainder of the international community. This is the biggest shortcoming in the proposal of a common heritage of humankind appropriation regime: its implementation barely stands a chance.[109]

C. Comparative Remarks

Overall, it is apparent that any appropriation regime governing icebergs should guarantee certain standards. According to Geon, these include certainty, considering the significant investments necessary for IFR harvesting, as outlined in section 4; fairness, in terms of

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[101] cf UNCLOS (n 27) art 137(2).
[102] ibid art 152.
[103] ibid art 144.
[104] ibid art 139.
[105] ibid.
[106] Joyner (n 86) 236.
[107] Hanessian (n 34) 470.
[108] UNGA Res 41/88 B (4 December 1986) UN Doc A/RES/41/88 B, para 2.
[109] See also Joyner (n 86) 237.

providing access to financial and technological means to those States which most need water; efficiency, with a view to limited availability of icebergs and high costs; practicability, and adaptability for smooth implementation.[110] Although States or private actors applying for authorisation to harvest icebergs could not be certain in advance whether such authorisation would be granted based on the authority's current priorities, having access to the legal framework based on which the authority would decide would provide a certain degree of legal certainty. Once authorisation is granted to an entity based on their plans, investors would have full certainty, a characteristic which cannot be guaranteed at all under a *res nullius* approach. Therefore, while the *res nullius* regime cannot ensure equal access to States who would need it the most given the dire climate conditions and severe water scarcity, the common heritage approach might constitute the most striking example for the implementation of a 'fair' regime in international law.[111] The degree of efficiency would ultimately depend on the concrete implementation of the common heritage regime. Under the *res nullius* approach, high-level efficiency could result from competition of the various entities interested in iceberg harvesting, unless the varying levels of resources available to States would create unfair competition. Whereas the loose regulation under the *res nullius* approach would likely allow parties to adapt whenever needed, adaptation under the *res communis* approach could end up in gridlocks if members of the authority fail to come to an agreement. Conclusively, a *res nullius* approach is far easier to implement and would most likely be favoured by ATS consultative members. A *res communis* approach would, in turn, offer the environmental protection necessary for the preservation of the vulnerable Antarctic environment and its dependent or associated ecosystems. It would ensure fair and equal access to Antarctic IFR for all actors involved and, therefore, access to drinking water for those who need it most.

Ultimately, in light of legal discourse having been laid on ice since 2004, we can only hypothesise about the potential regimes and the legal implications they may have on the future development of iceberg harvesting in general. However, the following section provides an overview of the attempts to engage in large-scale Antarctic icebergs harvesting that have taken place so far, illustrating that interested parties, particularly when in dire need of drinking water, will hardly wait for States to decide on a legal framework.

V. From Law to Practice: Iceberg Harvesting in Action

A. Historical Background

The concept of using icebergs as a source of fresh drinking water is not a novel one. In fact, inhabitants of the Arctic region such as the Inuit, have a long-standing practice of cutting and melting iceberg pieces for drinking purposes.[112] However, the first large-scale idea of towing an iceberg through the ocean dates to the 1970s, when Saudi Prince Mohammad al-Faisal instructed French engineer Georges Mougin to conduct an evaluation on the possibility of bringing an Antarctic iceberg to Saudi Arabia. The findings were presented at the First International Conference on Iceberg Utilisation for Fresh Water Production, Weather Modification and Other Applications that took place in Iowa in 1977. Moreover, a pilot run was conducted, which included towing a small iceberg weighing a little over 2000 kg from

[110] Geon (n 7) 295-96.
[111] ibid 296.
[112] Birkhold (n 68).

Alaska.[113] The research results identified a number of 'economic, political, legal, and practical obstacles'.[114] Most importantly, there was no equipment advanced enough to allow tugging a massive iceberg and transporting it all the way from the Atlantic Ocean to the Saudi shore. Ultimately, the Prince discontinued the funding, thus temporarily freezing the attempts to use icebergs for freshwater purposes. However, ahead of contemporaneous technology in the 1970s, Mougin's ideas were brought back to life in 2011. Having partnered with the software company Dassault Systèmes, Mougin initiated a new venture. Using satellite data and 3D modeling, he tested the possibility of a trans-Atlantic towing of a 7 million ton iceberg wrapped in an 'insulated fabric mesh' from Newfoundland to the Canary Islands.[115] According to the results, the project could be potentially realised in 141 days, while 'consuming 4,000 tons of fuel'.[116] Despite the considerable losses in size, the chosen iceberg 'would still weigh 4 million tons upon arrival' according to the 3D model.[117] The project attracted the attention of an Emirati businessman, Abdulla Alsheihi, who was willing to provide the funding to deliver fresh water to the UAE in order to solve their water scarcity problem.[118] A pilot run was planned for the second part of 2019; however, no information is available on the results.[119] Thus, leaps made in significant technological progress have led to the gradual revival of the iceberg harvesting idea.

B. Advantages of Iceberg Harvesting

The principal advantage of iceberg harvesting is that it can potentially solve the freshwater scarcity crisis. Approximately 75% of the world's freshwater is held in glaciers and icecaps, 90% of which are located in Antarctica.[120] Antarctic glaciers produce around 140,000 icebergs annually, thus, amounting to 2,000 billion tons of ice.[121] Alas, harvesting icebergs could facilitate the realisation of the human right to drinking water and the right to access to sanitation. Furthermore, accelerated by the rising temperatures, icebergs calve and melt into the ocean, causing a multitude of environmental and climatic impacts.[122] Therefore, harvesting icebergs could be beneficial with a view to averting some of the threats of climate change, although this opinion is not widely supported.[123] Finally, exploitation of IFR could provide a more environmentally friendly alternative to sea water desalination. This commonly used practice, which is 'expensive and energy-intensive', produces not only potable water, but also

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113 Winter (n 8).
114 Lewis (n 9).
115 Smedley (n 10).
116 ibid.
117 ibid.
118 Euronews, 'Will an Emirati Businessman Succeed in Towing an Iceberg to the UAE?' *Euronews* (Lyon, 5 July 2019) <www.euronews.com/2019/07/05/will-an-emirati-businessman-succeed-in-towing-an-iceberg-to-the-uae> accessed 26 November 2020.
119 Smedley (n 10).
120 'The World's Fresh Water Sources' (*The 71 Percent*) <www.the71percent.org/the-worlds-fresh-water-sources/> accessed 26 November 2020.
121 Smedley (n 10).
122 See Julie Dinasquet and others (n 72); Mark J Hopwood and others (n 72); Kate Mcalpine, 'Melting Icebergs Boost Sea-Level Rise' (NewScientist, 30 April 2010) <www.newscientist.com/article/dn18841-melting-icebergs-boost-sea-level-rise/> accessed 26 November 2020.
123 Birkhold (n 68).

a large amount of brine, which, when poured back into the ocean, sinks to the sea bottom, damaging marine life and depleting oxygen.[124]

C. Disadvantages of Iceberg Harvesting

Despite having a number of substantial advantages, harvesting icebergs entails several drawbacks. Most importantly, very little is known about the potential adverse environmental implications of towing icebergs across long distances. Despite Alsheihi's statement that an EIA has been conducted for the planned test project that detected 'a minimal impact to the ecosystems as well as the environment', no results have been made public.[125] Consequently, the statements of interested stakeholders remain largely speculative. Nevertheless, it is impossible to deny that the impact is likely to be substantial. In particular, iceberg towing will have an immense carbon footprint. According to the estimations of marine services company Atlantic Towing, it would require 'at least 40-50 metric tons of fuel per day, per vessel' to transport a large iceberg across the ocean, releasing 5,000 metric tons of fuel into the ocean during a 100-day journey. Other organisations reaffirm the supposition that harvesting icebergs will have 'a [prohibitive] greenhouse gas footprint'.[126] However, more scientific data is required before definitive conclusions can be drawn concerning this matter.

Aside from the environmental harm and despite the technological progress, towing icebergs remains an extremely expensive activity, primarily due to the lack of required facilities and installations. For instance, Nick Sloane's project of towing an iceberg to South Africa was estimated to cost over 200 million dollars.[127] Transporting icebergs over longer distances to Northern Africa and the Middle East would require a substantially larger sum, which, for now, governments remain hesitant to provide.[128] With present-day technologies, melted iceberg water is estimated to be five times more expensive than surface water.[129]

For now, it is apparent that a lot of questions regarding the prospect of iceberg harvesting remain unanswered. The above analysis illustrates the increasing potential of IFR exploitation in solving the water scarcity crisis. However, the persevering uncertainty illustrates the imperative need for further scientific cooperation and information sharing within the international community. It also highlights the necessity of reopening the international legal discourse.

VI. Conclusion

The last time potential IFR exploitation was addressed within the ATS framework was almost thirty years ago. As demonstrated by the present paper, much has changed since then. Firstly, the severity of climate change has escalated, aggravating droughts and freshwater scarcity, and, consequently, reinforcing the necessity for alternative water sources. Secondly, we have

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[124] ibid.
[125] Euronews (n 118).
[126] Smedley (n 10).
[127] Winter (n 8).
[128] Thus, the South African government declined Nick Sloane's offer, inter alia, for financial reasons. Moreover, in 2011 Georges Mougin sought funding from the EU, but received a refusal. See Smedley (n 10).
[129] According to the calculations conducted in Cape Town in 2018, melted iceberg water would cost 'roughly $2 per 1,000 liters' compared to '$0,36 per 1,000 liters' from onshore sources, excluding the transportation costs. See ibid.

witnessed fundamental technological improvements, giving a second life to earlier iceberg harvesting ideas, as demonstrated by the fact that trials have already been planned. Taking into consideration the lack of certainty regarding the potential environmental impacts, we can only speculate whether large-scale iceberg-towing to water scarce regions will take place in the coming years. However, an increasing number of private projects shows evidence of limited patience for States' reluctance to regulate the matter.

In the 1980s, State Parties to the ATS were eager to conclude CRAMRA before the discovery of substantial mineral deposits took place. Today, States need to follow the same approach regarding iceberg harvesting for freshwater use. Having regulations in place before the activity commences provides a degree of security and enables States to mitigate environmental damages as much as possible. Additionally, it prevents the development of customary international law potentially contrary to the objectives of the international community. Therefore, the suspended discourse needs to be revisited before it is overtaken by the practice of singular States or private entities, as the realisation of IFR exploitation becomes ever more feasible. Preservation of Antarctica for peaceful purposes should not be compromised but maintained for the common benefit of humanity and future generations. For the moment, too much remains unknown to theorise as to the form that such regulations might take. In particular, questions remain unanswered as to the legal regime that will govern the allocation of rights over the Antarctic icebergs. While viewing icebergs as *res nullius* will ensure a flexible framework that will require almost no additional legal decisions to be taken, it cannot guarantee fair and equal access to IFR that is possible under the *res communis* approach. On the other hand, the latter option, due to its complexity, might postpone reaching a consensus for an indeterminate period, which could jeopardise the attainment of an agreement before the commencement of the first large-scale iceberg harvesting projects. Nonetheless, whether the applicable regime will be negotiated within the scope of the ATS as an additional annex to the Madrid Protocol or whether a new treaty will be concluded, whether States will agree on free access to icebergs or will establish an extensive system of international cooperation, what is paramount is to ensure that the respective regime is sufficiently stringent to maintain the pristine state of the Antarctic environment.

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The Road Not Taken: Failure to Protect from Atrocity Crimes in Myanmar

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R2P; MYANMAR; ATROCITY CRIMES

Abstract

In 2005, more than 150 heads of State and government pledged that the world must never witness another Rwanda. They accepted the Responsibility to Protect (R2P) both their own populations, and those of other States from atrocity crimes. Yet, in late August 2017, thousands of Rohingya had to flee from the alleged genocide taking place in their home, northern Rakhine in Myanmar. The international community, equipped with a toolbox developed and refined over the past 12 years, does nothing more than politely asking Myanmar to stop. This begs the question: to what extent can the Responsibility to Protect doctrine be used to save the Rohingya from atrocities committed against them? This article explores the potential application of the R2P in the context of Myanmar by exploring the root causes of the alleged genocide, the legal status of the R2P and various options open to the international community to protect the Rohingya. The case is made that applying the R2P – in its current shape and form – would be in the best interest of the Rohingya. After all, the international community cannot stand by in the wake of another mass atrocity.

I. Introduction

'The situation [in Myanmar] seems a textbook example of ethnic cleansing'.[1] These were the words of Zeid Al Hussein, former United Nations High Commissioner for Human Rights, when addressing the United Nations Human Rights Council (HRC) on 11 September 2017, two weeks after the atrocity crimes against the Rohingya minority in northern Rakhine began.[2] Yet, at the time of writing, the international community has taken too little effective action to save the Rohingya minority in northern Rakhine, Myanmar. This is evidenced by the growing number of refugees in Bangladesh's refugee camps, as well as the HRC's assessment of the situation as having deteriorated for the Rohingya.[3]

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1 Zeid Ra'ad Al Hussein, 'Opening Statement at the Human Rights Council 36th session' (OHCHR 11 September 2017).

2 ibid; OHCHR 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc A/HRC/39/CRP2 (IIFFMM Report) 177-178.

3 OHCHR 'Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (16 September 2019) UN Doc A/HRC/42/CPR5 (IIFFMM Follow-up Report) [176]; OCHA, 'Rohingya Refugee Crisis' (*OCHA*) <https://www.unocha.org/rohingya-refugee-crisis> accessed 20 April 2020; UN Special Rapporteur Yanghee Lee, 'Myanmar: "Possible War Crimes and Crimes Against Humanity Ongoing in Rakhine and Chin States"' (29 April 2020) OHCHR Press Release.

The Responsibility to Protect as adopted by the United Nations General Assembly (GA) in 2005 would serve as the ideal framework for a response.[4] It declares a State's primary Responsibility to Protect its own population from war crimes, ethnic cleansing, crimes against humanity, and genocide.[5] When a State is unable to do so, it may request assistance from others and only if it fails in its own responsibility, should the international community intervene.[6] In such a case the international community has a responsibility to take timely and decisive action in accordance with the Charter of the United Nations (UN Charter)[7], either under Chapter VI or VIII, or should these prove inadequate, the United Nations Security Council (SC) shall take collective action under Chapter VII.[8] This structure, in particular to the international community's responsibility to react, seems to have been overlooked in the context of Myanmar.

This article investigates the reasons for the international community's inaction and offers suggestions on how to utilize the R2P. It will answer the question: to what extent can the Responsibility to Protect doctrine be used to save the Rohingya from atrocities committed against them? In doing so, events leading up to the 2017 attacks, the atrocity crimes that took place and the international response will be analysed. Post that the legal status of the R2P and its scope of application will be determined. Subsequently, the options to act before the international community will be addressed and their effectiveness weighed. Finally, an actionable solution is sought, by recognizing the R2P's limitations and defining measures that could realistically be adopted.

This research is crucial in ensuring 'never again' does not lose its meaning, in proving that there is a way to react to these atrocities and the international community can and should do so now. By adopting a realistic approach, the paper almost serves as a practical guide for the international community to protect the Rohingya. For this, the author has drawn on teleological interpretations of R2P documents, to assert that it is intended for situations like Myanmar. She further analysed voting patterns and arguments put forward by the veto powers (P5) of the SC to determine the scope of the doctrine. Moreover, by considering State practice and *opinio juris*, its soft law status could be determined. Drawing upon these preliminary conclusions thereafter allowed the determination of how the international community could react and identify the most realistic measures to do so under the R2P framework.

II. Historical Background and Analysis of the Current Situation

The crimes against the Rohingya did not take place in a vacuum. Rather, they are the culmination of events that had built up for almost two centuries. This protracted institutionalization of hatred and 'othering' saw its height in the events taking place on 25 August 2017.[9] Myanmar's security forces committed the most heinous crimes against the Rohingya Muslim minority in northern Rakhine State in the West of Myanmar (formerly

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4 UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 2005 World Summit Outcome (WSOD) [138]-[139].

5 ibid; UNGA 'Report of the Secretary-General 63/677' (12 January 2009) Session? UN Doc A/63/677 [11], [49].

6 ibid.

7 Charter of the United Nations (signed 26 June 1945, published 24 October 1945, ratified 31 August 1965) 1 UNTS XVI (hereinafter UN Charter).

8 ibid.

9 Kyaw Zeyar Win, 'Securitization of the Rohingya in Myanmar' in Justine Chambers and others (eds), *Myanmar Transformed? People, Places and Politics* (ISEAS Yusof Ishak Institute 2018) 257-258, 270.

known as Burma).[10] Since then, the situation for the Rohingya who had not yet fled to Bangladesh only deteriorated.[11]

A. A Roadmap to Atrocities

Myanmar's Buddhist majority believes the Rohingya to be illegal immigrants from Bangladesh who came to Rakhine (formerly known as Arakan) during the British Colonial Empire (1824-1948).[12] They are viewed as fundamentally different from other groups in Myanmar in terms of ethnicity, religion, and political identity which is referred to as 'othering'.[13] In 1948 and 1978, the Rohingya were formally classified as illegal immigrants and had to flee the country to neighbouring Bangladesh due to eruptions of violence between the State and the minority.[14] The process of othering was expanded through the 1982 Citizenship Law and its narrative that Myanmar should be united and foreigners could not be trusted and should therefore not be granted citizenship.[15] The law set out the official ethnic minorities in the country, which were automatically granted citizenship.[16] However, as the Rohingya were not a recognized ethnic minority of Myanmar, the threshold to attain citizenship under the new law was too high for many Rohingya, thus effectively rendering them stateless.[17]

In subsequent years, the Rohingya faced further discrimination and human rights abuses, justified by Myanmar under the fight against terrorism and security threats.[18] Several instances, not least the 2012 communal violence, demonstrate how the top-down process of othering and securitization is deeply ingrained in society.[19] In June 2012, Rakhine witnessed an outbreak of violence including extra-judicial killings, rape, torture, and confiscation of property, after ten Muslim men had been murdered because three Muslim men had raped a Buddhist woman.[20] The narrative was also spread on Facebook,

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10 OHCHR 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc A/HRC/39/CRP2 (IIFFMM Report) 177-255. In 1989 the military junta changed the country's name from Burma to Myanmar. See Haradhan Kumar Mohajan, 'History of Rakhine State and the Origin of the Rohingya Muslims' (2018) 2 IKAT The Indonesian Journal of Southeast Asian Studies 19, 20.

11 IIFFMM Follow-up Report, 6, 176; UN Special Rapporteur Yanghee Lee, 'Myanmar: "Possible War Crimes and Crimes Against Humanity Ongoing in Rakhine and Chin States"' (29 April 2020) Press Release OHCHR.

12 Afroza Anwary, 'Interethnic Conflict and Genocide in Myanmar' (2020) 24 Homicide Studies 85, 92; The Republic of the Union of Myanmar President Office, 'Executive Summary of Independent Commission of Enquiry – ICOE's Final Report' (21 January 2020) <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/01/21/id-9838> accessed 22 March 2020 (Summary ICOE Report) 1. Note that Burma was under British rule from 1886 until 1948. See Win (n 9) 253.

13 Win (n 9) 257.

14 Union Citizenship Act 1948 (8 November 1948) Act No LXVI of 1948; Anwary (n 12) 93; Kazi Fahmida Farzana, *Memories of Burmese Rohingya Refugees: Contested Identity and Belonging* (Palgrave Macmillan 2017) 49-50; Summary ICOE Report (n 12) 1-2; Win (n 9) 257-258.

15 Farzana (n 13) 48-50; Win (n 9) 258.

16 Pyithu Hluttaw Law No 4/1982 (1982 Citizenship Law).

17 1982 Citizenship Law; Farzana (n 13) 51-53; Mohammad Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma' (2017) 37 Journal of Muslim Minority Affairs 454, 456-458. The official narrative is that the Rohingya were not interested in applying for citizenship as they identified as ethnic Rohingya which is not mentioned in the law. See Summary ICOE Report (n 12).

18 Nicole Messner and others, 'Qualitative Evidence of Crimes Against Humanity: The August 2017 Attacks on the Rohingya in Northern Rakhine State, Myanmar' (2019) 13(41) Conflict and Health 1, 4-5; Summary ICOE Report (n 12) 2; Win (n 9) 258-259.

19 Win (n 9) 264, 270-272.

20 ibid 260-261.

where politicians posted incendiary messages about the Rohingya.[21] For instance, the Director of President Thein Sein's office announced that they decided to eradicate the Rohingya, further demanding the international community to tolerate any action necessary to achieve this, 'without any outcry for human rights abuses'.[22] There was another surge of violence in 2016, yet, the most heinous crimes were committed in 2017.[23] In the early hours of 25 August 2017, the Arakan Rohingya Salvation Army (ARSA), a Rohingya insurgency group, labelled a terrorist group in Myanmar and launched attacks against Myanmar security forces (Tatmadaw).[24] Myanmar's President immediately authorized 'clearance operations' in Rakhine which mainly targeted the civilians.[25]

B. Ongoing Atrocities[26]

It is important to know what crimes were committed in order to analyse whether intervention under Pillar III of the R2P is warranted.[27] A valuable source is the Independent International Fact-Finding Mission on Myanmar (IIFFMM) which was established in March 2017 by the HRC.[28] Myanmar does not accept these findings and therefore established its own fact-finding mission, the Independent Commission of Enquiry (ICOE).[29] Myanmar claims that the situation in Rakhine is overdramatized, declaring it will take the primary responsibility in solving the issue without external interference.[30] Myanmar therefore often rebuts the claims made by the IIFFMM, in an effort to shift the blame and white-wash the crimes, thereby trying to demonstrate that any R2P action is unnecessary.

The IIFFMM Report, supported by other evidence, provides clear evidence of mass killings of civilians in northern Rakhine in 2017. Men, women, and children were shot at, tied to or trapped inside burning buildings, thrown into rivers, had their throats cut with

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21 ibid 251-252, 262. The use of Facebook and other media can be compared to the use of media to broadcast hate and incite violence in the Rwandan genocide. This was found to be direct and public incitement to commit genocide and persecution by the International Criminal Tribunal for Rwanda. See *Nahimana et al (Media Case)* (Appeals Judgment) ICTR-99-52-A (28 November 2007).

22 Win (n 9) 262.

23 Messner (n 18) 2; Summary ICOE Report (n 12) 3.

24 IIFFMM Report (n 10) 177-178; UNSC Presidential Statement 22 (6 November 2017) UN Doc S/PRST/2017/22; Summary ICOE Report (n 12) 3. The ARSA is not the be confused with the Arakan Army (AA), a Buddhist group fighting for more autonomy of Rakhine, which is often in the news.

25 Summary ICOE Report (n 12) 3-4, 10. The term 'clearance operation' is used by officials in Myanmar to refer to military operations targeted at insurgents or terrorists who have intruded or attacked a certain area and to clear it of weapons and terrorists in order to restore peace and stability in the area. In reality these attacks are aimed at removing the Rohingya from Myanmar and therefore mainly target civilians. It has been argued that the nature, scale, and organization of these operations indicate a certain plan or policy, and were not on the spot reactions. See IIFFMM Follow-up Report, 6, 178; Messner (n 18) 7; Summary ICOE Report (n 12) 4.

26 Most of the following crimes were reportedly committed by Myanmar security forces (Tatmadaw), although the ARSA as well as civilians, committed crimes as well. It is important to note that this accounts for the most heinous crimes and the list is not exhaustive. See IIFFMM Report n (11); Summary ICOE Report (n 12).

27 See Chapter III "Discussion of the Status of the Responsibility to Protect".IIFF.

28 IIFFMM Report (n 10).

29 Michael A Becker, 'The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case Against Myanmar' (*EJIL:Talk!*, 14 December 2019) <https://www.ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/> accessed 23 March 2020. The ICOE handed over its final report to the President of Myanmar on 20th January 2020, who then published an Executive Summary thereof. See ICOE, 'Mandate' (*ICOE*) <https://www.icoe-myanmar.org> accessed 22 March 2020.

30 UNGA Verbatim Record (23 December 2017) UN Doc A/72/PV/76, 6.

machetes, or were stabbed or beaten to death.[31] Survivors described how they came across numerous mass graves, and that the ground in the villages was sticky because of the blood.[32]

According to the IIFFMM Report, many females who fled to Bangladesh reported that they were victims of rape, gang rape, sexual mutilation, or sexual humiliation.[33] Women and girls as young as eight-years-old, were separated from men and taken to houses and raped.[34] Nonetheless, men and boys were also subjected to rape, genital mutilation, and sexualized torture, especially upon arbitrary detention during the clearance operations which took place in August and September 2017.[35] These victims suffer long-lasting mental and physical harm. Some had to be carried to Bangladesh because they were unable to walk, while others died of their wounds.[36] Between May and June of 2018, there was a spike in numbers of pregnancies in the refugee camps in Bangladesh, many of which were terminated at a late stage.[37] Survivors recall how Tatmadaw forces entered the villages and successively burned down each house.[38] Satellite imagery shows burned Rohingya villages, next to intact villages of ethnic Rakhines, demonstrating a deliberate targeting of the minority.[39]

Myanmar claims that the clearance operations which commenced on 25 August 2017 lasted until 5 September 2017.[40] However, the IIFFMM Follow-up Report confirms that many of the factors that contributed to the 2017 operations are still present.[41] Rohingya continue to be victims of government attacks formulated to eradicate them from Myanmar.[42] Hence, the IIFFMM concluded that the situation in Rakhine remained the same, if not deteriorated.[43] As a result of the 2017 attacks, more than 725,000 Rohingya refugees had arrived in Bangladesh by September 2018.[44] By March 2020 the 34 refugee camps in Cox's Bazar, Bangladesh are crowded with almost one million Rohingyas.[45] Furthermore, the IIFFMM calls Myanmar's statements concerning the facilitation of the return of these refugees 'an insincere attempt to appease the government of Bangladesh and the international community'.[46]

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31 IIFFMM Report (n 10) 179-220; Messner (n 18) 5-6. cf Summary ICOE Report (n 12) 10. While the ICOE's Executive Summary acknowledges that mass killings occurred, the Presidency attempted to distribute responsibility among all actors equally. It adopts the argument of disproportionate and excessive use of force by individual actors and declares that there have yet to be found any official plans or orders to commit such killings.

32 IIFFMM Report (n 10) 179ff; Messner (n 18) 6-7.

33 IIFFMM Report (n 10) 187-218. cf Summary ICOE Report (n 12) 6. The ICOE's Executive Summary on the other hand states that there were no credible sources proving instances of rape or gang rape, and merely acknowledges that some women had complained about what might amount to sexual violence.

34 Messner (n 18) 7.

35 IIFFMM Report (n 10) 218-220.

36 IIFFMM Report (n 10) 187-218; Messner (n 18) 7.

37 IIFFMM Report (n 10) 217.

38 ibid 221-222; Messner (n 18) 5.

39 IIFFMM Report (n 10) 230-231. cf Summary ICOE Report (n 12) 6. The ICOE Report's declares that arson was not only perpetrated by security forces but also by civilians, including Muslims. Furthermore, it suggests that most houses were burned down after the Rohingya had already exited them.

40 Summary ICOE Report (n 12) 12.

41 IIFFMM Follow-up Report, 6, 176.

42 ibid 6.

43 ibid 6, 176.

44 IIFFMM Report (n 10) 278.

45 OCHA, 'Rohingya Refugee Crisis' (*OCHA*) <https://www.unocha.org/rohingya-refugee-crisis> accessed 22 March 2020.

46 IIFFMM Follow-up Report, 176.

C. The International Community's Response

Following the 2016 and 2017 attacks, most States issued statements condemning the violence and vocalizing their great concern for the situation.[47] In addition, several States demanded access to northern Rakhine for humanitarian assistance or themselves provided an aid to the Rohingya.[48] Most importantly however, the European Union (EU), Australia, Canada, and the United States (US) have imposed sanctions on high-ranking military officials in Myanmar.[49] Moreover, several States have demanded that the United Nations (UN) take action according to its mandate, including a request for a closed SC meeting.[50] Nonetheless, several States publicly support Myanmar, by asserting their States' close ties to the country, or voting against any resolutions concerning the situation in Myanmar, while others remain silent on the issue. These include most prominently Russia and China, as well as Myanmar's neighbouring countries (apart from Bangladesh).[51] It follows that

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[47] This includes, among others, Japan, Mexico and Ukraine; other actors such as the Organization of Islamic Cooperation and several Nobel Peace Laureates have also condemned Myanmar's violence. See Contact Group on Rohingya Muslims of Myanmar, 'Report of the Contact Group on Rohingya Muslims of Myanmar' (25 September 2019) <https://www.oic-oci.org/docdown/?docID=4518&refID=1255> accessed 4 April 2020; Norio Maruyama, 'The Attacks in Northern Areas of Rakhine State in Myanmar and the Release of the Final Report by the Advisory Commission on Rakhine State' (Press release, Ministry of Foreign Affairs of Japan 29 August 2017); Ministry of Foreign Affairs Mexico, 'Mexico Expresses Concern Over the Situation of the Rohingya Minority in Myanmar' (Press release, Ministry of Foreign Affairs Mexico 11 September 2017); Permanent Mission of Ukraine to the UN in New York, 'Statement by the Delegation of Ukraine at the UNSC Session on the Situation in Myanmar' (Permanent Mission of Ukraine to the UN in New York September 28 2017); Open letter from Muhammar Yunus and others to the President of the Security Council and Member Countries of the Security Council (29 December 2016).

[48] Among these are: Austria, Belgium, Canada, Denmark, Finland, France, Greece, Ireland, the Netherlands, Poland, Spain, Sweden, Turkey, and the US as well as Japan. See US Mission Burma, 'Joint Statement on Humanitarian Access to Northern Parts of Rakhine State' (US Mission Burma 9 December 2016); Ministry of Foreign Affairs of Japan, 'Emergency Grant Aid for the People in Myanmar and Bangladesh in Response to the Destabilizing Situation in the Northern Part of Rakhine State, Myanmar' (Press Release, Ministry of Foreign Affairs of Japan 26 September 2017).

[49] Council of the EU, 'Myanmar/Burma: Council Adopts Conclusions' (Press Release, Council of the EU 10 December 2018); Department of Foreign Affairs and Trade, 'Sanctions Regimes Myanmar' (*Department of Foreign Affairs and Trade Australian Government*) <https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/myanmar> accessed 23 March 2020; Government of Canada, 'Canadian Sanctions Related to Myanmar' (*Government of Canada*, 14 January 2020) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng> accessed 23 March 2020; John Sifton, 'US Imposes Human Rights Day Sanctions on Myanmar' (*HRW*, 10 December 2019) <https://www.hrw.org/news/2019/12/10/us-imposes-human-rights-day-sanctions-myanmar> accessed 23 March 2020.

[50] These include Bangladesh, Pakistan, Nigeria, the United Kingdom (UK) and Sweden. See Jane Adams , 'Nigeria Condemns Human Rights Abuse in Myanmar' (Press Release, Ministry of Foreign Affairs Nigeria 12 September 2017); Masud Bin Momen, 'Statement by H E Mr Masud Bin Momen Security Council Meeting on the 'Situation in Myanmar'' (Permanent Mission of the People's Republic of Bangladesh to the UN 28 September 2017); Boris Johnson, 'Foreign Secretary Calls for an End to Violence in Rakhine' (Press Release, Foreign & Commonwealth Office and Boris Johnson 2 September 2017); Ministry of Foreign Affairs of Sweden, 'Swedish Statement at the UN Security Council Briefing on the Situation in Myanmar' (Press Release, Ministry of Foreign Affairs 13 February 2018); Prime Minister's Office Islamic Republic of Pakistan, 'Resolution Passed by the Federal Cabinet Against Myanmar on the Rohingya Genocide' (Press Release, Prime Minister's Office Islamic Republic of Pakistan 7 September 2017); Sheikh Hasina,' 73rd Session of the United Nations General Assembly Address by Sheikh Hasina' (Permanent Mission of the People's Republic of Bangladesh to the UN 27 September 2018).

[51] This is a non-exhaustive list. See UN Doc A/72/PV/76; UNGA Verbatim Record (27 December 2019) UN Doc A/74/PV/52; Embassy of the People's Republic of China in the United States of America,

any action within the SC or regional organizations such as the Association of Southeast Asian Nations (ASEAN) is hindered by this.[52]

On 6 November 2017, the SC articulated its grave concern and condemned the violence in Rakhine.[53] The GA has further adopted a resolution on 23 January 2018 with the aim of aiding the Rohingya refugees and facilitating their safe return to Myanmar where they shall be granted citizenship, and appointing a special envoy to Myanmar.[54] The HRC adopted resolutions expressing its grave concern over the situation and calling upon Myanmar to take the necessary measures to halt atrocities, and established the IIFFMM and the Independent Investigative Mechanism for Myanmar (IIMM).[55]

On 11 November 2019, The Gambia instituted proceedings against Myanmar before the International Court of Justice (ICJ) regarding a violation of its obligations under the Genocide Convention.[56] Moreover, on 14 November 2019, Pre-Trial Chamber III of the International Criminal Court (ICC) authorized the Prosecutor to proceed with the investigation of the situation in Bangladesh/Myanmar with regard to the Rohingya.[57] Yet, both these cases will take several years before a judgment is rendered and thus provide little comfort for the Rohingya currently in crisis.

It is evident that the Rohingya have been victims of discrimination and gross human rights violations for decades. By February 2021, the situation has not significantly improved for the Rohingya. Myanmar is taking very little action to find a viable solution for the issue and is not interested in joining the international community's efforts to put a halt to the atrocities being committed there. The February 1st, 2021 military coup d'état and arbitrary arrest and detention of the de facto civilian leader Aung San Suu Kyi further exemplifies the dire human rights situation in the country. Although, multiple States have responded to the Rohingya crisis through condemnations in official statements, economic sanctions, and demands of UN action, none of the responses have effectively improved the

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'Wang Yi Holds Talks with U Kyaw Tint Swe, Minister for the Office of the State Counsellor of Myanmar' (Press Release, Embassy of the People's Republic of China in the United States of America 27 August 2019); Ministry of External Affairs Government of India, 'India-Myanmar Joint Statement During State Visit of President to Myanmar (10-14 December 2018)' (Press Release, Ministry of External Affairs Government of India 13 December 2018); Sugam Pokharel and Ben Westcott, 'Philippine Strongman Told Myanmar Leader to Ignore "Noisy" Rights Activists' *CNN* (Atlanta, 26 January 2018) <https://edition.cnn.com/2018/01/26/asia/duterte-aung-san-suu-kyi-rohingya-intl/index.html> accessed 4 April 2020.

52 See Chapter IV "The Options Before the International Community".

53 UN Doc S/PRST/2017/22.

54 UNGA Res 72/248 (24 December 2017) UN Doc A/RES/72/248.

55 OHCHR 'Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar' (8 December 2017) UN Doc A/HRC/RES/S-27/1; OHCHR 'Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar' (3 October 2018) UN Doc A/HRC/RES/39/2; OHCHR 'Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar' (3 October 2019) UN Doc A/HRC/RES/42/3.

56 *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (Application Instituting Proceedings and Request for Provisional Measures) <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf> accessed 22 March 2020. In its most recent Order of 23 January 2020 the ICJ ruled that Myanmar must take measures to protect the Rohingya and report on these within four months and then every six months thereafter until the final judgment. How this affects the situation of the Rohingya in Myanmar is yet to be seen. See *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (Request for Indication of Provisional Measures) (23 January 2020) [76]-[83] <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> accessed 4 April 2020.

57 *Situation in Bangladesh/Myanmar* (Decision on the Authorisation of an Investigation) ICC-01/19 (14 November 2019) <https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF> accessed 5 April 2020.

situation of the Rohingya. It follows that more serious, coordinated measures are called for, for which the R2P serves as the ideal framework.

II. Discussion of the Status of the Responsibility to Protect

A. The Responsibility to Protect Framework and its Application with Regard to Myanmar

The R2P emerged when the Post-Cold War era witnessed an impasse between the long-standing principle of State sovereignty and the urge to protect populations from atrocity crimes through intervention.[58] The International Commission on Intervention and State Sovereignty (ICISS) sought to resolve this issue by formulating the 'Responsibility to Protect' doctrine, which was adopted by the World Summit in 2005.[59] It entailed a three-fold commitment proclaimed by each State. Firstly, honouring its own Responsibility to Protect its population from genocide, crimes against humanity, war crimes, and ethnic cleansing. Secondly, assisting other States in doing so and lastly, declaring its willingness to take collective action should a State manifestly fail in protecting its population and more peaceful means prove inadequate.[60] By identifying 'sovereignty as responsibility', it placed sovereignty at the heart of the debate and allowed for intervention only when a State failed in its own R2P.[61]

Despite its enthusiastic adoption by the GA, the operationalization of the doctrine took some time. It was only in 2009 when United Nations Secretary-General (SG) Ban Ki-moon formally laid out the three-Pillar structure.[62] Pillar I is relatively straight-forward, as States maintain their Responsibility to Protect their population from the four core crimes, which essentially reaffirms principles firmly established in international law.[63] Pillar II rests on the foundation that a State which is unable to fulfil its responsibility, may obtain support from the international community.[64] This could be in the form of encouragement, capacity-building, or assistance.[65] However, it is important to recognize that this should be done

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[58] Nicole Deitelhoff, 'Is the R2P Failing? The Controversies about Norm Justification and Norm Application of the Responsibility to Protect' (2019) 11 Global Responsibility to Protect 149, 152; Yukiko Nishikawa, 'The Reality of Protecting the Rohingya: An Inherent Limitation of the Responsibility to Protect' (2020) 16 Asian Security 90, 98. The narrative was that the world must never again witness another Rwanda, Srebrenica or Cambodia. See UNGA 'Report of the Secretary-General 63/677' (12 January 2009) UN Doc A/63/677 [5]-[6].

[59] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 (WSOD); ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001). The World Summit was the largest gathering of heads of State, held at the UN Headquarters in New York in September 2005. Over 170 Heads of State and Government unanimously adopted the World Summit Outcome Document (WSOD). A year later the SC affirmed paras 138 and 139 of the WSOD in its Resolution 1674 on the Protection of Civilians in Armed Conflict. See WSOD; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674.

[60] WSOD [138]-[139].

[61] ibid; ICISS (n 59) 13; UN, 'Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World'' (Press Release, UN 15 July 2008) (SG Berlin Speech).

[62] UNGA 'Report of the Secretary-General 63/677' (12 January 2009) UN Doc A/63/677. Although Ban Ki-moon addressed it previously in the SG Berlin Speech in 2008. See SG Berlin Speech (n 61).

[63] UN Doc A/63/677 [13]; UNGA Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, opened for signature 11 December 1948, entered into force 12 January 1951) 78 (Genocide Convention); UNGA Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

[64] UN Doc A/63/677 [28]-[48].

[65] UNGA and UNSC 'Report of the Secretary-General A/68/947-S/2014/449' (11 July 2014) UN Doc A/68/947-S/2014/449 [1].

preventively rather than reactively.[66] Lastly, and most controversially, Pillar III sets out the courses of action which the international community may take in order to protect populations from atrocities. These include pacific measures under Chapter VI and VIII, or if these prove inadequate, timely and decisive collective action under Chapter VII of the UN Charter.[67] This is however to be invoked only if the State in question manifestly fails in its responsibility, and even then, forcible measures should be adopted as a last resort.[68] It is worth noting that Pillar III entails several non-forcible means, which can be employed without requiring authorization by the SC.[69] The case of post-election violence in 2007-2008 in Kenya presents an interesting example, where mediation efforts led to a successful resolution of the conflict.[70] Authorization for collective action lies with the SC under article 41 or 42, or by way of authorizing regional arrangements under article 53.[71] Nevertheless, should the SC fail to exercise its responsibility due to a lack of unanimity among the P5, the GA could act under the Uniting for Peace Resolution, whose outcome would however not be legally binding.[72] While some claim that further operationalization of the R2P is needed to guarantee its effectiveness, the author is of the opinion that there is a clear set of response that should be promoted rather than criticized. Continuous negotiation of the precise framework will not improve its effectiveness, as each situation is assessed individually and the responses are not novel, but are already encompassed in the well-established UN-framework.

As proved by the institutionalized discrimination towards the Rohingya, Myanmar is not seeking to alleviate their suffering. It therefore becomes apparent that, as the State is the perpetrator of the atrocity crimes which also refuses to consent to international assistance, a Pillar III solution is the only option.[73] Moreover, if a State is the perpetrator and is considered to be 'manifestly failing' in its responsibility, it is not necessary to assess a Pillar II response first, rather, the focus should be on a timely and decisive reaction.[74]

The scholar Lindsey Kingston advanced an interesting argument that the R2P should not merely be equated with military intervention, but should focus on non-violent prevention mechanisms to stop mass atrocities in progress.[75] While she is right in asserting that forcible intervention is not the only tool in the box, her line of reasoning neglects the fact that where mass atrocities are ongoing, prevention mechanisms are inadequate.[76] In such cases, action under Pillar III albeit not forcible, might serve as a better response. Alex

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66 SG Berlin Speech (n 61).
67 UN Doc A/63/677 [49].
68 ibid [49]-[50].
69 ibid [51].
70 SG Berlin Speech (n 61). Many claim it was dubbed R2P only after its successful completion in an effort to influence the R2P debate. See Julian Junk, 'Bringing the Non-Coercive Dimensions of R2P to the Fore: The Case of Kenya' (2016) 30 Global Society 54, 58, 61.
71 UN Doc A/63/677 [56].
72 UNGA Res 377 (V) (3 November 1950) UN Doc A/Res/377(V) (Uniting for Peace); UN Doc A/63/677 [63].
73 Adrian Gallagher, 'The Promise of Pillar II: Analysing International Assistance under the Responsibility to Protect' (2015) 91 International Affairs 1259, 1263.
74 UN Doc A/63/677 [29]; Gallagher, 'The Promise of Pillar II' (n 73) 1267. The academic Adrian Gallagher suggests further criteria to assess a 'manifest failing'. These include government intentions, weapons used, death toll, number of people displaced, and the intentional targeting of civilians especially women, children and the elderly, yet in his argument he makes clear that each situation is best assessed on a case-by-case basis. See Adrian Gallagher, 'What Constitutes a 'Manifest Failing'? Ambiguous and Inconsistent Terminology and the Responsibility to Protect' (2014) 28 International Relations 428, 437-439.
75 Lindsey N Kingston, 'Protecting the World's Most Persecuted: The Responsibility to Protect and Burma's Rohingya Minority' (2015) 19 The International Journal of Human Rights 1163, 1172.
76 See *supra*, n 74.

Bellamy correctly reasoned that 'there would be obvious moral objections to a concept that demanded that the world's first response to the Rwandan genocide should have been to "assist" the regime that was largely responsible'.[77]

B. Previous Efforts with Regard to the Responsibility to Protect and its Impact

While Pillar I references in UN documents, emphasizing a State's primary Responsibility to Protect its population, are rather frequent, Pillar II cases are less common.[78] Some Pillar II cases, where assistance was provided to a State struggling to meet its own R2P will briefly be explained below.[79] The Central African Republic and South Sudan encompassed similar situations. In both cases, the SC had already been assisting the government when the situations deteriorated and the SC expanded the mandate of its mission by shifting from capacity building to protecting civilians.[80] Another example is Resolution 2100, where the SC authorized requested assistance in Mali, which was provided by several actors, not least the African Union and the Economic Community of West African States.[81] However, in Côte d'Ivoire, Pillar II was taken a step further. While the legitimate Head of State Mr. Ouattara requested assistance from the international community, critics claim the mandate was exceeded through the use of coercion aimed at disposing of President Gbagbo.[82]

Although non-forcible measures have been applied under Pillar III, for example in Kenya in 2008, the most influential case has been the military intervention in Libya. While SC Resolution 1973 enforced a 'no-fly zone' and a 'no-walk zone', hence preventing regime change, many argue that the intervening North Atlantic Treaty Organization (NATO) forces did just that.[83] The NATO countries later argued that a leader who himself is perpetrating atrocities against civilians cannot stay in power.[84] Nevertheless, regime change was not envisaged in SC Resolution 1973 authorizing intervention and even feared by some and therefore led to global criticism among academics and States alike.[85] Concerns

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77 Alex J Bellamy, 'Making RtoP a Living Reality: Reflections on the 2012 General Assembly Dialogue on Timely and Decisive Response' (2013) 5 Global Responsibility to Protect 109, 113.

78 See *supra*, n 64. References to Pillar I reiterate a State's own responsibility and do not call for any action, except from the State in question. Such references are utilized to assert a State's sovereignty while reminding it of its obligations. As such, they present an easy way out, as the relevant UN body can demonstrate the importance of human rights and the R2P, while in essence, no substantive action from its member States is required. The SC has issued a presidential statement asserting Myanmar's primary Responsibility to Protect its population in 2017. See *infra*, n 122.

79 See *supra*, n 65.

80 UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127; UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149; UNSC Res 2155 (27 May 2014) UN Doc S/RES/2155; Spencer Zifcak, 'What Happened to the International Community? R2P and the Conflict in South Sudan and the Central African Republic' (2015) 16 Melbourne Journal of International Law 52, 59-60, 63-66, 81.

81 UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100.

82 UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975; Gallagher, 'The Promise of Pillar II' (n 73) 1266.

83 UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973; Nesam McMillan and David Mickler, 'From Sudan to Syria: Locating 'Regime Change' in R2P and the ICC' (2013) 5 Global Responsibility to Protect 283, 304-306; Paul Tang Abomo, *R2P and the US Intervention in Libya* (Palgrave Macmillan 2019) 242-246; Thomas G Weiss, 'Libya, R2P, and the United Nations' in Dag Henriksen and Ann Karin Larssen (eds), *Political Rationale and International Consequences of the War in Libya* (OUP 2016) 8-9. The vote was ten in favor and five (China, Russia, Brazil, Germany and India) abstaining. See UNSC Verbatim Record (17 March 2011) UN Doc S/PV/6498.

84 McMillan and Mickler (n 83) 306; Weiss (n 83) 9.

85 UN Doc S/RES/1973; McMillan and Mickler (n 83) 306-307. Criticism for regime change was communicated among others by China, Russia, India, South Africa and Pakistan. See UNSC Verbatim

that Libya would establish a precedent for regime change was emphasized in the Syrian crisis.[86]

Syria is in danger of setting a precedent of inaction, caused by the Chinese and Russian veto.[87] It further demonstrates that those capable are willing to condemn, but not to act, proving that passivity remains an option.[88] The Sino-Russian bloc justified the use of their veto by asserting concern about the abuse for regime change.[89] Yet, in a subsequent draft resolution that explicitly precluded military intervention they continued to use their veto, thereby substantially weakening their case.[90] Unfortunately, this was not the only time the SC stood by and did nothing. In 2008 and 2009, Sri Lanka witnessed war crimes resulting in about 40,000 casualties, while the international community failed to address the issue effectively.[91] Additional examples include a stalled response in Yemen, North Korea and of course Myanmar.[92]

The academic Jess Gifkins argues that R2P language has been more frequently invoked in the SC, especially since Libya.[93] Nevertheless, she stresses that while there is less objection towards the use of R2P language, Pillar III invocations remain rare.[94] However, scholar Aidan Hehir rightly points out that increasing R2P references should not necessarily be interpreted as progress.[95] In fact, the contrary is the case. He claims that the SC has used R2P language in a way to legitimize their inaction by emphasizing the host State's primary responsibility, thereby shifting liability.[96] Nonetheless, this behaviour can mostly be attached to Sino-Russian views of the doctrine, as they see the R2P only in terms of Pillar I and II and have shown a pattern of vetoing concrete R2P responses.[97] The SC thus comes to a typical deadlock of the West against the rest.

Record (4 October 2011) UN Doc S/PV/6627; UNSC Verbatim Record (4 February 2012) UN Doc S/PV/6711.

86 Zheng Chen and Hang Yin, 'China and Russia in R2P Debates at the UN Security Council' (2020) International Affairs 4 <https://academic.oup.com/ia/article-abstract/doi/10.1093/ia/iiz229/5712435?redirectedFrom=fulltext> accessed 24 March 2020; McMillan and Mickler (n 83) 307; Tang Abomo (n 83) 247; Zifcak (n 80) 81.

87 Chen and Yin (n 86) 4-5; Tor Dahl-Eriksen, 'R2P and the UN Security Council: An "Unreliable Alliance"' (2019) 36 International Journal on World Peace 33, 42-43.

88 Jean-Marc Coicaud, 'International Law, the Responsibility to Protect and International Crises' in Ramesh Thakur and William Maley (eds), *Theorising the Responsibility to Protect* (CUP 2015) 169-171, 177; Global Centre for the Responsibility to Protect, 'Syria' (*Global R2P*, 15 March 2020) <https://www.globalr2p.org/countries/syria/> accessed 26 March 2020; Weiss (n 83) 9-10.

89 UN Doc S/PV/6627; McMillan and Mickler (n 83) 307-308.

90 The second time they argued the respect for the principle of State sovereignty, but both times they failed to mention their national interest in Syria. See UN Doc S/PV/6711; McMillan and Mickler (n 83) 308.

91 Dahl-Eriksen (n 87) 44; Weiss (n 83) 14.

92 Jared Genser, 'The UN Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement' (Policy Brief, Global Centre for the Responsibility to Protect 2018) <http://responsibilitytoprotect.org/files/un-security-council-application-of-r2p-jared-genser.pdf> accessed 26 March 2020, 4-5.

93 Jess Gifkins, 'R2P in the UN Security Council: Darfur, Libya and Beyond' (2016) 51 Cooperation and Conflict 148, 157-161.

94 ibid 157, 160.

95 Aidan Hehir, *Hollow Norms and the Responsibility to Protect* (Palgrave Macmillan 2019) 142.

96 ibid.

97 Chen and Yin (n 86) 4-5; Hehir (n 95) 143-144.

C. The Legal Basis of the Responsibility to Protect

Since its emergence on the international agenda in 2005, the R2P has undergone a process of contestation, which greatly shaped its content.[98] Most importantly, Russia and China demonstrated time and again that they will veto any resolution in the SC which could lead to regime change and that this must not be encompassed in the emerging norm.[99]

Another important aspect is the perception of the doctrine as a right, yet not an obligation to intervene.[100] The argument that the doctrine contains such a duty has been rejected by several States, both weak and powerful.[101] One interesting example is US representative to the UN John Bolton's letter in which he explicitly crossed out the word obligation to replace it with responsibility in the World Summit Outcome Document (WSOD) draft, and argued that it is not of a legal character and that the decision to intervene should remain with the SC.[102] Scholar Anne Orford likewise argues that the language in R2P documents is of a character to confer authority and allocate powers rather than impose duties.[103] Thus, it has been argued by several scholars that as the WSOD did not seek to alter the rules on jus ad bellum, support for it was easier to obtain.[104]

Additionally, States have taken an approach that differentiates the responsibility of States to protect their own population and that of the international community to intervene in case of a manifest failure. The latter does not receive widespread support and is invoked far less frequently.[105] A State's Responsibility to Protect its own population is long entrenched in various treaties, whose object was not only to hold States accountable once atrocities have occurred but also to prevent them from happening in the first place.[106] Yet, as Pillar III constitutes the means by which the R2P is enforced, without States' willingness to invoke it, the R2P is significantly undermined.[107]

State practice coupled with *opinio juris* indicates whether a norm has attained the status of customary international law (CIL).[108] More precisely, State practice needs to be widespread and representative, with specific attention brought to States especially affected, such as the P5 in this case.[109] States must furthermore act out of a feeling of legal obligation,

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98 Hehir (n 95) 109. The R2P as it stands today is different from what the ICISS imagined it to be. cf ICISS (n 59).

99 UN Doc S/PV/6627; Chen and Yin (n 86) 4-7, 12; Deitelhoff (n 58) 171.

100 Alex J Bellamy and Edward C Luck, *The Responsibility to Protect: From Promise to Practice* (Polity Press 2018) 56-57.

101 Andreas S Kolb, *The UN Security Council Member's Responsibility to Protect* (Springer 2018) 520; Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 23-24; Thomas Ramopoulos, 'International Law and the Application of the Third Pillar Approach' in Daniel Fiott and Joachim Koops (eds), *The Responsibility to Protect and the Third Pillar* (Palgrave Macmillan 2015) 12-13.

102 Letter from John Bolton Representative of the United States to the UN to UN Member States (30 August 2005).

103 Orford (n 101) 25-26. See also Kolb (n 101) 522.

104 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (UN Charter) art 2(4), arts 39-42; Alex J Bellamy and Ruben Reike, 'The Responsibility to Protect and International Law' (2010) 2 Global Responsibility to Protect 267, 273; Dahl-Eriksen (n 87) 42; Hehir (n 95) 108.

105 Chen and Yin (n 86) 3; Deitelhoff (n 58) 171; Kolb (n 101) 522.

106 See eg Genocide Convention; Rome Statute arts 6-8; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

107 Hehir (n 95) 108-109.

108 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 [74], [77].

109 *North Sea Continental Shelf* Cases (n 108) [74]; Ramopolous (n 101) 11.

evidenced for example through GA resolutions.[110] Nevertheless, if a State persistently objects to the legality of a rule, it does not become binding on that State.[111] Consequently, if several States do so, they can stop the doctrine from becoming CIL at all.[112]

With regard to the R2P, State practice is limited and non-uniform. While the SC took action in some instances, it also abstained from acting in several others.[113] Although SC resolutions specifically referencing the R2P have increased, actual practice with regard to Pillar II or III has not.[114] Moreover, the international community is giving little evidence that it considers the R2P legally binding.[115] For instance, Resolution 1674 on the Protection of Civilians in Armed Conflict was preceded by debates regarding the status of R2P, which arose again in Resolution 1706 which called upon Darfur to allow military assistance.[116] The negotiations centred around Russian and Chinese claims that they had only agreed to further discuss the R2P, not to implement it.[117] While Libya shaped concern about the abuse of R2P, it also led States to assert the non-binding nature and flawed implementation of the doctrine.[118] Nevertheless, the R2P is frequently mentioned in GA, SC, and HRC resolutions.[119]

It follows that as the R2P doctrine's actionable part is still widely contested and State practice has neither been widespread nor representative, it should be regarded as

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[110] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 [188]; *North Sea Continental Shelf Cases* (n 108) [77].

[111] *Fisheries (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116, 131.

[112] ibid.

[113] See Chapter III-B "Previous Efforts with Regard to the Responsibility to Protect and Their Impact".

[114] Hehir (n 95) 205; Kolb (n 101) 519-522; Ramopoulos (n 101) 12; Zifcak (n 80) 81.

[115] Chen and Yin (n 86) 4-5; Kolb (n 101) 519.

[116] UN Doc S/RES/1674; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706; Deitelhoff (n 58) 154-155, 165-166. See *supra*, n 59.

[117] ibid.

[118] Chen and Yin (n 86) 4-5; David Pressman US Representative to the UN, 'Statement at the 2016 United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect' (6 September 2016); Deitelhoff (n 58) 166-167; Matthew Rycroft UK Representative to the UN, 'Statement at the 2016 United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect (6 September 2016); Representative of China to the UN, 'Statement at the 2016 United Nations General Assembly Thematic Panel Discussion 'From Commitment to Implementation: Ten years of Responsibility to Protect'' (Global R2P 26 February 2016); Representative of France to the UN, 'Statement at the 2016 United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect' (Global R2P 6 September 2016); Representative of the Russian Federation to the UN, 'Statement at the 2016 United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect' (Global R2P 6 September 2016); Representative of the Russian Federation to the UN, 'Statement at the 2016 United Nations General Assembly Thematic Panel Discussion 'From Commitment to Implementation: Ten years of Responsibility to Protect'' (Global R2P 26 February 2016).

[119] Global Centre for the Responsibility to Protect, 'UN Security Council Resolutions and Presidential Statements Referencing R2P' (*Global R2P*, 17 January 2020) <https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/> accessed 29 March 2020; Global Centre for the Responsibility to Protect, 'United Nations General Assembly Resolutions Referencing R2P' (*Global R2P*, 28 October 2019) <https://www.globalr2p.org/resources/un-general-assembly-resolutions-referencing-r2p-2/> accessed 29 March 2020; Global Centre for the Responsibility to Protect, 'UN Human Rights Council Resolutions Referencing R2P' (*Global R2P*, 18 October 2019) <https://www.globalr2p.org/resources/un-human-rights-council-resolutions-referencing-r2p/> accessed 29 March 2020. Additionally, the SG releases an annual report on the R2P, which is then followed by either a formal debate or an informal interactive dialogue held by the GA where affirmative statements, though mainly with regard to Pillar I, are plenty. See Peter Thomson, 'President's Summary of the Informal Interactive Dialogue of the 71st Session of the General Assembly on the Responsibility to Protect: Implementing the Responsibility to Protect: Accountability for Prevention' (6 September 2017).

being of a political and moral rather than legal nature.[120] Yet, the doctrine is valuable despite its soft-law status and should not be disregarded in future instances of mass atrocities.

III. The Options Before the International Community

A. Security Council Action

Following the attacks starting on 25 August 2017, the SC has been briefed by various actors on numerous occasions, yet failed to adopt any conclusive measures to react to the crisis.[121] It issued only one official document, a presidential statement stressing Myanmar's primary Responsibility to Protect its population, condemning the violence and welcoming Myanmar's efforts to address the root causes of the crisis, including the establishment of the Advisory Commission on Rakhine State.[122]

It is evident that any resolution within the SC needs to be supported by all P5. In that regard, Russian and Chinese arguments in similar circumstances have focused on the principles of State sovereignty and non-intervention, and the fear of abuse (i.e. regime change) of the R2P doctrine. In the context of Myanmar, Russia and China stress the need for a political dialogue rather than concrete action, as in their view that would worsen the state of affairs.[123]

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[120] Deitelhoff (n 58) 164; Kolb (n 101) 522-523; Ramopoulos (n 101) 15-16.

[121] Mohammad Tanzimuddin Khan and Saima Ahmed, 'Dealing with the Rohingya Crisis: The Relevance of the General Assembly and R2P' [2019] Asian Journal of Comparative Politics 1, 4; Simon Adams, 'The Responsibility to Protect and the Fate of the Rohingya' (2019) 11 Global Responsibility to Protect 435, 443-444; Department of Political Affairs – Security Council Affairs Division, 'Repertoire of Practice of the Security Council: Part I' (20th supplement, 2016-2017) <https://www.un.org/en/sc/repertoire/2016-2017/Part_I/2016-2017_Part_I.pdf#page=121> accessed 13 May 2020; Department of Political Affairs – Security Council Affairs Division, 'Repertoire of Practice of the Security Council: Part I' (21st supplement, 2018) <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/scpcrb.repertoire.part_i._21st_supplement_2018_for_webposting_0.pdf> accessed 13 May 2020; United Nations Digital Library, 'Security Council – Myanmar' (*United Nations*) <https://digitallibrary.un.org/search?ln=en&cc=Security+Council&p=Myanmar&f=&action_search=Search&rm=&ln=en&sf=&so=d&rg=50&c=Security+Council&c=&of=hb&fti=0&fct__1=Meeting+Records&fct__2=Security+Council&fct__3=2020&fct__3=2019&fct__3=2018&fct__3=2017&fti=0&fct__1=Meeting+Records&fct__2=Security+Council&fct__3=2020&fct__3=2019&fct__3=2018&fct__3=2017> accessed 13 May 2020.

[122] UNSC Presidential Statement 22 (6 November 2017) UN Doc S/PRST/2017/22. The Advisory Commission, chaired by former SG Kofi Annan, was set up in autumn 2016 and presented its findings to the authorities of Myanmar on 23 August 2017, two days before the attacks happened. It had suggested interim recommendations in March 2017, for which Myanmar took steps to implement. However, this leaves questions regarding the sincerity of the efforts of Myanmar, while demonstrating the complexity and deep roots of the problem. See Advisory Commission on Rakhine State, 'Towards a Peaceful, Fair and Prosperous Future for the People of Rakhine: Final Report of the Advisory Commission on Rakhine State' (23 August 2017) <http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf> accessed 10 April 2020; Kofi Annan, 'Remarks by Kofi Annan, Chairman of the Advisory Commission on Rakhine State' (Advisory Commission on Rakhine State 24 August 2017). The SC held a closed meeting on Myanmar on the 4th of February 2020, following the notice of the provisional measures ordered by the ICJ to the SC subsequent to article 41(2) of the UN Charter. The SC failed to adopt any resolution or presidential statement on this meeting. The next closed meeting concerning Myanmar was set for the 14th of May 2020, in which the SC failed again in adopting any official document or press statement. See United Nations Security Council, 'Meetings' (*United Nations*) <https://www.un.org/securitycouncil/content/meetings> accessed 16 May 2020.

[123] These arguments are in line with the demands of Myanmar. See UNSC Verbatim Record (28 September 2017) UN Doc S/PV/8060; UNSC Verbatim Record (13 February 2018) UN Doc S/PV/8179.

Political reality dictates that States guard their national interests and in this instance, the national interests of Russia and China do not appear to coincide with any concrete measures, therefore, the R2P remains on the side-lines.[124] The domestic considerations that dictate the response to the Rohingya crisis include strong economic and military ties to Myanmar, geopolitical considerations, Myanmar's strategic importance with regard to security, transit rights, natural resources and energy security, and the internal problems with their own respective Muslim population.[125] While these factors appear to be the basis for strong opposition of the Sino-Russian bloc, there is little political will to overcome this obstruction.[126] Neither the US nor Britain sees the Rohingya crisis as a priority because they have too little economic and strategic interests in Myanmar.[127]

Posterior to the inaction in Syria, a French-Mexican initiative proposed a Code of Conduct calling for a suspension of the veto of the P5 in cases of mass atrocities.[128] Notwithstanding the effects such political pressure could have had, one scholar Bolarinwa Adediran, points out that Russia, China, and the US are highly unlikely to restrain themselves on the use of the veto, which is essential to the relations among the P5, thereby emphasizing the political reality within the SC.[129] Nevertheless, if observed by the P5, this would be a break-through for atrocity responses and should therefore not be denied its potential.

As demonstrated in the previous section, the R2P currently holds a soft law status and is regarded as a (moral) right, rather than a duty, to intervene.[130] If States decide to

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[124] Tor Dahl-Eriksen, 'R2P and the UN Security Council: An "Unreliable Alliance"' (2019) 36 International Journal on World Peace 33, 42; Khan and Ahmed (n 121) 3-4; Imran Syed, 'To Intervene or Not to Intervene: Ethics of Humanitarian Intervention in Myanmar' (2019) 14 Islamabad Policy Research Institute Journal 111, 118.

[125] Zheng Chen and Hang Yin, 'China and Russia in R2P Debates at the UN Security Council' (2020) International Affairs <https://academic.oup.com/ia/article-abstract/doi/10.1093/ia/iiz229/5712435?redirectedFrom=fulltext> accessed 24 March 2020, 18-19; Khan and Ahmed (n 121) 12-13; Mohammad Zahidul Islam Khan, 'Pathways to Justice for "Atrocity Crimes" in Myanmar: Is There Political Will?' (2019) 11 Global Responsibility to Protect 3, 24-26; Syed (n 124) 122-124.

[126] A possible solution to overcome the obstruction will be discussed in the next section. See *infra*, The General Assembly.

[127] Khan and Ahmed (n 121) 5; Syed (n 124) 123.

[128] Political Statement on the Suspension of the Veto in Cases of Mass Atrocities (Presented by France and Mexico at the 70th UNGA meeting, 2015) <https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf> accessed 10 April 2020. This political statement is supported by 104 States and exists alongside a similar proposal by the Accountability, Coherence and Transparency (ACT) Group calling for all SC members not to vote against any credible draft resolution intended to put a halt to atrocity crimes, which is supported by 117 member States and 2 observers, including France and the UK. Moreover, former Special Adviser to the SG on the R2P Ivan Simonovic fully endorsed both initiatives. See Ivan Simonovic, 'The Responsibility to Protect' (*UN Chronicle*, 26 January 2017) <https://www.un.org/en/chronicle/article/responsibility-protect> accessed 10 April 2020; Letter from the Permanent Representative of Liechtenstein to the UN addressed to the SG (14 December 2015); Permanent Mission of France to the UN in New York, 'The UN Reform' (*Permanent Mission of France to the UN in New York*, 13 December 2019) <https://onu.delegfrance.org/The-UN-Reform> accessed 10 April 2020; Permanent Mission of the Principality of Liechtenstein to the UN New York, 'List of Supporters of the Code of Conduct Regarding Security Council Action against Genocide, Crimes against Humanity or War Crimes, as Elaborated by ACT' (1 January 2019) <https://www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/> accessed 10 April 2020.

[129] Bolarinwa Adediran, 'Implementing R2P: Towards a Regional Solution?' (2017) 9 Global Responsibility to Protect 459, 460.

[130] See *supra*, Chapter III-C "The Legal Basis of the Responsibility to Protect".

intervene, they can legitimately do so under the UN Charter through the SC framework, but there is no obligation to do so and as the Code of Conduct initiative demonstrates, there are few effective tools to stop the P5 from blocking action. There is no legal obligation to apply the R2P, and accordingly, there are no consequences should States fail to do so. When coupled with the geopolitical considerations at the time and the lack of incentive to apply the R2P this brings about, inaction like in the situation of Myanmar becomes possible.

B. The General Assembly

When a State refuses to accept measures under Pillar II, it manifestly fails to protect its population from atrocity crimes, and less coercive measures prove inadequate, GA action is foreseen whenever the SC fails to adopt collective measures due to a lack of unanimity among the P5.[131] While some claim that this lack of unanimity in the SC must be evidenced by a veto, the author believes that it can also include lack of unanimity which already hinders any negotiation of substantive action. When interpreting the Uniting for Peace Resolution in accordance with the plain meaning rule, it does not demand a prior veto. Therefore, the author believes the situation of Myanmar, where the Sino-Russian bloc is unwilling to consider substantive action, suffices to evidence a lack of unanimity. In such a situation, the SC on the vote of any 7 members, or a majority of the members of the GA, can request either a special session under article 20 or an emergency session, under the Uniting for Peace procedure.[132] Upon failure of the SC to exercise its primary responsibility for the maintenance of international peace resulting from a lack of unanimity, the GA may recommend collective measures it deems necessary to maintain or restore international peace and security.[133] In exercising these powers the GA is restricted in that it must refer to the SC any question in which coercive or enforcement action is necessary.[134] While article 12 of the UN Charter provides that the GA may not exercise its functions with regard to a matter with which the SC is exercising its function at that moment, unless it so requests, the ICJ noted that the SC and GA often deal in parallel with the same matter regarding the maintenance of international peace and security.[135] It is however important to note that the GA recommendations are non-binding.[136] Nevertheless, such recommendations have considerable moral force, especially when the matter has been referred to the GA by the SC.[137]

At the time of writing, due to the lack of political will and the absence of unanimity among the P5, the SC failed to adopt any resolution concerning the situation in Rakhine.

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131 UNGA 'Report of the Secretary-General 63/677' (12 January 2009) UN Doc A/63/677 [56], [63].

132 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (UN Charter) art 20; UNGA Res 377 (V) (3 November 1950) UN Doc A/Res/377(V) (Uniting for Peace) [1]; Khan and Ahmed (n 121) 17.

133 Such recommendations may include collective non-coercive measures or, in case of a breach of the peace or act of aggression, the use of armed force. Moreover, while the SC has the primary responsibility for the maintenance of international peace and security, the GA has a residual responsibility, which is equally authoritative. See Uniting for Peace [1].

134 UN Charter art 11(2); *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 164-165; Rebecca Barber, 'Accountability for Crimes against the Rohingya: Possibilities for the General Assembly Where the Security Council Fails' (2019) 17 Journal of International Criminal Justice 557, 563-564.

135 UN Charter art 12. Thus, although the SC is seized of the matter and is briefed on the situation on a regular basis, the GA may exercise its residual responsibility for the maintenance of international peace and security in parallel. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] 136 [27].

136 UN Doc A/63/677 [63].

137 Barber (n 134) 567, 574-575.

It has been demonstrated by various actors that the crisis in Myanmar is witness to gross human rights abuses and possible international crimes, which present a threat to the peace.[138] Hence, there is nothing preventing the GA from issuing collective, non-forcible recommendations under a Uniting for Peace procedure, thereby ensuring the international community lives up to its R2P.[139]

C. International Courts

Where the international community fails to adopt measures to put a halt to atrocity crimes, international courts can play a substantial role in ensuring that international law is upheld.[140] Despite it taking several years for an international court to render a judgment, therefore making its usefulness as a primary response to atrocities limited, it may still serve justice. This is especially true in the case of *The Gambia v Myanmar* where the ICJ ordered Myanmar to adopt provisional measures to protect the Rohingya, thereby offering them reassurance that they are not forgotten.[141] Nonetheless, a case before the ICC can be just as viable, especially as it serves the primary purposes of punishment in international criminal law; retribution and deterrence.[142] Furthermore, the two cases complement each other as the ICJ ensures State responsibility, while the ICC holds individual perpetrators to account, and focuses on a more victim-centred approach.[143]

The ICC is currently investigating crimes committed against the Rohingya on the territory of Bangladesh.[144] Yet, considering the limited amount of crimes over which the ICC has jurisdiction in the situation of Bangladesh/Myanmar, it is worth assessing whether the SC could refer the situation to the ICC, thereby circumventing the fact that Myanmar is not a State party to the Rome Statute (RS). At face value, the answer is in the affirmative. The SC may, acting under Chapter VII, refer any situation to the ICC Prosecutor in which a crime under the RS appears to have been committed.[145] However, upon taking a closer look, it becomes evident that a SC referral of a situation to the ICC

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[138] ibid 571-572.

[139] Such measures may include targeted sanctions, such as on travel, financial transfers, luxury goods and arms, or alternatively it could establish an ad hoc tribunal. However, in light if the current case of *The Gambia v Myanmar* before the ICJ and the situation of Bangladesh/Myanmar at the ICC, it is questionable what new prospects such a tribunal would bring. See Un Doc A/63/677 [56]-[57]; Barber (n 134) 580-583.

[140] Adams (n 121) 447.

[141] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (Request for Indication of Provisional Measures) (23 January 2020) <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> accessed 11 April 2020 [79]-[82]; Priya Pillai, 'ICJ Order on Provisional Measures: The Gambia v Myanmar' (*Opinio Juris*, 24 January 2020) <http://opiniojuris.org/2020/01/24/icj-order-on-provisional-measures-the-gambia-v-myanmar/> accessed 11 April 2020. .

[142] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 468.

[143] Konstantinia Stavrou, 'And the Victim's Voices?' (*Völkerrechtsblog*, 21 February 2020) <https://voelkerrechtsblog.org/and-the-victims-voices/> accessed 11 April 2020.

[144] As the situation was referred to the ICC by Bangladesh under article 14 of the Rome Statute and Myanmar is not a State party, the ICC may only exercise its jurisdiction with regard to crimes committed on the territory or by nationals of a State party, that is, Bangladesh. For now, these crimes constitute the crimes against humanity of deportation, other inhumane acts and persecution on grounds of ethnicity and/or religion. See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) arts (1)(d), (k), (h), 12-14; *Situation in Bangladesh/Myanmar* (Decision on the Authorisation of an Investigation) ICC-01/19 (14 November 2019) <https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF> accessed 11 April 2020.

[145] Rome Statute arts 5, 13(b).

faces the same obstacles as R2P action under Pillar III, namely the Sino-Russian alliance with Myanmar and their resulting obstruction of any concrete action.[146]

On 11 November 2019 The Gambia filed an application instituting proceedings against Myanmar at the ICJ.[147] The Gambia asserts that Myanmar violated its *erga omnes* obligations under the Genocide Convention, namely that it committed genocide through various modes of liability, that it failed to prevent and punish genocide, and that it failed to enact legislation to give effect to the provisions of the Genocide Convention.[148] While requesting the ICJ to adjudge these matters, it also demanded the ICJ to indicate provisional measures to protect and preserve the Rohingyas' rights under the Genocide Convention.[149] On 23 January 2020, the ICJ found that there is 'a real and imminent risk of irreparable prejudice to the rights [of the Rohingya] invoked by The Gambia'.[150] In doing so, it ordered Myanmar to prevent the commission of acts of genocide by all actors under its control, direction or influence, ensure the preservation of evidence related to the alleged genocidal acts, and report on all measures it has taken to give effect to the ICJ's Order by 23 May and every 6 months thereafter until the final judgment is rendered by the ICJ.[151] Despite the binding nature of the measures, its effect will be determined by Myanmar's response.[152] In April 2020, the President's Office of Myanmar issued three directives to its Ministries, Regions, and States Governments.[153] The first orders all government personnel not to commit any acts of genocide as enshrined in the Genocide Convention and to report any credible information that such acts have been committed.[154] The second announces criminal investigations with regard to the events acknowledged in the ICOE Report and further prohibits all government officials from destroying any evidence related thereto.[155] The third aims at preventing the incitement of hatred and violence and the proliferation of

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[146] Elliot Higgins, 'Transitional Justice for the Persecution of the Rohingya' (2018) 42 Fordham International Law Journal 101, 119; Kurt Mills, 'R2P and the ICC: At Odds or in Sync?' (2015) 26 Criminal Law Forum 73, 96.

[147] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (Application Instituting Proceedings and Request for Provisional Measures) (11 November 2019) <https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf> accessed 11 April 2020.

[148] ibid [111].

[149] ibid [112]-[115].

[150] *The Gambia v Myanmar* (Request for Indication of Provisional Measures) (n 141) [75].

[151] ibid [79]-[82].

[152] *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466 [102]-[103]; Wes Rist, 'What Does the ICJ Decision on The Gambia v Myanmar Mean?' (2020) 24(2) American Society of International Law <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean> accessed 11 April 2020.

[153] A response to an alleged genocide requires more than a few directives. It requires concrete action to alter the course of the century old institutionalization of hatred and discrimination. See Param-Preet Singh, 'Myanmar's Directives not Enough to Protect Rohingya' (*Human Rights Watch*, 9 April 2020) <https://www.hrw.org/news/2020/04/09/myanmars-directives-not-enough-protect-rohingya-0> accessed 11 April 2020.

[154] Khin Latt, 'Republic of the Union of Myanmar Office of the President Directive No 1/2020' (President Directive, Republic of the Union of Myanmar Office of the President 9 April 2020) <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/09/id-10001> accessed 11 April 2020.

[155] ibid; Summary ICOE Report n (13).

hate speech.[156] How effective these directives are, remains to be seen.[157] However, as Directive 2/2020 only mentions the crimes enumerated in the ICOE Report, it raises questions with regard to the accountability for sexual violence crimes, as reported in the IIFFMM Report.[158]

D. Regional Organizations as Respondents

Adediran argues that regional organizations should be given more attention with regard to responses to atrocities.[159] Regional organizations have the advantage that they are in closer proximity to the events in terms of how it affects them and their cultural and political understanding of the situation, thereby making a response more legitimate and fostering the necessary political will.[160] This would also settle concerns with regard to abuse of the R2P, as it would no longer be in the hands of the most powerful actors.[161] Indeed, cooperation with regional organizations is also foreseen by the WSOD and reiterated by the SG in the Report on Implementing the R2P.[162] However, Adediran's argument falls short of recognizing the limitation that coercive actions by regional organizations still need authorization from the SC, therefore regional arrangements could not authorize such force but would have to focus on non-coercive measures.[163]

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156 Khin Latt, 'Republic of the Union of Myanmar Office of the President Directive No 3/2020' (President Directive, Republic of the Union of Myanmar Office of the President 20 April 2020) <https://www.president-office.gov.mm/en/?q=briefing-room/news/2020/04/21/id-10007> accessed 15 May 2020.

157 Myanmar submitted the first report on the measures it has taken to give effect to the ICJ's Order of 23 January on 22 May. The ICJ does not require the report to be made public, and Myanmar has not made an official statement regarding the report at the time of writing. An official from the Ministry of Foreign Affairs of Myanmar has told a news agency that the report is based on the three directives issued by the President's Office of Myanmar. However, it has been argued that Myanmar has been doing too little to give effect to the ICJ Order of 23 January, as the directives do not give enough explanations on what constitutes genocide and the precise steps that should be taken, and do not address the root causes of the Rohingya crisis. See Global Justice Center, 'Webinar: The ICJ Provisional Measures: Is Myanmar Protecting the Rohingya from Genocide?' (Webinar, 20 May 2020) <http://www.globaljusticecenter.net/blog/28-publications/videos/1257-webinar-the-icj-provisional-measures-is-myanmar-protecting-the-rohingya-from-genocide> accessed 25 May 2020; International Court of Justice, 'NEWS: On 22 May 2020, Myanmar Submitted the First Report Indicated in the ICJ Order on Provisional Measures of 23 January 2020 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)' (Tweet, 25 May 2020) <https://twitter.com/cij_icj/status/1264843908477050880?s=12> accessed 25 May 2020; Kyaw Ye Lynn, 'Myanmar Submits Report to ICJ on Rohingya Genocide' *Anadolu Agency* (Ankara, 23 May 2020) <https://www.aa.com.tr/en/asia-pacific/myanmar-submits-report-to-icj-on-rohingya-genocide/1851784> accessed 23 May 2020.

158 Latt (n 156); Summary ICOE Report (n 12). cf IIFFMM Report.

159 UNGA and UNSC 'Report of the Secretary-General A/65/877-S/2011/393' (27 June 2011) UN Doc A/65/877-S/2011/393 [6]; 461.

160 Adediran (n 129) 468, 471, 473.

161 Often, such concerns focused on notions like the West against the rest and displayed residual unease with imperialism. See Adediran (n 129) 476.

162 UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 (WSOD) [139]; UN Doc A/63/677 [10]-[11], [22], [30], [49], [51], [57].

163 UN Doc A/63/677 [56]. cf Adediran (n 129) 461. Nonetheless, even non-coercive measures under Pillar III can be effective in ensuring the international community's Responsibility to Protect and its usefulness should not be disregarded. An important illustration is for example Kenya. See UNGA and UNSC 'Report of the Secretary-General A/66/874-S/2012/578' (25 July 2012) UN Doc A/66/874-S/2012/578 [23]. See *supra*, n 70.

In the context of Myanmar, the ASEAN has a suitable framework to address the Rohingya issue, for example through its human rights mechanisms.[164] Nonetheless, this would mean that the ASEAN would have to break ties with its traditional non-interference and sovereignty focused approach, while currently political will to resolve the Rohingya issue and pursue justice is limited.[165]

IV. How Can the Aim of the Responsibility to Protect Be Fulfilled After All?

The aim of the R2P is to protect all populations from atrocity crimes. In the context of Myanmar, too little is currently being done to halt the atrocities committed by the State against its Rohingya minority. Critics of the doctrine argue that this is evidence of its ineffectiveness and irrelevance.[166] It is, therefore, necessary to address the following questions: how would the framework of the R2P have to be amended for it to serve its intended function in a situation like Myanmar? Where does the problem lie, is it within the SC set-up or due to the lack of political will?

A. Accepting the Responsibility to Protect's Limitations

The R2P needs to be recognized as what it is: a tool of moral and political influence. It is a framework under which States can act and have a predetermined set of responses at their disposal. If it is recognized as such, one can observe its usefulness without pointing to apparent shortcomings of public international law. It should not be seen as a law that does not achieve its goal but rather as a doctrine which has changed the world significantly already and which can continue to be used for great causes. Although current shortcomings in its application can inevitably be blamed on the States' lack of political will and the SC veto system, the political reality of world politics will not change. The current soft law status of the doctrine and the fact that it is seen as a right to intervene rather than a duty gives States considerable leeway in the application of the R2P. Therefore, increased application of the R2P should be sought by naming and shaming States that fail to act in accordance with it, while stressing that the R2P can be used as a moral and political tool. Ultimately, this might lead the R2P to become (emerging) CIL. Accordingly, it is not necessary to amend the R2P framework, but rather to advocate its use. Adopting the words of former SG Ban Ki-moon, the R2P should be understood as a 'responsibility to try' to protect populations.[167]

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[164] Khan (n 125) 27; Yukiko Nishikawa, 'The Reality of Protecting the Rohingya: An Inherent Limitation of the Responsibility to Protect' (2020) 16 Asian Security 90, 110.

[165] Barber (n 134) 567; Khan (n 125) 27; Nishikawa (n 164) 97. Nevertheless, some regional powers have shown support. See *supra*, n 48.

[166] Alex de Waal, 'Darfur and the Failure of the Responsibility to Protect' (2007) 83 International Affairs 1039, 1039-1054; Alex J Bellamy and Edward C Luck, *The Responsibility to Protect: From Promise to Practice* (Polity Press 2019) 66; Nicole Deitelhoff, 'Is the R2P Failing? The Controversies about Norm Justification and Norm Application of the Responsibility to Protect' (2019) 11 Global Responsibility to Protect 149, 150.

[167] UN, 'Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World'' (Press Release, UN 15 July 2008) (SG Berlin Speech).

B. Potential Measures Under the Responsibility to Protect Framework to Be Employed in Myanmar

Peaceful measures to protect a population from atrocities can be employed by various actors without SC authorization.[168] However, I have argued above that Myanmar is manifestly failing in its R2P and therefore collective measures are necessary.[169] The ultimate goal is to protect the Rohingya, and therefore this section addresses various measures which can realistically be implemented in light of the SC's inaction. In any case, there needs to be a shift by the international community from calling on Myanmar to accept its R2P, to assuming the international community's responsibility and acting upon it.

Firstly, smart sanctions aimed at the political and military elite of Myanmar could be employed.[170] These may include travel bans, restrictions on arms and other equipment, or sanctions aimed at financial transfers of the elite and their families.[171] They would limit Myanmar's ability to interact with other States, which can then have a positive long-term effect on the political climate within Myanmar.[172] However, to ensure the effectiveness of sanctions, they should be closely monitored by the international community itself as well as independent stakeholders.[173] Timing is crucial, as it can take some time before sanctions are felt.[174] Finally, there may be collateral economic damage for neighbouring countries, which is why close cooperation with these is desirable.[175] While some States already have implemented targeted sanctions against Myanmar, a more holistic approach should be taken by the international community, including important partners of Myanmar such as China, Russia, or India.[176]

Secondly, international criminal justice may complement and reinforce economic sanctions, as its aim is to end violence and hold accountable those at the top.[177] This is especially valuable for promoting long-term changes within Myanmar.[178] Nevertheless, its effectiveness during a crisis is contested, as some argue that criminal prosecutions might undermine a peace process.[179]

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168 UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 (WSOD) [139]; UNGA and UNSC 'Report of the Secretary-General A/66/874-S/2012/578' (25 July 2012) UN Doc A/66/874-S/2012/578 [31].

169 Such action can be authorized by the SC, regional organizations with prior SC authorization or the GA can recommend measures under a Uniting for Peace procedure. See UNGA 'Report of the Secretary-General 63/677' (12 January 2009) UN Doc A/63/677 [56].

170 Caroline Fehl, 'Probing the Responsibility to Protect's Civilian Dimension: What Can Non-Military Sanctions Achieve?' in Daniel Fiott and Joachim Koops (eds), *The Responsibility to Protect and the Third Pillar* (Palgrave Macmillan 2015) 43.

171 Such sanctions can be recommended by the GA under a Uniting for Peace Resolution, in line with the rules on countermeasures. See *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 [83]-[85]; UN Doc A/63/677 [57]; UNGA and UNSC 'Report of the Secretary-General A/65/877-S/2011/393' (27 June 2011) UN Doc A/65/877-S/2011/393 [36]; Patrick M Butchard, *The Responsibility to Protect and the Failures of the United Nations Security Council* (Hart 2020) 203-204, 266-268; ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001) 30.

172 Fehl (n 170) 50, 52; ICISS (n 171) 29.

173 UN Doc A/66/874-S/2012/578 [31]; ICISS (n 171) 30.

174 UN Doc A/65/877-S/2011/393 [36].

175 ibid.

176 See *supra*, n 49.

177 UN Doc A/65/877-S/2011/393 [37]; UN Doc A/66/874-S/2012/578 [29]; Fehl (n 170) 47.

178 Fehl (n 170) 52.

179 ibid 47-48, 53; Catherine Renshaw, 'Myanmar's Transition without Justice' (2020) Journal of Current Southeast Asian Studies <https://journals.sagepub.com/doi/full/10.1177/1868103419893527> accessed 15 April 2020, 17.

Thirdly, in *The Gambia v Myanmar* the ICJ ordered Myanmar to adopt provisional measures to protect the Rohingya.[180] Ultimately, if found guilty, Myanmar will face State responsibility, which presents an important step towards justice for the Rohingya.

To generate the will of States to act, especially in the context of the GA, but also the ASEAN in this case, various actors play an important role. The SG has an ideal position to instigate a response, thanks to his proximity to governments and the media and his regular interaction with the SC.[181] Additionally, non-governmental organizations (NGOs) and the media are well suited to advocate on behalf of the Rohingya.[182] Moreover, States can 'name and shame' Myanmar, the SC, and the GA for their failure to protect, and demand action.[183] Finally, civil societies and the UN human rights bodies can create public pressure and increase political will by advocating specific responses.[184]

V. Conclusion

The brutal legacy of the twentieth century prompted the international community to adopt the R2P. Yet, this doctrine has to date not been utilized to respond to the atrocities in northern Rakhine, in Myanmar. This leaves one to wonder to what extent the doctrine may be used to protect the Rohingya minorities from the horrible atrocities committed against them.

While Pillar I and II are hardly contested, precisely because they do not alter the status quo, Pillar III action is controversial. States have made it clear that its application may in no case encompass regime change, and that the R2P is merely a moral norm, to which they are not legally bound. Regardless, the international community must not ignore the warning signs, instead, it must do its part in protecting populations from atrocity crimes. The R2P was adopted to prevent situations like in Myanmar, it presents the international community with a variety of tools, both peaceful and non-peaceful to halt the atrocities. Although the cases at the ICC and ICJ play an important part in ensuring justice is served and the relevant people and entities are held accountable for their actions, they are not as effective in ending the atrocities right now. I, therefore, propose the R2P be advocated and used in the situation of Myanmar.

Considering a situation where officials in Myanmar seem determined to commit mass atrocities against the Rohingya, measures under Pillar I and II, which require the national authorities' cooperation, are inadequate. However, Pillar III envisages a range of responses, both non-coercive under Chapter VI or VIII and coercive under Chapter VII of the UN Charter, with the authorization of the SC. Contrary to what some critics argue, the R2P does not need to be further operationalized or altered, it rests on well-established principles of international law and is fully functional within the UN Charter framework. Unfortunately, the Sino-Russian political interests and the US's, France's and the UK's lack of interest, dictate the SC's unresponsiveness. Nevertheless, a residual responsibility remains with the GA, which may adopt recommendations under the Uniting for Peace procedure. As the SC is unlikely to alter its approach in the current political climate, and the ASEAN, a regional organization similarly fit to adopt appropriate non-coercive measures, is taking a passive stance, GA recommendations are necessary to protect the

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[180] See *supra*, n 157.
[181] ICISS (n 171) 72-73.
[182] ibid 73-74.
[183] UN Doc A/66/874-S/2012/578 [41].
[184] ibid [45]; Jared Genser, 'The UN Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement' (Policy Brief, Global Centre for the Responsibility to Protect 2018) <http://responsibilitytoprotect.org/files/un-security-council-application-of-r2p-jared-genser.pdf> accessed 26 March 2020, 5.

Rohingya. Therefore, the GA should recommend sanctions against Myanmar's elite, and insist on collective action, not merely statements, by the international community.

This can be achieved through advocacy for the doctrine. The R2P's soft law status and the fact that there is no duty for States to intervene are not limitations, but opportunities. While international law can be challenging to enforce, a doctrine, precisely because of its moral character, might have the power to bring about change. Advocacy for the doctrine will put pressure to act on States wanting to bolster their image, as well as on the GA and perhaps even the SC, and thereby require Myanmar to adopt changes in its institutionalized discrimination.

'We can, and must, do better. Humanity expects it and history demands it'.[185] Thus, after proposing various solutions to the Rohingya crisis, it is worth considering taking the road less travelled, because it indeed may make all the difference.

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[185] UNGA 'Report of the Secretary-General 63/677' (12 January 2009) UN Doc A/63/677 [6].

Human Rights and Space: Reflections on the Implications of Human Activity in Outer Space on Human Rights Law

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OUTER SPACE; HUMAN RIGHTS; INTERNATIONAL LAW; TECHNOLOGY; EXTRATERRITORIAL

Abstract

What are the implications of human activity in outer space for international human rights law? In this article, we reflect on these questions with a view to advancing dialogue on the intersection between space law and human rights. We do so by considering the impact of extra-terrestrial human activities such as access to space and remote-sensing activities, space debris, space mining, the weaponisation and militarization of space, and the assertion of criminal jurisdiction extra-terrestrially. Ultimately, we conclude that human activity in space has significant consequences for the advancement of human rights. While, in our view, existing legal frameworks on international human rights law apply extra-terrestrially, there is still scope for specialist frameworks guarding human rights law in the context of human activity in outer space.

"To confine our attention to terrestrial matters would be to limit the human spirit."
~ Stephen Hawking, Astrophysicist

"Space is for everybody. It's not just for a few people in science or math, or for a select group of astronauts. That's our new frontier out there, and it's everybody's business to know about space."
~ Christa McAuliffe, Teacher and Challenger Astronaut

I. Introduction – a Confluence of Two Regimes

In its 2004 advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall *Opinion*),[1] the International Court of Justice held that a State party to the *International Covenant on Civil and Political Rights* remains legally bound to comply with its provisions, even when exercising jurisdiction outside its national territory.[2]

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1 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (Wall Opinion).

2 ibid 179. Israel was found to be bound by its obligations under the International Covenant on Civil and Political Rights on the basis that it was exercising a type of territorial jurisdiction over Occupied Palestine; see, also, the decision of the European Court of Human Rights in the case of *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001). In that case, an application by six citizens of the Federal Republic of Yugoslavia asserted that the bombing of a radio and television building by North Atlantic Treaty Organisation (NATO) during the Kosovo crisis in April 1999, in which a number of people were killed, violated the right to life in art 2, and the freedom of expression in art 10, of the Convention for the Protection of Human Rights and Fundamental Freedoms (European

What, then, is the relationship between outer space (which by definition is regarded as an area beyond national jurisdiction) and international human rights law? What implications does inevitable increasing human activity in space have on the realisation of and adherence to human rights norms? As observed by the United Nations General Assembly in its *Declaration on the Use of Scientific and Technological Progress in the Interest of Peace and for the Benefit of Mankind*:

> … while scientific and technological developments provide ever increasing opportunities to better the conditions of life of peoples and nations, in a number of instances they can give rise to social problems, as well as threaten the human rights and fundamental freedoms of the individual.[3]

Space has relevance for many aspects of human life. For example, remote sensing technologies can be useful to health, agriculture, environment, disaster management, education, transportation, communication, and humanitarian assistance. There is also some speculation that, at some point in human history, outer space will include 'colonies [we think that this is perhaps more accurately to be described as 'permanent settlements'] established, operated, and populated'[4] by humans.

Human activity in outer space may also bring with it the darker side of human nature – including the potential for human rights abuses and armed conflict. Sadly, 'one enduring characteristic of humankind since its existence on Earth has been its willingness to engage in intraspecies warfare'.[5] Nonetheless, space also brings possibilities for the improvement of knowledge, science, and other beneficial developments for humanity.

In these respects, outer space asserts a far greater influence upon the directions taken by humankind than one might at first instance imagine – yes, the exploration and use of outer space has been designated as the 'province of [hu]mankind',[6] but outer space is not only a place for us to venture to in order to explore and exploit. Our myriad uses of outer space have real impacts upon all on Earth every day of our lives. This is expressly recognized, for example, in the preamble of the *Outer Space Treaty*, paragraphs 2 and 3 of which confirm that, at the time these principles had been codified, the international community had:

> Recogniz[ed] the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

and

Convention on Human Rights, as amended) (ECHR). The Court declared the application inadmissible on the basis that there was no jurisdictional link between the victims of the act and the respondent States. For background to the bombing, see Steven Freeland 'The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues' (2002) Australian International Law Journal 150.

3 UNGA Res 3384 (1975) GAOR 30th Session Supp 16.

4 Taylor Hardenstein, 'In Space, No One Can Hear You Contest Jurisdiction: Establishing Criminal Jurisdiction on the Outer Space Colonies of Tomorrow' (2016) 81 Journal of Air Law and Commerce 251, 282.

5 Steven Freeland and Ram S. Jakhu, 'Promoting Peace from Above? Utilising Space for the Prevention and Prosecution of Human Rights Violations' in Aram Daniel Kerkonian (ed) *Global Space Governance and the UN 2030 Agenda* (McGill 2019) 22.

6 See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty) art 1.

> Believ[ed] that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development

In essence, the international legal regulation of outer space is founded on an assumption that space was (at the time) a new frontier and this raised important issues about humanity. We hold the firm view that this is still the case, despite the realities associated with the rapid diversification of space activities to incorporate, for example, military uses, and the increasing involvement in outer space of commercial (private) enterprise, whose agendas may not match up entirely with a spirit of sharing and community.

Given this obvious 'human' face to space activities (both as to cause and effect), it is therefore quite surprising that the interaction and intersection between the specific international legal regime of outer space and the international legal regulation of human rights has not been the subject of greater considered scholarship in the past. Apart from a small number of interesting commentaries,[7] these two legal paradigms have largely been considered in isolation, even though their formal codification coincided from a temporal viewpoint, and even though the same actors were involved in the detailed conversations and negotiations that led to their finalization.

The two legal regimes are largely products of the post-Second World War period. From the perspective of outer space, the late 1940s saw a ratcheting up of distrust between the 'west' and 'east', giving rise to diplomatic tensions and, ultimately, the onset of the 'Cold War'. This geopolitical rivalry saw the two main protagonists, the Soviet Union and the United States, intensify their efforts to build upon the weapons-related technology that had been developed during the war period, including in the area of rocket technology. Both superpowers made significant strides towards developing space capabilities, and devoted significant resources towards that end.

In the end, on 4 October 1957, a Soviet space object, Sputnik I, was launched and subsequently orbited the Earth over 1,400 times during the following three-month period. This milestone heralded the dawn of the space age, the space race, and the legal regulation of the use and exploration of outer space. There then followed an intense period of international discussion and consideration of how best to provide for a framework of legal principles to regulate human activities in outer space, culminating in the first instance in the *Outer Space Treaty*.

The Second World War had also starkly illustrated the horrors that flow from a gross and systematic violation of human rights and human dignity. Up until that time, there were barely any international instruments that addressed the concept or content of the fundamental rights of the individual. Indeed, the reference in the United Nations Charter to the international community's determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small',[8] was in more practical terms recognition of the need to codify these rights as a first step towards the promotion and protection of those ideals, in order to have any chance of avoiding such catastrophes again (sadly, subsequent history suggests that we have thus far failed in this regard).

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[7] See for example Irmgard Marboe, 'Human Rights Considerations for Space Activities' in Stephan Hobe and Steven Freeland (eds), *In Heaven as on Earth? The Interaction of Public International Law on the Legal Regulation of Outer Space* (Institute of Air and Space Law of the University of Cologne 2013) 135. See also references at footnote 1 of that chapter.

[8] Charter of the United Nations (adopted 26 June 1945, entered into force 1968) (UN Charter).

The first stages of this human rights' 'movement' saw the conclusion of several very significant legal instruments that set out to codify the fundamental rights and freedoms that underpin international human rights law. The 'twin covenants' of 1966,[9] which incorporate into treaty form the principles set out in the 1948 Universal Declaration of Human Rights,[10] were being negotiated – sometimes quite fiercely – while the same time that the space race had begun, and the most important ground-rules of space law were being developed.

In both instances, the same geopolitical rivalries and ideological differences shaped the final structure of each regime. A fact not often acknowledged is that the *ICCPR* and *ICESCR* were finalized by the United Nations General Assembly and opened for signature on 16 December 1966, just a matter of a few weeks before the *Outer Space Treaty* (27 January 1967).

The development of these two legal regimes also coincided with a process of decolonization, largely under the stewardship of the United Nations system. Both the UN Charter and the twin covenants make express reference to the right of self-determination of 'peoples',[11] and this galvanized a momentum that ultimately led to the establishment of a significant number of new States in the period between the 1950s and 1970s, many of these in Asia and Africa.[12] Most of these new States were established as a result of decolonization, and with this newly-won independence came the clear resolve of those States to be fiercely independent and to reject as much as possible the geopolitics and single-minded resource exploitation that had existed during the time of colonialism.

This stance is reflected, for example, by the opening paragraph of the *Outer Space Treaty*, which demands that the exploration and use of outer space is to be 'for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development'.

Nonetheless, this period was also characterized by an increasing divide, both in actual but also ideological terms, between what became known as 'developed' and 'developing' States – a division that formed an important, and sometimes controversial[13]

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[9] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) (ICESCR). Collectively these two instruments are often referred to as the 'twin covenants'.

[10] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR). Reference should also be made to other very significant treaties finalised at that time, including the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); 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 (Fourth Geneva Convention); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR).

[11] See UN Charter (n 8) art 1(2); ICCPR (n 9) art 1(1); ICESCR (n 9) art 1(1).

[12] For example, at the time of the adoption of the UDHR (n 10) in 1948, the membership of the United Nations stood at 56. By 1967, when the 'twin covenants' (n 9) and the Outer Space Treaty (n 6) had been finalised, this number had more than doubled.

[13] See Agreement Governing the Activities of States on the Moon and other Celestial Bodies (adopted 18 December 1979, entered into force 11 July 1984) 1363 UNTS 3 (Moon Agreement) art 11(7)(d).

element in the formulation of various of the space law source documents.[14] Moreover, the overall trusteeship of the two international legal regimes remains to a large degree (although not exclusively) within the United Nations; space law through the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) and its secretariat the United Nations Office of Outer Space Affairs (UNOOSA), and human rights law through a series of Charter Bodies, including the Office of the High Commissioner for Human Rights (OHCHR), the Human Rights Council (which replaced the United Nations Commission on Human Rights in 2006) and the Economic and Social Council (ECOSOC), as well as various United Nations Treaty Bodies such as the Human Rights Committee, which was established to monitor compliance with the *ICCPR*.

In addition to their shared historical antecedents, the lack of a coordinated analysis of these coinciding regimes is also at odds with the structure of outer space regulation itself. It is undisputed that, from a 'legal rules' perspective, the international regulation of outer space – past, present and future - is 'embedded' in international law. It is not an esoteric and separate paradigm limited solely to the *lex specialis* of space law, which is based primarily on a series of United Nations Space Treaties. Whilst these instruments are, of course, the important baseline for the applicable legal framework, other aspects of international law, including the *jus ad bellum*, international environmental law, international air law and international trade law, are all relevant and may provide guidance to resolve space-related issues and disputes. In a sense, this is an obvious point, particularly given the complexity of human activities in space and their impacts on all of us, but one that is worth emphasizing.

The space-related instruments cannot and do not purport to provide a comprehensive legal framework for every activity, nor for every contingency that may arise. It has often been noted that, whist it is clear that the fundamental principles in the UN Space Treaties, particularly the *Outer Space Treaty*, are relevant and applicable to all space activities, there are *lacunae* within these instruments with respect to the specifics of many space activities, a trend that continues to increasingly show itself as new uses of space are being contemplated, developed and undertaken that would almost certainly have been outside of the contemplation of the drafters of those documents in the 1960s and 1970s.

For example, since that time, seven private citizens or 'space tourists' have paid to go to space.[15] On 13 December 2018, Virgin Galactic, conducted their first trip to 'near-space' with Virgin's spaceplane VSS Unity reaching an altitude of 82.7 kilometers (51.4 miles).[16] There is now considerable interest in mining natural resources in space and legal debate as to whether - and the extent to which – that is permitted. In short, the development that will ultimately enable activities like space mining and large-scale space tourism to be undertaken will create interactions between humans and states which the existing treaty regimes simply did not anticipate.

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[14] See for example UNGA Res 37/92 (1982) GAOR 37th Session Supp 51 (Broadcasting Principles) principles 2, 6, 11; UNGA Res 41/65 (1986) GAOR 41st Session Supp 53 (Remote Sensing Principles) principles II, IX, XII, XIII; UNGA Res 47/68 (14 December 1992) UN Doc A/SPC/47/L.6 (Principles to Use of Nuclear Power Sources in Outer Space) principle 7(2)(b); UNGA Res 51/122 (1996) GAOR 51st Session (Use of Space for Benefit and Interest of All States).

[15] 'Space tourists paying $71 million each to be first all-private International Space Station Crew' *ABC News Online* (27 January 2021) <https://www.abc.net.au/news/2021-01-27/1st-private-space-crew-paying-71m-each-to-fly-to-station/13096360>

[16] Mike Wall, 'Virgin Galactic's SpaceShipTwo Reaches Space for 1st Time in Historic Test Flight' (*Space,* 13 December 2018) <https://www.space.com/42716-virgin-galactic-spaceshiptwo-unity-reaches-space.html>

Notwithstanding the continuing applicability of the fundamental framework of space principles, in such cases, were the need to arise, it would often become necessary to draw upon other areas of (international) law to resolve a particular dispute.

This is also a logical consequence of the wording of article III of the Outer Space Treaty, which requires that activities in the exploration and use of outer space are to be carried out 'in accordance with international law, including the Charter of the United Nations'. Various authors have previously sought to highlight this point in relation to other international law contexts,[17] and it remains no less relevant when it comes to the relationship between the regulation and conduct of outer space activities and the fundamental human rights of individuals on Earth.

In this article, we reflect on these questions with a view to advancing dialogue on the intersection between space activity, space law, and international human rights law. We do so by considering the impacts of certain aspects of extra-terrestrial activity, including access to space, remote sensing-activities, the increasing implementation of artificial intelligence into space technology, space debris, assertions of criminal jurisdiction in outer space, space mining, and the weaponisation and militarization of space. Each of these activities is briefly described and then its relationship with, and/or implications for human rights is considered.

First, and by way of background, we 'recap' the premise of international human rights law and the fundamentals of space law. This is not intended as a complete analysis of either body of law but rather is simply undertaken by way of 'scene-setting' for our analysis in the substantive parts of this article.

II. Background

A. Recapping Human Rights Law

We do not purport to provide a comprehensive summary of all aspects of international human rights law in this background section, and nor would that be possible. Rather, we instead include a brief overview of the basic frameworks of international human rights law, so as to equip a person not familiar with the relevant principles with a basic understanding of the relevant (at least for the purposes of this article) foundational instruments and mechanisms and basic human rights literacy.

At its most basic, to have a right is to have a claim recognised by the relevant governing rules. The relevant 'rules' of human rights law include a number of international treaties, as well as customary international law, and regional and domestic law.

i. Sources of international human rights law

As a starting point, the *Charter of the United Nations*, which came into force on the 24 October 1945, opens with a commitment to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'. This language was subsequently adopted in the Preamble of *Universal Declaration of Human Rights* (*UDHR*) in 1948, along with a 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that 'human rights should be protected by the rule of law'.

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[17] See for example Ram Jakhu and Steven Freeland, 'The Relationship between the United Nations Space Treaties and the Vienna Convention on the Law of Treaties' in Scott Hatton (ed) *Proceedings of the International Institute of Space Law* (Eleven International Publishing 2012) 375; Ram Jakhu and Steven Freeland, 'The Sources of International Space Law' in Scott Hatton (ed) *Proceedings of the International Institute of Space Law* (Eleven International Publishing 2013) 461.

The *UDHR* is one of the key instruments that make up the International Bill of Human Rights,[18] along with the *International Covenant on Civil and Political Rights (ICCPR)*[19] and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,[20] which both came into effect in 1976. For breaches of the *ICCPR*, individuals can institute proceedings before the Human Rights Committee,[21] and an individual complaints mechanism is provided for in an optional protocol to the *ICESCR* came into force in 2013.[22] Human rights mechanisms are also present at the regional level.[23]

As a matter of international law, however, a treaty is only binding on states that have ratified. Article 34 of the *Vienna Convention on the Law of Treaties* expressly provides that 'A treaty does not create either obligations or rights for a third State without its consent'. However, the Vienna Convention also affirms in Article 38 that a non-party to a treaty containing a particular norm can still be bound by a similar norm found in customary international law. Sources of human rights obligations can be found at customary international law (which itself is made out by both a) established state practice and b) opinion juris, the belief of states they are bound) as well as in regional and domestic human rights law. For example, rights recognised under customary international law include a prohibition against torture, the prohibition against genocide, the right of self-determination and principles of fair trial.

ii. Positive and negative rights

Human rights law includes both positive obligations and injunctions on particular types of state interference. For example, the rights contained in the *ICCPR* are commonly treated as rights which should be free from State interference, such as freedom of movement, peaceful assembly, the freedom of thought and religion, equality before the law, and prohibitions on practices such as torture, slavery, and arbitrary arrest and detention. By

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[18] Note, there are, however, a plethora of other international agreements relating to human rights, including the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 32 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); and Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3. Further, a number of the foundational conventions have associated optional protocols, such as the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/64/435 and the Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[19] ICCPR (n 9).

[20] ICESCR (n 9).

[21] Office of the High Commissioner of Human Rights, 'Monitoring civil and political rights' (*United Nations Human Rights*, 16 July 2014) <http://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>

[22] Office of the High Commissioner of Human Rights, 'Committee on Economic, Social and Cultural Rights' (*United Nations Human Rights*, 16 July 2014) <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>

[23] The European Court of Human Rights, for example, can hear complaints by individuals of violations of the ECHR (n 10). The *African Court on Human and Peoples' Rights* was established by African countries. It is intended to complement the functions of the African Commission on Human and Peoples' Rights. By way of further example, the *Inter-American Human Rights Commission* is a quasi-judicial body established by the Charter of the Organisation of American States and the American Convention on Human Rights.

contrast, the rights contained in *ICESCR* are perceived to pose positive obligations, albeit in some circumstances on a 'best efforts' basis. For example, *ICESCR* includes the right to work, to enjoyment of just and favourable conditions of work, the right of all peoples to freely dispose of their natural wealth and resources, the right to an adequate standard of living, including adequate food, clothing and housing, the highest attainable standard of physical and mental health, the right to education, the right to take part in cultural life; and the right to enjoy the benefits of scientific progress and its applications.

iii. Individuals as the subject of human rights law

Unlike many other areas of international law, international human rights law, along with international criminal law, recognises individual persons as the subject of rights and duties (as distinct from only nation states being the subject of rights and duties to one another which is by far the most typical case in other areas of international law). This means that individuals in outer space may both owe (such as the obligation to not persecute or discriminate on the basis of gender, race, religion, etc) and be owed human rights obligations (such as the right to health, fair trial rights, access to education and the benefits of scientific knowledge, and so forth).

iv. Extraterritorial human rights obligations

While jurisdiction (in this context, meaning the extent of public authority over conduct) is primarily territorial, customary international law recognises a number of bases on which the state may have legal authority to act extraterritorially, including the nationality principle, the universality principle, the effects doctrine and protective principle of jurisdiction.[24] Some contemporary commentary on these principles suggests they are outdated, particularly in the context of cyber space[25] and increased human activity in outer space. However, setting that claim aside for now, in terms of extraterritorial legal obligations (as opposed to extraterritorial legal authority), the traditional starting point for human rights and jurisdiction has been that:

> A state is not responsible under human rights law for every act or omission by any person that arises within its jurisdiction. However, a state's responsibility under human rights law is limited by its jurisdiction. That is, a state cannot be responsible for acts or omissions under human rights law that fall outside its jurisdiction.[26]

Notwithstanding that, all major international human rights courts and tribunals have tended to accept that extraterritorial human rights obligations arise 'when a state has

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[24] For further and detailed discussion of the principles of jurisdiction at international law, see for example Danielle Ireland-Piper, 'Recapping Extraterritorial Jurisdiction' in *Extraterritoriality in East Asia: Extraterritorial Criminal Jurisdiction in China, Japan, and South Korea* (Edward Elgar 2021); Danielle Ireland-Piper, *Accountability in Extraterritoriality: An International and Comparative Law Perspective* (Edward Elgar, 2017); Danielle Ireland-Piper, 'Prosecutions of extraterritorial criminal conduct and the abuse of rights doctrine' (2013) 9 Utrecht Law Review 68; Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13 Melbourne Journal of International Law 122.

[25] See for example Dan Jerker B. Svantesson, 'A new legal framework for the age of cloud computing' (*The Conversation,* 3 February 2015) <http://theconversation.com/a-new-legal-framework-for-the-age-of-cloud-computing-37055>; Dan Jerker B Svantesson, 'Internet & Jurisdiction Global Status Report 2019', (Secretariat of the Internet & Jurisdiction Policy Network 2019) 28.

[26] Sarah Joseph and Sam Dipnell, 'Scope of application' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds) *International Human Rights Law* (Oxford University Press 2018) 151; see, generally, UNGA Res 56/83 (12 December 2001) 53rd Session, annex.

effective control of a foreign territory, and when it exercises control over the person whose rights have been allegedly abused'.[27] Further, there is merit to the argument that the 'the concept of jurisdiction in human rights law should be distinguished from that found in general international law'.[28] This is because each has two different objectives: the purpose of jurisdiction in general international law being to delineate spheres of state sovereignty; whereas in human rights law, the purpose of jurisdiction is to define to the applicability of human rights law and to assess state responsibility.[29] In human rights law, jurisdiction is not necessarily territorial, but established by effective control over territory or persons even outside states' territories.

The jurisdictional clauses of the *International Covenant on Civil and Political Rights* provide that State Parties shall respect, ensure, or secure to everyone within their "jurisdiction" the rights recognized by the Convention.[30] In its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[31] the International Court of Justice held that States parties to the *International Covenant on Civil and Political Rights* should be bound to comply with its provisions, even when exercising jurisdiction outside national territory.[32] The Inter-American Court of Human Rights also considered the extraterritorial application of human rights law in the specific context of transboundary environmental harm.[33] The Court observed:

> […] the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory.[34]

Further, as Seunghwan Kim has suggested, 'the concept of state sovereignty has begun to undergo a paradigm shift that places extraterritorial human rights concerns … squarely within a legal rather than merely a moral framework'.[35] While writing about the specific context of the principle of non-refoulement and external migration, the point has relevance across a range of human rights obligations. However, there still exists in many countries an accountability gap in regulating extraterritorial action of the State. Domestic courts not subject to regional courts like the European Court of Human Rights may lack the legal basis and/or will to hold the State accountable for extraterritorial action. For example,

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27 Joseph and Dipnell (n 26) 158.

28 Seunghwan Kim, 'Non-Refoulment and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30 Leiden Journal of International Law 49, 51.

29 Anna Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Bernad Ryan and Valsamis Mitsilegas (eds) *Extraterritorial Immigration Control: Legal Challenges* (Brill 2010) 98.

30 ICCPR (n 9) art 2(1); See, for example, UNHRC 'General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13 paras 8, 15, 18.

31 Wall Opinion (n 1).

32 ibid 109. See also (n 2).

33 Inter-American Court of Human Rights *The Environment and Human Rights* (Advisory Opinion) (2017) OC-23/17.

34 ibid 102.

35 Kim (n 28) 49.

courts in Canada and the United States have found that domestic constitutional protections may not apply extraterritorially.[36]

A decision of the High Court of Australia, *Plaintiff M68/2015 v Minister for Immigration and Border Protection,* also illustrates a different sort of accountability gap wherein the extraterritorial involvement of Australian in offshore detention in Nauru was held not to be justiciable by an Australian Court due to the sovereign status of Nauru as a nation state[37] In essence, this overlooks the capacity for collective and ancillary responsibility at international law, particularly as relates to principles of state responsibility for internationally wrongful acts.[38]

In any event, however, an obvious interpretive issue for current purposes is whether human rights treaties extend extraterritorially into outer space, especially in light of the existence of a *lex specialis* group of space treaties. We suggest that they do, given international human rights law is a part of international law generally, and it is generally accepted (dissenters aside) that international law applies in outer space.[39] In our view, and given the undoubted increased frequency and extent of human presence in space now and into the future, it would seem counter-intuitive to argue that the principles that are to guide the rights of humans on Earth would not also guide the rights of human in space.

Having briefly introduced the foundations of international human rights law, we now recap space law.

B. Recapping Space Law

For the most part, space law has historically comprised mainly international law. There are currently five key international treaties specifically governing space: the "*Outer Space Treaty*"[40]; the "*Rescue Agreement*"[41]; the "*Liability Convention*"[42]; the "*Registration Convention*"[43]; and the "*Moon Agreement*".[44] In essence, the *Outer Space Treaty*, as a binding instrument, is also an exhortation to good behaviour: the exploration and use of outer space is to be free, in the interests of all countries, and not subject to a claim of national sovereignty. The Moon and other celestial bodies are to be used only for peaceful purposes. States are prohibited from placing weapons of mass destruction in Earth orbit or outer space and the militarization of celestial bodies is forbidden. States are internationally responsible for national space activities and internationally liable for damage caused by their space objects.

The *Rescue Agreement* requires States to take all possible steps to rescue and assist astronauts in distress and promptly return them to the launching authority, and to provide

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[36] See *R v Hape* [2007] SCC 26; *R v Klassen* [2008] BCSC 1762; *Frederick Ker v Peoples of the State of Illinois* 119 US 436 (1886).

[37] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (M68).

[38] For an extended discussion of this point, see Danielle Ireland-Piper, 'Outdated and Unhelpful: The Problem with the Comity Principle and Act of State Doctrine' (2018) 24 Australian International Law Journal 15.

[39] See Outer Space Treaty (n 6) art III which provides *inter alia* that 'activities in the exploration and use of outer space' are to be carried out 'in accordance with international law …'.

[40] ibid.

[41] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (adopted 22 April 1968, entered into force 3 December 1969) 672 UNTS 119 (Rescue Agreement).

[42] Convention on International Liability for Damage Caused by Space Objects (adopted 29 March 1972, entered into force 1 September 1972) 961 UNTS 187 (Liability Convention).

[43] Convention on Registration on Objects Launched into Outer Space (adopted 14 January 1975, entered into force 15 September 1976) 1023 UNTS 15 (Registration Convention).

[44] Moon Agreement (n 13).

assistance to launching States in recovering space objects that return to Earth outside their territory. Under the *Liability Convention,* which also provides for procedures for the settlement of claims for damages, a launching State is, depending on the circumstances, potentially liable to pay compensation for damage caused by its space objects.

The *Registration Convention* requires States, and some intergovernmental organizations, to establish national registries and provide information on their space objects to the UN Secretary-General. According to the United Nations Office for Outer Space Affairs, as at June 2020, approximately 86% of all satellites, probes, landers, crewed spacecraft and space station flight elements launched into Earth orbit or beyond have been registered,[45] However, the launch of large constellations of smaller satellites and the trend towards miniaturization may put some considerable pressure on the compliance rate in the future.[46] Registration also occurs voluntarily in accordance with UN General Assembly Resolution 1721B and is still actively being undertaken by States that are not party to the *Registration Convention*.

The *Moon Agreement* reaffirms and elaborates on many of the provisions of the *Outer Space Treaty* relating to the Moon and other celestial bodies: such as the use of celestial bodies being exclusively for peaceful purposes, and the Moon and its natural resources being the 'common heritage of [hu]mankind'. It also calls on States parties to that instrument to establish an international regime to govern the exploitation of resources when such exploitation is about to become feasible.

The *International Space Station Intergovernmental Agreement* (IGA) is also important in the context of criminal jurisdiction. The IGA is an international agreement signed on 29 January 1998 by governments and the European Space Agency involved in the Space Station project. Although drafted not a general treaty in the traditional sense (due largely to US domestic concerns), the IGA is a rare 'positive source of criminal law'[47] in outer space. The implications of this will be considered in the section on jurisdiction in Part III below.

In addition to the five space treaties, there are also five key declarations and principles relating to space: the "*Declaration of Legal Principles*"[48]; the "*Broadcasting Principles*"[49]; the "*Remote Sensing Principles*"[50]; the "*Nuclear Power Source Principles*"[51]; and the "*Benefits Declaration*".[52] We will not detail these but mention them for completeness.

In short, aside from general principles relating to the exploration and use of outer space, there are no specific binding instruments relating to individual human rights in space, although there is clear recognition in the binding instruments of the need to be cognizant and take account of the 'interests and needs of the developing countries'.[53] Some

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45 United Nations Office for Outer Space Affairs, 'United Nations Register of Objects Launched into Outer Space, (*United Nations Office for outer Space Affairs*, 25 June 2020) <http://www.unoosa.org/oosa/en/spaceobjectregister/index.html>

46 See generally Steven Freeland, 'Newspace, small satellites, and law: finding a balance between innovation, a changing space paradigm, and regulatory control' in Md Tanveer Ahmad and Jinyuan Su (eds) *NewSpace Commercialization and the Law* (McGill University 2017) 107.

47 PJ Blount, 'Jurisdiction in Outer Space: Challenges of Private Individuals in Space' (2007) 33 Journal of Space Law 300, 312–313.

48 UNGA Res 1962 (XVII) (13 December 1963) GAOR 18th Session Supp 15.

49 Broadcasting Principles (n 14).

50 Remote Sensing Principles (n 14).

51 Principles to Use of Nuclear Power Sources in Outer Space (n 14).

52 Use of Outer Space for Benefit and Interest of All States (n 14).

53 See for example Moon Agreement (n 13) art 11(7)(d).

of the space declarations do make reference to specific human rights[54] although, as noted, these are not expressed in instruments that are *per se* binding. However, in recent times, there has been significant growth in national space law, which both complements and supplements the rights and obligations that arise under the relevant treaty law. Examples of specific activities in and/or relating to outer space, and the potential implications for human rights and human rights law, are now considered.

III. Human activities in Outer Space: Implication for Human Rights

The first two issues we consider relating to human activity in outer space are that of access to space and the related issue of remote-sensing and artificial intelligence technologies. This gives cause to consider rights, such as the 'right to enjoy the benefits of scientific progress and its applications' (REBSP) as enshrined in *ICESCR*, and the right to privacy, on the one hand; and the right to other life-sustaining services, on the other.

A. Access to Space and Remote Sensing and Artificial Intelligence (AI) Technologies

Human access to outer space has increased and this trend will undoubtedly continue. While 'technology has evolved and … the range of activities planned for outer space has proliferated',[55] this does not necessarily represent an equality of access. At present, of the 195 Member States of the United Nations, approximately 70-80 are engaged in space activities and thus involved in domestic capability development to allow them to participate actively in directly accessing space. Of course, viewed from another perspective, this also means that somewhere approaching two-thirds of the world's countries do not have *any* indigenous space capability whatsoever, placing them at an increasing comparative disadvantage over time and rendering them entirely dependent on others for access to space infrastructure and, indeed, access to space itself.

Obviously, this gives rise to sovereignty and national security concerns for those States. Their ability therefore to access space and enjoy the benefits that this will bring in terms of their development and the development and livelihood of those under their jurisdiction is thus severely curtailed and highly dependent on the swings and roundabouts of strategic and geopolitical networks and understandings. The issue of access to outer space and the associated ensuing benefits is linked with the right to enjoy the benefits of scientific progress and its applications (REBSP), as enshrined in Article 27 of the *UDHR*, which stipulates that 'everyone has the right… to share in scientific advancements and its benefits'; and in Article 15 of the *ICESCR*, which recognises 'the right of everyone to enjoy the benefits of scientific progress and its applications.'

In turn, this right is 'especially connected'[56] to other rights including, but not limited to, the right to education (in Article 13 and 14 of the *ICESCR*, for example), the right to seek, receive, and impart information (in Article 19 of the *UDHR*, for example) and the right to development, such as is recognised in the *United Nations Declaration on the Right to Development*,[57] for example. The connection between these rights and human activity in

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[54] See for example Broadcasting Principles (n 14) principle A.

[55] Steven Freeland, 'Up, up and … Back: The Emergence of Space Tourism and Its Impact on the International Law of Outer Space' (2005) 6 Chicago Journal of International Law 1, 5.

[56] United Nations Educational, Scientific and Cultural Organisation, 'The Right to Enjoy the Benefits of Scientific Progress and its Applications' (Experts' Meeting on Scientific Progress, Venice, July 2009) 5.

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

space is particularly pronounced given the humanitarian applications of space technologies and access, particularly remote-sensing activities.
Further, in a general sense, the REBSP 'is important to redress the negative effects of globalization and to eradicate poverty'.[58]

It is also true, however, that 'individuals should be protected from possible negative effects of scientific and technological progress on the enjoyment of human rights'.[59] One particular way in which these competing interests arise is in the capability to access space for the purpose of remote sensing. Remote sensing is conducted via satellites and aircraft that detect and record imagery.[60] Some satellite images are commercially available, with such images 'becoming sharper and taken more frequently'.[61] In 2008, there were 150 Earth observation satellites in orbit; by June 2019, there were 768.[62] These numbers are set to increase even more dramatically with the advent of proposed large constellations of small Earth observation satellites. The term "remote sensing of the Earth from outer space" was defined in the 1979 *Convention on the Transfer and Use of Data of Remote Sensing of the Earth from Outer Space* as:

> observations and measurements of energy and polarization characteristics of self-radiation and reflected radiation of elements of the land, ocean and atmosphere of the Earth in different ranges of electromagnetic waves which facilitate the location, description of the nature and temporal variations of natural parameters and phenomena, natural resources of the Earth, the environment as well as anthropogenic objects and formations.[63]

In turn, the *Principles relating to Remote Sensing of the Earth from Outer Space* describe remote sensing as:

> making use of the properties of electromagnetic waves emitted, reflected or diffracted by the sensed objects, for the purpose of improving natural resources management, land use and the protection of the environment.[64]

As noted at the outset of this article, remote-sensing technologies have humanitarian applications. Remote-sensing technologies can assist in promoting, for example, the right to education (recognised in Article 26 of the *UDHR*, as well as in other international treaties) through facilitating remote access learning and advances in scientific knowledge; and even, given the broad agricultural applications of these technologies, the right to food (as recognised in Article 2 of *ICESCR*, and further articulated in General Comment No. 12) and the right to safety (from, for example, natural disasters). Incidentally, the right to food is a significant right because it is 'indivisibly linked to the inherent dignity of the

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58 Experts' Meeting on Scientific Progress (n 56) 4.
59 ibid 6.
60 'What is Remote Sensing', (*Earthdata,* 10 March 2021) <https://earthdata.nasa.gov/learn/remote-sensing>
61 Christopher Beam, 'Soon, satellites will be able to watch you everywhere all the time: Can privacy survive?' (*MIT Technology Review*, 26 June 2019) <https://www.technologyreview.com/2019/06/26/102931/satellites-threaten-privacy/>
62 ibid.
63 Convention on the Transfer and Use of Date of Remote Sensing of the Earth from Outer Space (adopted 19 May 1978, entered into force 21 August 1979) (Moscow Convention).
64 Remote Sensing Principles (n 14) principle I.

human person and is indispensable for the fulfilment of other human rights'.[65] It is also 'inseparable from social justice'.[66]

However, such technologies (and the data collected) also can be used to achieve national security objectives, some of which will be consistent with human rights objectives; but others less so. For example, in the United States, the *U.S. Commercial Space Launch Competitiveness Act* refers to 'the need to protect national security while maintaining United States private sector leadership in the field, and reflect the current state of the art of remote sensing systems, instruments, or technologies.'[67] The reality is that there will at some point always be a tension between aspects around the need to protect national security on the one hand and the full gamut of available human rights to the populous on the other.

While the full implication of this in the space context is yet to be appropriately considered, recognition of the link between remote sensing and various human rights issues is evident in, for example, *UN Resolution 41/65, Principles Relating to Remote Sensing of the Earth from Outer Space*.[68] This mirrors sentiments expressed in Article I of the *Outer Space Treaty*, and provides that remote-sensing 'shall be carried out for the benefit and in the interests of all countries', and also taking 'into particular consideration the needs of the developing countries'.[69] Principle III calls for compliance with international law. Principles X and XI provide, for example, that remote sensing should help protect the natural environment on Earth and humans from natural disasters.

Notably, remote-sensing technologies also have consequences for the capacity of criminal justice systems to redress human rights violations. As Steven Freeland and Ram Jakhu have observed in the specific context of international criminal justice: 'Satellite imagery is proving to be a valuable tool for the collection and presentation of critical, accurate, timely and credible evidence before courts/tribunals'.[70] However, those authors go on to note that 'challenges still need to be met in the development of appropriate satellite imaging and other technologies as well as relevant procedural matters related to the use of evidence acquired with the use of satellites'.[71]

Of course, the capacity to utilize remote sensing data in criminal justice also comes with consequences for the right to privacy more generally (such as recognised in Article 12 of the *UDHR* and Article 17 of the *ICCPR*, among others). As privacy advocates have warned:

> innovation in satellite imagery is outpacing the … government's ability to regulate the technology. Unless we impose stricter limits now … one day everyone from ad companies to suspicious spouses to terrorist organisations will have access to tools previously reserved for government spy agencies. Which would mean that at any given moment, anyone could be watching anyone else'.[72]

This is significant because, as NGO Privacy International has recognised: 'privacy give us the ability to assert our rights in the face of significant power imbalances' and 'is an

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[65] CESCR, 'General Comment No 12: The Right to Adequate Food (Art. 11)' (1999) UN Doc E/C.12/1999/5.
[66] ibid.
[67] 2 USC § 202 (U.S. Commercial Space Launch Competitiveness Act).
[68] Remote Sensing Principles (n 14).
[69] ibid principle II.
[70] Freeland and Jakhu (n 5) 31.
[71] ibid.
[72] Beam (n 61).

essential way we seek to protect ourselves … from others who may wish to exert control'.[73] Thus, there is tension between knowledge and information and humanitarian causes on the one hand, and privacy rights on the other.

In this context, one should also consider that AI technology is an increasingly important element of space technology. Various aspects of AI potentially seem well suited to a number of current and proposed space applications, including the following:

(i) Remote sensing and monitoring for a broad array of missions, including environmental change, national security and aircraft and maritime tracking;
(ii) Communications between ground and space, and from satellite-to-satellite (particularly in the case of mega/large constellations of small satellites), using radio frequencies, optical-laser communications, radar and other technologies;
(iii) Data analytics, including policy and regulatory issues inherent in collecting massive amounts of information, and how that information can be used, as well as data privacy;
(iv) Satellites as an alternative to terrestrial-based systems, including cloud computing, cross-border broadband services, and other methods of data and information transfer.

Simply put, the implementation of AI impacts upon privacy issues, but also the full range of human rights guaranteed by international human rights instruments, including civil and political rights, as well as economic, cultural, and social rights. The need to address these concerns – and not simply be 'seduced' by the increased capabilities that AI might offer in terms of space activities – is highlighted even further by the fact that space has become a significant global 'economy',[74] with a multitude of private and commercial activities engaging in myriad space activities, each directed towards profitability without, one might speculate, sufficient thought being given to the (potential) human rights consequences.[75]

We now move to consider the issues of space debris and space mining. Each of these activities raise human rights issues relating to access, safety, and the emerging right to a safe environment.

B. Space Debris

Space debris - sometimes referred to as 'space junk'[76] – and the cascading effects represent one of the greatest challenges for the long-term sustainability of space activities. According to estimates, as of January 2019, there were in Earth orbit more than 128 million pieces of

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[73] 'What is Privacy' (*Privacy International*, 23 October 2017) <https://privacyinternational.org/explainer/56/what-privacy>

[74] The global space economy in 2020 has transitioned toward the private sector, with a decreased reliance on government spending; '30 Voices on 2030: The future of space' (*KPMG*, 2020) <https://assets.kpmg/content/dam/kpmg/au/pdf/2020/30-voices-on-2030-future-of-space.pdf>; The COVID-19 pandemic did not significantly impact the space sector with increase in the European space workforce and similar trends of successful launched, with growth of $9 billion USD reported, increasing the overall global space economy to $423.8 billion USD; 'Global Space Economy Grows in 2019 to $423.8 Billion, The Space Report 2020 Q2 Analysis Shows' (*Space Foundation*, 30 July 2020) <https://www.spacefoundation.org/2020/07/30/global-space-economy-grows-in-2019-to-423-8-billion-the-space-report-2020-q2-analysis-shows/>

[75] For a detailed discussion, see Anne-Sophie Martin and Steven Freeland, 'The Advent of Artificial Intelligence in Space Activities: New Legal Challenges' (2021) 55 Space Policy 101408.

[76] Mark Garcia, 'Space Debris and Human Spacecraft' (*National Aeronautics and Space Administration Space Station,* 7 August 2017) <https://www.nasa.gov/mission_pages/station/news/orbital_debris.html>

debris smaller than 1 cm, about 900,000 pieces of debris 1–10 cm in length, and around 34,000 pieces larger than 10 cm. Space debris is typically comprised of orbital debris and natural debris.[77] Space debris principally comprises those space objects (satellites) that have reached their end of life, various launch stages (for example, rocket bodies, upper stages of launch vehicles) and the remnants of space objects from explosions, conjunctions or deliberate destruction, but will also include other items that are deliberately or accidentally released during a space mission. It can be decomposed into natural (meteoroid) and artificial (human-made) particles in space. Human-made debris has also been defined as 'any piece of machinery or debris left by humans in space'.[78]

Generally, meteoroids – defined as 'a small chunk of rock or iron that travels through space'[79] – orbit around the sun, while human-made debris tends to orbit around Earth. Consequently, the latter is classified as 'orbital debris',[80] defined as 'any [hu]man-made object in orbit about the Earth which no longer serves a useful function'.[81]

If a piece of debris that causes damage can be definitively identified, it may also constitute a 'space object' within the terms of the liability for damage regime under international space law.[82] The Inter-Agency Space Debris Co-ordination Committee ('IADC') has described orbital debris as 'all [hu]man-made objects, including fragments and elements thereof, that are orbiting the Earth or re-entering the Earth's atmosphere, that are non-functional'.[83] The *United Nations Technical Report on Space Debris* ('UNTRSD') describes orbital debris in similar terms.[84] The following incident reported in *Nature, a* science magazine, illustrates part of the problem:

> On Monday 2 July 2018, the CryoSat-2 spacecraft was orbiting as usual, just over 700 kilometres above Earth's surface. But that day, mission controllers at the European Space Agency (ESA) realized they had a problem: a piece of space debris was hurtling uncontrollably towards the €140 million (US$162 million) satellite, which monitors ice on the planet.
>
> As engineers tracked the paths of both objects, the chances of a collision slowly increased — forcing mission controllers to take action. On 9 July, ESA fired the thrusters on CryoSat-2 to boost it into a higher orbit. Just 50 minutes later, the debris rocketed past at 4.1 kilometres a second.[85]

Debris orbits at speeds up to 17,500 mph (28,154 km/hr). At such velocities, debris may cause damage to spacecraft. For example: in 1996, a French satellite was damaged by debris from a French rocket which exploded a decade before;[86] in 2007, China executed

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77 ibid.

78 Jonathan O'Callaghan, 'What is space junk and why is it a problem?', (*Natural History Museum*) <https://www.nhm.ac.uk/discover/what-is-space-junk-and-why-is-it-a-problem.html>

79 Sandra May, 'Meteoroid' (*National Aeronautics and Space Administration,* 7 August 2017) <https://www.nasa.gov/audience/forstudents/k-4/dictionary/Meteoroid.html>

80 Garcia (n 76).

81 ibid.

82 Liability Convention (n 42).

83 Space Debris Team Project, 'Space Debris' (International Space University 2012) 1.

84 ibid, citing UN COPUOS (Sub-Committee), 'United Nations Technical Report on Space Debris' (1999) UN Doc A/AC.105/720 (Technical Report on Space Debris) 11.

85 Alexandra Witze, 'The quest to conquer Earth's space junk problem' (2018) 561 Nature 24, 25.

86 'Does Space Junk Fall from the Sky?' (*National Oceanic and Atmospheric Administration*, 19 January 2018) <https://www.nesdis.noaa.gov/content/does-space-junk-fall-sky>

an anti-satellite test destroying an old weather satellite using a missile, allegedly adding more than 3,000 pieces of orbital debris;[87] and in 2009, a defunct Russian satellite collided with a functioning US Iridium satellite, adding over 2,000 pieces of trackable debris. [88]

Not only does this pose safety concerns; the increasing proliferation of space debris may develop into a barrier to accessing space, and therefore, reduce access some of the benefits to human rights of such access. Efforts to address the issue of mitigation guidelines include the *IADC Space Debris Mitigation Guidelines*,[89] and the *United Nations Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space (UN Space Debris Guidelines)*, adopted by the full United Nations General Assembly in late 2007.[90] Regional organisations, including the European Space Agency ('ESA'),[91] and domestic space agencies, including in China,[92] France,[93] Germany,[94] Italy,[95] Japan,[96] the United Kingdom,[97] the United States,[98] and Russia[99] have also developed guidelines.[100] NASA has developed programs such as LEGEND and ORDEM 3.0 to predict future debris environment.[101] There have been, for example, discussions around utilising nets and harpoons to capture debris, and tethers, drag augmentation devices and solar sails to remove debris.[102] Further, the importance of developing appropriate practices with respect to orbital space debris has more recently (June 2019) been further highlighted by the

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87 See also Becky Iannotta, 'U.S. Satellite Destroyed in Space Collision' (*Space News*, 11 February 2009) <https://spacenews.com/u-s-satellite-destroyed-in-space-collision/>

88 Garcia (n 76).

89 Inter-Agency Space Debris Coordination Committee, 'IADC Space Debris Mitigation Guidelines' (2007) <https://orbitaldebris.jsc.nasa.gov/library/iadc_mitigation_guidelines_rev_1_sep07.pdf>

90 UNGA Res 62/217 (1 February 2008) UN Doc A/RES/62/217.

91 Committee on the Peaceful Uses of Outer Space, 'Space Debris Mitigation Handbook' (1999); Committee on the Peaceful Uses of Outer Space, 'Space Debris Safety and Mitigation Standard' (2000).

92 Commission for Science, Technology and Industry for National Defence, 'Requirements for Space Debris Mitigation' (2005) Document QJ3221-2005.

93 Loi n° 2008-518 du 3 juin 2008; Décret n° 2009-643 du 9 juin 2009.

94 European Space Agency, 'European Code of Conduct for Space Debris Mitigation' (2004) Document No 1 (ECCSDM).

95 ibid.

96 Japan Aerospace Exploration Agency, 'Space Debris Mitigation Standard' (2014) (Document JMR-003C).

97 ECCSDM (n 94); Outer Space Act 1986 (UK).

98 See for example United States Government Orbital Debris Mitigation Standard Practices, FCC-02-80 (2002); National Aeronautics and Space Administration, 'NASA Procedural Requirements for Limiting Orbital Debris and Evaluating the Meteoroid and Orbital Debris Environments' (2017) Document NPR 8715.6B.

99 *Federal Law of August 20 1993* No. 5663-I (Russia); *Federal Law of July 13 2015* No. 215-FZ (Russia); *Federal Law of June 29 2015* No. 162-FZ (Russia); Order of the Federal Agency for Technical Regulation and Metrology, *Space Technology Items: General Requirements for Space Vehicles for Near-Earth Space Debris Mitigation* (Document, GOST R 52925-2018, 21 September 2018). See also Federal Space Program of Russia for 2016-2025 (approved by the Russian Federation Government Decree of 23 March 2016 N 230); Fundamentals of the Russian Federation's State Policy in the Field of Space Activities for the Period up to 2030 and Beyond (approved by the President of the Russian Federation on April 19, 2013 N Pr-906).

100 National Aeronautics and Space Administration , 'Orbital Debris Management and Risk Mitigation' (2012) 23.

101 ibid 5.

102 National Research Council, 'Limiting Future Collision Risk to Spacecraft – An Assessment of NASA's Meteoroid and Orbital Debris Programs' (The National Academies Press 2011) 59.

adoption within UNCOPUOS of the Preamble and 21 Guidelines for the Long-Term Sustainability of Outer Space Activities.[103]

Notwithstanding that, the issue of space debris poses obvious threats of property damage, safety, and potentially, the right to life in the case of severe collisions. Congestion and ensuing safety risks also potentially have implications for equality of access to space (and therefore the knowledge and information rights discussed above). There are also likely risks to the natural environment. In the same way that plastics pose risks to the marine environment and therefore, to any ensuing human rights enjoyments, this may also prove to be true of debris in our atmosphere. In more general terms, the avoidance of a 'tragedy of the commons' scenario[104] is crucial if humankind is to garner the maximum benefit from what space can offer.

C. Space Mining

The Solar System is replete with resources such as the water, minerals, precious metals found on moons and asteroids. This has attracted interest from both scientists and entrepreneurs. Not only is this (potentially) of enormous financial value if transported back to Earth, but may also assist in onward space travel, and the building of future settlements and outposts. Technological equipment required for space mining, however, is still very much in its development phases.[105] Nonetheless, in 2019, a collection of rock samples was taken from the asteroid Ryugu by Japanese spacecraft Hayabusa-2.[106]

Luxemburg, the United Arab Emirates (UAE), and the United States, for example, have indicated through their domestic laws an intention to facilitate and regulate space mining. Luxembourg passed legislation in 2017 'granting businesses operating within its jurisdiction rights in resources extracted in outer space'.[107] That legislation asserts 'space resources are capable of being appropriated in accordance with international law'.[108] In the UAE, *Federal Law No. (12) of 2019 on the Regulation of The Space Sector,*[109] expressly

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[103] UNGA 'Report of the Committee on the Peaceful Uses of Outer Space' UN GAOR 74th session Supp No 20 UN Doc A/74/20 (2019) (Report of the Committee on the Peaceful Uses of Outer Space) para 163; UNGA 'Report of the Committee on the Peaceful Uses of Outer Space' UN GAOR 74th session Supp No 20 UN Doc A/74/20 (2019) (Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space) annex II.

[104] See Garrett Hardin, 'The tragedy of the commons' (1968) 162 Science 1243. For a discussion of the implications of the tragedy of the commons to the use of outer space, see Steven Freeland, 'Common heritage, not common law: how international law will regulate proposals to exploit space resources' (2017) 35 Questions of International Law 19.

[105] Virginie Blanchette-Seguin, 'Reaching for the Moon: Mining in Outer Space' (2017) 49 New York University Journal of International Law and Politics 959, 969.

[106] This sample collection occurred approximately 300 million kilometres from Earth, with the return taking place at Woomera, Australia in December 2020. See Steven Freeland and Annie Handmer, 'Giant leap for corporations? The Trump administration wants to mine resources in space, but is it legal?' (*The Conversation,* 20 April 2020) <https://theconversation.com/giant-leap-for-corporations-the-trump-administration-wants-to-mine-resources-in-space-but-is-it-legal-136395>

[107] Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace [Law of 20 July 2017 on the exploration and use of space resources] (Luxembourg) art 1 [tr Vincent Wellens] (Luxembourg Space Law). See also the discussion of Luxembourg's contentious space mining laws as compared with art II of the Outer Space Treaty (n 6) in Philip De Man, 'Luxembourg law on space resources rests on contentious relationship with international framework' (2017) Working Paper No 189, 5.

[108] Stefan A Kaiser, 'Legal Protection against Contamination from Space Resource Mining' (2017) 66 German Journal of Air and Space Law 282, 284 citing Luxembourg Space Law (n 107).

[109] *Federal Law No. (12) of 2019 on the Regulation of The Space Sector* (United Arab Emirates) 19 December 2019, Corresponding to 22 Rabi' Al-Akhar 1441H [*Federal Law No. 12 of 2019*] (UAE Law). See also Kelsey Warner, 'UAE looks to regulate asteroid mining as it aims to lure private space sector' (*The National,* 26 November 2019) <https://www.thenational.ae/uae/science/uae-looks-to-regulate-

contemplates permits for the exploration, exploitation and use of Space Resources.[110] In 2015, the US adopted the *US Commercial Space Launch Competitiveness Act* (H.R.2262)[111] to facilitate 'commercial exploration for and commercial recovery of space resources by United States citizens'.[112]

More recently, NASA has released the principles that it proposes to govern the 'Artemis Accords' that it will seek to negotiate on a bilateral basis with partners in its Artemis Moon / Mars endeavours.[113] Although the details of these accords are yet to be finalised, these overarching principles appear to be highly relevant regarding any proposed future activities involving exploitation of space natural resources and their ensuing impact on the enjoyment of human rights and on human rights law. Both the US and Luxembourg have expressly acknowledged the terms of Article II of the *Outer Space Treaty*, which specifies that that outer space, including the Moon and other celestial body, 'is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.[114]

However, some commentators suggest that the US approach distinguishes the term 'resources' from the term 'celestial bodies' used in Article II of the *Outer Space Treaty*.[115] The US legislation prevents classification of spatial resources as a 'celestial body' and so rights are granted to the minerals in the celestial body, not the body itself.[116] Essentially, according to this viewpoint, the US position is that the lawfulness of mining "resources" in the celestial body, rather than appropriating the celestial body itself, fills a *lacunae* in the *Outer Space Treaty*.[117] On this view, the 'use, ownership, possession and sale of mineral resources do not constitute a (national) appropriation by means of use or by any other

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asteroid-mining-as-it-aims-to-lure-private-space-sector-1.943028>; Sam Bridge 'New UAE Space Law to open doors to foreign investment' (*Arabian Business Industries,* 28 February 2020) <https://www.arabianbusiness.com/technology/441175-new-uae-space-law-to-open-doors-to-foreign-investment>.

110 UAE Law (n 109) art 18.

111 U.S. Commercial Space Launch Competitiveness Act (n 67).

112 Interview with Steven Freeland, Professor of International Law at Western Sydney University (April 2020) (Steven Freeland Interview) referring to U.S. Commercial Space Launch Competitiveness Act (n 67); Freeland and Handmer (n 106) citing U.S. Commercial Space Launch Competitiveness Act (n 67); Stephan Hobe, 'The International Institute of Space Law adopts Position Paper on Space Resource Mining' (2016) 65 German Journal of Air and Space Law 204 referring to U.S. Commercial Space Launch Competitiveness Act (n 67); see also discussion in Mariella Moon, 'Luxembourg's asteroid mining law takes effect August 1st', (*Engadget* 30 July 2017) <https://www.engadget.com/2017-07-30-luxembourg-asteroid-mining-law-august-1.html>; see also Kaiser (n 108) 282–286.

113 Brian Dunbar, 'The Artemis Accords', (*National Aeronautics and Space Administration*, 16 May 2020) <https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords_v7_print.pdf>

114 Kaiser (n 112) 283 referring to Outer Space Treaty (n 6). For a detailed analysis of art II, see Steven Freeland and Ram Jakhu, 'Article II of the 1969 Outer Space Treaty' in Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law, Volume I – Outer Space Treaty* (Carl Heymanns Verlag 2009) 44–63.

115 See for example Kaiser (n 112) 282–283 referring to U.S. Commercial Space Launch Competitiveness Act (n 67) and Outer Space Treaty (n 6).

116 Kaiser (n 112) 282 referring to U.S. Commercial Space Launch Competitiveness Act (n 67) and Outer Space Treaty (n 6); see also Mariella Moon, 'Luxembourg's asteroid mining law takes effect August 1st' (*Engadget*, 30 July 2017) <https://www.engadget.com/2017-07-30-luxembourg-asteroid-mining-law-august-1.html>

117 Kaiser (n 112), 282–283 referring to U.S. Commercial Space Launch Competitiveness Act (n 67) and Outer Space Treaty (n 6); see generally Steven Freeland and Ram Jakhu, 'What's human rights got to do with outer space? Everything!' in Rafael Moro-Aguilar, PJ Blount & Tanja Masson-Zwaan (eds), *Proceedings of the International Institute of Space Law 2014* (Eleven International 2014) 365, 369.

means.'[118] The authors of this article are not in entire agreement with that perspective, believing the situation to be more nuanced and requiring a more detailed multilateral understanding. It is pertinent to note also that it does stand in contrast to the relevant terms of the *Moon Agreement* of 1979 (to which the US is *not* a State Party and therefore is not bound).[119] That agreement provides:

> Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. The foregoing provisions are without prejudice to the international regime referred to in paragraph 5 of this article.[120]

The *Moon Agreement* is, however, only binding among only those 18 States who have ratified it.[121] UNCOPUOS continues to consider the issues around the 'exploration, exploitation and utilization of space resources' and has mandated for 'scheduled informal consultations' on the matter.[122]

The obvious point for a human rights analysis of space mining is that space belongs to 'everyone'. Article III of the *Outer Space Treaty* requires that:

> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.[123]

There are a number of conflicting rights that arise here. On the one hand, international law does recognise a sovereign right to natural resources, which has long been accepted.[124] On the other, little is known about the potential impact of mining in space on the stability of both the space and Earth environments. This is potentially problematic in several ways, including in the context of 'emerging rights to a clean and healthy environment'.[125] Given

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[118] Kaiser (n 112), 283–284.

[119] ibid 284-285, citing Moon Agreement (n 13).

[120] Moon Agreement (n 13) art 11(3).

[121] ibid. Note the Moon Agreement has to date been ratified by Armenia, Australia, Austria, Belgium, Chile, Kazakhstan, Kuwait, Lebanon, Mexico, Morocco, Netherlands, Pakistan, Peru, Philippines, Saudi Arabia, Turkey, Uruguay and Venezuela whilst France, Guatemala, India and Romania, are signatories; see 'Status of International Agreements relating to Activities in Outer Space' (*United Nations Office for Outer Space Affairs,* 27 January 2021) <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html>; and COPUOS, 'Report of the Committee on the Peaceful Uses of Outer Space' (2019) UN Doc A/74/20.

[122] Report of the Committee on the Peaceful Uses of Outer Space (n 103) 257–258; UNGA 'Report of the Legal Subcomittee on its fifty-eight session, held in Vienna from 1 to 12 April 2019' UN GAOR 62nd Session UN Doc A/AC.105/1203 (2019); United Nations, 'Legal Subcommittee 2020: Fifty-ninth session (23 March – 3 April 2020) CANCELLED' (*United Nations Office for Outer Space Affairs*, 19 August 2020) <https://www.unoosa.org/oosa/en/ourwork/copuos/lsc/2020/index.html>

[123] Freeland and Jakhu (n 117), citing Outer Space Treaty (n 6) art 3.

[124] UNGA Res 1803 (XVII) (17 December 1973).

[125] Experts' Meeting on Scientific Progress (n 56) 6.

this uncertainly, the precautionary approach and the principle of intergenerational equity may be relevant to the extent that they might be applicable to activities carried on in outer space. Naturally, however, there are questions as to how and to what extent these (and other 'terrestrial' international law principles) can be adapted to appropriately apply to the unique (legal) environment of space.

The precautionary approach urges caution where environmental outcomes are uncertain. One of the better-known iterations of the principles can be found in Principle 15 of the *Rio Declaration on Environment and Development* in 1992:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[126]

Since then, the principle has gained recognition in a plethora of multilateral environmental agreements and in domestic laws and policies, including those that deal with 'climate change, biodiversity, endangered species, fisheries management, wildlife trade, food safety, pollution controls, chemicals regulation, exposure to toxins, and other environmental and public health issues'.[127] The precautionary approach might possibly be relevant, although not necessarily directly applicable, to human rights and to human activity in outer space, particular given that so much is unknown as to the environmental consequences for Earth of destabilising the Moon through, for example, mining activities.

Further, a related concept, the principle of intergenerational equity, is based on the notion that every generation holds the Earth in common not only with members of the present generation, but also with other generations.[128] In turn, the principle calls for fairness between 'generations in the use and conservation of the environment and its natural resources'.[129]

In international law, the principle builds upon the use of equity. In short, equity in this context requires 'that each generation pass on the planet in no worse condition than received and have equitable access to its resources.'[130] This, and other concerns, give context to calls for 'great swathes of the solar system' to be 'preserved as official "space wilderness" to protect planets, moons and other heavenly bodies from rampant mining and other forms of industrial exploitation'. For example, one proposal 'calls for more than 85% of the solar system to be placed off-limits to human development'.[131]

In this regard, it is pertinent also to note that Article 4 of the *Moon Agreement* specifically requires that '[d]ue regard shall [*inter alia*] be paid to the interests of present and future generations ….' Notwithstanding that, as noted above, this treaty has a low

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[126] UNGA 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (Vol. I) (1992) principle 15 (Rio Declaration on Environment and Development).

[127] Deborah Peterson, 'Precaution: principles and practice in Australian environmental and natural resource management' (Productivity Commission Presidential Address 50th Annual Australian Agricultural and Resource Economics Society conference, New South Wales, February 2006) 5.

[128] Edith Brown Weiss, 'Intergenerational Equity', *Max Planck Encyclopedia of Public International Law* (2020) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421>

[129] ibid.

[130] Edith Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 Vermont Journal of Environmental Law 615, 622–23.

[131] Ian Sample, 'Protect solar system from mining 'gold rush', say scientists', (*The Guardian,* 13 May 2019) <https://www.theguardian.com/science/2019/may/12/protect-solar-system-space-mining-gold-rush-say-scientists>

number of ratifications, its terms had been agreed through a consensus process at UNCOPUOS, including reference to this recognition of the concept of intergenerational equity, already in the 1970s.

The consequences for the space environment of such resource extraction activities are not at all well understood. We are simply not yet able to accurately forecast the impacts of disruptive extraction processes on celestial bodies, and the effects that this may also have on intergenerational equity.

In sum, the legalities of space mining turn on interpretation of the *Outer Space Treaty*, the *Moon Agreement* (for its small number of States Parties) and how the 'global commons' principle manifests in outer space.[132] This raises environmental human rights issues, as well as broader considerations around the precautionary principle and principles of intergenerational equity. For example, some mining activities on Earth have negatively impacted the enjoyment of the right to health of local communities, as well as workers, and in some cases, have also impeded access to clean and safe food and water. Very little is known of the impact mining in space would have on the stability of Earth's environment, and therefore, in turn, on the enjoyment of the right to health.

Further, tensions over natural resource exploitation on Earth have escalated international relations into armed conflicts before in human history. There is a genuine concern the same risks exist in relation to competing claims to resources in outer space. This in turn leads us to now consider the weaponization and militarization of space.

D. Militarisation and Weaponization of Space

Since the launch of Sputnik 1 in 1957, humankind has to a large degree respected the 'peaceful purposes' requirement that underpins the United Nations Space Treaties. We have not seen a space object destroyed in anger – although several States have deliberately destroyed their own satellites[133] – and space has not become a theatre of warfare, notwithstanding more recent calls by some for it to be regarded as a 'war fighting domain', a categorization that, in the authors' opinion at least, should be resisted and rejected whenever possible.[134]

From this perspective, space has actually 'worked' well, itself quite a remarkable feat of law and the rule of law, and its facilitation of responsible norms of behaviour, given the rapid development of (military) space technology over the past five decades. In this regard, space law has played a positive role, by allowing for – and not unduly restricting – the development of space-related technology and ensuing human rights benefits, whilst discouraging and proscribing bad behaviour, which would have negative consequences on the enjoyment of human rights.

For example, it is evident that the utilisation of space technology has allowed for significantly better access to information, communications, technology and infrastructure for less developed countries, a transformation that has been significantly enhanced

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[132] Steven Freeland Interview (n 112). Note, however, that the recent Executive Order issued by the Trump Administration on 6 April 2020 asserted that, from the perspective of the United States, outer space was *not* to be regarded as a 'global commons'.

[133] As is well known, the latest of these 'tests' was conducted by India on 27 March 2019 – ironically three days before the start of the 58th session of the Legal Subcommittee of UNCOPUOS – when it deliberately destroyed by kinetic means an Indian satellite orbiting at approximately 285 kilometres above the Earth; see Marco Langbroek, 'Why India's ASAT Test was Reckless' (*The Diplomat*, 30 March 2019) <https://thediplomat.com/2019/05/why-indias-asat-test-was-reckless/>

[134] See Steven Freeland, 'The US Plan for a Space Force risks escalating a 'Space Arms Race' (*The Conversation*, 10 August 2018) <https://theconversation.com/the-us-plan-for-a-space-force-risks-escalating-a-space-arms-race-101368>

through the establishment, in the 1970s, of INTELSAT, whose original purpose was to provide satellite services and infrastructure to such countries in a way that would promote higher standards of living and conditions of economic and social progress.[135]

At the same time, the existing legal regime has not prevented the development of military technology capable of utilizing outer space. Whilst there are some restrictions in the *Outer Space Treaty*, these were specified in relatively general terms and were open to divergent interpretation as to what they did (and did not) prohibit. This is not entirely surprising, given the time that the instrument was concluded, and that the development of space-related technology was, at least initially, inextricably related to military strength – both in reality and to influence the perception of others.

Indeed, it is no coincidence that the space race emerged at the height of the Cold War, when both the United States and the Soviet Union strove to flex their respective technological 'muscles'. The early stages of human space activity coincided with a period of quite considerable tension, with the possibility of large scale and potentially highly destructive military conflict between the (space) superpowers of the time always lurking in the background.

The conventional obligations and restrictions that were eventually agreed and codified in the major space treaties addressed, in part, specific military and weapons-related aspects of space activities. However, they were, as described below, neither entirely clear nor sufficiently comprehensive to meet all of these challenges. The Moon and celestial bodies were declared as to be used 'exclusively for peaceful purposes'.[136] Whilst most space scholars would subsequently interpret the relevant provisions as prohibiting military space activities in outer space, this was not followed by the practice of those who actually had space capability. Indeed, with the benefit of hindsight, it is now clear that space has been utilized to support terrestrial military activities almost from the commencement of the space age.

Since those early days, the situation has, if anything, become significantly more complex, with potentially drastic and catastrophic consequences, including for the enjoyment of human rights relating to life and safety. Just as the major space-faring nations have been undertaking what might be termed 'passive' military activities in outer space, outer space is increasingly now being used as part of active engagement in the conduct of armed conflict.[137] Not only is information gathered from outer space – through, for

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[135] INTELSAT was created through a multilateral treaty with the desire to produce telecommunications 'for the benefit of all [hu]mankind'; Agreement relating to the International Telecommunications Satellite Organization (adopted 20 August 1971, entered into force 12 February 1973) UNTS 1220 (INTELSAT); The United States advocated at the United Nations for the establishment of the international organisation to provide a single global public telecommunications network. See Bert Rein and Carl Frank, 'The Legal Commitment of the United States to the INTELSAT System' (1989) 14 North Carolina Journal of International Law 219. Alongside ambitions of social progress, INTELSAT provided high quality telecommunication that were economically viable through international collaboration of governments and private enterprise; FG Nixon, 'Intelsat: A Progress Report on the Move toward Definitive Agreements' (1970) 20 The University of Toronto Law Journal 380, 383. INTELSAT was privatised in 2001, and the International Telecommunications Satellite Organization (ITSO) continues to fulfil its international obligations; 'About Us' (ITSO, 2020) <https://itso.int/about-us/>

[136] Outer Space Treaty (n 6) art 4.

[137] See for example Jackson Maogoto and Steven Freeland, 'The Final Frontier: The Laws of Armed Conflict and Space Warfare' (2007) 23 Connecticut Journal of International Law 165; David Simonds, 'A New Arms Race in Space?' (*The Economist*, 25 January 2007) <https://www.economist.com/leaders/2007/01/25/a-new-arms-race-in-space>; Thomas Ricks, 'Space Is Playing Field for Newest War Game; Air Force Exercise Shows Shift in Focus', (*The Washington Post*, 29 January 2001)

example, the use of remote satellite technology and communications satellites as discussed above – used to plan military engagement on Earth, but also space assets are now used to direct military activity and represent an integral part of the military hardware of the major powers.

Sadly, it is now within the realms of reality that outer space may itself become an emerging theatre of warfare. Designations of space as simply to be thought of as 'contested, congested and competitive'[138] with war in space described in some military circles as 'inevitable', are dangerously self-fulfilling and largely self-defeating: all States, particularly the major space-faring ones, will suffer if activities in space are undertaken in such an irresponsible manner as to cross certain "red lines" of accepted behaviour.

In the specific context of human rights, it is accepted that the 'development of weapons technologies endangers the enjoyment of human rights worldwide',[139] and the weaponization of space is no different. In particular, the militarisation and weaponization of space raises concerns for specific rights, such as the right to life, the right to a safe environment, the right to development, the right to peace and others.[140] Moreover, in the event that military activities in space lead to irreversible consequences that compromise humankind's ability to utilize space in the future, this will undoubtedly impact adversely on the myriad other rights referred to in this article that are connected to sustainable uses of space for present and future generations.

Clearly, resort to irresponsible behaviour in space has the potential to give rise to consequences that are beyond contemplation and, given that the authors believe the future of humanity is inextricably tied to our continuous use of space for peaceful purposes, the ongoing militarization and threatened weaponization of space represents a most significant challenge. Interestingly, such developments are giving rise to a new human rights discourse, where some commentators are now seeking to explore what they see as a development towards human rights principles that protect from 'physical or psychological threats' from above.[141]

E. Assertion of jurisdiction extra-terrestrially

Jurisdiction is a technical means of establishing public authority,[142] including over humans and human rights. Therefore, considering jurisdictional practice in space is a means of gaining insight as to the nature of public authority over humans and human rights in space. As noted in our recap of human rights law at II(a) above, as a matter of customary international law, States are entitled to exercise jurisdiction on three main bases: territoriality, nationality, and universality.

Put simply, the nationality principle can provide a State with grounds for jurisdiction where a victim (passive nationality), or a perpetrator (active nationality), is a national of that State. The territoriality principle may be invoked where conduct either takes place

<https://www.washingtonpost.com/archive/politics/2001/01/29/space-is-playing-fieldfor-newest-war-game/938e9674-0c3b-4d66-b67b-e3195b1275fd/>

[138] See for example Government of Australia, 'Working Paper by Australia to the UN Disarmament Commission 2018 Working Group on Transparency and Confidence Building Measures in Outer Space Activities' (2018) Document A/CN.10/2018/WG.II/CRP.1 <https://www.un.org/disarmament/wp-content/uploads/2018/04/A-CN.10-2018-WG.2-CRP.11.pdf>

[139] Experts' Meeting on Scientific Progress (n 56) 6.

[140] See generally UDHR (n 10); ICCPR (n 9); ICESCR (n 9).

[141] See Nick Grief, Shona Illingworth, Andrew Hoskins and others, 'Opinion: The Airspace Tribunal: Towards a New Human Right to Protect the Freedom to Exist Without Physical or Psychological Threat from Above' (2018) 3 European Human Rights Law Review 201, 201–207.

[142] Shaunnagh Dorsett and Shaun McVeigh, 'Jurisprudences of Jurisdiction: Matters of Public Authority' (2014) 23 Griffith Law Review 569, 588.

within a nation's borders (subjective territoriality), or the effects of the conduct are felt within the borders (objective territoriality). The universality principle is reserved for conduct recognised as a crime under international law, such as piracy, genocide and crimes against humanity. International law also recognises a 'protective principle', wherein a State can assert jurisdiction over foreign conduct that threatens national security. There are also claims to an 'effects principle', by which jurisdiction over extraterritorial conduct is enjoyed because the effects of that conduct are felt by a State, although this is sometimes considered controversial.

In our 2020 article, 'Star Laws: Criminal Jurisdiction in Outer Space',[143] we considered the issue of the exercise of extra-territorial criminal jurisdiction in outer space. In so doing, we identified circumstances in which the law currently appears to permit the assertion of domestic criminal law to conduct occurring in space. For example, the IGA has express provisions on jurisdiction over criminal matters in outer space. The provisions only apply on board the International Space Station and are only binding on the 'Partner States'. Article 22, titled 'Criminal Jurisdiction' (and commencing with the words: 'in view of the unique and unprecedented nature of this particular international cooperation in space'), provides for nationality-based jurisdiction. Article 22(1) states that:

> Canada, the European Partner States, Japan, Russia, and the United States may exercise criminal jurisdiction over personnel in or on any flight element who are their respective nationals.

This is an example of active-nationality jurisdiction, whereby authority is asserted by a State over its national. Article 22(2) provides for passive nationality jurisdiction, but only where the 'Partner State' of which the perpetrator is a national either 'concurs' in such exercise or fails to provide assurances that it will prosecute the perpetrator itself – the latter being somewhat akin to an 'unwilling or unable' type of jurisdiction. This statement of passive personality jurisdiction is also in the context of specific types of conduct. Specifically, Article 22(2) provides:

> In a case involving misconduct on orbit that: (a) affects the life or safety of a national of another Partner State or (b) occurs in or on or causes damage to the flight element of another Partner State, the Partner State whose national is the alleged perpetrator shall, at the request of any affected Partner State, consult with such State concerning their respective prosecutorial interests. An affected Partner State may, following such consultation, exercise criminal jurisdiction over the alleged perpetrator provided that, within 90 days of the date of such consultation or within such other period as may be mutually agreed, the Partner State whose national is the alleged perpetrator either: (1) concurs in such exercise of criminal jurisdiction, or (2) fails to provide assurances that it will submit the case to its competent authorities for the purpose of prosecution.

While the exercise of extraterritorial jurisdiction makes sense in an interconnected world and can help minimize impunity for cross-border or extra-terrestrial criminal activity, there nonetheless remain some concerns for human rights. For example, assertions of the passive nationality principle without a meaningful territorial nexus may create issues for due process rights and the rule of law, particularly given the terms and content of the law

[143] See Danielle Ireland-Piper and Steven Freeland, 'Star Laws: Criminal Jurisdiction in Outer Space' (2020) 44 Journal of Space Law 44.

is not always 'knowable' (or accessible) to a citizen of a different nationality. This is particularly so given, as a matter of international human rights law, the principle of double jeopardy only applies *within* a state and not as between them.[144] In theory, this might mean an accused could be subject to multiple proceedings.

Further, most assertions of extra-territorial jurisdiction are based on the premise that 'ordinary' terrestrial (national) criminal law and procedure can continue to apply in space. However, this may not be practical given the time, distances, and expense facing the practical realities of enforcement jurisdiction beyond Earth. Article 14 of the *ICCPR* provides for a number of 'fair trial' rights and Article 9 of the *ICCPR* is relevant to an exercise of extra-territoriality because it prohibits arbitrary arrest or detention.[145]

It may be that these rights need specific 'unpacking' in the context of crimes alleged to have been committed in outer space in order to provide guidance and clarity as to what arbitrariness and detention might look like extra-terrestrially, or when an accused person returns to Earth and multiple States have interest in the alleged conduct. It also gives rise to the broader question, which is beyond the scope of this article, as to what specific laws should be developed to apply more suitably to the interactions between human beings living in future permanent human settlements in space, for example on the Moon.

IV. Conclusion

The task we have set ourselves in this introductory article is to broadly consider some of the human rights implications of human activity in outer space. In so doing, we have identified that access to space and remote-sensing technologies have implications for the right of everyone to enjoy the benefits of scientific progress and its applications, and other related rights, but also for the right to privacy. The management of space debris and future ambitions for space mining have implications for the principle of intergenerational equity and on the emerging right to a clean and safe environment.

The weaponization and militarization of space have clear implications on the right to life and, more broadly, on the prohibition of the use of force and the principles of international humanitarian law, including the principles of military necessity, proportionality, unnecessary suffering, and distinction. Turning to procedural rights, we also observed that the assertion by States of domestic criminal jurisdiction in outer space raises issues for due process, detention and fair trial rights.

We have written this article using a necessarily broad brush. It, of course, does not represent a complete exposition of human rights law in outer space. Instead, what we hope to have achieved, is to make the point that increasing human activity in outer space does have tangible consequences for human rights law here on Earth and to generate further discussion on this issue. In turn, this may require the development of cohesive and specialist regimes addressing the nexus between human rights and space. We look forward to participating in, and commenting on, the research of others who will look to explore this nexus in more express detail. There is clearly much work to be done in this regard and we hope that these brief thoughts will facilitate further discussion.

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[144] See OHCHR, 'Views: Communication No 204/1986' (1987) UN Doc CCPR/C/OP/2. This is somewhat nuanced under international criminal law, which applies the principle of *ne bis in idem* as between a state and an international criminal tribunal, such as the International Criminal Court; see Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 20.

[145] ICCPR (n 9) art 9 which specifies that '[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

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The Role of Estonian Community Settings for Achieving Independent Living for Persons with Disabilities in Eastern European Countries

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CRPD; ARTICLE 19; INDEPENDENT LIVING; DE-INSTITUTIONALIZATION; CONGREGRATED COMMUTY SETTINGS

Abstract

This article is dedicated to analysing the implementation of Article 19 (paragraphs 'b' and 'c') of the Convention on the Rights of Persons with Disabilities (hereby: the CRPD) in community settings in Estonia and how Estonian experiences can shift the development of independent living and deinstitutionalization in other non-European Union member countries of Eastern Europe. In this regard, this article depicts the details of independent living for persons with mental health problems according to the UN CRPD Committee. Furthermore, the introduction of Maarja Küla (village) SA and its role in providing independent living has been highlighted as well. Finally, the primary obstacles in Eastern European countries ahead of establishing an independent living as well as solutions for the implementation of Article 19 are underlined, and as an author, I have emphasized how to foster deinstitutionalization in the conclusion.

In most congregated community settings where organizational management techniques have relied on the medical model of disability rather than the social model of disability, inhabitants suffer from legal incapacitation in most cases. These community settings had been established before the adoption of the CRPD, but gradually have been developed and adjusted to the fundamental principles of the Convention. In my view, a human rights approach has been emerging in such places, though the UN CRPD Committee has urged to rectify management methods and to promote the social model of disability.

This research paper also aims to describe the current situation in community settings that has arisen following the pandemic and to find out scientific and practical solutions to abolish the remaining elements of the medical model of disability and to substitute the human rights approach towards a social model of disability in the management and philosophical views of community settings for persons with disabilities.

I. Introduction

Before commencing with the gist of the essay, we should first focus on Article 19 CRPD itself. In particular, this essay will look to analyze two paragraphs of Article 19; in this way, advocating for 'living independently' and being included in the 'community of persons with disabilities'. States Parties to this Convention demand to recognize the equal rights of all persons with disabilities to live in the community, with equal choices to others, and take effective and appropriate measures to facilitate full enjoyment for the sake of persons with disabilities and their full inclusion and participation in the community, including by ensuring that:

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> *- Persons with disabilities have access to a 'range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;*
> *- Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs*.'[1]

Unfortunately, the definition of 'independent living' is not determined in the convention accurately. It can be assumed that this term is not deployed in the narrow sense of performing tasks alone and without assistance. However, the CRPD connects the meaning of independence 'to choice and control' while arranging daily living tasks rather than to unassisted functional ability.[2] According to the interpretation of Article 19 (b), if a person needs aid, it should be directed to the empowerment of a person for developing their physical existence and inclusion in the community and to reduce 'isolation or segregation from the community.[3] According to scholarly claimed views, the social model of disability interprets disability as a 'social construct' under discrimination and oppression because it mainly concentrates on an overview of society rather than on individuals.[4]

On the other hand, a precise nomination for settings that can substitute institutions has not been determined yet, usually, it is called either 'community setting' or 'congregated setting'. In my opinion, a legal definition depends on the specific community. Besides that, a principal issue is to focus on 'the will and preferences' of inhabitants. In this way, we should find an answer to the following questions in advance: is this place where they want to live? Have they had a real choice to decide to live in this entity? Are they free to leave based on their will? If the answers to these questions are negative, such settings may be restricting the individual's right to liberty. In this way, the position of Maarja Küla (Maarja Village) has been evaluated from the point of 'community congregated setting' to clarify the purposes of this entity and to give a basic description for readers.

Thus, the first section describes the legal definition of independent living according to the social model of disability as well as the main difference between independent living in the congregated setting or at house setting is emphasized based on Estonian experience.

In the second section, alternatives between community setting and family setting have been compared from the point of Article 19 and Article 25 CRPD. We need to avoid segregation and discrimination based on disability in practical life for persons with disabilities and therefore, we should ensure a certain choice for the best interests of persons with disabilities.

In the third section, the role of individualised support services in community congregate settings are slightly discussed, and social workers in the Maarja Village organization expressed their approach towards distinctions between "in-home" facilities, quality of supplements and services in this village.

In the fourth section, I shared information about Maarja Village and community facilities for persons with disabilities.

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1 Barlet Peter, 'A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention' (2012) 16(6) The International Journal of Human Rights 831.

2 Valentina D Fina, Rachele Cera and Guiseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer 2017) 42.

3 European Union Publications Office, *Choice and control: the right to independent living: Experiences of persons with intellectual disabilities and persons with mental health problems in nine EU Member States* (Luxembourg 2013) 26.

4 Rosemary Kayess and Phillip French, 'Out of darkness into light?' (2008) 8(1) Hum Rights Law Rev 1.

The following section will examine the possible benefits community congregate settings similar to Maarja Küla SA might have for other disability communities.

In the final section, I have noted my personal views on the advantages and disadvantages of the congregated community settings.

II. Independent living according to the CRPD and new models of disability

Disability is observed as a regular difference within the sequence of human variations. In this regard, the social model discerns between impairment and disability. Because the impairment relates to a condition of the body or the mind, disability is the environmental overview which appears as the result of society responding to that impairment.[5] From a political point of view, the segregation of disabled persons from society is considered as the result of obstacles and exclusion.[6]

The human rights model of disability also rejects segregation by society even though there are several key differences between them. Whilst the social model respectively aims to promote disability, the human rights model implicates values for a disability policy that recognize the 'human dignity' of disabled persons. This model merely elucidates why all persons with disabilities have a right to be legally recognized as a person before the law. Furthermore, the social model does not aim to provide moral principles or values as a foundation of disability policy. According to the interpretation of Article 1 CRPD, the aim of the Convention is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."[7]

In Article 19, one of the essential targets of the CRPD has been stipulated which comprises, "the full inclusion and effective participation in society for persons with disabilities that require to respect 'freedom of choice' of persons with disabilities, and 'the principle of control' by themselves over their own lives". Besides that, Article 19 also stipulates States Parties to accept legal obligations to respect and facilitate 'full enjoyment of the primary rights of persons with disabilities.[8] Both the 'social' approach to disability enshrined in the CRPD and the concept of equality (and 'non-discrimination') that underlines the Convention explains the notion and implications of this obligation.[9]

The term 'living independently' in the title of the CRPD, Article 19 does not justify an alleged right of persons with disabilities to be independent, in the sense of living 'a highly individual and self-sufficient life'; namely, a life 'on their own'. Perhaps we can refer to the opinion of one disability studies scholar who observed, "in reality, of course, no one in a contemporary industrial society is completely independent: we live in a state of mutual interdependence', therefore, the dependence of people with disabilities should not be designated as a different personality from the rest of the population."[10]

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5 Anna Lawson and Caroline Gooding, *Disability rights in Europe* (1st edn, Hart Publishing 2007) 85-87.

6 Valentina D Fina, Rachele Cera and Guiseppe Palmisano (n 2) 42.

7 ibid 43.

8 Lawrence Gostin and Lance Gable, 'The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health' (2009) 63 Maryland Law Review, 20.

9 Valentina D Fina, Rachele Cera and Guiseppe Palmisano (n 2) 354-355; See United Nations, Report of the Working Group to the Ad Hoc Committee (2004) A/AC.265/2004/WG/1, Annex I. Final text compiled as adopted (CRP.4, plus CRP.4/Add.1, Add.2, Add.4 and Add.5). See General Comment No. 5 (2017) on living independently and being included in the community.

10 Michael Oliver, 'Disability and dependency: a creation of industrialised societies' in Len Barton (ed), *Disability and dependency* (Falmer Press 1989) 83–84.

III. Optional choice: regular family setting or community living?

We should consider that 'the right to live independently and be included in the community is a relatively 'new' right. In this way, it is difficult to point out the precise indication regarding their optionality. That stipulates importance from the perspective of a proper application of the Convention. This means that the requirement of such recognition would not be satisfied merely by the ratification of the CRPD and the consequential acceptance of Article 19. States Parties should rather provide explicit and formal recognition of the right, principally by including it in their national legislation and rooting it "in a legislative framework which establishes it as a legal right and in changing duties on authorities and service providers, while also allowing for remedy in case of violation."[11]

The notion of 'independent living' is profoundly connected to 'personal autonomy', 'freedom to make choices concerning their own life' and 'run one's life and decisions'. Thus, it does not matter whether the right to independent living is breached either in the family or in the community setting. In this sense, the term is compatible with the Preamble to the Convention, which features, "the significance for persons with disabilities of their 'individual autonomy and independence, the right to make their own choices is included as well". The scope of Article 19 simultaneously seizes the principle of Article 3(a) of the Convention; namely, "respect for inherent dignity, personal autonomy including the freedom to make one's choices, and independence of persons."[12]

We should also note that Article 19 (c) has similarity with and relationship to other provisions such as Article 9 on 'accessibility' which requires States to pass measures to protect equality for persons with disabilities when they need access to a physical environment, to transportation, to information and communication technologies and systems and to other facilities and services that are openly provided to the public.[13] We can add to this list: Article 20 on personal mobility; Article 21, in the part concerning access to information; Article 24, para. 2, on education; Article 25 on health; Article 27 on work and employment; Article 28, in so far as social assistance and social protection services, besides, partly Article 30, that concerning cultural and sporting services; and certainly, Article 5 on 'equality and non-discrimination', specifically para. 3, which requires States Parties to take all appropriate steps to ensure that reasonable accommodation is provided.[14]

One of the decisive issues at stake in Article 19 (a) concerns 'forced institutionalization' and deinstitutionalization. It is well known that high numbers of persons with disabilities all over the world are placed in 'institutions' where they are segregated from their families, communities, and the wider society and where they often suffer under appalling living conditions and human rights abuses.[15] This is antithetical to the main objective of Article 19 which underlines 'community living' that engages the right of persons with disabilities 'to live, participate, and be included in the community and prohibit segregation or isolation from the

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[11] Office of the United Nations High Commissioner for Human Rights, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities* (2009) A/HRC/10/48, 51.

[12] Michael Perlin, 'International Human Rights and Comparative Mental Disability Law' (2008) Carolina Academic Press, 353.

[13] Ruth Townsley, 'The implementation of policies supporting independent living for disabled people in Europe: synthesis report' (2009) Academic Network of European Disability Experts.

[14] Ariene Kanter, *The Development of Disability Rights Under International Law* (Routledge 2015) 134.

[15] Office for Europe of the UN High Commissioner for Human Rights, 'Getting a life – living independently and being included in the community' (Office of the United Nations High Commissioner for Human Rights Regional Office for Europe, April 2012) 75-76 <https://europe.ohchr.org/Documents/Publications/Getting_a_Life.pdf> accessed 17 July 2021.

community'.[16] A strong presumption that the practice of isolating and segregating people with disabilities in long-term institutions thus contradicts with the scope of Article 19. Nevertheless, such a presumption is amplified by the interdiction interpreted in Article 14 of the Convention. Meanwhile, it does not allow any exceptions based on which persons may be deprived of liberty or detained by their actual or perceived disability, including perceived danger to themselves or others.[17]

In this regard, 'institutionalization' could only be accepted from an abstract and theoretical point of view or in cases in which a person with disabilities would sincerely choose to be a resident of a large or small institution, isolating him/her from the family and the community. However, such a choice would stipulate that real options of dispositions of family and community life that are different from living in institutions have been made compatible to the will of the particular person.[18] We cannot deduce a conclusion from the meaning of Article 19 (a) as an obligation on States Parties to prohibit institutionalization. Nevertheless, the correct point is to acknowledge and ensure that persons with disabilities should have effective exercise of the right to live independently and be included in the community. In addition, States Parties must commence and proceed forward a deinstitutionalization process by making living arrangement alternatives to be actually available.[19]

In my point of view, 'congregated community centres' are special types of non-profit organizations that play the role of more than just a rehabilitation centre. For instance, typical medical institutions base their functionality on a medical model of disability. However, congregated community centres like Maarja Küla SA are potential institutions that can fulfil the requirements of the CRPD which is based on a social model of disability in terms of providing an independent living.

According to several authors, effective 'deinstitutionalization requires a systemic approach, in which the transformation of 'residential institutional services' is a unique element of substitution in areas such as 'health care, rehabilitation, support services, education and employment, as well as in the societal perception of disability'.[20] On the other hand, to implement the object and purpose of Article 19 (a), taking all available and measurable steps to carry out the target of deinstitutionalization is a duty of State Parties while displaying all their resources and adopting satisfactory funded strategies with obvious time frames and criteria.[21]

While concluding remarkable concerns about choices in community settings and how far they can substitute family life, I would rather say that it depends on the level of disability and individual choices. For example, in Estonian community settings, inhabitants consider these places as their first homes. However, some of them consider it as a second home for themselves. Nevertheless, there is also a need to conduct rigorous scientific research and to designate precise distinctions between family setting and communities in terms of implementation of independent living, inclusive education and participation in cultural life.

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16 See Valentina D Fina, Rachele Cera and Guiseppe Palmisano (n 2) 295: commentary on Article 14 [Liberty and Security of Person].

17 OHCHR, 'On the outcomes and costs of the process of de-institutionalization' (2014) para 25.

18 Valentina D Fina, Rachele Cera and Guiseppe Palmisano (n 2) 370; See Camilla Parker and Luke Clements, 'The UN Convention on the Rights of Persons with Disabilities: a new right to independent living?' (2008) 4 European Human Rights Law Review 508.

19 Jim Mansell et al, *Deinstitutionalisation and community living – outcomes and costs: report of a European Study. Volume 1: executive summary* (Tizard Centre, University of Kent 2007).

20 Mental Disability Advocacy Center, *Litigating the right to community living for people with mental disabilities: A handbook for lawyers* (OUP 2014).

21 Jim Mansell et al, *Deinstitutionalisation and community living – outcomes and costs: report of a European Study. Volume 2: main report* (Tizard Centre, University of Kent 2007).

IV. Role of Individualised Support Services in Community Congregate Settings

The guaranteeing role of States towards the enforcement of the right to accommodation reflects the social model of disability that sees disability because of barriers in society rather than a person's particular impairment. Thus, the onus falls on the States Parties rather than the person with the disability to take the necessary steps to ensure compliance with the CRPD.[22] By contrast, I imply that representative organizations of persons with disabilities and individuals from disability communities should foster recognition of legal capacity not only in the minds of authorities but also in the mind of the whole society. The philosophical establishment of the Maarja Village and other community settings in Estonia consequently looks to change biased approaches towards disabilities in all Eastern European countries.

The conclusion above is moreover confirmed by subparagraph (b) of Article 19, which requires States Parties to ensure that persons with disabilities have access to, "a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community." This is ultimately the second kind of measure precisely contemplated by Article 19 as necessary to be adopted by States to facilitate the enjoyment of the right of persons with disabilities to 'community living'.[23]

According to requirements of Article 19(b), the 'naturally occurring community support', that is the form of assistance that is provided informally to persons with disabilities by family, friends, or other members of the community, should also be considered within the support services that States Parties are charged to provide incentives- such as social security benefits, allowances, and pension schemes.[24]

Regardless of the type of measure, a State must guarantee 'the existence and accessibility of support services, the measure reasons that such services are to be provided as and to the extent that they are significant to support living and being included in the community and to prevent isolation or segregation from the community'.[25] Nevertheless, support services include 'home assistance' with self-care and housekeeping. But, 'in-home assistance' should not be intended and applied to, "prevent a person from leaving the home when he or she desires and should be complemented, where needed, by other community-based services."[26]

According to several authors, ensuring that non-discrimination is the major principle in all areas of society aligns with the seven other leading principles in Art. 3 of the Convention. Nevertheless, it is considered a firm foundation to establish within the conditions of the implementation of civil and political rights. However, 'the non-discrimination policy' must always be followed up by assertive measures, improving perspectives of the independent living, inclusive education and employment on the regular labour market.[27]

As for all other citizens, three leading issues will repudiate all others when it comes to inclusion in contemporary society for persons with disabilities:

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[22] AS Kanter, *The development of disability rights under international law from charity to human rights* (Routledge 2015) 855–856.

[23] Oliver Lewis and Genevra Richardson, 'The right to live independently and be included in the community' (2020) 69 IJLP; 'The Statement of the Committee on the Rights of Persons with Disabilities on article 14' (issued at the 12th Session of the Committee, CRPD/C/12/2) 14.

[24] OHCHR, *Thematic study on the right of persons with disabilities to live independently and be included in the community* (2014) A/HRC/28/37, para 29.

[25] OHCHR (n 17); General comment No. 5 (n 9) paras 16 (a), 16(b), 16 (c)

[26] General comment No. 5 (n 9) 30.

[27] Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities* (2nd edn, Handicap International 2010) 113–116.

- 'Schooling and education,
- 'Work and employment and
- 'Health'.[28]

Maarja Village provides its inhabitants with education and employment within the community. However, this is segregated education and employment of inhabitants apart from the society.

Equal opportunities in these three aforementioned sectors are essential. Meanwhile, for persons with disabilities ,the following three preconditions for inclusion are equally necessary:

- 'Habilitation and rehabilitation,
- 'Accessibility' and
- 'Personal mobility'.[29]

In Maarja Village, habilitation and rehabilitation services are organized for persons with disabilities and accessibility is provided as far as possible to help inhabitants to accelerate their mobility as well.

V. Practical implementation of Article 19 according to the UN CRPD Committee

Disability rights defenders most of all promulgate to enhance efforts towards deinstitutionalization. The enunciation and implementation of national plans for the prohibition of 'residential institutions' as well as to take on fairly funded strategies have been challenged by the UN CRPD Committee for deinstitutionalization. Furthermore, it has also been stressed that policy processes for deinstitutionalization should have "a clear timeline and concrete benchmarks for implementation which are effectively monitored at regular intervals."[30]

We should also note that besides the requirement on changing policies and measures for the sake of implementing, 'community support services must allow adults with disabilities to live independently on their own accord. Therefore, the Committee has envisaged States Parties to "involve disabled persons' representatives and their families in their tutoring process."[31]

In my opinion, deinstitutionalization itself requires providing accessibility to persons with disabilities with regard to public services in their daily lives. The interpretation of 'inclusiveness and accessibility to public services' as per the scholars covers essential services and facilities provided for in the society and concerns, such as by providing health, vocational education and training, and support in finding employment, social assistance, housing, transportation, information technologies and so on. In addition, Article 19 (c) relates to other

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[28] Valentina D Fina, Rachele Cera and Guiseppe Palmisano (n 2) 367; Committee on the Rights of Persons with Disabilities (n 23) paras 30-32.

[29] Valentina D Fina, Rachele Cera and Guiseppe Palmisano (n 2) 368; Clíona de Bhailís and Eilionóir Flynn, 'Recognising legal capacity: commentary and analysis of Article 12 CRPD' (2017) 13(1) International Journal of Law in Context 6, 9.

[30] Committee on the Rights of Persons with Disabilities, 'Concluding observations on Australia' (2013) CRPD/C/AUS/CO/1, para 42; See CRPD Committee, 'Concluding observations on Azerbaijan' (2014) CRPD/C/AZE/CO/1, para 33; See CRPD Committee, 'Concluding observations on Belgium' (2014) CRPD/C/BEL/CO/1; See CRPD Committee, 'Concluding observations on the initial report of Germany' (2015) CRPD/C/DEU/CO/1, para 42.

[31] CRPD Committee, 'Concluding observations on Belgium' (2014) CRPD/C/BEL/CO/1, para 33; CRPD Committee, 'Concluding observations on China'(2012) CRPD/C/CHN/CO/1, para 32.

provisions of the Convention, such as Article 9, Article 20; Article 21, Article 24 (2), Article 25 on health, Article 2, Article 28 and so on. It should be emphasized that Article 19 (c) requires States to ensure not only that public services are available on an equal basis to persons with disabilities but also that they are retaliatory to their needs.[32] On the other hand, to make it responsive, it will require the representatives of disability organizations to be principal decision-makers who in addition have the right to participate in the planning, development, and implementation of State policies and measures on the subject of accessibility to publicly established services.[33]

To sum up, congregated community settings with representatives of disability organizations should make partnerships with academic institutions and business associations to promote independent living for persons with all types of disabilities as far as possible. Social workers in Maarja Küla SA claim that to enforce full independence for all types of persons with mental health disabilities because of prejudice and perhaps due to their inabilities in certain situations. According to their views, the role of community settings should be an intermediary, namely, we can only connect a person with disabilities with an employer who is looking for cheap products. Unfortunately, in vulnerable cases, employers abuse their cheap workforce to gain more profits. In my view, we should look over the improvement of independent living not only in the context of Article 19, but with other provisions of the CRPD, such as Article 23, Article 24, and Article 30. Maarja Village and other similar communities in Estonia pay attention to Article 30, which tries to provide public facilities to foster participation in cultural and sports activities for their inhabitants. For example, although there is a sports day or circus day out of each week for inhabitants in Maarja Village, it does not mean that they are independent since it is a daily obligation that inhabitants must fulfil every time. Therefore, arbitral procedural community rules prevent achieving full independence for inhabitants as well.

VI. Introduction to Maarja Küla SA. It's a role for providing independent living

Maarja Küla as an organization was founded by Tartu Toome Rotary Club and by Tartu Maarja School on April 7, 2001 to establish a 'home' for persons with intellectual disabilities all over Estonia. There are two essential goals of this organization: the first target is to inform society about the existence and nature of people with intellectual disabilities and the social shortcomings related to their way of life in Estonia. At the same time, providing development and employment opportunities for young people with intellectual disabilities is the second purpose. In this way, the Maarja Küla SA ('kula' means village in Estonian) as an NGO is a community in Southern Estonia, it is home to adults with intellectual disabilities who can enjoy a satisfying and meaningful daily and working life within a community.[34] The people living in the village are not considered customers but residents who organize their living arrangements. Working family members also live with them to facilitate them to cope better in case of need.

This organization stands for supporting the right of people with intellectual disabilities to full life activities and resources. Maarja Küla tries to remain as an independent and economic unit as much as possible. Nevertheless, the offered services in Maarja Küla are implemented by professionals from different fields, and services are gradually developed.

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[32] Maya Sabatello and Marianne Schulze (eds), *Human rights and disability advocacy* (University of Pennsylvania Press 2014) 209.

[33] Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (2013) A/HRC/22/53, para 26.

[34] 'Homepage' (Maarja Küla) <https://maarjakyla.ee/> accessed 17 July 2021.

This organization embraces these values are noted below:

- Everyone is a value;
- Caring and respect;
- Everyone is capable of development;
- Openness;
- A sense of security;
- Cooperation;
- Nature friendliness and awareness.[35]

Maarja Küla (village) rejects the internal hierarchy for people with special mental needs within the community and members of the family have equal rights, they have been provided with proper safe work, working facilities, and areas of responsibility varying according to ability. Besides that, Maarja Küla is a multicultural organization where people are not discriminated against or distinguished because of their origin, religion, social background, sexual preferences or any type of biological or social varieties. This organization is open to new ideas, activities and people. Members of the organization should learn, explore and find ways to turn our ideas into reality. This organization promotes social entrepreneurship, they provide forward-looking feedback with the help of acting, and instructions.

Interviews with two officials of Maarja Küla SA have been conducted to investigate problems of deinstitutionalization in Estonia, and this organization's role for the sake of providing an independent living. This interview is based on six precise questions. The first question was about assessing the role of Maarja Küla SA in providing accessibility for inhabitants, namely, in terms of the implementation of Article 9 CRPD. They briefly answered that Maarja Village has created accessibility to physical facilities for all inhabitants regardless of the type of disability, age or gender. Workshops and living houses are easily accessible, besides that, by the sponsorship of the 'Philip Morris' help, a wheelchair footpath to the forest has been set up too, thus, inhabitants who need physical help during their daily life have the opportunity to get personal assistance from house assistants. Besides, internet access is provided to all inhabitants who can then express their interest.

The second question was: 'How far community living habits can substitute regular family life for adult inhabitants within conditions of the Maarja Küla SA?' According to representatives, their inhabitants (clients) are all grown up individuals with learning disabilities. They have all the rights to live a regular family life. When planning living houses, we took into consideration that there might be inhabitants who would like to live a regular family life – so we planned some rooms bigger than others. State service 'living in the community' that is provided in Maarja Village, has five areas of support:

- Time planning;
- Free time activities;
- Using public services;
- Helping with studies;
- Helping with work or other types of labour activities.

Respondents accentuated that regular family life requires responsibility from grown-up family members, but authorities do not require service providers to give support towards family life. The main goal of the service is to preserve and develop people's everyday life skills, so that he/she could manage their lives as independently as possible in the community environment. In Maarja Village, administrators have created groups for inhabitants who would like to discuss different topics. These groups have been developed by specialists of our rehabilitation

[35] 'What is Maarja Küla' (Maarja Kula) <https://maarjakyla.ee/maarja-kula/> accessed 17 July 2021.

team. Topics include friendship, family, sexuality, community. When inhabitants need more support on these topics, rehabilitation specialists continue with individual work.

Representatives have also stressed that there are key details of 'the person-centred approach in Maarja Küla:

> a) Personal profiles and developmental plans, weekly plans of work. Inhabitants can change their plans if they like to, plans have always been created by inhabitants presence;
> b) Comparing to state service, in Maarja Village there are more assistants per person than service requires;
> c) Rehabilitation plans have been made in spirit to develop personal skills in areas that lead inhabitants to a more independent life and widen their possibilities to be an equal member of society.

In the interview, they evaluated perspectives which they consider distinctive elements of living in Maarja Küla from institutional care. According to their responses, the Maarja Village identifies itself more as a regular Estonian village than an institution. For example, a public bus stop activates in the centre of the village, where daily buses from Põlva to Tartu move every day. Inhabitants live in their family houses like they would live anywhere else in society. The main difference would be that here they can use individual support more frequently. There are also some volunteers from abroad who live in Maarja Village with inhabitants. Their task is also to support village inhabitants in everyday life. Volunteers' presence makes a lot of difference in the village's environment through the creation of community life which would be impossible under institutional restrictions.

To the question of what kind of benefits Maarja Küla offers regarding: 'self-determination and choice'; 'personal and family satisfaction; 'skills development' and 'quality of life: the respondents highlighted that the main principles of villages point out no difference between inhabitants and workers in terms of rights and possibilities Inhabitants are allowed to visit the rehabilitation team regularly during the meetings where they share their thoughts and point of views with the specialists. In every house, there are supportive persons as house assistants who work and live together with inhabitants with the goal of creating a bond where inhabitants are free to share their deepest wills. The rehabilitation team, house assistant and inhabitants create developmental plans together for inhabitants where they mark down goals and choices (long term) from the inhabitants' point of view.

Inhabitants are also included in village life and development. For example, every Monday there are village meetings where village life and development is being discussed. Inhabitants have a right to add their suggestions to improve their life and life in the village in general. Since the beginning of the village, personal development and 'quality of life' have been top priorities for the Maarja community. According to Ly Milkheim and Huko Laanoja: 'We have created a physical environment of work, free time and study that includes workshop buildings, free time facilities, possibilities for personal space'. Additionally, the rehabilitation team of the village, which is dealing with the questions of 'skill development' and 'quality of life' of the people who live there, but also for the disabled persons who do not live there but are merely visiting the village as clients.[36]

The last question was to determine what kind of challenges they foresee regarding 'deinstitutionalization in Estonia. According to experts, wrong decisions from authorities who have precise information and policy concerning the living of persons with learning disabilities is at the forefront. Therefore, the Estonian government should figure out a general

[36] Interview with Ly Milkheim and Huko Laanoja on 12 May 2020.

approach of disability rights organizations towards the deinstitutionalization process and what it actually means from the point of independent living.

In my opinion, we should first evaluate the significance of community settings like the Maarja Küla from a point of equal recognition before the law and effective participation in society. Article 19 is to call on States parties to 'recognize' the equal right of all persons with disabilities to reside in the community with choices 'equal to others.' This right requires banning confining high-functioning persons with disabilities or by excluding sub-groups such as those with intellectual or psychosocial disabilities, those with 'high dependency needs' or those who have 'dangerous behaviour'. It is more convenient for States to extend this right first to those who are 'high functioning'. However, Article 19 does not abandon the 'low hanging dependency' either, therefore, its normative reach is included to all categories without exception, in addition, States must take 'effective and appropriate measures to facilitate 'full enjoyment of the right.[37] In my opinion, while highlighting the definition of 'independent living' we should focus on the notion of 'home' in advance. Medical treatment in psychiatric institutions emanated from a medical model of disability, perhaps, an institution can never substitute 'home' for persons with intellectual disabilities.[38]

From the point of Article 19(a), the notion of a 'home' has been characterized as the 'materialisation of identity' by scholars. According to their approach, it is a physical space that ramifies one's 'personhood', reflects it and provides an auspicious and safe environment for the flourishing of 'personhood'.[39] Furthermore, the home provides a place of repose where the individual can be excluded from the world and, in interaction with 'family and friends and other intimate acquaintances 'develop one's identity' and how an individual approaches the society. The notion of a 'personal privacy'(or 'the reasonable expectation of privacy') , however, seems to be at its most significant when an individual is confined inside the home.

While disclosing the definition and requirements of Article 19, an interesting topic emerges when we discuss the reason behind deinstitutionalization, and how far it is appropriate and effective from the point of the state policy and the CRPD. In this regard, the literal statement of Article 19 calls on States to take 'effective and appropriate measures' to facilitate 'full enjoyment' of the right. However, 'effectiveness' is also affiliated with 'the subjective experience' of the individual. Replacing large institutions with smaller ones will not necessarily be beneficial if the main functional characteristics of larger institutions are not renovated. Therefore, banning large institutions in favour of 'group homes' may not certify being 'effective and appropriate' when imitation remains. In particular, the obstacles to associate the individual, namely, 'qua individual'– to the community are not labelled, meanwhile, the establishment of 'appropriateness' is subject to evaluating the quality of the adopted measures and specifically if they suitable with the outspokenly expressed 'wishes and preferences of the individual.[40]

The practical implementation of deinstitutionalization policy requires 'effective and regular' monitoring with the help of utilization of firm standards and 'measurable human rights-based indicators'. Besides that, budgetary assignments for the progress of community services should follow this implementation process too.[41] In several cases, the CRPD Committee had revealed that despite commitments towards deinstitutionalization, states parties have continued to invest resources for constructing, renovating, and enlargement of institutions. However, Article 19 does not forbid renovating institutions if reasonable balance

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[37] Office for Europe of the UN High Commissioner for Human Rights (n 15) 26.

[38] ibid, 27;Clíona de Bhailís and Eilionóir Flynn (n 29) 11-12.

[39] Iris Young, 'House and Home: Feminist Variations on a Theme' in Dorothea Olkowski (ed), *Resistance, Flight, Creation: Feminist Enactments of French Philosophy* (Cornell University Press 2000) 63.

[40] Camilla Parker and Luke Clements (n 18) 26.

[41] CRPD Committee, 'Concluding observations on the initial report of Kenya' (2015) UN Doc CRPD/C/KEN/CO/1, para 38.

must be protected between rival policy objectives.[42] In this way, it seems that authorities in not only EU countries but also in the rest of the world are not voluntarily willing to abolish psychiatric institutions, probably, the representatives of , authorities who make decisions on behalf of the disability rights lawyers and health practitioners do not have basic knowledge concerning the social model of disability.

VII. Counterargument: what advantages or disadvantages do institutions like Maarja Küla SA can impose on States

Despite the ultimate prohibition of psychiatric institutions by the Convention, we can envisage the provisional benefits of the social institutions that exist in Estonia. Unfortunately, psychiatric institutions continue to serve in several countries. Meanwhile, several countries have adopted deinstitutionalization within a policy that enables adults with disabilities to abandon institutions and to settle down in the community. The disability rights organizations which supported deinstitutionalization have achieved to revise not only the place of treatment inside a community, but they could also change certain 'clinical aspects of treatment' too.[43] In this respect, Arlene S. Kanter noted that 'Custodial care of the poor and insane' has been avoided, while medical professionals apply psychotropic drugs to 'maintain' inhabitants in the community. In addition, although having funding concerns about the escalating costs of institutions, new reformed NGOs provided the necessary impact for the development of 'community-based alternatives' to institutions for people with disabilities in particular countries.[44]

Unfortunately, some community housing programs for people with disabilities have been harmful. Meanwhile, 'community living arrangements' were developed as alternatives to institutions based on the notion that housing and services should be offered together, as is done in institutions. Experts usually refer to it as the 'linear model' or the 'continuum of care model' and this model requires that persons with needed services must be sent to specific 'community living' settings.[45] Thus, to receive the care or rehabilitation services, a person with a disability must move out of his or her own home and must be provided with a room inside a congregate living setting that provides support services.[46]

Article 19 is necessarily connected to Articles 12 and 8 of the CRPD. In this regard, scholars presume that personal development can only exist when 'equal recognition before the law' (article 12) as well as 'awareness and receptiveness to the rights of people with disabilities (Article 8) are inevitably provided. Article 12 stipulates the fundamental right of persons with disabilities 'to exercise their legal capacity on an equal basis with others. Meanwhile, Article 19 (a) CRPD, as well as article 3(a) embarks on 'individual autonomy'.[47] Individual autonomy is tightly affiliated with 'the right to legal capacity' essentially because recognition before the law is one of the decisive elements for making decisions not only regarding 'the place of residence', but also it gives the right to choose with whom to live in a particular house. 'Incapacitation' is one of the primary violations of displaying choice under

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42 CRPD Committee, 'Concluding Observations on the initial periodic report of Hungary' (2012) UN Doc CRPD/C/HUN/CO/1; and UN CRPD Commentary: F.B.Janos.

43 Donal McAnaney, 'Active inclusion of young people with disabilities or health problems' (2012) Eurofound, 56.

44 Michael Stein and Penelope Stein, 'Beyond Disability Civil Rights' (2007) 58(6) Hastings Law Journal 1203.

45 Rosemary Kayess and Phillip French, 'Out of Darkness into Light - Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Hum Rts L Rev 1.

46 Camilla Parker and Luke Clements (n 18) 26.

47 Arlene Kanter, 'The Promise and Challenge of the United Nations Convention on the rights of Persons with Disabilities' (2007) 34 Syracuse J Int'l L & Com 287.

paragraph (a). Contrarily, General Comment No 5 requires guaranteeing 'the right to legal capacity', which is one of the essential obligations of state parties.

The Maarja Küla SA is an alternative institution to psychiatric institutions that enable persons with various mental health problems to rehabilitate themselves and to protect their autonomy. Besides incapacitation, the CRPD Committee has identified several practices and tools that can restrict the choice of persons with disabilities under Article 19(a); for example: directly sending persons to institutional care, or forcibly relocating them to institutions.[48]

Another most encountered limitation of choice by the state while disallowing the development of alternatives to institutions, in this way, authorities apply overcomplicated licensing processes for the private and non-profit sector, perhaps, it causes dominance of residential institutions.[49] Scholars also acknowledge that instead of remaining passive, the State's role is to overcome social, cultural and authoritative barriers.[50] The UN CRPD Committee also included all aspects of a person's living arrangements in the "General comment No. 5 (2017) on living independently and being included in the community", such as one's daily schedule and routine, 'lifestyle', to personal choice, hereby, persons with disabilities must enjoy an effective network of options to enable them to exercise rights as established by article 19.[51]

Besides the aforementioned advantages of Maarja Küla SA and other similar organizations in Estonia, we can see some adversary elements of this organization to the CRPD standards. Article 19 rejects institutions and 'segregated places' because these entities compel control over the daily decisions of inhabitants and are inconsiderate to their individual preferences.[52] The ''General comment No. 5 (2017) on living independently and being included in the community" emphasized that institutions are not determined by size, however, particular crucial elements cause disengage of individual choice and 'personal autonomy' as a result of the enforcement of certain means of subsistence and maintenance.[53] The right to choose is undoubtedly the core of article 19 and 'independent living' is hardly possible in isolated institutions or in 'congregated care facilities', because, such enterprises often restrict opportunities to make choices, besides that, psychiatric institutions based their offer on a 'fixed program' without verifying whether an inhabitant wants to live or to work in a particular place.[54]

While taking into account the requirements of the CRPD Committee concerning the definition of institutions, we can compare institutions with community settings likewise Maarja Küla we can claim that this community setting is located in a remote area covered with forests, and most citizens might not be aware of its existence. Unfortunately, because of poor transportation and for its far location inhabitants do not always have access to communication and making friends from outside. However, we should also take into account that non-disabled persons do not have all facilities to make friends with their peers, especially in a small country such as Estonia, that's why, from my point of view segregated location should not be a serious reason for disqualification, nevertheless, this a special type of scientific question which is difficult to evaluate without broader academic and practical investigation.

'Loss of choice' is the sensitive side of Article 19 can happen also in congregate care but hardly occurs in individualized support, however, there is a need to enable inclusion in

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48 CRPD Committee, 'Concluding observations on the initial report of Belgium' (2014) UN Doc CRPD/C/BEL/CO/1, para 32; CRPD Committee, 'Concluding observations on the initial report of Denmark' (2014) UN Doc CRPD/C/DNK/CO/1, para 42.

49 Tom Shakespeare, *Disability Rights and Wrongs* (Routledge 2006) 32.

50 ibid, *supra* note 127, at 102.

51 CRPD General Comment No 5 (n 9) paras 24,25.

52 Rosemary Kayess and Phillip French *(*n 45) 292, see *supra* note 89; Paul Harpur, *Discrimination, Copyright and Equality: opening the e-book for the print-disabled (Cambridge University Press, 2017) 46.*

53 Rosemary Kayess and Phillip French *(*n 45) 292, see *supra* note 89.

54 ibid.

the person's home or inside 'supported individualized apartment'.[55] The Committee validated that probable violation of 'independent living' might occur even in the persons' family home when a shortage in services causes segregation and being concealed in the family.[56] Therefore, we cannot justify obstacles and regulations that are appeased by authorities for persons who need support in a way in which people without disabilities are not regulated. On the other hand, a choice has direct relevance to the methods of provided support and is related to the existence of options.

To sum up, we should reckon and comprehend what else community settings like SA Maarja Küla can bestow upon something from its' experience. While comparing the benefits of this setting, we should take into account that they provide security, and prevent unnecessary interference in the private life of persons with disabilities which is also protected by Article 8, the European Convention on Human Rights 1950. The ECtHR has prohibited arbitrary interference of authorities, such as mandatory medical treatment. However, community setting is poor to defend a person with disabilities when he/she is arbitrarily taken to the medical institution under the aim of 'to protect health' if a family member or guardian asks for a court about it, despite that the Court has tried to reduce such tendency in *Shtukaturov vs Russia (2008)* case, nevertheless, the domestic laws in Estonia and other neighbour countries are not enough liberal and positive in terms of personal freedom of persons with mental health impairments. In this way, there is a need to conduct long-term scientific research to enhance the role of community settings for replacing substituted decision-making with the supported decision-making mechanism.

VIII. Conclusion

While discussing the advantages and disadvantages of congregated community settings in Estonia such as Maarja Küla SA, we can suggest that this experience can be the model to emulate in countries lacking individualised support in institutions. Some experts claimed that the absence of 'community-based services' is significant for States' to abide by Article 19 as people with disabilities have limited choices regarding their place of residence. This is particularly a widespread problem in countries where institutional and congregate care entities are dominant.[57] Although Article 19 does not tackle deinstitutionalization, its text makes it clear that the closure of institutions is required, together with the development of community-based alternatives. Article 19 emphasizes full inclusion and participation in the community, which can only be achieved when there are no more institutions. As General Comment No 5 makes clear, any support service provided by an institutional form that segregates and limits personal autonomy is not permitted by Article 19(b).[58]

I should also emphasize that the Estonian experience might have convergence and a model law for other countries of Eastern and Central Europe such as Azerbaijan. However, to foster deinstitutionalization and to promote the development of community settings that preserve independent living of persons with mental disabilities, there must be trust between family members or representatives of persons with disabilities.

Unfortunately, the supported decision-making has not been effectively established in these countries as a legal institution. Therefore, consent of family members or guardians is required primarily when moving out inhabitants from institutions to community facilities. On

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55 Rosemary Kayess and Phillip French *(*n 45) 296, see *supra* note 89.

56 CRPD Committee, 'Concluding Observations on the initial report of Gabon' (2015) UN Doc CRPD/C/GAB/CO/1, para 44.

57 Jim Mansell et al (n 21) 26.

58 Maria Pallisera, 'The role of professionals in promoting independent living: Perspectives of self-advocates and front-line managers' (2018) 31(6) Journal of Applied Research in Intellectual Disabilities 1103.

the other hand, I stipulate that it is also important to note authorities in post-communist Eastern European countries are not likely to shut down all institutional settings and fully transfer to community facilities. However, Azerbaijani the Psychiatric Act 2011 still encompasses the medical model of disability, and there is still no development of the deinstitutionalization. [59]

In conclusion, the promotion of independent living requires to have a legal capacity for reform that enables incapacitated persons with mental health problems to make decisions on their behalf regarding their legal concerns. In an actual situation, it is difficult to posit exoneration or to condemn adjudication advantages or disadvantages of congregated community settings for the ameliorating position of persons with disabilities. There is an ultimate need to conduct rigorous research regarding the theoretical and practical challenges of these communities in Eastern European countries to find out obstacles to independent living, supported decision-making and so on. The most convenient model law would have been to repeal guardianship utterly, and to bring forth the formal supported decision-making mechanism in community settings of Eastern European countries including Estonia. In Maarja Village, social workers try to play an informal part in the assisted decision-making, as the Estonian government has not recognized formal support services. In my opinion, it is too early to talk about formal support services, because informal supported decision-making has commenced to be applied recently, we need more time and long practice to start developing 'sprouts' of the official supported decision-making in community settings. There is an urgent need to establish an official support service to foster participation in cultural life for inhabitants with disabilities.

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[59] The Psychiatric Aid Act of Azerbaijan Republic (2011) Articles 11-24.

Environmental Degradation and Human Rights Violation: A Cursory Overview of the Potential of the Existing Frameworks to Hold Multinational Corporations Accountable

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ENVIRONMENTAL DEGRADATION; EXTRATERRITORIAL JURISDICTION; HUMAN RIGHTS ABUSE; MULTINATIONAL CORPORATIONS; REGULATORY FRAMEWORKS

Abstract

It has been reported that an estimated 100,000 multinational corporations (MNCs) account for about a quarter of the global gross domestic product (GDP), generating a turnover which exceeds, by leaps and bounds, the public budget of many countries. Unfortunately, the manner of operation of the ever-expanding MNCs appears to engender rampant environmental degradation and wanton human rights violations in host nations. Even though frameworks aiming to regulate the activities of these corporations are in place, the effectiveness of the said regulatory mechanisms has been vociferously challenged, time and again, by academics and experts across the globe. Drawing on a range of pertinent case law as well as secondary sources, this article attempts to critically explore, and navigate, the extent to which the existing regulatory frameworks have been effective in holding MNCs accountable for their environment and human rights-related transgressions. The article establishes that the extant regulatory mechanisms have, to some extent, however miniscule, helped to promulgate awareness and inculcate environmental and human rights issues into corporate culture. It, however, demonstrates that these frameworks are grossly inadequate owing to the complex nature of the MNCs, the overtly broad and obscure nature of the existing international instruments and the reeking corruption in domestic political and judicial institutions. It recommends the codification of binding documents, backed by adequate compliance mechanisms, and the creation of an International Court having special jurisdiction over all MNCs.

I. Introduction

Over the last couple of decades, the world has witnessed a dramatic development and unprecedented expansion of multinational corporations (MNCs).[1] The 2009 edition of the World Investment Report released by the United Nations Conference on Trade and Development (UNCTAD), recorded a global total of 889,416 MNCs.[2] The global flows of foreign direct investment (FDI) in 2019 amounted to US$1.3 trillion.[3] According to the World Investment Report 2019, even though the FDI flows to developed economies reached the lowest point since 2004, declining by a steep 27 per cent in 2019, the flows to

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1 United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (UNCTAD 2009).

2 ibid.

3 United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2019: Special Economic Zones* (UNCTAD 2019).

developing countries such as those in Africa and Asia remained stable, rising by 2 per cent. The report further suggests that FDI flows to Africa rose by 11 per cent to US$46 billion in 2019.[4] It has been reported that an estimated 100,000 MNCs account for about a quarter of the global gross domestic product (GDP),[5] generating a turnover which exceeds the public budget of many countries.[6] It is therefore hardly surprising that these corporations, which are indubitably the key players and drivers of today's globalised economy, have grown and continue to grow, not only in number, but also in power and influence.[7] However, the continual expansion of MNCs, the massive geographical spread of their operations, and the multiplicity of the activities involved, have evoked environmental and human rights concerns among scholars, experts, activists and, indeed, the general public.

Globalisation, as Shelton notes, has 'created powerful non-state actors that may violate human rights in ways that were not contemplated during the development of the modern human rights movement.'[8] Thus, the operations of MNCs do, many a time, result in extremely detrimental environmental consequences and, consequently, tangible human rights violations.[9] *Ipso facto*, there are several notable frameworks and mechanisms aimed at regulating the activities of these corporations and holding them accountable for the environmental slander and human rights infringement they inflict. But the efficacy of these frameworks has been repeatedly questioned by various esteemed academics and experts, as environmental damage and human rights violations appear to be escalating rather than subsiding, particularly in the developing countries.[10] This has compelled Chesterman to assert that the regulatory frameworks appear an 'illusion … which may be

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4 ibid.

5 United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: Non-Equity Modes of International Production and Development* (UNCTAD 2011).

6 John Mikler, 'Global Companies as Actors in Global Policy and Governance' in John Mikler (ed), *The Handbook of Global Companies* (Wiley-Blackwell 2013) 1.

7 Alison Shinsato, 'Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria' (2005) 4(1) Northwestern Journal of International Human Rights 186; Peter Muchlinski, 'Multinational Enterprises as Actors in International Law: Creating "Soft Law" Obligations and "Hard Law" Rights' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers?* (Ashgate 2010) 9.

8 Dinah Shelton, 'Protecting Human Rights in a Globalized World' (2002) 25 Boston College International and Comparative Law Review 273, 279.

9 Jana Silverman and Alvaro Orsatti, 'Holding transnational corporations accountable for human rights obligations: the role of civil society' (2009) Social Watch < https://www.socialwatch.org/node/812> accessed 28 August 2021; Daniel Augenstein, Alan Boyle, David Cabrelli, James Harrison, Navraj Singh Ghaleigh and Elisa Morgera, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh 2010); Itzhak Ben-David, Yeejin Yang, Stefanie Kleimeier and Michael Viehs, 'Exporting Pollution: Where Do Multinational Firms Emit CO2?' (2020) European Corporate Governance Institute – Finance Working Paper 717/2020 <https://ssrn.com/abstract=3252563> accessed 10 June 2021

10 Alexandra Gatto, *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Elgar 2011); Jan Wouters and Anna-Luise Chané, 'Multinational Corporations in International Law' (2013) KU Leuven Working Paper 129 <https://ssrn.com/abstract=2371216> accessed 14 April 2020; Barnali Choudhury, 'Balancing Soft And Hard Law for Business and Human Rights' (2018) 67(4) International & Comparative Law Quarterly 961; Prasadi Wijesinghe, 'Environmental Pollution and Human Rights Violations by Multinational Corporations' (SSRN 2018) <http://dx.doi.org/10.2139/ssrn.3164142>; Mallika Tamvada, 'Corporate social responsibility and accountability: a new theoretical foundation for regulating CSR' (2020) 5(2) International Journal of Corporate Social Responsibility 1; Nils Muižnieks, 'Multinationals Seem Too Big for Accountability: Switzerland May Change That' (*Amnesty International,* 27 November 2020) https://www.amnesty.org/en/latest/news/2020/11/multinationals-seem-too-big-for-accountability-switzerland-may-change-that/> accessed 29 April 2020.

worse than no regulation at all'.[11] This article, thus, seeks to critically evaluate the effectiveness of the existing frameworks, at the regional, national and international levels, in modulating the operations of the MNCs and rendering them accountable for unethical environmental practices and human rights violations in host States.

To achieve the defined aim, the article, drawing on not only a range of cases and judicial mandates but also secondary sources, briefly explains the term, 'multinational corporations', highlighting some of their key positive and negative economic aspects and prospects. This is followed by an identification and succinct description of some of the general negative impacts of the operations of MNCs on the environment and human rights. Efforts have been made to pinpoint and briefly elucidate the key mechanisms and instruments that are currently in place to regulate the activities of the MNCs. The second part of the article critically explores the extent to which the existing regulatory frameworks have been effective in monitoring the operations of MNCs and holding them accountable for any environmental degeneration and human rights' breaches that they may happen to be involved in, directly or indirectly, in host States. It proposes a couple of measures for the effective monitoring of the MNC operations. Finally, a conclusion, recapitulating the key points, is arrived at.

II. Multinational Corporations and their Impacts

The term, 'multinational corporation' (MNC), also known as 'transnational corporation' (TNC), has been defined as 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.'[12] Drawing on Vernon,[13] Ferdausy and Rahman state that MNCs 'represent a cluster of affiliated firms located in different countries that are linked through common ownership, draw upon a common pool of resources, and respond to a common strategy'.[14] The essence of an MNC, thus, lies in the fact that it establishes offices or factories and operates in several countries (known as the 'host' countries) despite being centralised and headquartered in just one single country (referred to as the 'home' country), where it monitors and coordinates global management.[15] The end goal of MNCs is to make profits.[16] According to Wouters and Chané, a distinctive feature of contemporary MNCs is that they 'have the capacity to flexibly move places of production and assets between countries. They structure management units independently of national borders and lose every tie to a nation state except for the formal nexus of

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[11] Simon Chesterman, 'Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones' (2010/2011) 11(2) Chicago Journal of International Law 321, 324.

[12] UN Sub-commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (26 August 2003) 55th Session UN Doc E/CN.4/Sub.2/2003/12/Rev.2., para 20.

[13] Raymond Vernon, 'Sovereignty at Bay: The multinational spread of U.S. enterprises' (1971) 13 The International Executive <https://doi.org/10.1002/tie.5060130401>.

[14] Shameema Ferdausy and Sahidur Rahman, 'Impact of Multinational Corporations on Developing Countries' (2009) 24 The Chittagong University Journal of Business Administration 111, 115; See also Yao-Su Hu, 'Global or Stateless Corporations are National Firms with International Operations' (1992) 34(2) California Management Review 107.

[15] Gary Z Nothstein and Jeffrey P Ayres, 'The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act' (1976) 10 Cornell International Law Journal 1; Ferdausy and Rahman (n 14); Hu (n 14).

[16] Isabella D Bunn, 'Global Advocacy for Corporate Accountability: Translantic Perspectives from the NGO Community' (2004) 19(6) American University International Law Review 1265; Hu (n 14).

incorporation.'[17] It is further maintained that '[t]his operational fluidity and the ensuing detachedness from domestic bounds are one of the main reasons why national legislators fail to put adequate checks on the power of MNCs, and why MNCs have moved into the focus of international law.'[18]

There is no denying that MNCs have a wide range of socio-economic benefits, and play a pretty significant role in the developmental, technological and financial upliftment of the host nations.[19] This, perhaps, explains why nations adopt aggressive but usually less stringent policies to allure and retain foreign investors.[20] One of the obvious economic benefits of MNCs to host countries is the creation of jobs or the stimulation of domestic employment, which may ultimately enhance the quality of life of domestic employees.[21] Another important benefit is the injection of capital unto the State through FDI, which evidently helps to revitalise an economy through improved productivity, growth, and exports. MNCs may also facilitate the development and/or enhancement of innovative technology, effective business practices, marketing and communication skills, inter alia.[22] It is also known that they create well-paid jobs as well as technologically advanced products, particularly, in developing States that otherwise would not have access to such opportunities.[23] Some Corporations even expand into traditionally State-run sectors, fulfilling governmental functions to some extent by providing infrastructure, housing, and educational and health services;[24] however, it is not being suggested here that such conduct necessarily entails governmental authority. It is also eminently obvious that the presence of the MNCs in the host nations may contribute immensely to the integration of these countries to the global economy through increased exports, trade, and communication.[25]

This is not to suggest that the operations of MNCs do not have any negative economic repercussions for host nations. Some experts have expressed concerns about significant challenges that MNCs could pose for domestic businesses, poignantly their possible decline and disintegration, due to their inability to compete with MNCs, which consequently acquire them at a throwaway price.[26] Again, lack of stringent control measures by host countries may result in tax avoidance or evasion by MNCs, particularly in developing countries.[27] But the most alarming and calamitous aspects of the operations of MNCs, on which this article focuses, are their deleterious impact on the environment and severe violation of human rights in host countries.[28]As Silverman and Orsatti

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17 Wouters and Chané (n 10) 6.

18 ibid.

19 Olivier De Schutter, Jan Wouters, Philip De Man, Nicolas Hachez and Matthias Sant'Ana, 'Foreign Direct Investment, Human Development and Human Rights: Framing the Issues' (2009) 3 Human Rights and International Legal Discourse 137.

20 Wouters and Chané (n 10); Jan Wouters and Cedric Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction' (2009) 40(4) The George Washington International Law Review 939.

21 Nothstein and Ayres (n 15); Ferdausy and Rahman (n 14).

22 Gatto (n 10) 4; Bunn (n 16) 1269; Ferdausy and Rahman (n 14).

23 Ferdausy and Rahman (n 14).

24 Gatto (n 10) 4; See also Bunn (n 16) 1269.

25 Joseph M Grieco and Gilford Jonhn Ikenberry, *State Power and World Markets: The International Political Economy* (Norton & Company 2003).

26 Ferdausy and Rahman (n 14); Sol Picciotto, 'Rights, Responsibilities and Regulation of International Business' (2003) 42 Columbia Journal of Transnational Law 131, 148.

27 Picciotto (n 26); John Stopford, 'Multinational Corporations' (1998) 113 Foreign Policy 12.

28 Silverman and Orsatti (n 9); Stopford (n 27); Aniefiok E Ite, Usenobong F Ufot, Margaret U Ite, Idongesit O Isaac and Udo J Ibok, 'Petroleum Industry in Nigeria: Environmental Issues, National Environmental Legislation and Implementation of International Environmental Law' (2016) 4 American Journal of Environmental Protection 21.

observe, 'the proliferation of investments by multinational enterprises in developing countries over the last decades has had profound social and environmental impacts, to the point where some multinationals have been complicit in gross violations of fundamental human, social, labour and environmental rights.'[29] It is therefore imperative to highlight, concisely yet comprehensively, how and where the operations of MNCs impinge the environment and vilify human rights.

A. Negative Impact of MNCs' Activities on the Environment and Human Rights

One of the major environmental problems caused by the activities of MNCs is air pollution, which usually results from the emission of noxious gases and has colossal health implications.[30] For instance, the unlawful practice of gas flaring creates massive plumes of fire and smoke, releasing a mixture of toxic chemicals which has been linked to increased occurrences of cancer and respiratory ailments.[31]There have also been umpteen incidences of oil spillage and inappropriate disposal of waste, leading to severe and irrevocable pollution of farmlands, wells, streams and rivers, besides the profligate annihilation of thousands of hapless aquatic creatures and the delicate mangrove forests.[32]For example, over the past five decades, the oil-producing host communities in Nigeria's Niger Delta region have, according to Ite and others, 'experienced a wide range of environmental pollution, degradation, human health risks and socio-economic problems as a result of activities associated with petroleum exploration, development and production'.[33] It is asserted that, on average, major oil spills are recorded thrice a month in the Niger Delta, and that about 4,835 oil spills were recorded in the same oil-rich region between 1976 and 1996.[34]Such environmental hazards are usually the direct result of poor environmental, health and safety, and human resource management practices; or sheer negligence.[35]There have been endless complaints of lack of proper maintenance and housing of equipment, and rampant disposal of toxins into the waterbodies by MNCs in implicit and explicit collusion with hoodlums and criminals.[36]

As rural communities (especially in developing countries) rely primarily on fishing and farming for subsistence, and as rivers and streams provide water for domestic uses, most importantly drinking, the pollution of rivers, streams, and farmlands tends to adversely affect not only the environment, but also the health and socio-economic life of the people, as evidenced in the *Anderson et al v WR Grace and Beatrice Foods*[37] and *Wiwa v Royal Dutch Petroleum/Shell*[38] cases. Environmental pollution or destruction, as Shinsato

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29 Silverman and Orsatti (n 9).
30 Shinsato (n 7).
31 ibid 194.
32 ibid 186; Nigerian Environmental Study/Action Team (NEST), *Nigeria's Threatened Environment: A National Profile* (NEST 1991).
33 Ite and others (n 28).
34 Shinsato (n 7).
35 ibid.
36 ibid.
37 *Anderson et al v W R Grace & Beatrice Foods*, 628 F Supp 1219 (D Mass. 1986); See also Lewis Grossman, Robert G Vaughn and Jonathan Haar, *A Documentary Companion to A Civil Action* (Foundation Press 1999); Jonathan Haar, *A Civil Action* (Random House 1995)
38 *Wiwa v Royal Dutch Petroleum/Shell* 226 F.3d 88 (2d Cir. 2000), cert. denied, 532 US 941 (2001); This case will be looked at in more detail later in the discussion.

emphasises, may also compel the local populace to become environmental refugees or environmentally displaced people as they are compelled to leave the contaminated environment for a more habitable place.[39] This was the case during the Bhopal dissaster where a methyl isocyanate gas leak from a Union Carbide plant in Bhopal, India, resulted in the death of over 3,500 people, and exposed more than 550,000 individuals to the poisonous gas.[40] MNCs may directly violate human rights in host nations in other ways such as the employment of children (child labour); the exploitation of their indigenous workforce (e.g., paying low wage); using discriminatory recruitment, training and promotion policies; adopting poor health and safety standards at the workplace; generating undue constant noise; and endangering the lives and health of the local people as a result of the damaged environment.[41] There have also been instances where MNCs have indirectly created incentives for State authorities to violate human rights for business purposes, or financially and logistically supported regimes engaged in human rights violations such as torture and murder as alleged in *Wiwa*.[42]

The aforementioned facts, and other evidence, demonstrate the profound and inextricable link betwen the environment and human rights.[43] It could, in fact, be argued that a safe and healthy environment is an essential requirement for the enjoyment of fundamental human rights, as the polution or destruction of the natural environment of a community always tends to have greater disturbing human rights implications. MNCs' harmful and unethical practices have therefore called for a revitalisation of the concept of Corporate Social Responsibility (CSR), which 'describes the expectation that corporate operations and strategies be conducted "in ways that respect ethical values, people, communities and the environment"',[44] and which encourages the intensification of efforts to hold MNCs accountable for the negative impact of their commercial activities in host countries.[45]

B. Relevant Regulatory and Accountability Frameworks

In order to mitigate potential corporate harms such as those elucidated above, accountability frameworks are needed; and work on building such measures began decades ago.[46] Therefore, before the extent of the efficacy of these regulatory and accountability mechanisms is explored, it is considered expedient to identify and succinctly describe some of the relevant or key ones.

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39 Shinsato (n 7) 188.

40 Edward Broughton, 'The Bhopal disaster and its aftermath: a review' (2005) 4(6) Environmental Health: A Global Access Science Source 1; Clayton R Trotter, Susan G Day and Amy E Love, 'Bhopal, India and Union Carbide: The Second Tragedy' (1989) 8(6) Journal of Business Ethics 439; Ingrid Eckerman, *The Bhopal Saga – Causes and Consequences of the World's Largest Industrial Disaster* (Universities Press, 2005).

41 Wouters and Chané (n 10); Ferdausy and Rahman (n 14); Picciotto (n 26) 148.

42 Wouters and Chané (n 10); *Wiwa* (n 38).

43 Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(2) The European Journal of International Law 613.

44 Bunn (n 16) 1272.

45 ibid; Nancy Lee and Philip Kotler, *Corporate social responsibility doing the most good for your company and your cause* (Wiley 2013); Benedict Sheehy, 'Understanding CSR: An Empirical Study of Private Regulation' (2012) 38 Monash University Law Review 103; Kirsten Stefanik, 'Rise of the Corporation and Corporate Social Responsibility: The Case for Corporate Customary International Law' (2017) 54 Canadian Yearbook of International Law 276.

46 Connie de la Vega, Amol Mehra and Alexandra Wong, 'Holding Businesses Accountable for Human Rights Violations', *Global Policy and Development and Dialogue on Globalization* (Friedrich-Ebert-Stiftung 2011).

As a matter of fact, the initiative to address the accountability of MNCs was begun by the United Nations (UN) in 1972, when its Economic and Social Council ordered a study of the role of MNCs and their impact on the development process as well as on international relations.[47] That request led to the establishment of the UN Centre on Transnational Corporations (UNCTC) in December 1974 as an advisory body.[48] One of UNCTC's aims, as Vega and others note, was to secure 'international arrangements that promoted the positive contributions of transnational corporations'.[49] It completed a first draft of an international code of conduct for MNCs – the UN Draft Code of Conduct on Transnational Corporations in 1990 after its commencement in 1978. The Draft Code was never adopted before the UNCTC's responsibilities were transferred to the UNCTAD in 1993.[50] The prime goals of UNCTAD, which was established by the UN General Assembly in 1964, are to 'maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis'.[51] It also formulates policies that relate to all aspects of development, including trade, investment, transport, finance and technology. The UNCTAD prepares several important reports, including the Trade and Development Report, the Trade and Environment Review, the World Investment Report, and the Economic Development in Africa Report, among others.[52] The year 2000 witnessed the promulgation of the UN Global Compact, a multi-stakeholder initiative committing corporations to respect international principles pertaining to human rights, labour rights, environmental issues, and anti-corruption practices.[53] Mention should be made of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter the Norms) formulated in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights.[54] The Norms were a valuable articulation of obligations of corporations to respect the environment and human rights, for they called for greater accountability of MNCs.[55]

The UN Guiding Principles on Business and Human Rights (hereinafter the Principles), drafted in 2011, too, deserves a noteworthy acknowledgement. It is one of the first UN endorsed instruments that is not only meant to directly address the adverse impacts of MNCs' activities, but also applies to all States and business enterprises. The Principles which were formulated under the leadership of John Ruggie encompass respect for human rights and the environment and other ethical behaviours. States are also required to provide effective access to remedy such as State and non-state-based

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47 UN Economic and Social Council 'The impact of multinational corporations on the development process and on international relations' (28 July 1972) ESCOR 53rd Session Supp 1 UN Doc E/RES/1721(LIII).

48 See Vega and others (n 46) 2.

49 ibid.

50 ibid.

51 UNCTAD, *Guide for Delegates* (2019) UN Doc UNCTAD/ISS/MISC/2019/4 <https://unctad.org/en/PublicationsLibrary/issmisc2019d4_en.pdf> accessed10 June 2020.

52 UNCTAD, 'About UNCTAD' <https://unctad.org/en/Pages/aboutus.aspx> accessed 10 April 2020.

53 'The Ten Principles of the UN Global Compact' (*United Nations Global Compact*) <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 10 June 2020; See also Wouters and Chané (n 10).

54 UN Sub-commission on the Promotion and Protection of Human Rights (n 12).

55 ibid para 15; See also David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97(4) American Journal of International Law 901.

grievance and judicial mechanisms.[56] The International Labour Organisation's (ILO) general regulatory activity also embraces broader issues on social policy and MNCs contribution to the societies in which they operate. The formulation of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing body of the ILO in November 1977 has been quite significant.[57] One of the key goals of the Declaration, as the preamble indicates, is the promotion of the enjoyment of human rights.[58]

Another important body is The Organisation of Economic Cooperation and Development (OECD). Even though the OECD (which currently comprises about 36 member countries) focuses mainly on the promotion and protection of the interests of foreign investment, it has developed guidelines – OECD Guidelines for Multinational Enterprises (adopted by all OECD Member States in 1976) aimed at curtailing the grandiosities and excesses of MNCs.[59] The current OECD Guidelines contain important provisions on human rights, workers and wages, and climate change; besides, it stresses the need for MNCs to behave in a way that is ethical.[60] Also of some significance is the International Trade Union Confederation (ITUC) which seeks to promote and defend 'workers' rights and interests, through international cooperation between trade unions, global campaigning and advocacy within the major global institutions'.[61] Besides, various NGOs have been campaigning for codes of conduct for businesses. Some of such initiatives are, Amnesty International's Human Rights Principles for Companies, the Ethical Trading Initiative, Principles of Global Corporate Responsibility, and many others.[62]

Unfortunately, international and regional frameworks or mechanisms, including those highlighted above, form part of what is commonly known as 'soft law' and are thus not binding on MNCs. This, as it shall be argued and demonstrated later in this discussion, poses a huge challenge in effectively regulating the operations of MNCs and holding them accountable for various excesses and abuses at the international level. For this reason, domestic regulatory frameworks have become very important in the fight against environmental degradation and human rights abuses caused by MNCs. Indeed, each country on earth has its own mechanisms aimed at regulating the operations of MNCs within its jurisdiction and ensuring compliance with its laws. But special mention must be made of the US Alien Tort Claims Act (ATCA) also known as the Alien Tort Statute (ATS).[63] This Act provides district courts with jurisdiction *ratione materiae* for 'any civil action by an alien for a tort only, committed in violation of the law of nations or a

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56 UNHRC 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2001) UN Doc A/HRC/17/31.

57 ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy', ILO Doc. 28197701, OB Vol. LXI, 1978, ser. A, No. 1 (1977), amended by the Governing Body of the International Labour Office at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

58 ibid section 1.

59 Claes Hägg, 'The OECD Guidelines for Multinational Enterprises A critical Analysis' (1984) 3 Journal of Business Ethics 71.

60 OECD, *Guidelines for Multinational Enterprises* (OECD Publishing 2011).

61 'The International Trade Union Confederation (ITUC) is the global voice of the world's working people' (*ITUC CSI IGB*) <https://www.ituc-csi.org/about-us> accessed 20 July 2019; see also Human and Trade Union Rights Committee, 'Countries at Risk Report', International Trade Union Confederation, Brussels (2019).

62 Bunn (n 16) 1288-1289.

63 The Alien Tort Claims Act (ATCA) of 1789,USC § 1350.

treaty of the United States'.[64] Thus, based on the precept of universal jurisdiction for crimes involving the 'law of nations', this legislation presumably entitled US courts to rule on cases involving gross violations of human rights regardless of the location and nationality of the perpetrators and their victims.[65] This was reiterated in *Sosa v Alvarez-Machain* in which the US Supreme Court affirmed jurisdiction for violations of those international norms which are 'specific, universal, and obligatory'.[66] Until 2013, this instrument was exploited frequently by a number of foreign activists and claimants. However, its use was considerably restricted by the Supreme Court in 2013, as it shall be shown later in this discussion.

The important question that should now be addressed is how effective the aforenamed regional, national and international bodies and instruments have been in regulating the operations of MNCs and holding them accountable for their environmental and human rights related transgressions.

III. The Efficacy of Existing Regulatory Frameworks

A. The Strengths/Successes of Extant Regulatory Frameworks

There is not an iota of doubt that significant success has been realised by the existing accountability framework. Many of the structures, including the UNCTC and UNCTAD, have been legitimately successful in furthering understanding of the political, economic, social, and legal effects of the operations of MNCs, and campaigning against the overbearing and unethical behaviour of MNCs.[67] A number of the mechanisms, including the Guiding Principles, have been lauded for successfully creating awareness about the problem and establishing a clear demarcation between State obligations and corporate responsibilities.[68] Other instruments, particularly the OECD Guidelines, provide some form of complaints avenue (e.g., National Contact Points) where proceedings could be initiated against MNCs for non-compliance with the Guidelines. The existing framework, though generally non-binding, may be regarded as a precursor for binding rules. The outcomes of the *Rights and Accountability in Development (RAID) v Das Air* and *Global Witness v Afrimex* cases,[69] which were dealt with by the UK National Contact Point (NCP), merit special mention here. In these two cases, the UK NCP concluded that both Das Air and Afrimex had failed to meet the requirements of the OECD Guidelines, and also affirmed and stressed the need for all UK multinational enterprises to abide by international norms, standards, and conventions, including the

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64 28 US Code § 1350; also cited in Wouters and Chané (n 10) 20.

65 Silverman and Orsatti (n 9); Douglas M Branson, 'Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation' (2011) 9 Santa Clara Journal of International Law 227, 228.

66 *Sosa v Alvarez-Machain* 542 US 692 (2004) 331 F3d 604.

67 See Susan Ariel Aaronson and Ian Higham, '"Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' (2013) 35 Human Rights Quarterly 333.

68 ibid 336.

69 Larry Catá Backer, 'Rights and Accountability in Development (RAID) v Das Air and Global Witness v Afrimex' (2009) 10 Melbourne Journal of International Law; In 2005, RAID lodged a complaint with the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises against Das Air (a UK-registered company), accusing the company of violating certain OECD Guidelines by playing a role in the Ugandan invasion of Democratic Republic of Congo (DRC) territory. In February 2007, Global Witness also filed a complaint against Afrimex (also a UK-registered company) alleging that Afrimex paid taxes to rebel forces in the DRC and that it failed to practice due diligence regarding its supply chain because it sourced minerals from mines that used child labour.

Convention on International Civil Aviation (also known as the *Chicago Convention*)[70] which establishes rules of airspace as well as aircraft registration and safety, security, and sustainability. The UK NCP even went to the extent of adopting UN Security Council *Resolution 1592* as a 'business requirement' that companies operating in the UK must observe despite the fact that the Resolution is intended for nations, not non-state entities.[71] The accused companies, particularly Afrimex offered to formulate a corporate responsibility document under which it would operate in the future. These two decisions of the UK NCP underpin the growing importance of the OECD Guidelines in influencing corporate behaviour across territorial borders, in particular, holding corporations responsible for the actions of third parties in their supply chain if they fail to apply a due diligent check on the said supply chain.

One of the other important triumphs of the existing frameworks has been the outcome of the *Doe v Unocal*[72] case initiated in 1997 in a US court under the ATCA. The case centred on alleged human rights offences perpetrated during the construction of the Yadana pipeline in Myanmar. On September 18, 2002, the US Court of Appeals reversed an earlier decision by a district court and declared that the lawsuit against Unocal could go to trial as it was satisfied that the claimants had presented enough evidence to support their allegations. A jury trial on the claimants' claims of murder, rape, and forced labour was accordingly scheduled for June of 2005. But in March of 2005, Unocal agreed to compensate the aggrieved parties in a historic settlement that ended the lawsuit. Another significant success story of the extant frameworks is the *Wiwa* case which consisted of three separate lawsuits brought by the family of Ken Saro-Wiwa and other Ogoni activists against Royal Dutch/Shell and its subsidiary, Shell Petroleum Development Company of Nigeria Limited (SPDC), in a US federal court under the ATCA.[73] The claimants won several pre-trial rulings.[74] These developments compelled Shell to pay out US$15.5 million out-of-court settlement in early June 2009. Shell also agreed to establish the Kiisi Trust, intended to benefit the Ogoni people in areas such as education, women's programmes, adult literacy, and small enterprise support.[75]

The *MV Erika*[76] oil spill case is also worthy of note. In December 1999, the poorly serviced tanker, *Erika*, sank approximately 50 miles off the coast of Brittany, dumping

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[70] Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, as amended by ICAO Doc 7300/9 (2006).

[71] Statement by the United Kingdom National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: DAS Air (21 July 2008) (Final Statement) <http://www.berr.gov.uk/files/file47346.doc> accessed 20 July 2020; RAID (n 69).

[72] *Doe v Unocal Corp*. 963 F Supp 880 (CD Cal 1997), dismissed in part, 110 F Supp 2d 1294 (CD Cal 2000), aff'd in part, rev'd in part, 395 F3d 932 (9th Cir 2002), opinion vacated and rehearing en banc granted, 395 F3d 978 (9th Cir. 2003).

[73] *Wiwa* (n 38); The plaintiffs accused Shell of colluding with government forces in crimes against humanity and gross human rights violations, including torture and the execution of the ace Nigerian writer and activist Ken Saro-Wiwa and several other activists in 1995.

[74] 'US court backs anti-Shell lawsuit' (*BBC News*, 26 March 2001) <http://news.bbc.co.uk/1/hi/world/americas/1244434.stm> accessed 10 July 2020.

[75] Chris Kahn, 'Settlement Reached in Human Rights Cases against Royal Dutch Shell' (*Global Policy* Forum, 08 June 2009) <www.globalpolicy.org/international-justice/alien-tort-claimsact-6-30/47879.html> accessed 15 August 2019.

[76] Tribunal Correctionnel de Paris (Jugement) No 9934895010 (16 January 2008); see also 'Permanent Commission of Enquiry into Accidents at Sea, 'Report of The Enquiry into the Sinking of the Erika off the Coasts of Brittany on 12 December 1999'; Matthew Saltmarsh, 'French Court Upholds Verdict in Oil Spill', *New York Times* (New York, 30 March 2010) <http://www.nytimes.com/2010/03/31/business/energy-environment/31total.html?> accessed 20 July 2020; BBC, 'France upholds Total verdict over Erika oil spill' (*BBC*, 25 September 2012) <http://www.bbc.co.uk/news/world-europe-19712798> accessed 10 January 2019.

30,000 barrels of oil into the sea, and contaminating about 400km of coastline. This caused a considerable impact, particularly, on the fisheries and tourism businesses in the area. In January 2008, a French Criminal Court in Paris, relying on the relevant legal instruments, found the oil giant, Total (the charterer of the tanker) and related parties (i.e. owners and managers) liable for the damage caused by the incident.[77] Total appealed, but in 2010, a French appeals court upheld the earlier ruling that Total and the related parties were equally responsible for the huge environmental damage caused by the oil spill from *Erika*.[78] Total was fined €375,000 and ordered to pay nearly €200million in damages to the French State, the local fishing industry, and other relevant environmental groups. This ruling, as Saltmarsh notes, has, to a significant extent, caused the European Union to tighten or impose new controls on its maritime safety, including the elimination of single-hull tankers like the *Erika*.[79]

In August 2006, the ship, *Probo Koala*, chartered by Trafigura or its affiliate, offloaded more than 500 tons of toxic waste at the Port of Abidjan, Ivory Coast. This toxic material was then recklessly dumped at various locations in the city and surrounding areas by a local subcontractor. The reckless and unethical disposal of the extremely hazardous material caused serious injuries to tens of thousands of people and severe damage to the environment. In November 2006, legal proceedings involving about 30,000 claimants were filed with the UK courts against Trafigura Limited (a UK company) and Trafigura Beheer BV (a company incorporated in the Netherlands) for their role in the disaster. The claimants argued that the Trafigura group had chartered the ship and had ordered it to proceed with its toxic cargo to the Ivory Coast when they knew or ought to have known that the material aboard was dangerous to human health, and that the local contractor was not properly resourced and was unqualified to dispose of the hazardous substance safely. Trafigura disputed the claimants' allegations; however, in September 2009 the claim was settled out of court before the matter went to trial, without any admissions of liability by Trafigura.[80] It should however be mentioned that the Ivorian domestic legal system's handling of this case was quite disappointing as it shall be shown later in this discussion.

BP has also been ordered by US courts to pay billions of dollars in compensation for the 20 April 2010 explosion from its Deepwater Horizon Well off the coast of Louisiana that killed 11 workers, releasing an estimated 4 million barrels of oil into the Gulf, and causing widespread environmental damage including the crippling of the fishing and seafood industry and regional tourism. It is reported that hundreds of lawsuits, many of which are class actions, have been and are still being filed with US

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77 Tribunal Correctionnel de Paris (Jugement) N° 9934895010 (16 January 2008); Saltmarsh (n 76); BBC (n 76).

78 Cour d'Appel de Paris (Jugement) Pôle 4, Chamber 11E, RG n° 08/02278 (30th March 2010).

79 Saltmarsh (n 76).

80 Amnesty International and Greenpeace, *The Toxic Truth: About a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire* (Amnesty International Publications 2012); see also Jennifer A Zerk, 'Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas' (2010) Corporate Social Responsibility Initiative, Harvard University Working Paper 59 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper> accessed 10 April 2020.

courts against BP under various relevant domestic human rights and environmental legal instruments such as the Clean Water Act and Oil Spill Pollution Act.[81]

In a limited number of cases, developing countries have been able to hold parent companies liable for the environmental and human rights transgressions of their subsidiaries, using domestic legal frameworks. For instance, following the Bhopal disaster in 1984, Union Carbide Corporation (UCC) was sued by the Government of India.[82] In 1988, the Madhya Pradesh High Court upheld a district court's ruling that lifted the corporate veil of Union Carbide India Limited (UCIL) and held UCC liable for the operations of UCIL and for the mass disaster.[83] The court found, inter alia, that UCC held more than one-half of the voting power of UCIL, empowering it not only to elect the board of directors but to control the management. It thus concluded that UCC '"had real control over the enterprise which was engaged in carrying on the particular hazardous and inherently dangerous industry at the Bhopal plant and as such [UCC] was absolutely liable (without exceptions) to pay damages/compensation to the multitude of gas victims"'.[84] In 1989, UCC welcomed and acted on the Supreme Court of India's directive to pay US$470 million in compensation.[85] There were, of course, several petitions filed with the Indian Supreme Court to challenge the settlement, which many viewed as a pittance, considering the enormity of the tragedy.[86] In June 2010, seven UCIL former local employees, including the former UCIL chairman, were prosecuted and convicted in the District Court of Bhopal, India, of criminal negligence and sentenced to two years imprisonment and a fine of US$2,000 each, the maximum punishment allowed by Indian law. However, the sentence imposed on the accused has been slammed as being too lenient.[87] Warren Anderson, the CEO of UCC, was also charged with manslaughter (culpable homicide) by Indian authorities. Formal requests issued for his extradition were declined by the US authorities, citing a lack of evidence.[88]

Clearly, the various frameworks have helped to introduce environmental and human rights issues into corporate culture. They have led to the proliferation of a wide

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81 US District Court, Southern District Texas, In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2185; US District Court Eastern District of Louisiana, In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, MDL No. 2179; See also Stephanie Theodotou, 'Corporate Liability and Compensation Following the Deepwater Horizon Oil Spill: Is There a Need for an International Regime?' (2018) 6(1) Groningen Journal of International Law 161; Campbell Robertson and Clifford Krauss, 'BP May Be Fined Up to $18 Billion for Spill in Gulf', *The New York Times* (New York, 4 September 2014) <http://www.nytimes.com/2014/09/05/business/bp-negligent-in-2010-oil-spill-us-judge-rules.html?_r=0> accessed 10 June 2019; Margaret Cronin Fisk, Lauren Brubaker Calkins and Jef Feeley, 'Worst Case: BP Ruling on Gulf Spill Means Billions More in Penalties', (*Bloomberg LLP*, 4 September 2014) <http://www.bloomberg.com/news/articles/2014-09-04/bp-found-grossly-negligent-in-2010-gulf-of-mexico-spill> accessed 7 June 2020; Rachel Clingman, 'Liability Issues Surrounding the Gulf Coast Oil Disaster', A testimony before the Committee on the Judiciary, United States House of Representatives (27 May 2010).

82 Trotter and others (n 40); Eckerman (n 40); Peter Muchlinski, 'Group Liability and the Multinational Enterprise' (Paper presented at the University of Warwick Workshop on Corporate Control and Accountability, 30 June – 2 July 1991).

83 *Union Carbide Corp v Union of India*, No 26/88 at 91, Madhya Pradesh HC (4 April 1988).

84 Tim Covell, 'The Bhopal Disaster Litigation: It's Not over Yet' (1991) 16(2) North Carolina Journal of International Law and Commercial Regulation 279, 287.

85 *Union Carbide Corporation v Union of India* (1989) SCC (2) 540; see also Covell (n 84); Eckerman (n 40); Muchlinski (n 82).

86 See Covell (n 84).

87 BBC, 'Bhopal trial: Eight convicted over India gas disaster' (*BBC News*, 7 June 2010) <http://news.bbc.co.uk/2/hi/south_asia/8725140.stm> accessed 20 June 2019.

88 John V Vilanilam, *Public relations in India: new tasks and responsibilities* (SAGE 2011).

range of private sector and market-driven initiatives to promote corporate social responsibility (CSR).[89] It has been reported that a growing number of corporations are not only formulating but also implementing specific environmental and human rights policies.[90] The Business and Human Rights Resource Centre asserts that over 240 enterprises have formulated their own guidelines, and more than 5200 corporations are listed as active members of the UN Global Compact.[91] Following the emergence of the MNCs accountability frameworks, a new category of 'ethical investment' seems to have gained momentum, 'leading stockbrokers and shareholding funds to scrutinize the business practices of companies in their portfolios.'[92] Besides, many CSR-oriented indexes have emerged, including the *Financial Times* 'FTSE4Good' programme, which was launched in 2001 and measures the performance of companies that meet globally-recognised corporate responsibility standards, and facilitates investment in those companies.[93] Such campaigns can go a long way to induce MNCs to behave in an ethical manner, as environmental and human rights abuses can be costly for them (MNCs) in terms of attracting and/or retaining customers, employees, and other stakeholders.[94] Thus, '[t]ried in the court of public opinion, they can suffer considerable reputational and financial damage through strikes and boycotts as well as loss of investor and consumer confidence.'[95]

Today, the Global Compact 'counts more than 10,000 participants from over 130 countries, making it the largest non-binding corporate responsibility initiative world-wide';[96] and companies are encouraged to submit an annual report on the implementation of the framework's ten principles. Even though such reports are not subject to any review mechanism and have consequently been labelled a mere public relations exercise, no one can discredit the policy's contribution to discouraging MNCs from violating acceptable standards.[97] It appears that the MNCs accountability frameworks that have been more successful, particularly in developed countries, are those at the local or national level. As a matter of fact, most of the international MNCs accountability instruments rely on domestic implementation and enforcement mechanisms. This role was most clearly expressed in the Charter of Economic Rights and Duties of States (CERDS) of 1974;[98] and as Bunn agrees, 'the adoption, implementation, and enforcement of laws at the *national* level will remain paramount in governing corporate behaviour.'[99] It is evident from the discussion so far that some of the existing frameworks have been quite effective in getting corporations to operate and behave in an ethical manner, and holding them accountable for environmental and human rights-related misconducts.

B. The Weaknesses/Failures of Regulatory Frameworks

89 Bunn (n 16) 1287.
90 Silverman and Orsatti (n 9).
91 ibid.
92 Bunn (n 16) 1289-1290.
93 ibid.
94 See Picciotto (n 26).
95 Wouters and Chané (n 10) 21.
96 ibid 19.
97 ibid.
98 Charter of Economic Rights and Duties of States (adopted 12 December 1974) UNGA Res 3281 (XXIX).
99 Bunn (n 16) 1293-1294.

Despite the important successes achieved by the existing accountability frameworks, there are enough evidence and data that demonstrate that their efficacy is far from satisfactory. A 2013 study by Aaronson and Higham shows little impact of the existing frameworks, including the Guiding Principles, on corporate practices so far.[100] One key challenge in effectively regulating the operations of MNCs and holding them accountable for human rights violations and environmental damage is the fact that there is no binding international law under which a multinational corporation can be formed and have legal existence in various nation-states.[101] As Hu observes, even the European Union, 'arguably the most integrated group of nations in the world, has so far, after many years of discussion, failed to agree on the legal basis for a European company'.[102] Thus, existing international human rights law and international environmental law, as Augenstein and others note, generally do not directly impose obligations on MNCs to protect human rights and the environment.[103]This, obviously, is due to the difficulty in ascribing international legal personality to them.[104]At present, corporations, including subsidiary companies, can only be formed under domestic law, and thus acquire the nationality or domicile of the host State or the country under whose law they are incorporated.[105] But the major problem here is succinctly expressed by Hu in these words:

> The separate legal personality of the parent and its subsidiaries means that the parent is not automatically held liable for its subsidiary's liabilities. The concept of limited liability applies to any shareholder, whether that refers to a private individual or a parent corporation. This means that the global enterprise is able to hide behind the legal principles of separate legal personality and limited liability to avoid taking responsibility for the actions of a subsidiary that it owns and controls.[106]

The Bhopal disaster case lends credence to Hu's observation. Between 1986 and 2016, victims of the disaster and affected families who believe justice has not been served, on multiple occasions, brought class action lawsuits against UCC (which held 50.9 per cent shares of UCIL) in the US courts under the ATS.[107] The claimants argued and demonstrated on each occasion that UCC designed the Bhopal plant, and was intimately and actively involved in every aspect of the building or installation process and management of the waste disposal systems that caused the pollution. It was therefore partly, if not fully, liable for the 1984 tragedy and the water pollution that the company's chemical plant continues to cause in the community.[108] But UCC contested that argument, insisting that it had no role in operating the plant at the time of the disaster as the factory was owned, operated, and managed by UCIL, a separate entity.[109] Claims

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[100] Aaronson and Higham (n 67).
[101] Hu (n 14).
[102] ibid 115; See also Zerk (n 80).
[103] Augenstein and others (n 9); See also Antonio Cassese, *International Law in a Divided World* (OUP 1986).
[104] Silverman and Orsatti (n 9); Wouters and Chané (n 10).
[105] Hu (n 14); Muchlinski (n 82).
[106] Hu (n 14) 115.
[107] Covell (n 84).
[108] Narayan Lakshman, 'U.S. court rules in favour of Union Carbide' *The Hindu* (Chennai, 31 July 2014) <https://www.thehindu.com/news/international/U.S.-court-rules-in-favour-of-Union-Carbide/article11181105.ece> accessed 20 July 2020.
[109] The Associated Press, 'Company Defends Chief in Bhopal Disaster', *The New York Times* (New York, 2 August 2009) <https://www.nytimes.com/2009/08/03/business/global/03bhopal.html?r=1&html> accessed 20 July 2020; Prasenjit Bhattacharya, 'Court Rules Union Carbide Not Liable in Bhopal Case' *The Wall Street Journal* (New York, 28 June 2012)

filed with US courts were persistently dismissed and/or redirected to Indian courts on the grounds that UCIL was a standalone entity of India, and that UCC is not liable for the disaster. In 2016, the US Court of Appeals, in *Sahu et al v UCC* (also known as *Sahu II*), upheld an earlier decision of a district court that UCC was not liable for any plant site pollution effects arising out of the Bhopal tragedy.[110]

Rights and duties are two sides of the same coin,[111] but despite the fact that multinational corporations enjoy substantial amount of rights, they do not seem to have any binding obligations at the international level,[112] making it extremely difficult to hold them responsible and accountable for any involvement that they may have in environmental degradations and human rights violations.[113] It has, for instance, been established that since 1995, over 370 bilateral and multilateral trade agreements have been signed and over 1,500 bilateral investment treaties have been concluded, involving almost all of the world's major economies.[114] It has also been noted that under the European Convention of Human Rights (ECHR), companies enjoy a right to a fair and public hearing by an independent and impartial tribunal, access to a court, equality of arms, and reasonable length of the proceedings, among others.[115] But unfortunately, these instruments and agreements, as Silverman and Orsatti note, 'confer supra-national rights on corporations, without granting corresponding rights to the people who may be adversely affected by their actions.'[116]

As MNCs incur no direct legal obligations under international human rights law, no concrete enforcement mechanism under international law exists. The relevant existing international frameworks, therefore, often require States themselves to regulate and monitor corporate activities harmful to human rights and the environment, and to enforce these regulations in case of corporate violations.[117] But since MNCs operate beyond State boundaries, State regulation of their activities is usually inadequate. This inadequacy is made worse by the fact that there appears to be no consensus on the concept of corporate nationality (i.e. whether by place of registration, by the location of its headquarters, or by the place of origin of its founders).

Indeed, one of the corollaries of the expansion of MNCs, and of globalisation 'is that assertions of extraterritorial jurisdiction in private law cases, also referred to as "civil cases," are now commonplace'.[118] The presence of complex cross-border networks of multinational corporate groups makes it necessary and reasonable for courts to

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<https://www.wsj.com/articles/SB10001424052702303561504577493642502980690> accessed 20 July 2020.

110 *Jagarnath Sahu et al v UCC and Madhya Pradesh State* No. 07 Civ. 2156 (JFK), (30 July 2014).

111 Nick Mabey, 'Defending the Legacy of Rio: The Civil Society Campaign against the MAI' in Sol Picciotto and Ruth Mayne (eds) *Regulating International Business: Beyond Liberalization* (Macmillan 1999) 60.

112 See Cassese (n 103); José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 Santa Clara Journal of International Law 1; Muchlinski (n 7).

113 Lori F Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials* (West Academic Publishing 2001); see also Silverman and Orsatti (n 9).

114 Rudolph Adlung and Martin Molinuevo, *Bilateralism in Services Trade: Is There Fire Behind the (BIT) Smoke?* (World Trade Organization 2008); see also Silverman and Orsatti (n 9).

115 *Sovtransavto Holding v Ukraine* App no 48553/99 (ECtHR, 25 July 2002) 95; *Silvester's Horeca Service v Belgium* App no 47650/99 (ECtHR, 4 March 2004); see also Wouters and Chané (n 10).

116 Silverman and Orsatti (n 9).

117 Augenstein and others (n 9).

118 Zerk (n 80) 144–145.

occasionally 'take jurisdiction over foreign parties, or foreign activities or both, in order to hear and determine a case.'[119] Thus, courts may assert extraterritorial jurisdiction directly over the foreign conduct of corporations, provided certain criteria are satisfied. But, as Zerk points out, the 'challenge for domestic legal systems, is to manage this in a way: (a) that is fair to the parties; and (b) that takes proper account of the sovereign interests of other states.'[120] It is worth mentioning that the rules or principles governing the use of civil jurisdiction are derived from domestic law; and each State usually acts unilaterally in developing these rules.[121] This makes the exercise of extraterritorial civil jurisdiction by individual States very complex and cumbersome. MNCs accused of misconducts and dragged to the courts have often employed the ostensibly sacrosanct *forum non conveniens* doctrine to evade accountability or sanctions.

Interestingly, it appears that, with the sole exception of *Doe*[122] and *Wiwa*[123] (where out-of-court settlements were secured), all the lawsuits that have been filed against MNCs by 'alien' claimants under the ATS since 1992, have been unsuccessful. Baue asserts that, between 1993 and 2006, NGOs such as the International Labour Rights Fund, the Centre for Constitutional Rights, and EarthRights International filed 36 lawsuits against multinational companies under the ATS in US district courts, alleging corporate complicity in human rights abuse and other offences. But disappointingly, to date, not a single company has been found guilty under the ATS. He notes that of the 36 cases presented, 20 were dismissed.[124] Silverman and Orsatti explain that 'some of those cases were dismissed on the grounds that the crimes committed did not fall within the scope of the law (which only applies to violations of "specific, universal and obligatory" norms such as those against torture, genocide, crimes against humanity, and summary executions)'.[125]

One notable case that has been dragging on for over two decades is *Esther Kiobel v Royal Dutch Petroleum/Shell,*[126] which was initiated at a US district court and is currently being dealt with at the Court of the Hague.[127] In this case, Esther Kiobel and 11 other individuals filed a class action lawsuit with a US district court under the ATS, accusing the Royal Dutch Petroleum/Shell, and SPDC, of being complicit in gross violation of fundamental human rights. The claimants allege that their lawful protests and campaigns against the environmental damage caused by oil extraction in their region were violently suppressed by agents of the Nigerian government, either in conspiracy with the SPDC and its affiliated businesses, or at the SPDC's own behest. They also accuse the defendants of causing the destruction of their property, forcing them to flee Nigeria for their lives, and subjecting their family members to arbitrary arrest and detention, torture and extrajudicial killings. One of the core legal questions that the US courts had to address in this case was whether, and under what circumstances, the ATS provides jurisdiction over claims brought against corporations for violations that occurred on foreign sovereign territory. The Court of Appeals for the Second Circuit, on September 17, 2010, upheld the District Court for the Southern District of New York's earlier

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[119] ibid.
[120] ibid 145.
[121] ibid.
[122] *Doe* (n 72).
[123] *Wiwa* (n 38).
[124] Bill Baue, 'Win or Lose in Court' (2006) Business Ethics, Summer; see also Silverman and Orsatti (n 9).
[125] Silverman and Orsatti (n 9).
[126] *Esther Kiobel v Royal Dutch/Shell* 621 F3d 111 (2d Cir 2010); *Esther Kiobel v Royal Dutch Petroleum Co*, 133 SCt 1659 (2013).
[127] *Esther Kiobel v Royal Dutch Shell Plc* (Court of Justice of the Hague) [2019] ECLI:NL:RBDHA: 2019:4233.

dismissal of the claim, stating that the ATS does not provide jurisdiction over claims for violations of international law committed by corporations and not individual persons.[128]In June 2011, the claimants filed a petition of *certiorari* with the US Supreme Court; but in April 2013, the Supreme Court held that the ATS has no extraterritorial application. It reasoned that

> [N]othing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "any civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.[129]

The Court further explained that claims about conducts that occurred outside the US filed under the ATS must 'touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application.'[130] Applying this standard to the facts of the *Kiobel* case, the Court dismissed the claims against Royal Dutch/Shell. Thus, the alleged misconduct of the defendants (who are foreign corporations) occurred outside the US, but the defendants 'mere corporate presence' in the US, in the court's reasoning, did not sufficiently 'touch and concern' the territory of the US to displace the presumption against extraterritoriality.[131] Evidently, the court's formulation, as Justices Alito and Thomas admit, 'leaves much unanswered.'[132] Thus, the pronouncement is pretty vague, as it provides little guidance about the meanings of phrases such as, 'touch and concern' and 'sufficient force'. Justice Breyer proposes three conditions or circumstances under which the ATS may justifiably be invoked. He states: 'I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest'.[133]Unfortunately, this attempt at clarifying the court's controversial pronouncement has been far from helpful, as the third condition raises more questions than it answers. Therefore, these and other similar questions that arise from the judgement must, as Hoffman notes, await further consideration.[134]

There is no doubt that the US Supreme Court's decision in *Kiobel* does not represent an unequivocal ban on all extraterritorial applications of the ATS as some have

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[128] *Kiobel* (n 126) – The suit alleges that Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), provided transport to Nigerian troops, allowed company property to be used as staging areas for attacks against the Ogoni and provided food to the soldiers and paid them. The plaintiffs claimed the defendant companies were complicit in the commission of torture, extrajudicial killing and other violations pursuant to the Alien Tort Claims Act (ATCA).

[129] ibid para III; see also Julia Zebley, 'Supreme Court Rules against Extraterritorial Application of Alien Tort Statute' (*Jurist*, 17 April 2013) <https://www.jurist.org/news/2013/04/supreme-court-rules-against-extraterritorial-application-of-alien-tort-statute> accessed 20 August 2020.

[130] *Kiobel* (n 126).

[131] ibid.

[132] ibid [1670] (Alito J).

[133] ibid [1671] (Breyer J).

[134] Paul L Hoffman, 'Kiobel v Royal Dutch Petroleum Co.: First Impressions', (2013) 52(28) Columbia Journal of Transnational Law 28.

suggested.[135] However, it makes its use by prospective foreign claimants exceedingly and implausibly difficult. Even though the Court stressed that the presumption against a statute's applicability to extraterritorial conduct governed the ATS, it did not rule out the possibility 'that some tort claims arising under the law of nations could displace that presumption, so long as those claims "touch and concern the territory of the United States" with "sufficient force."'[136] Thus, in the view of the Court, for a claim to be sufficient to displace that presumption, it would have to do more than merely 'touch and concern' the territory of the US. The problem, however, is that the Court did not formulate any test for determining whether or not a claim's connection with the territory of the US has 'sufficient force'. In fact, Justice Kennedy emphasised the possibility of some claims displacing the presumption against extraterritoriality in his concurring opinion.[137] Corbett argues that '[h]ad the Court intended to foreclose foreign-conduct human rights litigation, it could have done so more clearly'.[138] Thus, the fact that the Court carefully chose vocabulary or phrases such as 'touch and concern' and 'sufficient force' discredits any view that '*Kiobel* represents an absolute bar to suits for international law violations committed in the territory of a foreign sovereign, even if some preparatory conduct occurred in the United States'.[139]

The decision in *Kiobel* brought an unceremonious, almost automatic, end to *Sarei v Rio Tinto*.[140] In the *Sarei* case, the residents of the island of Bougainville in Papua New Guinea filed a class action lawsuit with a US court against Rio Tinto (a British mining corporation operating in about 40 countries) under the ATS in 2000, alleging various human rights violations and environmental extirpation caused directly or indirectly by Rio Tinto. After a long legal battle, the US appeals court, on 28 June 2013, dismissed the case, citing the Supreme Court's reasoning (concerning extraterritorial application of the ATS) in *Kiobel*.[141] Indeed, the decision that the ATS could not be used to sue corporations for violations of international law dealt a substantial blow to international law and its undertaking to protect fundamental human rights.

Traditionally, the courts of common law countries, such as the UK, have been very cautious about handling claims against a foreign party (foreign entity) as such proceedings come with a heavy price and may also interfere with the sovereignty of the country where the trial should ordinarily have taken place.[142] In the UK, the Civil Procedure Rules,[143] and the Supreme Court's (previously, the House of Lords) decision in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran*[144] suggest that permission for commencement of proceedings against a foreign party (commonly known as service out of the jurisdiction) will be granted by the courts only if the claimant convinces the courts that the issue to be tried is exceptionally serious and that the UK courts are the most

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[135] Christopher A Whytock, Donald E Childress, Michael D Ramsey, 'Foreword: After Kiobel – International Human Rights Litigation in State Courts and Under State Law' (2013) 3(1) UC Irvine Law Review 1; Paul Hoffman and Beth Stephens, 'International Human Rights Cases Under State Law and In State Courts' (2013) 3(1) UC Irvine Law Review 9; Roger P Alford, 'The Future of Human Rights Litigation After Kiobel' (2014) 89 Notre Dame Law Review 1749.

[136] Ross J Corbett, 'Kiobel, Bauman, and the Presumption Against the ExtraTerritorial Application of the Alien Tort Statute' (2015) 13(1) Northwestern Journal of Human Rights 50.

[137] *Kiobel* (n 126) at [1669] (Kennedy J) and at [1673] (Breyer J).

[138] Corbett (n 136) 56.

[139] ibid.

[140] *Alexis HolyweekSarei et al v Rio Tinto Plc*, 9th US Circuit Court of Appeals, No. 02-56256 (2011).

[141] See Jonathan Stempel, 'Rio Tinto wins end to human rights abuse lawsuit in US' (*Reuters* , 29 Jun 2013).

[142] See Zerk (n 80).

[143] The UK Civil Procedure Rules, CPR 6.20 and 6.21.

[144] *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL).

appropriate forum for determining the matter.[145] However, the discretion of the UK courts to accept or refuse to take jurisdiction over litigations concerning foreign parties has, undergone a quasi-alteration pursuant to the Brussels Regulation,[146] as evident in *Owusu v Jackson*.[147] Zerk succinctly summarises the relevant portion of the pronouncement of the European Court of Justice (ECJ) as follows:

> Now, where the defendant is resident in another EU member state and the matter falls within the scope of the one or more of the Brussels regime jurisdictional rules, service of process on that party is a matter of right and is not up to the court's discretion. The Brussels regime also removes the ability of the UK courts to decline jurisdiction on the basis of *forum non conveniens* where one of the defendants is domiciled in the UK, even where the alternate jurisdiction is not a state party to the Brussels regime.[148]

There is no question that the ECJ's ruling in *Owusu* significantly influenced the UK courts' decision to grant permission for the claims against the Trafigura group, and Vedanta Resources and its Zambian subsidiary to be tried in the UK.[149] For instance, in the *Vedanta* appeal case,[150] the Supreme Court accepted jurisdiction on the grounds that Vedanta was incorporated and domiciled in the United Kingdom and therefore Article 4 of the Recast Brussels Regulation was applicable; that the claimants' pleaded case and supporting evidence disclose real triable issue against Vedanta; and that even though it did not believe that The United Kingdom was the ideal place wherein the claim should be brought, it was convinced that there was a real risk that the claimants would not obtain access to substantial justice in the Zambian jurisdiction (both in the High Court and in the Court of Appeal).[151] In *Okpabi v Royal Dutch Shell* (where the issues addressed are strikingly similar to those of *Vedanta*), a further question that needed clarification was raised – the question of whether even if the courts accepted jurisdiction, the cause of action asserted would have a real prospect of success or whether there was any real issue to be tried in the first place. The Court of Appeal appeared to have based their decision on a principle that a parent company could never incur a duty of care in respect of the activities of a subsidiary by maintaining group-wide policies and guidelines; but the Supreme Court disagreed. After critically considering the pleaded case, the Court decided that it disclosed an arguable claim, and consequently allowed the appeal.[152] It, however,

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[145] ibid; CPR (n 143).

[146] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Regulation'), 22 December 2000.

[147] C-281/02 *Andrew Owusu v Jackson et al* [2005] ECR I-01383; European Court of Justice (Grand Chamber) ruled that proceedings may not be stayed by UK courts on the basis of *forum non conveniens* where at least one of the defendants is domiciled in the UK, as this would be inconsistent with the stipulations of the Brussels Regulation.

[148] Zerk (n 80) 149.

[149] *Owusu* (n 147); *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2019] UKSC 20; This case concerns approximately 1,826 poor Zambian citizens who live in rural farming communities and are reliant on open bodies of water for drinking and irrigation for their crops. They allege that their health and farming activities have been damaged as a result of the defendants/appellants' (Vedanta and its subsidiary, KCM) discharge of toxic matter from a mine KCM was operating into those waterways from 2005 onwards.

[150] *Vedanta* (n 149).

[151] ibid.

[152] *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3.

needs to be emphasised that the Regulation's scope of application, as Croser and others observe, is limited to European defendants. Consequently, 'residual jurisdiction over non-EU entities, including foreign subsidiaries of European companies, will be determined by domestic private international law rules of the forum'.[153]

Many giant corporations continue to damage the environment and abuse human rights despite the existence of international and domestic regulatory frameworks. Various groups and individual activists have exposed child labour, wage exploitation, and other unimaginable forms of maltreatment of workers in a number of the Bangladesh factories that serve as the major clothing suppliers of Tesco, Asda, and Primark in the UK.[154] It was reported that wages were as low as 3 pence per hour, with workers often working more than 80 hours a week.[155] But unfortunately, the existing frameworks such as the Norms and the Guiding Principles which recognise 'the importance of holding parent companies and their subsidiaries, contractors, and agents liable for violations of human rights',[156] have not been efficacious enough to prevent these big organisations and their suppliers from engaging in such serious abuse, or to hold them accountable for the violations.[157] Some analysts have also raised concerns about the failure of the relevant international mechanisms to establish a clear normative framework as a reference point against which the human rights performance of companies can be measured.[158] Besides, very few of the frameworks provide for a clear and effective implementation and complaints mechanisms.[159] It has also been asserted that 'while the ILO has developed a vast range of conventions, the level of ratification is often low', and concerns have been raised 'about the limited number of enforcement actions.'[160]

Although the adoption, implementation, and enforcement of frameworks at the national level remain paramount in governing corporate behaviour and holding MNCs liable for environmental defilement and human rights violations in host States, there are certain inescapable fundamental challenges that are faced when seeking remedies for environmental and human rights violations aided or abetted by MNCs in host States through domestic mechanisms. Among them are, corruption, 'a lack of legal remedies in host country jurisdictions with lax national laws, inefficient justice systems, lack of political will to prosecute investors, [and/]or a combination of these obstacles.'[161]

For instance, the Ivorian domestic mechanism's failure to satisfactorily address the *Probo Koala* disaster has been blamed on endemic corruption within both government and

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[153] Marilyn Croser, Martyn Day, Mariëtte Van Huijstee and Channa Samkalden, 'Developments in the Field Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability' (2020) 5 Business and Human Rights Journal 130, 131.

[154] Faisal Islam, 'Child labour making Tesco clothes' (*Channel 4 News*, 10 October 2006) <http://web.archive.org/web/20061026184624/http://www.channel4.com/news/special-reports/special-reports-storypage.jsp?id=3554> accessed 10 June 2020; Martin Hickman, 'The real price of cheap clothes: Bangladeshi sweatshop labourers paid just 3p an hour' *The Independent* (London, 8 December 2006) <http://www.independent.co.uk/news/uk/this-britain/the-real-price-of-cheap-clothes-bangladeshi-sweatshop-labourers-paid-just-3p-an-hour-427589.html> accessed 10 June 2020.

[155] ibid.

[156] Vega and others (n 46).

[157] Islam (n 154); Hickman (n 154).

[158] Rory Sullivan and Nicolas Hachez, 'Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw – The Case of Institutional Investors' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff 2012).

[159] See Picciotto (n 26).

[160] Bunn (n 16) 1277; See also Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443; Virginia A Leary, 'Lessons from the Experience of the International Labour Organisation' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon 1992).

[161] Silverman and Orsatti (n 9) 32.

the judiciary.[162] Thus, even though it has been indicated that some successes were achieved abroad,[163] the handling of the case at the domestic level was very disappointing. Following investigations conducted by a National Commission of Enquiry and the State Prosecutor, a number of private actors and public officials, mostly local folks, were charged in connection with offences relating to the toxic waste dumping. These included: WAIBS' director, Tommy's manager, and Puma Energy's manager, as well as Jean-Pierre Valentini (Trafigura's manager for Africa) and Claude Dauphin (Trafigura's CEO) who were both arrested at Abidjan airport as they were leaving the country following a visit to establish the facts of the incident. But to the utter disappointment of many locals, in February 2007, the charges against Dauphin, Valentini, and Puma's director were dropped, citing lack of evidence, and they were released. Of the other individuals who were indicted, only a handful were convicted, the only significant one being Tommy's director who was sentenced to 20 years' imprisonment.[164] Prior to the release of Dauphin and Valentini, the Ivorian government entered into a settlement agreement with the Trafigura Group without consulting relevant stakeholders. Under this non-transparent and dubious agreement, the government received approximately US$200 million as compensation to the State and the victims, and to pay for clean-up of the toxic waste. Unfortunately, the nature of the settlement created huge obstacles to the victims' pursuit of real justice and remedy, as it required, among others, that on-going prosecutions against Trafigura parties be discontinued. It also limited the rights of the victims to seek compensation in Ivorian courts. Consequently, victims of the pollution had no other option than to attempt to seek proper legal redress in other jurisdictions such as the Netherlands, UK and France.[165]

The problem of lax national laws is also a major reason why UCC, UCIL and key officers of the corporation never faced real justice. It has been suggested that exemplary and punitive damages were rarely allowed in Indian lawsuits at the time of the Bhopal disaster; and wrongful death judgments often amount to a few rupees.[166] It has been indicated that each of the victims of the Bhopal disaster received no more than 25,000 rupees (US$350) compensation.[167] Because punitive damages apparently did not exist in Indian lawsuits, UCC, UCIL and key officers got away with manslaughter. As Trotter and other observe, the only reason UCC got away with manslaughter was because the tragedy occurred in India, and not any of the developed countries where more effective, relevant legal mechanisms exist.[168] It has also been indicated that many governments or political regimes, particularly those in developing countries, are in bed with MNCs who

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[162] Amnesty International and Greenpeace (n 80); In fact, there were several companies involved in this case, namely: Trafigura Beheer BV (the parent company based in the Netherlands), Trafigura Ltd (its English subsidiary that chartered the ship), Puma Energy (Trafigura Beheer BV's subsidiary in Ivory Coast), Compagnie Tommy (a local firm eventually contracted for the waste disposal) and WAIBS Shipping (Puma Energy's agent engaged to supervise the reception of the waste and the disposal operations).

[163] ibid.

[164] ibid.

[165] ibid

[166] Trotter and others (n 40).

[167] ibid; Satinath Sarangi, 'Bhopal Disaster: Judiciary's Failure' (1995) 30(46) Economic and Political Weekly 2907.

[168] Trotter and others (n 40); Covell (n 84); Adam Withnall 'Bhopal gas leak: 30 years later and after nearly 600,000 were poisoned, victims still wait for justice' *The Independent* (London, 14 February 2019) <https://www.independent.co.uk/news/world/asia/bhopal-gas-leak-anniversary-poison-deaths-compensation-union-carbide-dow-chemical-a8780126.html> accessed 18 July 2020.

provide these corrupt regimes financial incentives, political campaign logistics and, in some cases, international credibility.[169] This makes it enormously difficult for such governments to hold those MNCs accountable for breaches of relevant domestic legal instruments. This problem is reiterated by Croser and others who note that '[w]hile host state courts often remain the preferred forum for pursuing legal redress, factors such as lack of due process, political interference, mistrust of the courts or absence of affordable legal assistance mean that a claim in the host state may be unviable'.[170] It is, therefore, not surprising that in cases such as *Doe, Wiwa*, *Sarei*, *Bowoto v Chevron Corp*, and several others, the complainants did not seek justice in their own domestic courts.[171] The claimants possibly felt they would have a better chance of succeeding in a non-domestic legal forum than a domestic one.

Moreover, 'economically weaker states depend on the investments of MNCs and may be unwilling to enact and enforce demanding human rights and environmental standards in order to enhance their attractiveness to foreign investors'.[172] For example, the giant global mining company, Anglo-Gold Ashanti (owned by Anglo American plc) which operates in a number of countries, has been accused of relentlessly degrading the environment and abusing human rights in Ghana since its establishment.[173] In January 2011, the company was unsurprisingly named the world's 'Most Irresponsible Company' at the *Public Eye Awards*, in Davos, Switzerland.[174] Ghana has various environmental and human rights policies and other frameworks that are meant to regulate the activities of MNCs, particularly those in the mining sector, and hold them accountable for any environmental damage and human rights violations they cause in the country. Yet, corporations such as Anglo-Gold Ashanti continue to cause severe damage to the environment and to seriously violate human rights without any action taken against them by the State or the existing mechanisms.[175] As one NGO, War on Want, observes, '[i]n Ghana and Mali, local communities … suffer from fear and intimidation and from the damaging impact of its [(Anglo-Gold)] mines on their environment, health and livelihoods. In Ghana, mining operations have devastated the environment and polluted vital water resources.'[176] Countless Anglo-Gold Ashanti underground workers are believed to have lost their lives, and many more continue to die each year as a direct

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169 See Covell (n 84); Wouters and Chané (n 10).

170 Croser and others (n 153) 130.

171 *Doe* (n 72); *Wiwa* (n 38); *Sarei* (n 140); *Bowoto v Chevron Corp*, 481 F Supp 2d 1010 (N.D. Cal. 2007); *Bowoto v Chevron Corp*, 621 F.3d 1116 (9th Cir. 2010); see also Engobo Emeseh, 'Challenges to Enforcement of Criminal Liability for Environmental Damage in Developing Countries: With Particular Reference to the Bhopal Gas Leak Disaster' (2003) 1(5) Oil, Gas and Energy Law Intelligence 1.

172 Wouters and Chané (n 10) 4; See also Jan Wouters and Leen Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6 Northwestern Journal of International Human Rights 262.

173 ActionAid International, *Gold Rush: The impact of gold mining on poor people in Obuasi, Ghana* (Johannesburg: ActionAid 2006) <https://www.actionaid.org.uk/sites/default/files/doc_lib/gold_rush.pdf> accessed January 2020; War on Want, *Anglo America: The Alternative Report* (War on Want 2007).

174 Mail&Guardian, 'AngloGold wins shame award at Davos' (*Mail&Guardian*,29 January 2011) <http://mg.co.za/article/2011-01-29-anglogold-wins-shame-award-at-davos> accessed 12 January 2020; Colombia Solidarity Campaign, 'La Colosa: The Quest for Eldorado in Cajamarca, Columbia' (*Colombia Solidarity Campaign*, 4 June 2011) <http://www.colombiasolidarity.org.uk/attachments/article/548/La%20Colosa%20Report%204%20June%202011.pdf> accessed 12 January 2020.

175 ActionAid (n 173); War on Want (n 173) 6 – 7.

176 War on Want 2 (n 173).

result of poor health and safety standards,[177] yet the company has never been made to be accountable. Ironically, Obuasi-Ashanti, the place where over 80 per cent of the mining activity in the country occurs is one of the most deprived and poverty-stricken towns in Ghana.[178]

There are a few instances where victims of human rights abuse and environmental degradation by MNCs in developing countries have managed to drag those offending organisations to domestic courts and been awarded huge compensations. But frustratingly, the realistic enforcement of the judgements has not been possible. For instance, in *Aguinda v ChevronTexaco* (hereinafter *Lago Agrio*), a group of Ecuadorians in 2003, filed a class-action lawsuit with a domestic court against Chevron-Texaco for allegedly polluting the Amazon by dumping 18 billion gallons of toxic waste during its operations there between the mid-1960s and 1992.[179] This pollution, the plaintiffs alleged, was the cause of numerous diseases, 'cancer deaths, miscarriages, birth defects, dead livestock, sick fish, and the near-extinction of several tribes; Texaco's legacy in the region amounted to a "rain-forest Chernobyl."'[180] In February 2011, the provincial court ruled that Chevron was responsible for the massive contamination and concomitant catastrophes, and ordered it to pay US$18 billion dollars in damages – the largest judgment ever awarded in an environmental lawsuit. The decision was upheld by the Ecuadorian High Court in 2012 (although the compensation was reduced to US$9.5bn) and then the Constitutional Court (the highest court in the country) in 2018. But to date, the relevant Ecuadorian authorities have not been able to enforce the judgement. In fact, by the time the case concluded, Chevron had emptied its bank accounts in Ecuador and transferred all of its assets, making it almost impossible for the domestic courts judgements to be enforced.

Chevron somehow managed to get an arbitration tribunal (Investor-State Dispute Settlement panel) to order the government of Ecuador in 2018 to ensure 'the immediate suspension of the enforceability of the Lago Agrio Judgment and the implementation of such other corrective measures as are necessary to "wipe out all the consequences" of the Respondent's internationally wrongful acts.'[181] Chevron had argued in a claim (*Chevron v Ecuador*) filed with the arbitration tribunal that the Ecuadorian courts delivered a procedurally flawed judgement and also violated a bilateral investment treaty when they declared Chevron liable for the contamination resulting from the company's oil and gas activities in the *Lago Agrio* case.[182]It must be stressed that the tribunal, applying

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[177] The Sydney Morning Herald, 'AngloGold wants zero mine deaths by 2015'*Sydney Morning Herald* (Sydney, 29 March 2010) <http://news.smh.com.au/breaking-news-business/anglogold-wants-zero-mine-deaths-by-2015-20100329-r7i2.html> accessed 7 January 2020.

[178] ActionAid (n 173).

[179] *Maria Aguinda et al v ChevronTexaco Corp*, Provincial Court of Justice of Sucumbios (Lago Agrio) Case No. 002-2003 (14 February 2011); The class-lawsuit was first filed with a US district court in 1993; but in 2001 the court dismissed the case on grounds of *forum non conveniens*. This decision was upheld in 2002 by the US Court of Appeals for the Second Circuit; See also Patrick Radden Keefe 'Reversal of Fortune: The Lago Agrio Litigation' (2013) 1(2) Stanford Journal of Complex Litigation 199.

[180] Patrick Radden Keefe, 'Reversal of Fortune: The Lago Agrio Litigation' (2013) 1(2) Stanford Journal of Complex Litigation 199, 200. see also Steven R Donziger, 'Rainforest Chernobyl: Litigating Indigenous Rights and the Environment in Latin America' 2004 Human Rights Brief 1.

[181] Chevron Corporation and Texaco Petroleum Corporation v Ecuador (II) (PCA Second Partial Award Tracking) [2018] IIC 1466 ix para 9.17; This case was in fact filed in 2009 to, among others, seek protection from liability in the Lago Agrio case; but it was amended following the provincial court's ruling in 2011.

[182] ibid.

international law, categorically mentions in its award that it 'does not consider that it has the power to annul the Lago Agrio Judgment as regards its lack of "correctness"'.[183] Hence, its pronouncement is not tantamount to a direct reversal of the decisions of the Ecuadorian domestic courts. However, the tribunal's decision to invite or ask the State to take all the available measures in order to revert or suspend the judgment, raises a number of questions regarding the extent of the powers of domestic courts in developing countries in dealing with giant multinational organisations.

One other major challenge in effectively regulating the activities of MNCs, as Emeseh explains, is lack of 'sufficient and adequately trained personnel to monitor corporate environmental practices and enforce the laws in the event of breach …. [Thus,] the institutions set up to monitor and implement the laws usually lack the necessary facilities as well as sufficient and adequately trained manpower to do so'.[184] This problem is very pronounced, particularly, in developing countries. The Bhopal tragedy, for example, has been blamed largely on the ineffectiveness of the regulatory systems that existed at the time. They have been vehemently criticised for not doing enough to prevent the disaster from occurring, in the first place.[185] As Trotter and others note, 'in essence, the operating environment in India, for various reasons, was woefully inadequate in terms of safety, land use, and environmental controls to prevent the disaster'.[186] In Nigeria, activists and experts have blamed the persistent pollution and degradation of the environment by MNCs on inefficient regulatory bodies and poor implementation of national environmental policies.[187] The serious environmental and human rights infringements by MNCs in the Niger Delta region that set off *Wiwa* and *Kiobel*[188] occurred largely due to the incompetence and ineffectiveness of relevant regulatory institutions in Nigeria.

It is obvious from the discussion and highlighted evidence that the existing MNCs regulatory and accountability frameworks are hugely inadequate to effectively curtail environmental degradation and human rights abuses.[189] However, this article does not support Chesterman's view that the MNCs regulatory frameworks are an 'illusion' and may be 'worse than no regulation at all'.[190] This is because although not all of the mechanisms profiled in this discussion have been equally effective in promoting the environmentally friendly practices and fundamental human rights principles that corporate entities are required to uphold, they have, to some appreciable extent, helped to raise awareness and to introduce environmental and human rights issues into corporate culture.

IV. The Way Forward

There is no question that ensuring corporate accountability is an enormous challenge that cannot be satisfactorily achieved through non-binding international and regional 'legal' frameworks (soft law) alone. Besides, since MNCs operate beyond State boundaries, attempts to institute a domestic or home State model of extraterritorial regulation to make them accountable for human rights violations and environmental degradation will

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183 ibid paras 9.14, 9.18.
184 Emeseh (n 171) 19.
185 Trotter and others (n 40).
186 ibid.
187 Ite and others (n 28).
188 *Wiwa* (n 38); *Kiobel* (n 126).
189 Adam Walczak, 'Coming to the Table: Why Corporations Should Advocate for Legal Norms for the Protection of Indigenous Rights' (2010) 42 The George Washington International Law Review 623.
190 Chesterman (n 11) 324.

always be inadequate. It is evident that individuals, particularly those in developing countries, adversely affected by MNCs' activities often have a low probability of attaining redress in their own country (i.e. the host country). This, as already noted, is due to a lack of political will, ineffective legislation, politicisation of the judiciary, lack of legal aid, poor infrastructure, and/or corruption among local authorities. To overcome the current regulatory problems faced and ensure that legal liability for the offences of MNCs and individuals acting on their behalf is well handled, the formulation of a comprehensive and legally binding international document (hard law) and the establishment of a global court for international corporate transgressions within the UN systems are vital.[191]

The Preamble of the Universal Declaration of Human Rights provides that every individual and every organ of society has an obligation to uphold and promote the principles contained in the Declaration. One would thus not be far from right in arguing, as Avery and others and Alvarez do, that the use of the word 'organ' suggests that the obligation also applies to entities such as companies.[192] Indeed, since the last couple of decades, there have been growing calls for MNCs to be subjected to a set of rigid universal standards that will apply to companies above and beyond the demands of any specific region or locality, as well as calls for a systematic and comprehensive procedure for adjudicating corporate liability at the international level.[193] For instance, in *Urbaser v Argentina*, the Tribunal (International Centre for Settlement of Investment Disputes) made mention of the possibility of human rights obligations being incumbent on a foreign investor (i.e. an MNC) under both domestic and international law.[194] In *Burlington v Republic of Ecuador*, Burlington Resources Inc sued Ecuador, alleging that certain measures taken by the respondent, including the seizure of shares, the physical takeover of the production facilities and the termination of a contract constituted an expropriation. Ecuador denied the allegations and filed a counterclaim, alleging that the claimant breached contractual obligations and violated Ecuadorian environmental laws; besides, its activities in the country resulted in significant environmental harm. The Tribunal rendered a decision holding Burlington liable for environmental harm.[195] Even though the investor's obligations were mainly found in domestic law, the Burlington ruling indicates the possibility of investor obligations being enforced through international proceedings.

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[191] Kevin T Jackson, 'A Cosmopolitan Court for Transnational Corporate Wrongdoing: Why Its Time Has Come' (1998) 17(7) Journal of Business Ethics 757.

[192] Christopher Avery, Annabel Short, Gregory Tzeutschler Regaigno, 'Why all Companies should Address Human Rights–and how the Business & Human Rights Resource Centre can help' in Judith Hennigfeld, Manfred Pohl and Nick Tolhurst (eds), *The ICCA Handbook on Corporate Social Responsibility* (John Wiley & Sons 2012); Alvarez (n 112).

[193] Jackson (n 191); See also Ronen Shamir, 'Between self-regulation and the Alien Tort Claims Act: on the contested concept of corporate social responsibility' (2004) 38(4) Law and Society Review 635, 637; Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6(2) Northwestern Journal of International Human Rights 222; Miguel Juan Taboada Calatayud, Jesús Campo Candelas and Patricia Pérez Fernández, 'The Accountability of Multinational Corporations for Human Rights' Violations' (2008) No. 64/65 Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol 171; Luis Gallegos and Daniel Uribe, 'The Next Step against Corporate Impunity: A World Court on Business and Human Rights?' (2016) 57 Online Symposium 7; Stefanik (n 45).

[194] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, (Award) ICSID Case No. ARB/07/26 (8 December 2016).

[195] *Burlington Resources Inc v Republic of Ecuador* (Award) ICSID Case No. ARB/08/5 (18 October 2018).

Admittedly, the notion of a binding global legal document and a world court for MNCs may seem too radical and enormous to contemplate, but as some commentators rightly mention, it remains an essential step towards preventing the violation of fundamental human rights and the degradation of the environment by MNCs, and guaranteeing victims' access to remedies for corporate wrongdoings.[196] Thus, the high level of sophistication or complexity of MNCs' structures, operations and misconducts requires enhanced global coordination and cooperation.

A. Binding International Legal Document

To effectively regulate the operations of MNCs, obedience to or compliance with basic norms should not be left up to the voluntary good-will and discretion of these corporations many of which can be extremely powerful. Instead, there should be a codification of binding instruments for all MNCs. As Windsor observes, it is enormously difficult for corporations, particularly transnational businesses, to render ethical decisions or operate ethically in the absence of well-defined legal prescriptions.[197] The international legal document being proposed must entrench the basic rights of people, a set of environmentally friendly practices, as well as corporations' basic privileges and their general obligations. Evidently, legal standards (particularly business related laws), as Jackson notes, 'are different in the various national legal systems around the world, so uniformity on an international level is not possible'.[198] Thus, different countries have different domestic laws that govern the operations of corporations within their borders/jurisdictions; such laws are usually drafted in line with the overall developmental vision and agenda of the relevant State. Besides, there is diversity of cultural values and of differing levels of economic development. For these reasons, it would be challenging for the international community to have a law that reflects the provisions of participating countries' relevant domestic laws and the cultural values of all nations. However, these challenges are not unsurmountable.

As already noted, several international and regional ethical guidelines or codes of conduct and similar initiatives already exist for regulating the activities of MNCs; and many of these ethical guidelines are based on norms that have attracted wide consensus in the international community.[199] The key problem with these existing guidelines and norms is that they are not binding, making it exceedingly difficult to enforce compliance. Indeed, there is a considerable measure of uniformity in the various corporate norms and guidelines that have been established or proposed for regulating the activities of MNCs. De George, for instance, recommends the following minimum standards regarding the operations of MNCs in host countries (particularly developing ones): the prohibition of activities that cause intentional harm/damage to people and the environment; ensuring that the good activities far outweigh any unintentional harm/damage; contributing to the host country's development; honouring basic human rights of workers and local communities; avoiding tax evasion or paying a fair share of taxes; and showing respect for local culture (provided that culture is itself ethical); among others.[200] These proposals and similar existing norms could be adopted or considered for the formulation of the binding international corporate law being advocated. The document should also

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[196] Jackson (n 191); Gallegos and Uribe (n 192) 9; Silverman and Orsatti (n 9) 33; Vega and others (n 46).

[197] Duane Windsor, 'Defining the Ethical Obligations of the Multinational Enterprise' in W Michael Hoffman, Ann E Lange, David A Fedo (eds), *Ethics and the Multinational Enterprise* (University Press of America 1986) 71-74.

[198] Jackson (n 191) 773.

[199] See the Norms (n 54); the Principles (n 56); OECD Guidelines (n 60).

[200] Richard De George, *Competing with Integrity in International Business* (OUP 1993) 45-56.

prescribe hefty sanctions for non-compliance with stipulated fundamental ethical norms or codes of conduct; as well as realistic monitoring and enforcement mechanisms. The fact that the international community has managed to establish binding and enforceable international human rights legal documents which, to a significant extent, are achieving their intended purposes, shows that lack of uniformity may not be an insuperable hindrance to the effectiveness of the proposed law.

B. International Corporate Court

One of the hotly debated subjects in the fields of International Environmental Law and International Corporate Law is the question of creating an international corporate court to address the transgressions of MNCs and the relevance of such a court. Various academics have argued for or against such a proposal from various angles.[201] However, even though this article endorses such an initiative, presenting a detailed and critical analysis of the subject is beyond its scope. There is no question that for an international corporate norms or law to achieve its intended purpose, it 'needs to be backed up by an effective mechanism for ensuring fairness and uniformity in the application, interpretation, and enforcement of those norms' or law.[202] In other words, there should be a global corporate court. Such a court, as Jackson advocates, should have both civil and criminal jurisdiction, as well as jurisdiction over both legal entities (i.e. MNCs) and individuals.[203] Thus, the world court on business and human rights being proposed could be competent to hear cases brought by victims (including States, groups and persons) of human rights abuses and environmental damage perpetrated by corporations, or by MNCs who may feel that they are unfairly treated by host countries.[204] In an age in which numerous businesses are entering foreign markets and in which unscrupulous activities of international corporations continuously cause severe damage to the environment and violate the fundamental rights of local communities, '[i]t is appropriate to exercise direction and control in bringing about a new global legal order as a framework for multinational business.'[205]

It has been argued by some academics that an international corporate court may have the capacity to hold to account only a handful of the tens of thousands of MNCs dispersed across the globe. Therefore, the creation of such an institution to enforce international corporate laws 'may only amount to a marginal contribution to the struggle for corporate accountability'.[206] But as Jackson argues, it is unreasonable to expect the court to have the capacity to address all of the problems and harms caused by MNCs' activities. However, if it 'can at least provide an incremental benefit over either the status quo or alternative arrangements, then it is justified on utilitarian grounds.'[207] Besides, it must be stressed that the creation of an international corporate court need not overthrow or thwart existing relevant domestic legal frameworks and efforts to regulate MNCs'

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[201] Hasanali Pirbhai, 'Legitimacy Issues in Investor-Treaty Arbitration and How a Permanent Court May Be the Best Solution' (2018) 6(2) Groningen Journal of International Law 286; Luis Gallegos and Daniel Uribe, 'The Next Step against Corporate Impunity: A World Court on Business and Human Rights?' (2016) 57 Online Symposium 7; Jackson (n 191).

[202] Jackson 774.

[203] ibid.

[204] Gallegos and Uribe (n 193).

[205] Jackson (n 191) 774.

[206] Duruigbo (n 193) 254-255; see also Laura A Dickinson, 'Public Law Values in a Privatized World' (2006) 31 Yale Journal of International Law 382, 388.

[207] Jackson (n 191) 761.

operations. It should also not thwart the existing investment protection legal regime or arbitration tribunals. Instead, the proposed international court would complement and, to a significant extent, enhance the ultimate objectives of those national and regional efforts.[208] Thus, such an international court may exercise jurisdiction only in cases where national and regional legal systems are, for whatever reasons, unwilling or unable to fulfil their obligation to address severe human rights and environmental concerns triggered by MNCs' activities;[209] or if the relevant parties have reasons to fear that national or regional courts/tribunals will be excessively biased or are ill-equipped to handle the matter due to it complexities.[210] The international corporate court being proposed may also serve as an appellate court and deal with cases brought before it from domestic courts or regional tribunals or arbitration panels. It will thus be down to the party seeking redress to decide where to initiate the legal proceedings – whether in a domestic, regional or the proposed international court. Of course, it would be unnecessary to initiate a claim at an international court (which may be more expensive) if the aggrieved party believes that domestic courts can effectively resolve the matter. Indeed, cases such as *Lago Agrio*, *Chevron*, *Kiobel*, *Sarei*, Bhopal and similar others would certainly not have dragged on for so long, and the outcomes may have been more satisfactory if they had been decided by, or the rulings had been contested in, an internationally recognised corporate court.

In instances where national legal standards do vary/differ, 'the [proposed] court can respect these variances by exercising its transfer jurisdiction, and by applying the substantive laws of the respective national legal orders where appropriate.'[211] When faced with a claim by an MNC against a host State, the international court may apply relevant aspects of the proposed binding legal document and pertinent existing investment protection treaties, as well as the relevant laws of the host State. As already argued, there is, in fact, a considerable measure of uniformity in the various corporate norms or laws that have been formulated for regulating the activities of MNCs.

It has also been suggested that, 'the imposition of direct obligations on private corporations, backed by an … international mechanism to enforce those obligations', may be viewed by some countries as a significant disempowering and an interference in State sovereignty.[212] In other words, some States, particularly advanced nations, may be reluctant to relinquish control over legal prosecution and adjudication to an international system/body, as that might be viewed as an interference with the concept of sovereignty which entails the exercise of absolute and unsupervised authority at the national level.[213] But such an argument is based on an exaggerated conception of sovereignty that is not reasonable or realistic.[214] This is because International Human Rights Law, International Humanitarian Law, and International Criminal Law already provide an elaborate system of norms and mechanisms which, to some extent, constrain the freedom of nation-states and agents acting on their behalf, to violate basic rights. For instance, the Universal Declaration of Human Rights and other international and regional human rights protection documents, as well as the decisions of relevant international institutions (e.g. courts, tribunals and commissions) have developed into both conventional and customary law binding, at least in principle, on all nations, and serving as checks and

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[208] ibid 758.
[209] Gallegos and Uribe (n 193).
[210] Jackson (n 191) 759.
[211] ibid 773.
[212] Dickinson (n 206) 388; see also Laura A Dickinson, 'Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law' (2005) 47 William & Mary Law Review 135.
[213] Dickinson (n 206); Dickinson (n 212).
[214] Jackson (n 191) 764.

balances on the excesses of national sovereignty. The fact that such international and regional legal frameworks have, to a significant extent, succeeded in enhancing human rights protection and promoting the dignity of the human entity by imposing significant constraints on the liberty of nation-states to violate the basic rights of individuals, justifies the institution of an international corporate legal framework to hold unscrupulous MNCs to account.

It is anticipated that the establishment of an international corporate court may face issues regarding funding, the role of States in proceedings, matters of access to the court (including costs and legal representation of victims), and the enforcement of its judgments.[215] However, with extensive multi-stakeholder dialogues, negotiations, and compromises, a common ground could be found and a consensus reached prior to the establishment of the court. NGOs may also be encouraged to play significant roles in seeking justice for people adversely affected by MNCs' unethical activities in the proposed international court. MNCs that fail to comply with the judgement of the international court should have their assets frozen not only in the host State but also the home country or internationally. It is not uncommon for MNCs sued to dissipate their assets from beyond the jurisdiction of the court in order to frustrate a potential judgment/award against them, as was the case in *Aguinda* (Lago Agrio). To prevent such actions by MNCs dragged to the international court, asset freezing injunction/order that has either a domestic or a worldwide effect (as may be deemed appropriate) may be issued by the court prior to delivering its judgement. Evidently, the cooperation of, at least, the host and home countries would be vital in enforcing the international court's judgements against MNCs. International sanctions may be imposed on States that fail to comply with judgements delivered against them.

C. General Benefits of a Binding International Legal Instrument

One major problem observed by many experts is that MNCs tend to pack up and leave countries which adopt stringent corporate laws in search of more lenient laws and regulations, and to evade being sued for human rights violations, environmental damage, and other harms.[216] As Shamir rightly puts it, 'MNCs are in a position to effectively escape local jurisdictions by playing one legal system against the other, by taking advantage of local legal systems ill-adapted for effective corporate regulation, and by moving production sites and steering financial investments to places where local laws are most hospitable to them'.[217] Having an international corporate legal document that prescribes ethical standards and sanctions for all MNCs, and a court that has the jurisdiction to deal with cases involving such corporations, irrespective of the territory in which they happen to operate, will compel chronically unscrupulous MNCs to change their behaviour and conduct their activities in ways that are acceptable and ethical.

Such an international framework will also help avoid the situation where host countries relax various primary regulatory frameworks (particularly ones relating to human rights and environmental protection, and the labour sector) in order to attract foreign investment. It must be admitted that various investment protection agreements that contain clauses prohibiting the host State from relaxing such important regulatory frameworks for foreign investment purposes do exist, but the extent of their effectiveness in ensuring ethical business practices has been minimal. Therefore, the international

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[215] Gallegos and Uribe (n 193).
[216] Jackson (n 191); Shamir (n 193).
[217] Shamir (n 193) 637.

corporate legal framework being proposed is important to facilitate the regulation of MNCs in a more even-handed fashion than an exclusively national or regional arrangement allows. It will markedly clarify the rights and duties of MNCs and their obligations to respect human rights and preserve the environment. A corporate international court will particularly benefit less developed nations where regulatory and legal frameworks are usually insufficient and ineffective.

The creation of a standard international corporate legal framework will also benefit MNCs in a number of ways. It may reduce the burden of dealing with multiple countries in multiple domestic courts in the event of a human rights violation and environmental degradation related allegation and lawsuit. By extending their activities into other countries, MNCs confront an intricate web of national, regional, and global corporate standards and a wide array of obligations. Often times, such obligations run into conflict with each other, presenting difficult dilemmas for MNCs.[218] A standard international legal system is therefore likely to significantly minimise this complication. Thus, such an international instrument will establish authoritative means to resolve conflicts arising from the law in different jurisdictions.[219] An international corporate law and court will also ensure that MNCs operate on an even playing field. Besides, corporations that conduct operations in ways that are ethical and respect human rights are likely to gain competitive advantage over unscrupulous corporations, since the latter's activities will be sanctioned by a recognised international institution.[220]

Indeed, if MNCs 'are going to be permitted to reap the enormous benefits of an interdependent global economy, and take advantage of markets and workforces abroad, it is only fair and just that they accept the responsibility that goes with it - or be held liable when they do not.'[221] Considering that many governments, particularly those in developing countries, tend to be in bed with MNCs and shield them from 'prosecution' for wrongdoings, and knowing the massive environmental damage and human rights abuses that may result when MNCs' greed becomes aligned with government power, it is reasonable to support the idea of a stiffer international legal framework for regulating the operations of MNCs. Formulating binding international legal document(s) and instituting an international court that impose legal liability on global businesses will go a long way to discourage unscrupulous business activities and promote compliance with ethical standards.

V. Conclusion

This article has sought to critically evaluate the effectiveness of MNCs regulatory and accountability frameworks in promoting the preservation of the environment and the protection of fundamental human rights, at the national, regional, and international level. It has established that MNCs play a quite significant role in the economic and, in some cases, the infrastructural development of host States; they are very 'capable of much good: generating economic growth, increasing opportunity, and contributing financial investment in some of the world's least developed areas.'[222] However, it has been ascertained that the operations of MNCs have had and continue to have very negative and debilitating impact on the environment and human rights (such as water and air pollution, destruction of farmlands, child labour, discrimination, and torture, among others in host countries). It has been shown that a number of regulatory and

[218] Jackson (n 191) 759.
[219] Gallegos and Uribe (n 193).
[220] Jackson (n 191).
[221] ibid 774.
[222] Vega and others (n 46) 2.

accountability frameworks dedicated at MNCs do exist, and these mechanisms have helped to raise awareness about the problem, and have encouraged some degree of ethics, respect, and circumspection in the behaviour and culture of MNCs in host States. The article has, nevertheless, strongly argued and demonstrated that the effectiveness of the relevant existing frameworks is far from approbatory, as gross and horrific environmental and human rights abuses continue unabated, and perpetrators (offending MNCs) go unpunished, particularly in less developed countries.

Unfortunately, many host governments (especially governments of developing countries) deliberately choose not to take strong and forceful action to hold MNCs accountable for their failure to adopt environmentally friendly practices and for violations of their human rights obligations, for fear of losing foreign investment to countries that enforce rights less stringently. This often gives MNCs the impetus to consistently disregard not only ethical practices to prevent environmental pollution but also fundamental human rights norms. Therefore, to effectively curtail the incessant human rights abuses and irreparable environmental degradations that result from the activities of MNCs, there should be enforceable environmental protection and human rights laws at the national level 'that are consistent with international norms and accompanied by strong, independent judiciary systems that provide concrete remedies for victims.'[223]

It is noticeable that corporate accountability is an enormous challenge that cannot be effectively dealt with through the existing non-binding methods or frameworks. Since MNCs operate beyond State boundaries, attempts to institute a home State model of extraterritorial regulation to make MNCs accountable for human rights violations and environmental damage will always be inadequate.[224] As Picciotto emphasises, 'although corporate codes have a legitimate place in helping to ensure compliance with standards through corporate networks, … they should be more firmly anchored within a broader regulatory framework that establishes obligations as well as rights for business.'[225] It is therefore important that a comprehensive international treaty formulated within the UN systems clarify the human rights obligations of corporations and establish 'binding mechanisms that can provide remedies for victims in cases where it is impossible to prosecute victimizing companies in domestic jurisdictions.'[226]

In a nutshell, the voluntary instruments and codes alone are qualitatively and quantitatively inept in achieving the results that they are meant to realise. It is therefore about time the unified international community moved towards the codification of binding instruments that are backed by a range of implementation and compliance mechanisms.[227] The creation of an international court, with special all-encompassing jurisdiction over MNCs would, indeed, be a commendable endeavour.

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[223] Silverman and Orsatti (n 9) 33.
[224] Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5 Melbourne Journal of International Law 37.
[225] Picciotto (n 26) 133.
[226] Silverman and Orsatti (n 9) 33.
[227] Vega and others (n 46).

Multifaceted Asylum Triangle: Does Fragmentation of the Right to Asylum and the Non-Refoulement Rule Deters the Functioning of Equitable and Predictable Burden- and Responsibility-Sharing Mechanism on Refugees?

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Abstract

The global refugee protection system is founded on two core values, assuring a safe and dignified life away from violent regimes and conflicts: the right to asylum and the non-refoulement rule. While there are no internationally agreed definitions for these concepts, their fragmentation affects the equitable and predictable burden- and responsibility-sharing, and subsequently, successful international cooperation in refugee matters.

By analysing the right to asylum in legal theory and examining its application in the jurisprudence of international human rights monitoring bodies, this article seeks to explore the complexity of heterogeneous approaches with regard to refugees. Furthermore, the impediments to the functioning of the current refugee protection regime is identified by analysing the complicated nature of its umbrella maxim - the non-refoulement rule. The article examines how the lack of clarity on the contents of the right to asylum and the non-refoulement rule causes different, sometimes contradictory, approaches regarding the corresponding international obligations of states. It further explores how the diversified understanding of these foundational principles makes it difficult to identify common protection needs and the responsibilities of states with regard to international cooperation and burden- and responsibility-sharing on refugee matters.

Eventually, the fragmentation of these core values threatens their unequivocal application and results in failing refugee protection regimes. Consequently, this article argues that a common understanding on the right to asylum and non-refoulement rule represents a *condicio sine qua non* for securing equitable and predictable burden- and responsibility-sharing mechanism in refugee matters.

I. Introduction

Is there a universally recognised understanding of the right to asylum or is it fragmented between the rights to seek, be granted and enjoy asylum? What is the normative composition of its protective shield - the non-refoulement rule? How does the nature of their application underpin the efficiency of international cooperation in refugee matters?

At the dawn of honouring human rights, humankind has witnessed untold cruelty resulting in mass human displacement in every corner of the world, some headed towards more unfortunate places. In the fullness of time, the problems faced by asylum seekers and their right to asylum have received considerable attention. Eventually, the

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scope of protection for those forcibly displaced internationally from their homeland has gradually extended alongside the increase in humanitarian sentiments among people. This was especially felt upon the creation of regional, international and supranational organisations, with the purpose of peacefully resolving existing challenges among states regarding the protection of human rights, including those of forcibly displaced people. By establishing the legal framework of protection and providing the solutions for refugees, states and international community assumed their responsibility for those persons who are forced to flee their countries. The current international refugee protection regime has attributed firm a bond between refugees and their receiving states.[1] Still, in the face of today's challenges, the current refugee protection regime has retained its 'enduring value and relevance in the twenty-first century'.[2]

Notwithstanding massive legal developments on the forced displacement throughout the 20th century, the fragmentation and vagueness of the right to asylum – the core principle of the refugee protection system remains an issue and a matter of scholarly inquiry.[3] Until recently, this concern has remained high on the global refugee agenda. Currently, of the total 79.5 million forcibly displaced persons in the world, 33.8 million are refugees or asylum seekers; 77% of them still remain in protracted situations.[4] While the international community has affirmed its willingness to equitable and predictable burden- and responsibility-sharing[5] on refugee matters by adopting the Global Compact on Refugees, states have varying, sometimes even contrasting, approaches to addressing protection needs.

The ambiguous understanding of the foundational principles of refugee protection regime, the right to asylum and the non-refoulement rule, makes it a challenge to identify common protection needs and therefore, the respective responsibilities of states regarding international cooperation and burden- and responsibility-sharing on refugee matters. The global refugee regime suffers from an apparent lack of identification of the relevant responsibilities of states towards asylum seekers and refugees within the scope of the right to asylum and non-refoulement rule. Consequently, the lack of common understanding of the right to asylum and the non-refoulement rule threatens their unequivocal application and can jeopardise the functioning of the global refugee protection regime.

While seeking to examine major safeguards of the global refugee regime, Part one of this article introduces the analysis on the controversial nature of the right to asylum from the lenses of legal theory and treaty law by exploring the non-refoulement rule under international refugee law, customary law and human rights protection regime. Part two analyses its protecting, supporting and endorsing role towards the enforceability of the right to asylum. Finally, Part three lays out the indispensability of a common

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1 James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 154.

2 UN High Commissioner for Refugees (UNHCR), *Ministerial Communiqué*, HCR/MINCOMMS/2011/6 (8 December 2011); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 47.

3 María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law'(2015) 27(1) IJRL 4, 6, 9; Atle Grahl-Madsen, *The Status of Refugees in International Law* (vol I Sijthoff 1966) and (vol II Sijthoff 1972); Chama LC Mubanga-Chipoya, 'The Right of Everyone to Leave any Country, Including His Own, and to Return to His Country', Doc.E/C.4/Sub.2/1988/35, 103-106.

4 UNHCR, 'Global trends: Forced Displacement in 2019' (2020) 2 <https://www.unhcr.org/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html> accessed 16 January 2021.

5 UNGA Res 73/151 (17 December 2018) UN Doc A/73/12 (Part II) (Global Compact on Refugees) Part III (A).

understanding of the right to asylum and the non-refoulement rule for the functioning of equitable and predictable burden- and responsibility-sharing mechanism.

A. The Diversified Right to Asylum

International jurisprudence, treaty law and international practice regarding the right to asylum is fairly extensive; however, there is no internationally agreed definition of this right in the legal world,[6] and the vagueness of this institution[7] remains a concern even in recent times.[8] What is the scope and extent of the right to asylum? Does it solely enshrine the right to seek and enjoy asylum or does it refer to the right to be granted asylum as well? Correspondingly, what is the legal nature of the right of a receiving state to grant asylum? Overall, how enforceable is the right to asylum and does it impose any kind of obligation(s) towards states, and importantly, how do these rights correlate with each other?

i. The Asylum Dilemma: 'right of everyone' or 'sovereign prerogative'?

Although one can trace the origins of the right to asylum back to ancient times, the concept has evolved over the centuries.[9] As Grotius put down in the 17th century: "a permanent residence [ought not] to be refused to foreigners, who, driven from their own country, seek a place of refuge."[10] However, it was in 1948, when 48 member states of the United Nations adopted the Universal Declaration of Human Rights (UDHR),[11] a milestone document in the history of human rights protection, stating in its Article 14(1) that "everyone has the right to seek and to enjoy in other countries asylum from persecution". While the language of the article referred to the right of a person to seek and enjoy asylum, the Declaration stayed silent regarding the counter obligation(s) of states and such reticence was not unintentional.

Before the adoption of the Declaration, it was discussed during the preparatory works that "it had been a mistake [...] to recognise the individual right to seek asylum while neither imposing upon states the obligation to grant it nor invoking the support of the United Nations".[12] Indeed, the original text of article 14(1) provided that "everyone has the right to seek and be granted, in other countries, asylum from persecution".[13] However, the term "and be granted" was altered with much acknowledged and endorsed provision by the majority of states:[14] "and to enjoy",[15] excluding the obligation of states to grant asylum to those who seek it.[16] "The right to be granted asylum" was left

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6 Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 42.

7 Goodwin-Gill and McAdam (n 2) 358.

8 Gil-Bazo (n 3) 10.

9 The right of sanctuary was enshrined in the Code of Theodosius, the Justinian Code, the Papal sanction; see also, A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980); E Reale, 'Le droit d'asile' (1938) *Recueil des Cours de l'Académie de Droit International de La Haye* 63(1), 473.

10 Hugo Grotius, *De iure belli ac pacis, libri duo* (AC Campbell tr, Batoche Books 2001) 84.

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

12 UNGA, Summary Records of Meetings, Part 1: 3rd Session, 122nd Meeting (4 November 1948) UN Doc A/C.2/SR.56-85, 347 (Mr Cassin, France).

13 UNGA, Summary Records of Meetings, Part 1: 3rd Session, 119th Meeting (30 October 1948) UN Doc A/C.3/285/Rev.1.

14 UNGA, Summary Records of Meetings, Part 1: 3rd Session, 122nd Meeting (4 November 1948) UN Doc A/C.2/SR.56-85, 345 (Mr Saint-Lot, Haiti), 345 (Miss Zuloaga, Venezuela), 346 (Mr Contoumas, Greece).

15 ibid.

16 Goodwin-Gill and McAdam (n 2) 358-359.

unaddressed by the Drafting Committee of the *1951 Refugee Convention* as well,[17] with only a mention of it in Recital 4 of its Preamble.[18]

Therefore, states objected to "formulas implying obligation"[19] and the right to grant asylum was perceived as a "sovereign prerogative",[20] and "a discretionary act of the state".[21]

ii. In attempting to fill in remaining gaps

The concerns surrounding the content of the right to asylum remained after the adoption of the 1951 Refugee Convention. The International Law Commission and the UN Commission on Human Rights further conducted substantial work to address the remaining gaps which was concluded with the adoption of the 1967 UN Declaration on Territorial Asylum.[22] Yet, "the right to be granted asylum" was left unaddressed under international treaty law, and its regulation remained under the discretion of domestic legal systems.[23]

In the years to come, the right to seek and enjoy asylum attained widespread recognition[24] in regional conventions, such as the Caracas Convention,[25] the Organisation of African Unity (OAU) Convention,[26] and Council of Europe Resolution (67)14.[27] The concepts of the right to seek and enjoy asylum were also applied in regional arrangements, such as the comprehensive programmes for Central America (CIREFCA), Indo-China (CPA), Central European Asylum System (CEAS), etc.[28] The ever-increasing pattern of forced displacement further placed the concept of asylum at the centre of global legal discourse. The 2016 New York Declaration for Refugees and Migrants reaffirmed "respect for the institution of asylum and the right to seek asylum",[29] however, explicitly recognised "that the ability of refugees to lodge asylum claims in the country of their choice may be regulated, subject to the safeguard that they will have access to, and enjoyment of, protection elsewhere".[30] Similarly, the 2018 Global

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17 ibid 362; R Alleweldt, 'Preamble to the 1951 Convention' in Andreas Zimmermann, Felix Machts, Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 236-238.

18 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Preamble, recital 4.

19 Goodwin-Gill and McAdam (n 2) 359.

20 ibid 358-359.

21 Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 16; Declaration on Territorial Asylum (adopted 14 December 1967) UNGA Res 2312(XXII) (Declaration on Territorial Asylum) article 3; Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1969) 7(92) CYBIL 92, 137-9.

22 Declaration on Territorial Asylum; Goodwin-Gill and McAdam (n 2) 363; Weis, 'The United Nations Declaration on Territorial Asylum' (n 21) 97-99.

23 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 16.

24 ibid; see also Paul Weis, 'Territorial Asylum' (1966) 6(2) *Indian Journal of International Law* 173, 194.

25 Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954) 1438 UNTS 127 (Caracas Convention) arts 1-4.

26 Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention) art II.

27 CoE Committee of Ministers Resolution (67) 14 (29 June 1967).

28 See further, Goodwin-Gill and McAdam (n 2) 365.

29 'New York Declaration for Refugees and Migrants', UNGA Res 71/1 (3 October 2016) (New York Declaration) 67, 3, 24, 27.

30 ibid 70.

Compact on Refugees recognised the right to asylum as the grounding element of the international refugee protection regime[31] and further reaffirmed the importance of fair and efficient status determination to all those who are in need to find and enjoy international protection.[32]

Therefore, the subsequent legislative developments after the UDHR reaffirmed its initial approach, yet leaving[33] core questions unaddressed; namely, what is the composition of the right to asylum, and how do its constituent elements correlate with each other?

iii. Conflicting or *compossible*[34] rights?!

The concept of asylum has retained its role as 'central to the refugee protection paradigm'[35] and undoubtedly, has its special normative force.[36] Nevertheless, how did the right to asylum become imbued with this prescriptive proposition? Alternatively, to frame this dilemma under Kant's deductive *quaestio iuris*[37] - by what right do we think ourselves as holders of the right to asylum?

If we consult the widely acknowledged Hohfeldian Analytical System,[38] the right to seek, the right to grant, the rights to be granted and enjoy asylum can be described as independent, "atomic" rights with diverse characteristics and subjects; however, when they band together, they form a complex, "molecular" right to asylum.

The right to seek asylum, owned by non-citizens who are outside of their country of origin, represents a privilege and a claim of the right holder. It obliges the receiving state to allow asylum seekers onto its territory and provide a fair and efficient asylum procedure. On the other hand, the state's discretionary right to grant asylum signifies that the state is the sole sovereign on its territory, acting under its legislation and sovereign interests. It gives complete discretion to the receiving state to grant or keep providing international protection, equipping the state with the power to alter the normative situation of asylum seeker and international protection holder, when required. Meanwhile, asylum seekers can make a claim towards the receiving state to be granted asylum - and similarly, the international protection holders can claim the right to enjoy asylum. However, the rights to be granted and to enjoy asylum are not limitless and can be restricted by the superior right of a state to grant or withdraw asylum.

Overall, the right to asylum is a complex, "molecular" right, characterised by multiple subjective parts, implying exclusive prerogatives on both sides - those who seek or grant it. Revealing the interdependence between "atomic" rights within the right to asylum does not exhaustively uncover its character and the asylum dilemma remains unresolved. As the accelerated transformation of the institution of asylum was profoundly caused by the growth in the global forced displacement crisis, the legal history and practice have revealed the direct linkage between the right to asylum and the prohibition of refoulement, the founding principle of the refugee protection system.

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31 Global Compact on Refugees (n 5).

32 ibid 5, 61; UNHCR Executive Committee (ExCom) Conclusions Nos 103 (2005) and 96 (2003).

33 Gil-Bazo (n 3) 8.

34 Hillel Steiner, *An Essay on Rights* (Blackwell 1994); see also Edward N Zalta (ed), 'Rights' (2015) The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/rights/> accessed 22 October 2020.

35 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 17.

36 Zalta, 'Rights' (n 34).

37 Immanuel Kant, *Kant's Critiques: The Critique of Pure Reason, the Critique of Practical Reason, the Critique of Judgement* (A & D Publishing 2008).

38 Zalta, 'Rights' (n 34).

II. The Non-Refoulement Rule as a Supporting Shield to the Well-Functioning Refugee Protection Regime - Misconceptions and Reality

Legal theorists argue that if the realisation of a right is an important precondition for the enjoyment of another right, the former has a strong supporting role for the latter.[39] Likewise, as Shue assumes, rights that are indispensable for the full enjoyment of all other rights are "basic rights".[40] Such a "linkage argument"[41] can be used to defend the non-refoulement rule as a basic, supportive right for the implementation of the refugee protection regime and ultimately, the right to asylum. The non-refoulement rule prohibits transfer or removal of a person given the substantial grounds for believing of risk of irreparable harm upon return.[42] By doing so, if we borrow Nickel's[43] typology of supporting relations between rights,[44] the right to be protected under the non-refoulement rule strongly supports the right to asylum.

Furthermore, by applying Dworkin's and Mill's metaphors, the non-refoulement rule can be considered as a "trumping power",[45] which represents an umbrella maxim for guaranteeing the successful implementation of the right to seek, be granted and enjoy asylum as it obliges the receiving state not to return asylum seekers and international protection holders in the place where their life or freedom might be in danger.

By analysing the non-refoulement rule through the lenses of international human rights law, international refugee law and customary international law, this Section attempts to identify the nature of the "support" provided by the non-refoulement rule to the right to asylum.[46]

A. The indispensability of the non-refoulement rule for the enforcement of refugee protection regime: refugee law perspective

States did 'exchange' their nationals in the spirit of reciprocity since the ancient times.[47] The objection of *refouler* of those who were in need of asylum emerged since the 19th century[48] alongside the development of the idea that non-citizens fleeing their tyrannical governments might be in need of protection from the host state, in certain circumstances, where their return would cause their persecution or punishment based on political or

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39 See generally Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (PUP 1996); Amartya Sen, *Development as Freedom* (OUP 1999).

40 Shue (n 39).

41 ibid.

42 See UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (26 January 2007) available at <https://www.refworld.org/docid/45f17a1a4.html> accessed: 09 September 2021.

43 James Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30(4) HRQ 984; James Nickel, 'Indivisibility and Linkage Arguments: A Reply to Gilabert' (2010) 32 HRQ 439.

44 See also, Pablo Gilabert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel' (2010) 32 HRQ 425.

45 Ronald Dworkin, 'Rights as Trumps', in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 153-67; John S Mill, *On Liberty and Other Essays* (Stefan Collini ed, CUP 1989) 20.

46 See, Gil-Bazo (n 3) 8-9; Paul Weis, 'The Development of Refugee Law' Transnational Legal Problems of Refugees (1982) 3 Michigan Yearbook of International Legal Studies 27, 38.

47 Goodwin-Gill and McAdam (n 2).

48 ibid 201.

religious grounds.[49] Alongside the global displacement caused by major conflicts, the legal scope and application of the non-refoulement rule relatively extended throughout the legal instruments of international refugee law. The conventional declaration of the principle of non-refoulement occurred in 1933 with the adoption of the Convention relating to the International Status of Refugees,[50] which was the ever first attempt of creating a comprehensive legal framework for the refugee protection.[51] As Goodwin-Gill and McAdam note, "the need for protective principles for refugees began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of non-refoulement".[52]

Large-scale displacement[53] caused by war and human rights abuses during and after the Second World War should have given an impulse to furthering the scope of the principle of non-refoulement for ensuring the realisation of the right to asylum. Shortly after the establishment of the United Nations, the General Assembly adopted Resolution 8(1) allowing refugees to stay in their host states if having 'valid objections' for returning to their countries of origin.[54] This was followed by the introduction of the provision of non-refoulement in 1950 in the draft Convention on the International Status of Refugees.[55] The draft provision was absolute, not including any exceptions from the rule[56] but as consequent events illustrated, "the change in the international situation"[57] led the 1951 Conference of Plenipotentiaries to fade the absoluteness of the principle of non-refoulement by adding exceptions to the application of the rule, such as public order and national security.[58] Nonetheless, as Lauterpacht and Bethlehem observed, consideration of the special circumstances in article 33(2) did not give states unlimited margin of appreciation for restricting the applicability of non-refoulement rule, as the probable individual consequences of refoulement should be assessed.[59] Accordingly, it was assumed that the derogation from the non-refoulement rule was allowed solely while having "reasonable grounds" for believing that there existed a very precise threshold of perspective danger for national security or public order.[60] Eventually, Article 33 of the Refugee Convention was adopted with enshrined limitations, alongside Article 42(1), which prohibited any reservation to the rule.[61]

The debate regarding the scope of the states' obligations of non-refoulement continued early after the adoption of the 1951 Refugee Convention. The discourse mostly referred to whether the principle exclusively protected refugees already present on the

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49 See for example Clive Parry and Sir Gerald Fitzmaurice (eds), *British Digest of International Law* (vol 6, Stevens 1965) 53-4, 64-5.

50 Goodwin-Gill and McAdam (n 2) 202; Zimmermann, Machts, Dörschner (n 17) 1399-1401.

51 Peter Fitzmaurice, 'Anniversary of the forgotten Convention: 1933 Refugee Convention and the Search for Protection between the World Wars' (2013) 8(1) RDC 1, 2.

52 Goodwin-Gill and McAdam (n 2) 203.

53 John A S Grenville, *A History of the World From the 20th to the 21st Century* (Routledge 2005) 310.

54 UNGA Res 8(I) (12 February 1946) A/RES/8(I) [c(ii)].

55 UNESC Res 248 (IX)B (8 August 1949) UN Doc E/OR(IX)/Suppl. No. 1; UNGA Res 429(V) (14 December 1950) A/RES/429.

56 UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee of 14 August to 25 August 1950, Second Session, Geneva, 14 August to 25 August 1950* (25 August 1950) UN Doc E/AC.32/8;E/1850 [30].

57 Goodwin-Gill and McAdam (n 2) 204.

58 Refugee Convention art 33(2).

59 Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 168, 169.

60 ibid 168-169.

61 Refugee Convention art 42(1).

territory of the receiving state or those at the frontiers as well. It was questionable whether it guaranteed "no duty to admit" policy for states, or, on the contrary, indirectly referred to the duty to grant asylum - interpretation highly unwelcomed by a majority of states.[62] UNHCR in its *Advisory Opinion of 2007* explicitly affirmed the applicability of the principle of non-refoulement to "any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border".[63] The UNHCR Executive Committee has consistently reaffirmed the "fundamental importance" of the principle of non-refoulement.[64] With the unparalleled increase of the forced displacement, the international instruments,[65] UNHCR Executive Committee conclusions,[66] state practice[67] and scholarly opinion[68] through time, has affixed clarity[69] to the Article 33 of the Refugee Convention, now encompassing both, non-return and non-rejection,[70] irrespective of where does asylum-seeker present himself for entry, within a state or at its border.[71]

Any individual who has a well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group, or political opinion, is protected under non-refoulement rule in the light of Article 1(A) of the 1951 Refugee Convention. The UN General Assembly and UNHCR Executive Committee have

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62 United Nations, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting* (23 November 1951) UN Doc A/CONF.2/SR.16 regarding art 6 and art 11, *Summary Record of the Thirty-fifth Meeting* (3 December 1951) UN Doc A/CONF.2/SR.35 regarding art 21; Paul Weis, 'Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees', (1953) 30 BYBIL 478, 482, 487.

63 UNHCR Advisory Opinion (n 42) 7.

64 UNHCR ExCom Conclusion 68 (1992) [f]; UNHCR ExCom Conclusion 71 (1993) [g]; UNHCR ExCom Conclusion 74 (1994) [g]; UNHCR ExCom Conclusion 79 (1996) [j]; UNHCR ExCom Conclusion 81 (1997) [i]; UNHCR ExCom Conclusion 82 (1997) [i].

65 OAU Convention art II(3); CoE Committee of Ministers Resolution (67) 14 (n 27); Declaration on Territorial Asylum art 3(1); AALCO, '1966 Bangkok Principles on the Status and Treatment of Refugees' (final text as adopted on 24 June 2001) art III; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12-304/23, art 21; Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2006] OJ L 326, art 3(1); Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9-337/26 (Council Directive 2011/95/EU) Preamble (3, 48), art 21.

66 UNHCR ExCom Conclusion 6 (1977) [c]; UNHCR ExCom Conclusion 22 (1981) [II(A)(2)]; UNHCR ExCom Conclusion 81 (1997) [h]; UNHCR ExCom Conclusion 82 (1997) [d(iii)].

67 Peter Collins, *A Mandate to Protect and Assist Refugees: 20 years of Service in the Cause of Refugees, 1951-1971* (Office of the United Nations High Commissioner for Refugees 1971) 67-77.

68 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 176; Goodwin-Gill and McAdam (n 2) 207; Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Nijhoff 1988) 123, 128; Atle Grahl-Madsen, *The Status of Refugees in International Law* vol 2 (Sijthoff 1972) 94.

69 cf Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 31(1)(2).

70 Goodwin-Gill and McAdam (n 2) 208.

71 *R (European Roma Rights Centre and others) v Immigration Office at Prague Airport (UNHCR Intervening)* [2005] UKHL 55 [26] (Lord Bingham).

reaffirmed multiple times that the principle of non-refoulement applies to asylum seekers as well, and therefore, the formal recognition of a person as a refugee is by no means a precondition for applying the non-refoulement rule upon him or her;[72] nor is it relevant how an asylum seeker reaches the territory of the state.[73]

The application of the principle of non-refoulement, alike numerous obligations in human rights protection regime, is linked to the exercise of state jurisdiction within its borders or extraterritorially.[74] The prohibition of return applies to any territory where risk exists, irrespective of being a country of origin or not.[75] The non-refoulement rule under the 1951 Refugee Convention does not enshrine any territorial limitations and prohibits return "in any manner whatsoever",[76] irrespective if it occurs "beyond the national territory of the state in question, at border posts or other points of entry, in international zones, at transit points, etc."[77] Conversely, by imposing restrictive measures towards asylum seekers, including implementing containment policies and safe third country practices, states may conceivably breach their good faith obligations[78] of availing protection under non-refoulement rule at the frontiers or in the territory of the state of destination.[79] As *Cantor* assumes, "the human rights *non-refoulement* principle has a strong speculative aspect, i.e. it is engaged by the envisaged risk extraterritorially".[80] Thus, the extraterritorial application of the principle of non-refoulement is effected, under Wilde's classification, with the "personal basis" rather than "spatial basis" for jurisdiction,[81] since the state conduct is linked to an individual rather than some specific territory.[82]

Apart from that, the existence and scope of non-refoulement obligation in mass influx situations has also been highly debated as the concept of mass influx is not explicitly enshrined in the 1951 Refugee Convention and the 1967 Protocol, or in international refugee law jurisprudence.[83] Lauterpacht and Bethlehem conclude that the principle of non-refoulement applies irrespective of the size and suddenness of the flow of asylum-seekers, as long as "the words of Article 33(1) give no reason to exclude the application of the principle to situations of mass influx".[84] This approach is well

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72 See, UNHCR ExCom Conclusion 6 (1977) [c]; UNHCR ExCom Conclusion 79 (1996) [j]; UNHCR ExCom Conclusion 81 (1997) [i]; UNHCR ExCom Conclusion 82 (1997) [d], [i]; UNGA res 52/103 (9 February 1998) [5]

73 Goodwin-Gill and McAdam (n 2) 233.

74 David J Cantor, 'Extraterritorial Non-refoulement: Intersections between Human Rights and Refugee Law' in Corinne Lennox (ed), *Contemporary Challenges for Understanding and Securing Human Rights in Practice* (School of Advanced Study 2015) 114; Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 177.

75 Goodwin-Gill and McAdam (n 2) 250; Cantor, 'Extraterritorial Non-refoulement: Intersections between Human Rights and Refugee Law' (n 74) 114.

76 Goodwin-Gill and McAdam (n 2) 246.

77 Lauterpacht and Bethlehem (n 59) 67.

78 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 179; Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 HHRJL 229, 237; Goodwin-Gill and McAdam (n 2) 221-3.

79 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 179; James C Hathaway and John A Dent, *Refugee rights: Reports on a Comparative Survey* (York Lane Press 1995) 14-15.

80 Cantor, 'Extraterritorial Non-refoulement: Intersections between Human Rights and Refugee Law' (n 74) 115.

81 Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?' (2005) 2 EHRLR 115, 116.

82 See UNHRC, 'Lopez Burgos v Uruguay, Saldias de Lopez (on behalf of Lopez Burgos) v Uruguay' (29 July 1981) CCPR/C/13/D/52/1979 [12.3]; UNHRC, 'Lilian Celiberti de Casariego v Uruguay' (29 July 1981) CCPR/C/13/D/56/1979 [10.3].

83 A Hurwitz, *Mass Influx, in Immigration and Asylum from 1900 to the Present* (Matthew J Gibney and Randall Hansen eds, ABC-CLIO 2005) 393, 394.

84 Lauterpacht and Bethlehem (n 59) 104.

supported by numerous international instruments, including the OAU Convention, Cartagena Declaration, EU Temporary Protection Directive, and UNHCR conclusions.[85] On the other hand, there is well-established assumption that "the prospect of a massive influx of refugees and asylum seekers exposes the limits of the state's obligation otherwise not to return or refuse admission to refugees".[86] As Durieux and McAdam conclude, the mass influx situation might cause "a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention"[87] considering the resources of the receiving states.

Consequently, the ever-increasing displacement challenges eventually troubled the scope of refugee protection and modified the content and scope of the non-refoulement rule, while doubling concerns regarding the efficiency and enforceability of refugee protection regime.[88] And, as Edwards precisely assumed in 2005,[89] "it is at this juncture that human rights law has stepped in to fill in the "grey areas".[90]

B. *De facto* right to asylum and prohibition of refoulement under human rights protection regime

The adoption of treaties outside international refugee law and the development of international jurisprudence on international protection has evidenced the wider scope of the principle of non-refoulement beyond Article 33 of the 1951 Refugee Convention.[91] The obligation not to return an individual to serious harm has been implicitly or explicitly stipulated[92] in the jurisprudence of international human rights law, serving as *de facto* right to asylum.[93]

The practice of judicial (in case of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[94]) and quasi-judicial bodies (in case of the 1966 International Covenant on Civil and Political Rights and the 1984

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85 OAU Convention art II(5); AALCO, Bangkok Principles (n 65) art 3.4; Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984), annual Report of the Inter-American Commission on Human Rights, OAS soc OEA/Ser L/V/II 66/doc 10, rev 1, 190-93 (1984-85) (Cartagena Declaration on Refugees) art III(8); Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof [2001] OJ L212/12-212/23; UNHCR ExCom Conclusion 15 (1979) [f]; UNHCR ExCom Conclusion 19 (1980) [a], [b], [i]; UNHCR ExCom Conclusion 22 (1981) [II(A)(1)], [II(A)(2)]; UNHCR ExCom Conclusion 4 (1994) [r]; UNHCR, Protection of Refugees in Mass influx Situations: Overall Protection Framework, UN doc EC/GC/01/4 (19 February 2001) [6], [13].

86 Goodwin-Gill and McAdam (n 2) 243, 229-31.

87 Jean-Francois Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass influx Emergencies' (2004) 16 IJRL 4, 9, 13.

88 Guy S Goodwin-Gill, 'Asylum 2001-A Convention and a Purpose' (2001) 13 IJRL 1, 1-2.

89 Alice Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (2009) 30 MJIL 763, 792.

90 See Alice Edwards, 'Human Rights, Refugees and the Right to "Enjoy" Asylum' (2005) 17 IJRL 293, 295.

91 Goodwin-Gill and McAdam (n 2) 285, 310.

92 ibid 285-286.

93 Walter Suntinger, 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?' (1995) 49 AJPIL 203, 224.

94 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment[95]), serving as supervisory mechanisms[96] under international human rights instruments greatly supported the clarification of the complex legal nature of the non-refoulement rule. International human rights instruments introduced obligations towards states not to transfer a person to another country where he or she might face serious human rights violation such as, arbitrary deprivation of life, torture, or other cruel, inhumane or degrading treatment.[97] For example, Articles 6 and 7 of the ICCPR prohibit arbitrary deprivation of life, torture, cruel, inhumane or degrading treatment or punishment. The UN Human Rights Committee in its General Comments No 20 and No 31 reiterated the non-derogable nature[98] of Article 7, further establishing that the removal of a person to a place where he or she would face a real risk (a necessary and foreseeable consequence) would lead to a violation of obligations imposed upon the states under the ICCPR.[99]

Likewise, while the European Convention on Human Rights (ECHR) does not expressly enshrine the principle of non-refoulement, its competent organs, through their jurisprudence, have consistently affirmed the absolute and non-negotiable nature[100] of its Article 3, which provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".[101] Prohibition of torture as a *jus cogens* norm, alongside its legal significance, represents the fundamental moral principle for maintaining a human society.[102]

Furthermore, the extensive case law of the Court, including its seminal cases of *Soering*,[103] *Chahal*,[104] and *Ahmed*,[105] illustrates the broader *ratione personae* scope[106] of Article 3 of ECHR compared to Article 33 of the Refugee Convention. Article 3 of ECHR applies to any individual falling within its protection due to fearing ill-treatment, irrespective of the character[107] and conduct[108] of the individual or a danger that derives from him/her.[109] Still, the Court has restricted[110] the extensive scope of the non-refoulement under Article 3 by establishing a high threshold of evidentiary requirements for its application.[111] According to the Court's jurisprudence,[112] establishing a minimum

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95 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT).

96 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 187-189.

97 Goodwin-Gill and McAdam (n 2) 302, 308, 310–11, 316.

98 ICCPR art 4(2); UNHRC, 'CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992) 3 available at: < https://www.refworld.org/docid/453883fb0.html> accessed on: 12.09.2021.

99 UNHRC, 'GT v Australia' (4 November 1997) UN Doc CCPR/C/61/0/706/1996 8.1.

100 See ECHR art 3; Council Directive 2011/95/EU art 15(b).

101 *Soering v United Kingdom* (1989) Series A no 161 [87]-[88], [90]-[91]; *Cruz Varas v Sweden* (1991) Series A no 201 [70]; *Chahal v United Kingdom* ECHR 1996-V 97 [74]; *Saadi v Italy* App no 37201/06 (ECHR, 28 February 2008) 125, 134-136.

102 Levan Alexidze, 'Legal Nature of Jus Cogens in Contemporary International Law' (1981) 172 Recueil des Cours 219, 260.

103 *Soering v United Kingdom* (n 101).

104 *Chahal v United Kingdom* (n 101).

105 *Ahmed v Austria* ECHR 1996-VI 26.

106 ibid 41, *Chahal v United Kingdom* (n 101) [80].

107 *Soering v United Kingdom* (n 101); *Chahal v United Kingdom* (n 101).

108 *Soering v United Kingdom* (n 101).

109 *Chahal v United Kingdom* (n 101) [80]; *Ahmed v Austria* (n 105) (criminal posing threat to national security).

110 Terje Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to De Facto Asylum' (1990) 2 IJRL 361, 373, 384; Hélène Lambert, 'Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue' (1999) 48(3) ICLQ 515, 517.

111 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 200.

level of severity for the treatment is an essential prerequisite, while less favourable treatment towards individuals does not give rise to a breach of Article 3.[113] As established in *Vilvarajah*, a mere possibility of ill-treatment does not suffice breach of Article 3,[114] since there should be substantial grounds for believing that upon removal, the person concerned would face a real ("foreseeable"[115]) risk of being subjected to torture or inhuman or degrading treatment or punishment.[116] Apart from the apparent duty of non-return under Article 3, the state parties to the Convention might not be allowed to remove persons due to the real risk of ill-treatment giving rise to a breach of other provisions of the Convention as well.[117] Thus, Article 3 may be considered as a protective shield suggesting "a right to *de facto* asylum"[118] while precluding[119] any exception or qualification even in time of war or public emergency.[120]

Notably, Article 3 of the UN Convention against Torture enshrines the explicit prohibition of the removal of a person when there are substantial grounds to believe that it will create a risk of being subjected to torture. Unlike the 1951 Refugee Convention, and in resemblance of the ICCPR, ECHR, American Convention on Human Rights and OAS Convention, [121] this provision permits no derogation irrespective of the character or behaviour of the person concerned, as well as, regardless of whether he/she poses a danger to the state.[122] The Committee against Torture has consistently affirmed that the standard of proof for Article 3 goes "beyond mere theory or suspicion" or "a mere possibility of torture";[123] rather, in order to qualify for protection, there should be substantial grounds for believing that the risk of torture is real, foreseeable and personal.[124] However, the scope of the protection is different from the ICCPR, ECHR and 1951 Refugee Convention: Article 3 of the Convention against Torture provides protection from torture, which encompasses acts, carried out or acquiesced solely by the

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[112] *Soering v United Kingdom* (n 101) 100; *Cruz Varas v Sweden* (n 101) [83]; *Vilvarajah and ors v United Kingdom* (1991) Series A no 215 107; *Ahmet Özkan and ors v Turkey* App no 21689/93 (ECHR, 6 April 2004) [334]; *Saadi v Italy* (n 101) 134.

[113] Katharina Röhl, 'Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human Rights' (2005) UNHCR Working Paper no 111, 18 <https://www.unhcr.org/research/working/41f8ef4f2/fleeing-violence-poverty-non-refoulement-obligations-under-european-convention.html> accessed 22 October 2020.

[114] *Vilvarajah and ors v United Kingdom* (n 112) 97.

[115] *Soering v United Kingdom* (n 101) 100.

[116] ibid [91]; *Cruz Varas v Sweden* (n 101) 69, 82; *Vilvarajah and ors v United Kingdom* (n 112) 107, 115; *Chahal v United Kingdom* (n 101) 74; *Ahmed v Austria* (n 105) 39; *H.L.R v France* ECHR 1997-III 34; *Abdurrahim Incedursun v the Netherlands* ECHR App no 33124/96 27; *Jabari v Turkey* ECHR 2000-VIII 38; *Salah Sheekh v the Netherlands* App no 1948/04 (ECHR, 11 January 2007) [135]; *Saadi v Italy* (n 101) 125.

[117] See *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26 [21], [24-5], [35], [39-50], [52-53], [62], [67].

[118] Terje Einarsen (n 110) 382-5.

[119] ECHR art 15(2); *Soering v United Kingdom* (n 101) 88; *Vilvarajah and ors v United Kingdom* (n 112) 108; *Chahal v United Kingdom* (n 101) 79-80; *Ahmed v Austria* (n 105) 40; *Saadi v Italy* (n 101) 127, 137-138.

[120] Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 189-190.

[121] *Gorki Ernesto Tapia Paez v Sweden* CAT/C/18/D/39/1996 (CAT, 28 April 1997) 14.5; *Seid Mortesa Aemei v Switzerland* CAT/C/18/D/34/1995 (CAT, 29 May 1997) [9.8]; Goodwin-Gill and McAdam (n 2) 302-303.

[122] OAU Convention art II(3); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (Pact of San Jose) art 22(8).

[123] *EA v Switzerland* CAT/C/19/D/028/1995 (CAT, 10 November 1997) 11.3.

[124] See, for example, ibid 11.5; X, *Y, and Z v Sweden* CAT/C/20/D/61/1996 (CAT, 6 May 1998) 11.5; *NM v Switzerland* CAT/C/24/D/116/1998 (CAT, 9 May 2000) 6.7; *SC v Denmark* CAT/C/24/D/143/1999 (CAT, 10 May 2000) 6.6.

state.[125] It is further circumscribed to provide protection from pain or suffering arising out of "lawful sanctions".[126] Likewise, the Inter-American Court of Human Rights has explicitly declared in its judgment on the *Pacheco Tineo* case, that the obligation to grant asylum exists if doing otherwise would violate the non-refoulement rule.[127]

All things considered, it can be claimed that the human rights protection regimes have established "the basic standards on which principled action can be based".[128] However, these standards encompass multiple, yet diverse legal conditions regarding the scope of the non-refoulement rule and while doing so, guaranteeing the *de facto* right to asylum.

C. Securing the right to asylum through the customary rule of non-refoulement, if any

The determination of non-refoulement as a customary obligation has undoubted significance for its unlimited application to all states, including those who are not bound by treaty law. The rules of customary international law have particular importance for the human rights protection regime where treaty provisions might not bind numerous states, or when there is an urgent need for interpreting, applying or modifying relevant treaty provisions.[129]

The behavioural regularity and acknowledgement of legality[130] represent the foundation of customary rule.[131] Kelsen explained custom as "unconscious and unintentional law-making".[132] Visscher described the customary rule as the expression of the 'deeply felt community of law'.[133] Likewise, Judge Read envisaged customary international law as "the generalisation of the practice of states"[134] which, according to Anzilotti, should be observed with the conviction of complying with certain obligation.[135]

Indeed, to be regarded as international customary rule, a consistent state practice should be accompanied by the belief that adherence to the rule reflects and is required by law. [136] While according to Ulpian, such "two-element theory" can be traced back to the 1st century A.D. in Roman Law,[137] the modern,[138] close-to-universal definition of

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[125] J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Brill 1988) 119-20; *H.L.R v France* (n 116) 40; Goodwin-Gill and McAdam (n 2) 301.

[126] Goodwin-Gill and McAdam (n 2) 301.

[127] *Familia Pacheco Tineo v Estado Plurinacional de Bolivia*, Inter-American Court of Human Rights, Serie C No. 272, 25 November 2013, 2; see also, Gil-Bazo (n 3) 10.

[128] Erika Feller, 'International Refugee Protection 50 years on: The Protection Challenges of the past, present and future' (2001) 83 IRRC 582.

[129] See, Michael Byers, *Custom, Power and the Power of Rules, International Relations and Customary International Law* (CUP 2004) 4, 166-80.

[130] ibid 3.

[131] Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 54.

[132] Antonio Cassese, *International Law* (2nd edn, OUP 2005) 156; see also, International Law Commission (André da R Ferreira, Cristieli Carvalho, Fernanda G Machry, Pedro B V Rigon), 'Formation and Evidence of Customary International Law' (2003) 1 UFRGSMUN 186.

[133] Charles De Visscher, *Theory and Reality in Public International Law* (Percy Ellwood Corbett edn, PUP 2016) 155; see also, Alexander Orakhelashvili, 'Natural Law and Customary Law' (2008) MPICPLIL 81.

[134] *Fisheries (United Kingdom v Norway)* (Dissenting Opinion of Judge Read) [1951] ICJ Rep 186 (Fisheries); see also, James R Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2015) 23.

[135] D Anzilotti, *Cours de droit international* (Gilbert Gidel tr, Recueil Sirey 1929) 73-74.

[136] ILC, 'Formation and Evidence of Customary International Law' (n 132) 182, 187.

[137] Ulpian, 'Tituli ex corpore Ulpiani' in Paul F Girard and Félix Senn (eds), *Textes de droit romain*, (vol 1, 7th edn, Dalloz 1967).

[138] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) art 38(1)(b).

customary rule is provided by Article 38 of the Statute of the ICJ, which refers "international custom, as evidence of a general practice accepted as law".[139] The jurisprudence of the ICJ[140], and its predecessor PCIJ,[141] has established the need of the cumulative presence of both constituent elements of international customary rule: state practice and *opinio juris*.

At the UN Conference on the Status of Stateless Persons,[142] the non-refoulement rule was proclaimed as a general principle of international law, approximately three years after one of its first conventional stipulations in the 1951 Refugee Convention.[143] Even though scholars have further assessed this statement as premature,[144] the principle of non-refoulement has greatly evolved during these 60 years in international practice[145] and treaty law[146] alongside the realisation of the right to asylum. Having 147 states to be now bound by the conventional obligation of non-refoulement, the norm-creating character of this principle has been well established[147] by international conventions,[148] UNHCR Executive Committee Conclusions,[149] UN General Assembly Resolutions,[150] etc. The customary nature of the principle of non-refoulement is highly asserted by majority of prominent scholars;[151] while some of distinguished scholars, such as Hathaway and Hailbronner, dispute that the standard for establishing the customary rule has not been yet attained as interstate practice illustrates noncompliance.[152]

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[139] ibid art 38(1)(b).

[140] *Asylum case (Colombia v. Peru) (Haya de la Torre case)* (Merits) [1950] ICJ Rep 395 (Asylum case); see also, *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark, Federal Republic of Germany/The Netherlands*) (Merits) [1969] ICJ Rep 3 (North Sea Continental Shelf cases) [37]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 (Nicaragua) 98.

[141] *SS 'Lotus' (France v Turkey)* (Merits) [1927] PCIJ Series A no 10 (Lotus).

[142] Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117.

[143] See also, Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663, art 3.

[144] Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 204; Goodwin-Gill and McAdam (n 2) 345.

[145] see e.g. UNHCR Advisory Opinion (n 42) [15]; Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 204; Goodwin-Gill and McAdam (n 2) 345; Zimmermann, Machts, Dörschner (n 17) 1411.

[146] See ECHR; ICCPR; UNCAT.

[147] Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 204-205.

[148] OAU Convention art II(3); Declaration on Territorial Asylum, art 3(1); CoE Committee of Ministers Resolution (67) 14 (n 27); Cartagena Declaration on Refugees; AALCO, Bangkok Principles (n 65) arts III.3, III.5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 art 45.

[149] UNHCR ExCom Conclusion 6 (1977) [a]; UNHCR ExCom Conclusion 17 (1980) [d]; UNHCR ExCom Conclusion 68 (1992) [f]; UNHCR ExCom Conclusion 71 (1993) [g]; UNHCR ExCom Conclusion 74 (1994) [g]; UNHCR ExCom Conclusion 79 (1996) [j]; UNHCR ExCom Conclusion 81 (1997) [i]; UNHCR ExCom Conclusion 99 (2004) [l]; UNHCR ExCom Conclusion 103 (2005) [m].

[150] Including: UNGA res 32/67 (8 December 1977) A/RES/32/67 [5(c)]; UNGA res 33/26 (29 November 1978) A/RES/33/26 [6]; UNGA res 60/120 (16 December 2005) A/RES/60/120 [3]; UNGA res 60/129 (24 January 2006) A/RES/60/129 [3]; UNGA res 61/137 (25 January 2007) A/RES/61/137 [3]; UNGA res 62/124 (24 January 2008) A/RES/62/124 [4].

[151] Weis, 'Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees' (n 62) 482; David Martin, 'The New Asylum Seekers' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s: The Ninth Sokol Colloquium on International Law* (Nijhoff 1988); Goodwin-Gill and McAdam (n 2) 346.

[152] James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 363.

i. States' compliance with the principle of non-refoulement: rules against practice

States are entities that enjoy international legal personality and their conduct, actions as well as omissions,[153] can widely evidence the customary nature of the non-refoulement rule.[154] It involves the practice of their executive, legislative and judicial organs, as well as those private persons and entities that act on their behalf.[155] The formation and expression of the customary rule of non-refoulement can also be affected by the practice of international organisations,[156] non-governmental organisations, multinational corporations and even individuals.[157] As ILC observed, the customary rule can by evidenced by taking due regard to subjects, forms, the general nature and duration of such practice.[158]

Practice regarding the non-refoulement rule can be evidenced by physical and verbal acts,[159] such as, but not limited to: diplomatic acts and correspondence, acts of the judiciary, legislature, or executive branch of government, conduct in connection with treaties and resolutions of the UN General Assembly, etc.[160] The particular duration of time is not essential for the determination of the existence of customary rule of non-refoulement if the practice is maintained or repeated.[161] The ICJ affirmed in the *North Sea Continental Shelf cases* that the passage of only a short period of time was not an impediment for the formation of a new international customary rule if there was fulfilled one "indispensable requirement" that state practice should be extensive and virtually uniform, as well as it "should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".[162]

Generality of state practice is an essential precondition for establishing the customary nature of the non-refoulement rule. The ILC has defined the generality of practice as "the aggregate of the instances in which the alleged rule of customary international law has been followed".[163] The states' observance of the non-refoulement rule can be considered as general or a "settled practice"[164] if it fulfils two requirements: firstly, if the adherence of the non-refoulement rule is sufficiently widespread and representative; and secondly, if such adherence is consistent.[165] For the non-refoulement rule to be widespread, universal participation by all states is not required; rather a

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153 ILC, 'Formation and Evidence of Customary International Law' (n 132) 187.

154 International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with commentaries' (2018) vol 2(2) ILCYB 130.

155 Maurice H Mendelson, *The Formation of Customary International Law* (Nijhoff 1999) 198.

156 Shaw (n 131) 241; ILC, 'Formation and Evidence of Customary International Law' (n 132) 188; ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 130.

157 Mendelson, *The Formation of Customary International Law* (n 155) 203; ILC, 'Formation and Evidence of Customary International Law' (n 132) 188.

158 ILC, 'Formation and Evidence of Customary International Law' (n 132) 187.

159 ibid 189; ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 133; Mendelson, *The Formation of Customary International Law* (n 155).

160 ILC, 'Formation and Evidence of Customary International Law' (n 132) 188; ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 133; see also, Crawford (n 134) 24.

161 ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 136; Crawford (n 134) 24.

162 North Sea Continental Shelf cases [74]; ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 138; ILC, 'Formation and Evidence of Customary International Law' (n 132) 189; Crawford (n 134) 24.

163 ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 136.

164 North Sea Continental Shelf (n 77).

165 ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 135-136.

sufficient number of states, including those who had an opportunity or possibility to adhere it should implement the prohibition from refoulement.[166] Likewise, according to the findings of ICJ in the *Fisheries case* and the ILC draft Conclusions, the consistency, or discernible pattern of behaviour of the states,[167] requires substantial not complete uniformity.[168]

Having no single case when the state has ever expelled refugees by calling it a refoulement,[169] seems like a promising foundation to evidence the generality of non-refoulement rule. However, Hathaway's conclusion represents the irrefutable truth that, "as the recounting of state practice […] makes depressingly clear, refoulement still remains part of the reality for significant numbers of refugees, in most parts of the world".[170] Close observance of state reports to the Human Rights Committee and the Committee against Torture evidences that states do not usually refer their expulsions, deportations, refusals to admit or removals as instances of refoulement.[171]

Having due regard to the violations of the non-refoulement rule, there arises the key question of whether such occurrences diminish the consistency of the customary rule. In the *Asylum case*, the ICJ defined that for the means of establishing international customary rule, the complete uniformity of the practise is not required, rather a customary rule must be "in accordance with a constant and uniform usage practised by the states in question".[172] This approach was reiterated in the *North Sea Continental Shelf cases*[173] and further elaborated in the *Nicaragua case*, where ICJ held that for the establishment of customary rule, it is not necessary that the corresponding practice to be "in absolutely rigorous conformity with the rule"; instead, "the conduct of states should, *in general*, be consistent with such rules".[174] The Court furthermore noted that the inconsistencies in the state conduct could not be used as a proof of the emergence of a new rule. Rather, they point to the breach of the customary rule, given that the state breaching the rule defends its conduct by referring to exceptions or justifications enshrined within the rule itself.[175] As Goodwin-Gill and McAdam note,[176] a number of states describe their conduct as "something other" than refoulement while closing their borders to the refugees,[177] avoiding calling accepted migrants as refugees by insisting that they were receiving them due to humanitarian concern,[178] or justifying deportations as expelling illegal migrants.[179] It is undoubtedly clear that irrespective of being bound by

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166 ibid 136.
167 Fisheries [131]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* (Merits) [1984] ICJ Rep 165 (Gulf of Maine Area) [81].
168 ibid 116, 131, 138; see also, Crawford (n 134) 24; Shaw (n 131) 57.
169 Goodwin-Gill and McAdam (n 2) 351.
170 Hathaway (n 152) 364; see also, UNHRC res 1997/75 (18 April 1997) E/CN.4/RES/1997/75; UNHCR, 'Note on International Protection', UN Doc A/AC.96/898 (3 July 1998) [10-14]; Hathaway and Dent (n 79) 5.
171 Goodwin-Gill and McAdam (n 2) 352.
172 Asylum case (n 140) 276-7; ILC, 'Formation and Evidence of Customary International Law' (n 132) 189; Shaw (n 131) 56.
173 North Sea Continental Shelf (n 77) 43.
174 Nicaragua (n 140) 186.
175 ibid.
176 Goodwin-Gill and McAdam (n 2) 352.
177 ibid 219, 227, 229-32, 347.
178 Donald W Greig, 'The Protection of Refugees and Customary International Law' (1983) 8 AYIL 108, 125-7; Patricia Hyndman, 'Asylum and Non-Refoulement - Are these Obligations Owed to Refugees under International Law?' (1982) 57 PLJ 43, 70-1.
179 Goodwin-Gill and McAdam (n 2) ch 5(2.5.1).

conventional obligations of non-refoulement, states have asserted to great lengths their conduct to be in compliance with the principle of non-refoulement, even when the contrary was obvious.[180] Thus, the balancing relationship between *opinio juris* and state practice should be given due regard,[181] since even inconsistencies do not always avert the establishment of a customary rule.[182]

ii. Evidencing *opinio juris* on non-refoulement rule

Prohibition of refoulement with the sense of a legal right or obligation is a constituent element in establishing the existence of legal custom of non-refoulement rule.[183] While everything that is mandated by morality, comity, courtesy or social needs does not evidence the legal rule, the rationale behind the psychological, subjective facet and *opinio juris*,[184] lies in distinguishing the practice that is established on legal conviction from those practices that are not.[185]

The absence of legal conviction has been a decisive factor in denying the existence of customary rule in *Lotus*.[186] Similarly, in the *Asylum case*[187] it was maintained that the presence of political expediency while lacking the sense of legal obligation refuted to evidence customary rule.[188] As ILC explained, "a general practice that is accepted as law *(opinio juris)* is to be distinguished from mere usage or habit"[189] and be undertaken with the belief that such conduct is permitted, required or prohibited by customary rules.[190] In 1969 the ICJ established in *the North Sea Continental Shelf* judgement, the judicial *locus classicus* on the matter,[191] that the state conduct should be the evidence of a belief that by acting so 'they are conforming to what amounts to a legal obligation'.[192] The Court in the *Nicaragua case* corroborated the same approach.[193]

The coexistence of *opinio juris* alongside with state practice should be properly evidenced in order to assert the existence of customary rule of non-refoulement.[194] While there exists no formal judicial declaration, the principle of non-refoulement has been consistently endorsed by UN member states as part of customary international law,[195] most prominently by the Global Consultations on International Protection,[196] the 2016

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[180] Hathaway (n 152) 364; See also, Oscar Schachter, *International Law in Theory and Practice* (Nijhoff 1991) 337-40; cf Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988-89) 12 AYIL 82; Goodwin-Gill and McAdam (n 2) 352.

[181] Schachter (n 180) 716, 735.

[182] ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 137.

[183] ibid 138.

[184] François Gény, *Méthode D'interprétation et Sources en Droit Privé Positif*: *Essai Critique* (2nd edn, LGDJ 1919).

[185] Committee on Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) 10.

[186] Lotus (n 141) 28.

[187] Asylum case (n 140).

[188] See also Orakhelashvili (n 133) 85.

[189] ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 138.

[190] ibid.

[191] Hugh Thirlway, *The Sources of International Law* (OUP 2014) 102.

[192] North Sea Continental Shelf cases (n 77) 44, 77.

[193] Nicaragua (n 140) 108-109.

[194] North Sea Continental Shelf cases (n 77).

[195] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [1980] ICJ Rep 3 [88]; See also Goodwin-Gill and McAdam (n 2) 346.

[196] UNHCR, Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees, HCR/MMSP/2001/09 (16 January 2002) [4], incorporated in ExCom of the High Commissioner's Program, Agenda for Protection (26 June 2002) UN Doc EC/52/SC/CRP9/Rev.1.

New York Declaration for Refugees and Migrants,[197] and the 2018 Global Compact on Refugees.[198]

As it has been rightly asserted by the ILC, *opinio juris* might be manifested by the same conduct used to confirm state practice,[199] such as: public statements made on behalf of states, positions of states before international organisations or international conferences, state's actual conduct, state's treaty practice, government legal opinions, diplomatic practice, pronouncements/decisions of national courts, etc.[200] Accession to treaties by states can also be considered as an evidence to *opinio juris*, since states behave so due to their belief that this is the right thing to do. The norm creating character of the principle of non-refoulement has been also routinely pronounced by UN General Assembly resolutions and UNHCR.[201] As an example, the ICJ has inferred the existence of *opinio juris* from the UN General Assembly resolutions,[202] its own or other tribunals' practice,[203] as well as major codification conventions[204] and the work of the ILC.[205] Likewise, states refrain from making formal or informal opposition to the principle, while invariably acknowledging its normative character irrespective of being a state party to the 1951 Refugee Convention or 1967 Protocol.[206]

As a general rule, the establishment of a customary rule of non-refoulement guarantees its unequivocal application and uniform interpretation among all states irrespective of their assignment to conventional obligations.[207] Therefore, the unhindered application of the non-refoulement rule itself should represent as a major assurance for respecting and enforcing the right to asylum. However, as illustrated above, the scope and composition of the non-refoulement rule is not identical in customary and treaty law, causing its multi-layered interpretation and application, including regarding refugee matters.

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197 New York Declaration 24, 58, 67.

198 Global Compact on Refugees 5, 87.

199 ILC, 'Formation and Evidence of Customary International Law' (n 132) 191; International Law Association, Report of the Sixty-Ninth Conference (n 185) 7.

200 ILC, 'Draft Conclusions on Identification of Customary International Law' (n 154) 140; ILC, 'Formation and Evidence of Customary International Law' (n 132) 21.

201 UNHCR ExCom Conclusion 6 (1977) [a]; UNHCR ExCom Conclusion 17 (1980) [d]; UNHCR ExCom Conclusion 68 (1992) [f]; UNHCR ExCom Conclusion 71 (1993) [g]; UNHCR ExCom Conclusion 74 (1994) [g]; UNHCR ExCom Conclusion 79 (1996) [j]; UNHCR ExCom Conclusion 81 (1997) [i]; UNHCR ExCom Conclusion 99 (2004) [l]; UNHCR ExCom Conclusion 103 (2005) [m]; see ftn 140.

202 See e.g. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion, 8 July 1996) [Nuclear Weapons] 226, 254-255.

203 North Sea Continental Shelf cases (n 77) 3, 44; Gulf of Maine Area [246], [293]-[294]; Nicaragua (n 140) 14, 108-109; Nuclear Weapons (n 202) 226, 254-255; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14 203-206.

204 See e.g. North Sea Continental Shelf cases (n 77) 3, 28-32; *The Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* (Merits) [2002] ICJ Rep 303, 429-30.

205 See e.g. *Gabcíkovo-Nagymaros case (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, 38-42, 46.

206 UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (31 January 1994) [5] available at:<https://www.refworld.org/docid/437b6db64.html> accessed on 11.09.2021; see also, Goodwin-Gill and McAdam (n 2) ch 5(2.5) 347.

207 Hurwitz, *The Collective Responsibility of States to Protect Refugees* (n 21) 207.

III. Common Understanding of the Foundational Principles of Right to Asylum and Non-Refoulement Rule as *Conditio Sine Qua Non* for Functioning of Predictable and Equitable Burden- and Responsibility-Sharing Mechanism

Refugee issues is a matter of transnational importance,[208] and consequently, states have a general obligation of international cooperation to provide protection to refugees, as it has been duly referred in 1951 Refugee Convention[209] and the Global Compact on Refugees.[210] As Volker Türk and Madeline Garlick point out:

> [...] the legal obligation for States to cooperate with each other in regard to refugee matters, directly among themselves and via cooperation with UNHCR, [...] emerges from the UN Charter, UNHCR's Statute, and subsequent relevant UNGA resolutions in conjunction with the 1951 Convention, as well as other international refugee instruments and corresponding State practice.[211]

While this proclamation provides veracity, the diversified understanding of the foundational principles of refugee protection regime, the right to asylum and the non-refoulement rule, makes it difficult to identify common protection needs and therefore, the respective responsibilities of states regarding international cooperation and burden- and responsibility-sharing on refugee matters. This section examines whether these deficiencies in the global refugee regime consequently affect the predictable and equitable allocation of responsibilities among states, particularly, while guaranteeing the right to asylum.[212]

Diversified approaches to the application of the right to asylum alongside with manifold interpretations of the non-refoulement rule can be considered as the reason behind failing refugee protection regimes. Recent experience illustrates that while concern regarding refugees has drastically increased due to previous and existing conflicts, massive violations of human rights and environmental degradation, this has imposed intolerable responsibilities and costs to low or middle-income developing countries.[213] Consequently, there is a pattern of defensive strategies by states to avoid receiving those who had to leave their homes forcibly.[214]

While the right to seek asylum is not accompanied with the corresponding state's duty to grant asylum, states enjoy full discretion of interpreting their obligations under the existing refugee protection regime and to design their individual approaches and asylum policies.[215] Consequently, the lack of common understanding of the right to asylum and non-refoulement rule causes vivid confusion regarding the corresponding

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[208] James C Hathaway, R Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivised and Solution-Oriented Protection' (1997) 10 HHRJ 115, 170.

[209] Refugee Convention, Preamble, Recital 4.

[210] Global Compact on Refugees, paras 2, 48, Annex I paras 1, 9.

[211] Volker Türk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' (2016) 28 IJRL 660.

[212] Catherine Phuong, 'Identifying States' Responsibilities towards Refugees and Asylum Seekers' (2005) ESIL Research Forum <http://www.esilsedi.eu/sites/default/files/Phuong.PDF> accessed 20 September 2020, 11.

[213] Hathaway and Neve (n 208) 116.

[214] ibid.

[215] Yvonne S Brakel, Rachel E Kester, Samantha L Potter, '50 Years Was Too Long to Wait: The Syrian Refugee Crisis Has Highlighted the Need for a Second Optional Protocol to the 1951 Convention Relating to the Status of Refugees' (2017) 40 UALRLR 51, 55, 59; Phuong (n 212) 1.

international obligations of states towards asylum seekers and refugees.[216] As a result, the manipulability[217] of the definition of these legal guarantees considerably weakens the functioning of the global refugee regime.

As Goodwin-Gill has pointed out, "the peremptory norm of non-refoulement secures admission".[218] However, given the "longstanding unwillingness by states to codify a global obligation to share responsibility for refugees",[219] admission of asylum seekers and refugees is one of such dimensions where fragmentation in the right to asylum and non-refoulement rule results in diverse practices between states.[220] In theory, admission of asylum seekers is a precondition for states to perform their conventional obligation of non-refoulement *in good faith*.[221] However, states can equally deny admission due to the existence of "safe third country" option that, in practice, might lead to having "orbit refugees" - who want to seek asylum but are rejected by each country as they have had the possibility to seek asylum earlier in another safe country and can return there.

In the absence of a common understanding, the "safe third country" practices, on the one hand, equip states with the discretion to reject such refugees at the border, and by doing so, provides them ample opportunity to interpret the right to asylum and the non-refoulement rule on a case-by-case basis.[222] On the other hand, states usually claim the expulsion of non-citizens as something different from refoulement. While the international community should respect the discretionary acts of the states as sovereigns, protection of those in need is a fundamental precondition for the functioning of the global refugee regime. Functionality of the regime now depends on whether states and the international community as a whole can agree on the substance of the value from which the global refugee regime was brought into being.

Another substantive lacunae[223] in the understanding of the right to asylum and non-refoulement rule is the vagueness of state responsibility for processing asylum claims in or outside the state where the application is lodged.[224] As early as the 1990s, states have been reluctant to examine asylum cases lodged on their territories.[225] While there is no explicit legal provisions that refers to the location of the examination, it is hardly imaginable to set up equitable and predictable burden- and responsibility-sharing mechanism without shedding light to this issue.[226]

While governments have regularly endorsed the importance of international solidarity and burden sharing, collectivised efforts have *been ad hoc* and usually insufficient,[227] which has ultimately caused "asylum fatigue" to traditional receiving

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[216] Phuong (n 212) 1.
[217] Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (n 89) 796.
[218] Goodwin-Gill and McAdam (n 2) 202.
[219] David J Cantor, 'Fairness, Failure, and Future in the Refugee Regime' (2018) 30(4) IJRL 627, 628.
[220] Brakel, Kester, Potter (n 215) 59.
[221] VCLT art 26.
[222] Phuong (n 212) 3.
[223] Edwards, 'Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders' (n 89) 796.
[224] Rosemary Byrne and Andrew Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 HHRJ 185; Phuong (n 212) 4.
[225] Joanne V Selm-Thorburn, *Refugee Protection in Europe: Lessons from the Yugoslav Crisis* (The Hague: Nijhoff 1998); Phuong (n 212) 4.
[226] Phuong (n 212) 4-5.
[227] Hathaway and Neve (n 208) 116.

states. The global refugee regime suffers from the lack of apparent identification of the relevant responsibilities of states towards asylum seekers and refugees within the scope of the right to asylum and non-refoulement rule. Consequently, fragmentation in these concepts represents a hindering factor to well functioning burden and responsibility-sharing mechanism, and in the long term, to the functioning of the global refugee regime. The common approach on the right to asylum and non-refoulement rule will ultimately enhance the accountability of states and burden- and responsibility-sharing in refugee context.

IV. Conclusion

Examining international jurisprudence on refugee matters and human rights has revealed the ambiguity in interpreting and applying core principles of refugee protection regime. In the absence of the universally accepted approach on the right to asylum, the rights to seek, be granted and enjoy asylum represent interconnected, but independent and partitioned concepts. Therefore, diversified, yet contrasting, approaches are still applied in interpreting the right to asylum and the non-refoulement rule. Such fragmentation represents a hindering factor to equitable and predictable burden- and responsibility-sharing mechanism, and in the long term, to the functioning of the global refugee regime as a whole.

After some 70 years following the establishment of the current refugee regime, the asylum dilemma progressively aggravates. The current refugee regime has moderately affixed precision to the legal protection towards those in need of asylum. However, application of the established standards illustrated invisible lacunas. This article suggested the analysis of the nature, composition and enforceability of the right to asylum and its protecting shield - the non-refoulement rule, by examining their sequel on the operation of equitable and predictable protection regime. Attaining a common understanding on the core values will serve as an ultimate precondition on the way to establishing and securing equitable and predictable burden- and responsibility-sharing mechanism in refugee context. Indeed, the major, yet incomplete, transformations in refugee matters over the decades evidences that the 21st century is no less transitional than its preceding one.

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Multilateral Investment Court – a Cure for Investor-State Disputes Under Extra-EU International Investment Agreements?

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Abstract

Both branches of international economic law – international investment and trade law are currently in crisis. Many reforms have been proposed to cure the shortcomings of their dispute resolution mechanisms. Distinctive though they are, it seems that the newest EU's proposal to establish the Multilateral Investment Court is heavily inspired by the dispute settlement system which exists in the World Trade Organization. The new system has been introduced to replace the investor-State dispute settlement mechanism existing in most investment treaties. In this article, the author assesses the objectives of the reform through the prism of successes and failures of the WTO dispute settlement system.

I. Introduction

Two major branches of international economic law – international trade and investment law have been portrayed in legal writing as Lottie and Lisa[1] – identical twins separated at a very young age who reunited years later at summer camp, thanks to recognizing their identical features and heritage. For years, international trade and investment law have been regulated separately. Nonetheless, the growing interdependency between the two calls for "consolidation of the two fields, similar to reunion of Lottie and Lisa and their parents".[2] It could be said with certainty that the dispute resolution systems under both fields, enormously different though they are, find themselves to be in crisis.

The World Trade Organization's ("WTO") dispute settlement system has been "killed from the inside".[3] That is because the United States of America ("USA") has been consistently blocking new appointments to the Appellate Body which ultimately resulted in it being inoperable. At the same time, there has been significant "backlash" against the investor-State dispute settlement system ("ISDS") existing under investment treaties.[4]

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1 Tomer Broude, 'Investment and Trade: The 'Lottie and Lisa' of International Economic Law?' (2011) Hebrew University of Jerusalem Legal Studies Research Paper 10-11 in Pierre Sauvé and Roberto Echandi (eds) *New Directions and Emerging Challenges in International Investment Law and Policy* (Cambridge University Press 2012).

2 ibid 140.

3 Eduardo Porter, 'Trump's Trade Endgame Could Be the Undoing of Global Rules', (*The New York Times*, 31 October 2017) <https://www.nytimes.com/2017/10/31/business/economy/trump-trade.html> accessed 30 May 2021.

4 Cecilia Malmström – the EU Commissioner for Trade – dubbed ISDS mechanism as 'the most toxic acronym in Europe' *see* Paul Ames, "ISDS: The most toxic acronym in Europe' (*Politico,* 17 September 2015) <https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/> accessed on 30 May 2021.

Some States have opted out of it (*e.g.* India[5] or Venezuela[6]) or revised their existing treaties (*e.g.* Canada-United States-Mexico Agreement ("CUSMA")[7]). One of the proposals to tweak ISDS concerns the creation of a Multilateral Investment Court – a permanent body adjudicating investment disputes with an appellate review stage inspired by the WTO dispute settlement system.[8]

In theory, the new dispute settlement mechanism would constitute a step towards a coherent international investment body of jurisprudence. The court would be composed of independent and impartial judges – the leading authorities in the field of international investment law. The introduction of an institutionalised judicial system aims at achieving predictability of judgements (mostly due to establishing an appellate tribunal) and more control over the costs of the proceedings and their length[9]. However, given the criticism surrounding the WTO Appellate Body in recent years and the crisis of the WTO dispute settlement system, we are yet to see whether the proposal to transplant a similar structure to the investment field will prove to be successful.

In this article, the author will focus on the alleged malfunctions of ISDS and whether certain aspects of it can be improved through establishing the Multilateral Investment Court. As the proposed reform draws inspiration from the WTO dispute settlement system, it seems only appropriate to evaluate the Multilateral Investment Court through the prism of advantages and disadvantages thereof. The EU put forward a plan to radically replace ISDS with a structure inspired by a WTO dispute settlement in 2015, when it was still considered as a successful dispute settlement mechanism.[10] With the benefits of the hindsight, we see that there was an (un)expected turn of events.

Does it mean that transplanting the mechanisms at WTO dispute settlement system into the Multilateral Investment Court renders the initiative doomed to failure?

II. ISDS crisis

Investment protection has played a major role in the international law field. The current shape of it has been somewhat a result of a balance between the economic interest of States in attracting foreign investment and investors' need to have certain legal guarantees offered.[11] Unlike trade law, international investment law has not been (so far) organised

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5 Alison Ross, 'India's termination of BITs to begin' (*Global Arbitration Review*, 22 March 2017) <https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin> accessed 30 May 2021.

6 Rian Matthews and Nandakumar Ponniya, 'Withdrawal from Investment Treaties: An omen for waning investor protection in AP?' (*Lexology, 12 May 2017*) <https://www.lexology.com/library/detail.aspx?g=4bdc087c-20f0-4729-9166-1d6de9b8d2de> accessed 30 May 2021.

7 CUSMA does not provide for a trilateral ISDS mechanism. Two parties to the treaty: United States and Mexico have agreed to maintain a bilateral ISDS mechanism for a narrow set of disciplines and sectors. ISDS mechanism does not extend to Canada. The only provided recourse for investors is State-to-State dispute settlement.

8 Multilateral Investment Court: Overview of the reform proposals and prospects <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf> accessed 30 May 2021.

9 Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearbook of European Law 209, 215.

10 Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers: Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109(4) Am J Inti L 761, 764.

11 Christoph Schreuer, 'The future of International Investment Law' in Marc Bungenberg et al (eds) *International Investment Law* (C.H.BECK 2015) 1904, 1905.

around a multilateral treaty or a central international organization.[12] The initial enthusiasm and the States' willingness to enter into bilateral investment treaties ("BITs") providing for ISDS dispute resolution mechanism has decreased.[13] Given the number of investment disputes and the awarded damages, Argentina and some European countries started wishing that "they could get the genie back into the bottle" and escape the liabilities created by BITs.[14]

BITs in their current form provide investors with vast protection mechanisms. These mechanisms are believed to be one-sided as only investors can pursue their claims against the States (with rare exceptions for counterclaims). Additionally, pursuant to the available information, investors have had a significant upper hand in the proceedings – under the ISDS regime, two-thirds of the cases have been settled or lost by States.[15] However, despite the initial assumptions, ISDS provisions in BITs did not contribute to a considerable increase of foreign direct investment ("FDI"). In fact, several commentators questioned whether ISDS provisions contained in BITs have any impact at all on investors' decisions to establish their presence in a certain State.[16] For example, Brazil consistently ranks among top 10 FDI receiving States even though it has never actually ratified any investment treaty providing for ISDS.[17]

In theory, ISDS provisions were to provide a neutral, independent and efficient dispute settlement forum which was supposed to eliminate the shortcomings of domestic litigation or diplomatic protection.[18] However, ISDS is not free of its own shortcomings. The backlash against it has been growing in recent years, and the opponents started calling for a reform.[19] States began to exclude ISDS from the concluded investment treaties calling into question its effectiveness.[20]

The ISDS crisis in the EU has two dimensions – the concerns relate to the intra-EU investment arbitration as well as the extra-EU investment arbitration. The legitimacy of BITs containing ISDS provisions within the EU has been challenged since the Lisbon Treaty entered into force in 2009. Under the Treaty in question, the power to conclude BITs was transferred to the EU itself. During the *travaux préparatoires*, the European Commission proposed that it should have the authority to force termination or renegotiation of existing BITs concluded between the EU Member States in cases it found that BITs were incompatible with EU law.[21] The proposal did not receive much support

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12 Joost Pauwelyn*, '*At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed' (2014) 29(2) ICSID Review 372, 378.

13 United Nations UNCTAD, 'Reforming Investment Dispute Settlement: A Stocktaking, IIA Issue Notes' (Issue 1, United Nations UNCTAD 2019) <https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf>.

14 Schreuer (n 11) 1906.

15 Frank J Garcia, 'The Case Against Third-Party Funding in Investment Arbitration' (2018) <https://wwwiisdorg/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/> accessed 30 May 2021.

16 Kaj Hobér, 'Does Investment Arbitration have a Future?' in in Marc Bungenberg et al (eds) *International Investment Law* (C.H.BECK 2015) 1873, 1874.

17 United Nations UNCTAD, 'World Investment Report 2019: Special Economic Zones' (United Nations UNCTAD 2019) <https://unctad.org/system/files/official-document/WIR2019_CH2.pdf> accessed on 30 May 2021; Geraldo Vidigal and Beatriz Stevens, 'Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?' (2018) 19(3) Journal of World Investment & Trade 475, 485.

18 Stephan W Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 (3) Journal of International Economic Law 649, 650.

19 Reforming Investment Dispute Settlement: A Stocktaking, IIA Issue Notes (n 13).

20 *E.g.* In CUSMA, under Annex 14-D, ISDS exists between Mexico and the United States but not Canada.

21 Hobér (n 16) 1874.

and ultimately it did not prevail. The majority of the Member States shared the view that intra-EU BITs are necessary and despite certain shortcomings decided to keep them in their current shape.[22] However, given the recent ruling of the Court of Justice of the European Union ("CJEU") in *Achmea B.V. v. the Slovak Republic*[23] in which the Court found that arbitration clauses in the intra-EU BITs violate the principles of EU law, the EU Member States agreed on a plurilateral treaty to terminate the intra-EU bilateral investment treaties[24]. This agreement aimed at terminating approximately 130 intra-EU BITs, along with the sunset clauses. It means that as of the entry into force (29 August 2020), investors cannot bring ISDS claims based on arbitration clauses included in the terminated BITs.[25] However, this agreement did not put an end to the already pending arbitral proceedings. Moreover, it remains to be seen how arbitral tribunals will react to future arbitrations under intra-EU BITs and whether they will reject jurisdictional objections.[26]

This article focuses on the extra-EU investment disputes and the proposal of how to reform it. The increased criticism towards ISDS made the EU seek alternatives. Its reform is based on two pillars: first, inclusion of the Investment Court System ("ICS") provisions into the newly negotiated treaties, and second, establishing a Multilateral Investment Court *in lieu of* ISDS. The proposal to include ICS mechanism into the treaties was introduced whilst Trans-Atlantic Trade and Investment Partnership ("TTIP") was negotiated. Further, the proposal made its way into the treaties with Canada (the Comprehensive and Economic Trade Agreement ("CETA")) and Vietnam (the EU-Vietnam Free Trade Agreement). On 5 May 2015, the EU issued a Concept Paper "Investment in TTIP and beyond – the path for reform"[27] in which it included an outline of an alternative to ISDS mechanism. The EU took a step further beyond the bilateral ICS included in CETA and proposed a creation of a permanent Multilateral Investment Court "which functions more like traditional court systems, by making their appointment to serve as arbitrators permanent, to move towards assimilating their qualifications to those of national judges, and to introduce an appeal system".[28]

The need for a replacement of ISDS was justified by the following reasons: the current system (i) imposes limitations to the right of governments to regulate in public interest, (ii) gives the investors right to sue the governments whenever the new legislation

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22 Hobér (n 16) 1874.

23 *Slovak Republic vs. Achmea B.V.*, Judgement of the Court of Justice of the European Union (Case C-284/16) (6 March 2018).

24 European Commission, 'EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties' (*European Commission*, 5 May 2020) <https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en> accessed 30 May 2021.

25 European Commission, 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (*European Commission*, 5 May 2020) <https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en> accessed 30 May 2021.

26 Devin Bray and Surya Kapoor, 'Agreement on the Termination of Intra-EU BITs: Sunset in Stone?' (*Kluwer Arbitration Blog*, 4 November 2020) <http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/> accessed 30 May 2021. For more details concerning the issue of termination of intra-EU BITs see: Gustavo Guarín Duque, 'The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions' (2020) 37 (6) Journal of International Arbitration 797.

27 European Commission, 'Concept Paper: Investment in TTIP and beyond – the path to reform' <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 30 May 2021.

28 ibid 4.

negatively affects their profits, (iii) protects solely the interest of investors disregarding sovereign right of States to legislate in the public interest.[29] Discussions regarding possible reforms have been taking place at the Working Group III of the United Nations Commission on International Trade ("UNCITRAL").[30] Whilst introducing the EU's proposal, the EU Commissioner for Trade at that time – Cecilia Malmström stated that there is "a fundamental and widespread lack of trust" in the current ISDS mechanism[31] and that ISDS constitutes "the most toxic acronym in Europe".[32]

The EU's proposal aims at curing the malfunctions of the current system. Hitherto, there has been no coherent protection regime in international investment law but rather a web of bilateral and regional treaties. Therefore, the EU intends to actually create such a multilateral system. However, given the reluctance of States in the past, it may require complex political negotiations on a global scale. Nonetheless, as observed by Pauwelyn, "[t]oday's benefits of a multilateral treaty must outweigh today's cost of negotiating a multilateral treaty and replacing thousands of BITs and a variety of arbitral institutions with a world investment court".[33]

A. Criticism

i. Inconsistency

Inconsistency and unpredictability of the awards issued by arbitral tribunals constitutes one of the most criticized drawbacks of ISDS. Currently, as in public international law, the principle of *stare decisis* is not applicable, the tribunals' opinions on certain matters can, and in fact do, vary.[34]

This issue has been discussed at the UNCITRAL Working Group III. Pursuant to the recent developments, it has been argued that introducing a review of arbitral awards may ensure consistency and coherence in adjudication.[35]

Investment disputes arise from "a web of more than 3,000 investment treaties, FTAs, and other similar instruments designed to foster international trade and protect foreign investors and their investments", and not a single multilateral treaty.[36] Therefore, it should come as no surprise that decisions of *ad hoc* tribunals differ depending on the wording of the treaty and specific facts of the case. However, the critics of the system point out that such differences arise not only with regard to the cases brought under different treaties but also almost identical cases under the same treaty.[37] It has been caused by the fragmentation

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29 ibid 5.

30 Council of the European Union, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (*Council of the European Union*, 20 March 2018) <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 30 May 2021.

31 Proposing an Investment Court System, <https://ec.europa.eu/commission/2014–2019/malmstrom/blog/proposing-investment-court-system_en> accessed 30 May 2021.

32 Ames (n 4).

33 Pauwelyn (n 12) 417.

34 Hobér (n 16) 1877.

35 United Nations General Assembly, 'Note by the Secretariat, Possible reform of investor-State dispute settlement (ISDS) Appellate and multilateral court mechanisms' (29 November 2019) UN Doc A/CN.9/WG.III/WP.185, 3.

36 Gloria M Alvarez et al., 'A Response to the Criticism against ISDS by EFILA' Journal of International Arbitration 33 (2016) 8.

37 Schill (n 18) 653.

of the system.[38] The lack of coherence creates the lack of trust among the interested actors who cannot predict the result of their dispute. Thus, the driving idea of introduction of the appeal mechanism is greater consistency of decisions.

ii. Impartiality and independence

Under the current ISDS regime, arbitrators are appointed by the parties. Given the nature of this model, concerns have been raised regarding the impartiality and independence of the adjudicators. On the one hand, it has been argued that there is a general risk that the party-appointed arbitrators will favor the party who appointed them. However, there is another concern in the investment arbitration context. Since under the investment treaties only investors can initiate claims, the arbitrators could be more prone to decide in favor of them to secure future appointments.[39] The seriousness of potential lack of impartiality and independence concerns has increased in the recent years, demonstrating that there is a growing distrust in the system.[40]

The arbitrators adjudicating investment disputes have been labelled as "private judges" who are high-powered, elite jurists.[41] In March 2015, Cecilia Malmström expressed yet another criticism of ISDS, tweeting that "[w]e want the rule of law and not the rule of lawyers".[42] The rate of reappointments is high, which renders ISDS "closed and elitists".[43] A desire to secure future reappointments and stay in the inner circle has allegedly created a bias in favor of the party who appointed a particular arbitrator. Additionally, the possibility of arbitrators to act as counsels in other proceedings have been flagged as a potential conflict of interest referred to as "double-hatting".[44] It can create justifiable doubts as to the impartiality and independence of adjudicators and undermine the trust in the dispute settlement process.

iii. Regulatory chill

The Concept Paper highlights that disregard of the right to regulate was one of the main reasons for the need to replace the current ISDS mechanism. ISDS was criticised for taking into consideration solely the interest of investors without balancing the right of the governments to regulate in the public interest. It has presumably created the possibility to sue governments in cases where the new regulations affected profits of the investors.

To provide more balance, CETA expressly included the States' right to regulate in the provisions of the treaty. Such constitutes a novel approach in comparison to previous treaties. Previously, the treaties rarely included such an explicit reference which contributed to the evolution of an asymmetric protection regime which protects the interest of investors.[45] In addition to that, this asymmetric protection regime may contribute to the so-called regulatory chill.[46] It has been defined as a situation in which a state authority will

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[38] Anders Nilsson and Oscar Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013) 5 Journal of International Arbitration 561, 574.

[39] Anthony VanDuzer, 'ISDS in CETA: Is it the Gold Standard' CD Howe Commentary 459 (2016) 4.

[40] ibid.

[41] Joost Pauwelyn (n 10) 763.

[42] Cecilia Malmström, *online:* <https://twitter.com/malmstromeu/status/578201842678640641> accessed 30 May 2021.

[43] Pauwelyn (n 10) 777.

[44] Malcolm Langford, Daniel Behn and Runar Lie, 'The Ethics and Empirics of Double Hatting' (2017) 6(7) ESIL Reflection; Henrique M Sachetim and Rafael R Codeço, 'The Investor-State Dispute Settlement System amidst Crisis, Collapse, and Reform' (2019) 6(1) The Arbitration Brief 20, 11.

[45] Investment in TTIP and beyond – the path to reform (n 27) 5.

[46] Julia G Brown, 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 (1) Western Journal of Legal Studies 13; The Impact of Investor-State-Dispute Settlement (ISDS)

refrain from enacting or enforcing regulatory measures because it fears that it would lead to investment arbitration.[47]

The most frequently cited cases which had implications for introducing legislative changes in other States were *Philip Morris vs. Uruguay*[48] and *Philip Morris vs. Australia*[49]. Both cases concerned plain packaging regulations which aimed at protecting public health. Other countries put their legislation efforts concerning plain packaging on hold as they were waiting for the result of the arbitral proceedings initiated by Philip Morris.[50]

iv. Lack of transparency

One of the aspects that has been largely criticised is the lack of transparency. In commercial arbitration, confidentiality is usually perceived as an advantage. However, in investor-State arbitration, which largely resembles public litigation, it seems to create a lot of distrust and animosity. The New York Times criticized ISDS by stating that: "[t]heir meetings are secret. Their numbers are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned, and environmental regulations challenged".[51] The perception of arbitrators adjudicating disputes does not help the legitimacy of the system either. Arbitrators have been described as an homogenous group of "older white man" – an "old boys club".[52] Even though efforts have been made to introduce more transparency into ISDS, e.g., through United Nation Commission on International Trade Law ("UNCITRAL") Rules on Transparency in Treaty-based Investor-State Arbitration, which came into force on 1 April 2014, ISDS still remains dubious in the public eye. As noted by the EU, the UNCITRAL regulations on transparency are insufficient since "they do not specifically provide for right to intervene to persons with a clear and concrete interest in the case".[53] Thus, Working Group III at UNCITRAL advocates for a high level of transparency and enabling e.g., representatives of communities affected by the dispute to participate in investment disputes.[54]

Additionally, there are number of concerns concerning publication of arbitral awards. There is no uniform obligation to publish the arbitral awards. Some treaties can impose such an obligation, however it is unusual (*e.g.* Under Annex 1137.4 of North

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in the Transatlantic Trade and Investment Partnership, <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investorstate-dispute-settlement-isds-in-the-ttip.html> accessed 30 May 2021, 40,

47 The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (n 46) 41.

48 *Philip Morris vs. Uruguay,* ICSID Case No. ARB/10/7.

49 *Philip Morris vs. Australia,* PCA Case No. 2012-12.

50 Tarald Laudal Berge and Axel Berger, 'Does investor-state dispute settlement lead to regulatory chill? Global evidence from environmental regulation' (*Semantic Scholar,* 2019) <https://www.semanticscholar.org/paper/Does-investor-state-dispute-settlement-lead-to-from-Berge-Berger/4afb08a676d0c17058db629b4134c52d28bf6942> accessed 30 May 2021.

51 Anthony Depalma, 'Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' (*The New York Times*, 11 March 2001) <https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> accessed 30 May 2021.

52 Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) European Journal of International Law 387, 388; Leigh Swigart and Daniel Terris, 'Who are International Judges?' in Cesare PR Romano, Karen J Alter, and Yuval Shany (eds) *The Oxford Handbook of International Adjudication* (Oxford Handbooks 2015) 635.

53 Investment in TTIP and beyond – the path for reform (n 27) 7.

54 Possible reform of investor-State dispute settlement (n 35) 12.

American Free Trade Agreement ("NAFTA") , an award may be made public by the investor or Canada or the United States if they are the disputing party). With regard to the arbitral rules, the ICSID Rules only provide that it will publish the award if there is a mutual consent of the parties. Rule 48 sets forth that: "[t]he Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal". Given that the investment proceedings resemble public litigation and usually involve matters of public interest, this prevailing confidentiality has been perceived as a drawback of the system.

Nonetheless, steps have been made to tackle this concern. On December 2014, a UN Convention on Transparency in Treaty-based Investor-State Arbitration was adopted, as of March 2020, it has been signed by 23 States.[55] The Convention is applicable to any dispute arising under an investment treaty which came into force before 1 April 2014 (unless a State opts-out). The Convention imposes "an extensive transparency regime, including publication of substantive pleadings, final awards and other documents associated with arbitration proceedings".[56] Therefore, it demonstrates that ISDS is receptive to criticism and may adapt to new challenges developed over time.

III. WTO Dispute Settlement Crisis

There is a prevailing view that the WTO crisis was created by Donald Trump's new approach to international trade. This view has been fuelled by information present in the media.[57] However, it has been over a decade since the United States started voicing its concerns with regard to the functioning of the WTO dispute settlement system. The main concern presented by the United States has related to the functioning of the Appellate Body – the alleged failure to respect the procedural provisions by its members and progressive self-empowerment.[58] The Appellate Body was established in 1995, introducing for the first time an appellate stage of proceedings in international trade law. The review stage was created to ensure that there would be a mechanism to rectify panel reports despite their automatic adoption.[59] Interestingly, in the beginning, the United States supported the strengthening of the WTO dispute settlement system.[60] At the end of the day, the United States' tactic resulted in its collapse – the Appellate Body does not have a sufficient number of members to hear appeals.

The United States shared more insight into its specific dissatisfaction with the regime most recently in "Report on the Appellate Body of the World Trade Organization"[61]. The

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[55] United Nations UNCITRAL 'Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' (*UN UNCITRAL*, 2014) <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 30 May 2021.

[56] Filip Balcerzak and Jarrod Hepburn, 'Publication of Investment Treaty Awards: The Qualified Potential of Domestic Access to Information Laws' (2015) 3 (1) Groningen Journal of International Law 147, 152.

[57] Farah N Jan, 'Trump's War on the World Trade Organization: The international trading order is weakening as a result of U.S. actions' (*The Diplomat*, 12 December 2019) <https://thediplomat.com/2019/12/trumps-war-on-the-world-trade-organization/> accessed 25 May 2021.

[58] Elvire Fabry and Erik Tate, 'Saving the WTO Appellate Body or returning to the wild west of trade' (2018) 225 Policy Paper, 8-9.

[59] Jeffrey Waincymer, *WTO litigation: procedural aspects of formal dispute settlement* (London: Cameron May, 2002) 693.

[60] Anwarul Hoda, 'Where Is US Trade Policy Headed Under the Trump Administration?' (2019) 20 Years of G20 81, 90.

[61] Office of the US Trade Representative: Report on the Appellate Body of the World Trade Organisation <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> accessed on 30 May 2021.

criticism *inter alia* concerned the disregard of the 90-day time period for deciding on appeals[62]. In line with Article 17.5 Dispute Settlement Understanding ("DSU"), the proceedings should not exceed 90 days.

The Appellate Body managed to decide on appeals within the imposed time limits in the first years of its establishment. Out of 101 appeals, in 87 it respected the 90-day deadline, and in the remaining 14, the Appellate Body consulted the parties and after obtaining their consent, exceeded 90-days to review the appeal.[63] However, with the time passing and the alleged self-empowerment, the Appellate Body changed its approach and infringed certain procedural regulations. In 2011, in *US-Tyres*[64], the Appellate Body not only exceeded the 90-day limit without any explanation for the delay but also did not consult with the parties regarding exceeding the time limit prescribed by the DSU.

The USA's negative reaction went unnoticed.[65] Since then, the Appellate Body has been increasing thetime needed for hearing disputes, between 2014 and 2017 achieving on average 149 days[66]. As pointed out by the United States, time limits set forth in the DSU are not discretionary and the Appellate Body cannot disregard or amend them.[67] Additionally, it was raised that the Appellate Body would be able to meet the time limits if it would not overstep other aspects of adjudicating disputes – unnecessarily address unimportant issues to resolve the case (*obiter dicta* decisions). For example, in *Argentina-Financial Services*[68]*,* the USA was alleging that more than two-thirds (46 pages) of the Appellate Body's analysis were of *obiter dicta* nature. Despite the main issue being the understanding of likeness requirements, the Appellate Body interpreted various unrelated provisions of GATS.[69]

The United States also heavily criticised participation of the Appellate Body members in the adjudication process after the expiry of their tenure.[70] Authorizing a person who is no longer a member of the Appellate Body raised many concerns. Pursuant to Rule 15 in the Appellate Body's Working Procedures "a person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member […]". The United States stated that the WTO Members never approved of such a regulation and it is of the opinion that pursuant to the view of the United States, "under the WTO Agreement, it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose

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62 ibid 41.

63 Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, June 22, 2018 (2018) <https://geneva.usmission.gov/wp-content/uploads/sites/290/Jun22.DSB_.Stmt_.as-delivered.fin_.public.rev_.pdf> accessed on 30 May 2021.

64 *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, 5 September 2011.

65 Minutes of the DSB Meeting on October 5, 2011 (WT/DSB/B/304) at 4.

66 Office of the US Trade Representative: Report on the Appellate Body of the World Trade Organisation (n 61) at 30.

67 Statement by the United States of 22 June 2018 (n 63).

68 *Argentina — Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, 14 April 2016.

69 Statement by the United States at the Meeting of the WTO Dispute Settlement Body of 23 May 2016 < https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf.> accessed 30 May 2021.

70 Statement by the United States at the Meeting of the WTO Dispute Settlement Body. Geneva, February 28, 2018 (2018) <https://geneva.usmission.gov/2018/03/01/statements-by-the-united-states-at-the-february-28-2018-dsb-meeting/> accessed 30 May 2021.

term of appointment has expired should continue serving".[71] Moreover, even though the Appellate Body can issue their own working procedures, it cannot "disregard or modify the DSU […], and that is what Rule 15 purports to do".[72]

Lastly, the United States criticized the Appellate Body for making factual findings. Under Art. 17.6 DSU, an appeal is limited to the issues of law in the panel report. The Appellate Body cannot make new factual findings[73] as such task was assigned to panels. However, in case the panel report is not sufficiently exhaustive, the Appellate Body is unable to decide on an appeal.[74] The Appellate Body does not have the power to remand the case back to the panel for further fact-finding. The lack of such powers was dubbed in legal writing as a "design flaw" of the WTO system.[75] That has led to the Appellate Body crossing the "procedural" lines and engaging in fact finding at the appellate stage. Again, the United States contends that the Appellate Body has increased the violation of the review standard with time.[76] In its view, it "harmed the dispute settlement system" since "invention of such authority has added complexity, duplication, and delay to WTO disputes".[77]

IV. Multilateral Investment Court

The criticism towards the investor-State dispute settlement prompted debates over alternatives to investment arbitration. The EU came up with an alternative judicialised system of settling investment disputes, following the findings of its online consultation with respect to investor protection in TTIP. The European Parliament concluded that investment disputes should rather be settled by a standing judicial body and not by *ad hoc* panels in arbitral proceedings.[78] In September 2015, the EU initially proposed inclusion of bilateral investment court system whilst negotiating the new international investment treaties –TTIP as well as CETA. The bilateral system would eventually be replaced by a Multilateral Investment Court to settle investment disputes *in lieu of* investor-State arbitration.

The main reasons for seeking a change and introducing an institutionalised judicial system is the predictability of judgements, independence and impartiality of judges, appellate stage and more control over the costs of the proceedings and their length.[79] Additionally, since 2017, the UNCITRAL Working Group III has been discussing potential options for amending ISDS. The Working Group III resumed its works in January 2020. During the meeting, issues arising out of the creation of a multilateral investment court have been discussed, especially concerning its jurisdiction, relations to other legal norms and institutions, the appellate mechanism and appointment of adjudicators. There are still numerous questions left for consideration, pertaining mostly to the structural and enforcement issues. The current negotiations on establishing an investment court, and in a further stage a Multilateral Investment Court, however, do not

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71 Office of the US Trade Representative: Report on the Appellate Body of the World Trade Organisation (n 61) 33.

72 ibid 34

73 See Art 17.6 DSU: 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'.

74 Waincymer (n 59) 372.

75 Joost Pauwelyn*, Appeal without remand: a design flaw in WTO dispute settlement and how to fix it* (Geneva: ICTSD International Centre for Trade and Sustainable Development, 2007).

76 Office of the US Trade Representative: Report on the Appellate Body of the World Trade Organisation (n 61) 39.

77 ibid 44.

78 Howse (n 9) 211.

79 ibid 215.

address the substantive investment standards.[80] Therefore, currently, the discussion is mainly focused on addressing the change of structural aspects of the hitherto ISDS as we know it but the treaty imbalance creating asymmetrical protection regime (such as the possibility of counterclaims) has been neglected so far.

The ISDS reform is difficult given the number of IIAs already in place. The initial proposal of a bilateral system in CETA seems to be insufficient on a bigger scale. Therefore, establishing a truly multilateral investment court could aide in achieving a long-term goal.[81]

A. Structure of Multilateral Investment Court

The Multilateral Investment Court would form an independent investment organization composed of its own internal bodies. It would operate on the basis of a treaty, with its separate legal personality.[82] In this analysis, the current proposals of a dispute settlement included in CETA will be used as a starting point of analysis of the prospective Multilateral Investment Court. It should be composed of a general plenary body making all the important decisions concerning its operation. As indicated in legal doctrine, plenary bodies are an essential part of every international organization. They are generally composed of representatives of member states and can be further divided into committees and subcommittees dealing with different issues.[83] The plenary body would hold periodical meetings with the possibility of conducting extraordinary sessions if there is a need.[84] The tasks of the plenary body would include appointment of the judges, adoption of procedural rules and annual budget.

With regard to adjudicators, it has been advocated that the number of appointed judges should be limited.[85] Moreover, it was advised that it should not be based on the number of members but rather on the caseload, which naturally will be dependent on the number of participating States.[86] Additionally, it would be desirable if the composition of the Multilateral Investment Court reflected diversity of various legal systems as well as geographical and cultural regions.[87] Such could be achieved by appointment of a designated number of judges from different regional groups (such us African, Asian, Eastern European, Western European, Latin American and Caribbean, South American and North American).[88] Lack of formation of regional groups could result in placing nationals of politically strong countries by which developing countries could potentially be excluded from being equally represented.[89] Members will sit in division of three. CETA also sets forth that the members of the tribunal should be appointed for a 5-year term, renewable once.

Art. 8.28 CETA introduces the Appellate Tribunal which will review awards rendered by the first-instance Tribunal. The awards may be upheld, modified or reversed

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80 Rhea T Hoffmann, 'The Multilateral Investment Court: A Stumbling Block for Comprehensive and Sustainable Investment Law Reform' (2018) SSRN Electronic Journal, 4.

81 Makane M Mbengue and Stefanie Schacherer, *Foreign investment under the comprehensive economic and trade agreement (CETA)* (Cham, Switzerland: Springer, 2019) 202.

82 Marc Bungenberg and August Reinisch, *From bilateral arbitral tribunals and investment courts to a multilateral investment court: options regarding the institutionalization of investor-state dispute settlement* (Berlin, Germany: Springer Open, 2018) 2.

83 Bungenberg and Reinisch (n 82) 27-28.

84 ibid 28.

85 ibid 29.

86 ibid 29.

87 In CETA, under Article 8.27, a proposal was made to appoint 15 members of the Tribunal in equal numbers from Canada (5), the EU (5), and nationals from other countries (5).

88 Geographical representation was adopted by e.g. the International Tribunal for the Law of the Sea.

89 Bungenberg and Reinisch (n 82) 34.

based on *inter alia* errors in the application or interpretation of law and manifest errors in the appreciation of the facts.

International organizations also have administrative bodies which help with the dispute settlement process. The proposed secretariat at the Multilateral Investment Court could not only administer the pending cases but also provide linguistic and translation services. Additionally, the staff at the secretariat could assist the judges with legal research and preparation of their decisions.[90]

This proposal largely resembles the structure of the Appellate Body at the WTO, however, contrary to the WTO dispute settlement system, it also introduces a standing Tribunal of the first instance.

B. Outcomes

Despite extreme changes with regard to the structure of investment dispute resolution and creation of a standing Multilateral Investment Court, so far, the EU's proposal has not tackled the core of ISDS shortcomings. The current debate focuses on institutional issues such as qualification and selection of judges, appellate mechanism, etc. However, the mandate of the Commission to negotiate the creation of a Multilateral Investment Court is limited. It does not include substantive protection of investment agreements such as imposing obligations to protect human rights and the environment. The substantive obligations are subject to negotiations with regard to each new IIA. However, there will be no single multilateral instrument which would provide some substantive "ground rules". The reform does not cover certain procedural aspects such as the advocated possibility of submitting counterclaims by the States. The current negotiations do not address the issue of *locus standi* in a dispute.[91] Public Service International ("PSI"; a global trade union federation advocating for human rights and social justice) accused the proposal of being "the EU's latest corporate privilege rebrand".[92]

In the following, the author will focus on several of the aspects of the reform which supposedly aim at improving the current system.

i. Predictability

The replacement of *ad hoc* arbitral proceedings within the ISDS framework by the Multilateral Investment Court aims at eliminating unpredictability and inconsistency of arbitral awards one of the main disadvantages of ISDS. The main criticism is that ISDS has produced different awards in cases involving similar facts and law.[93]

On the opposite side, there is WTO. The WTO dispute settlement constitutes an example of a system in which deciding on disputes by appointed judges instead of *ad hoc* arbitral tribunals allowed to establish a stable and consistent jurisprudence.[94] Such result could also be achieved due to the existence of the Appellate Body which facilitated elimination of divergent panel reports.

In that case, a Multilateral Investment Court with an appellate stage would provide a great harmonizing effect. A uniform approach to legal issues would contribute to a coherent body of jurisprudence even if the disputes arise out of violations of different IIAs.

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90 ibid 55.

91 Hoffmann (n 80) 8.

92 Public Services International, 'The Multilateral Investment Court: the wolf's newest outfit' (*Public Services International)* <http://www.world-psi.org/sites/default/files/mic_fact_sheet2.pdf> accessed 30 May 2021.

93 Lee M Caplan, 'ISDS Reform and the Proposal for a Multilateral Investment Court' (2019) 46 (1) Ecology LQ 53, 57.

94 Howse (n 9) 2015.

It would be achieved through appellate proceedings involving permanently appointed arbitrators.[95] The appellate stage is meant to eliminate divergent decisions and provide consistency in the field of international investment law.[96] At the end of the day, ensuring greater consistency would have a positive impact on acceptance of the rendered arbitral awards and an overall legitimacy of the system.[97] Additionally, greater consistency and predictability may have a positive impact on the States' awareness regarding their regulatory boundaries.[98]

However, consistency and predictability of the awards should not constitute an ultimate goal and should not be achieved at all costs. Indeed, introduction of the Multilateral Investment Court may increase stability and legitimacy of the system, however, it comes at a price: a decrease in accuracy, sincerity and transparency.[99] Consistency does not by any means guarantee accuracy of arbitral awards - as one may be consistently wrong. Introduction of the Multilateral Investment Court with an appellate mechanism may not allow for much needed flexibility either. The lack of such features of adjudication was actually one of the reasons why the USA blocked the new appointments to the Appellate Body. Despite the lack of formal doctrine of *stare decisis*, the previous decisions of the Appellate Body were of tremendous importance at the WTO and panels could not have freely disregarded legal interpretations in reports adopted by the Dispute Settlement Body.[100] The United States argued that treating interpretation in one dispute as a binding precedent or an authoritative interpretation of the covered agreement contradicted the provisions of the WTO Agreement.[101]

Binding precedents do not increase the legitimacy of the dispute settlement system. It was advocated that actually providing the reasoning and motives of a decision is more convincing than simply relying on past decisions.[102] Attempts to achieve predictability of the system at all costs by the proposed reform may turn out to be more detrimental to resolution of investment disputes than the current mechanism. That is because, in the last years the cross-references between the arbitral awards in investment arbitration have increased (despite the lack of formal *stare decisis* doctrine in investment arbitration). Such practices and further evolution of jurisprudence in investment disputes could naturally lead to more predictability and stability of the system.[103]

ii. Supporting staff

One of the advantages of creating a Multilateral Investment Court which received little attention from legal commentators is the permanent supporting staff. The support may range from tasks such as assisting the judges in legal research, translation of documents to

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95 Hobér (n 16) 1877.

96 Jonathan J Saulino and Josh Kallmer, 'The Emperor Has No Clothes: A Critique of the Debate Over Reform of the ISDS System' in Jean E Kalicki and Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System* (Brill NV 2015) 519.

97 Bungenberg and Reinisch (n 82) 2.

98 Sachetim and Codeço (n 44) 19.

99 Irene M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia Journal of Transnational law 418, 420.

100 Anne Scully-Hill and Hans Mahncke, 'The Emergence of the Doctrine of Stare Decisis in the World Trade Organization Dispute Settlement System' (2009) 36 (2) Legal Issues of Economic Integration 133, 143.

101 Office of the US Trade Representative: Report on the Appellate Body of the World Trade Organisation (n 61) at 56.

102 Ten Cate (n 99) 461.

103 Pauwelyn (n 12).

organizing case files and overall administration of the disputes.[104] Such supporting staff does not constitute a novelty - legal scholars note that a considerable number of international courts and dispute resolution organizations has administrative support.[105] Such staff could significantly improve the handling of caseload and also ensure that the staff is properly qualified and trained for the tasks. The existence of administrative support, in theory, has been found to positively influence not only efficiency of the court but also independence and impartiality of adjudicators.[106]

Creating a permanent support-staff body similar to the WTO structure also has its downsides. It can ultimately cause more harm than expected if not conducted properly. The USA's criticism towards the WTO was not only directed at the Appellate Body members but also at the overreaching power of the Secretariat. The Secretariat's role goes far beyond simple administrative help for adjudicators – they conduct legal research, participate in all closed-proceedings and even draft the questions that adjudicators ask of the parties.[107] In the study conducted by Pauwelyn and Pelc, the analysis demonstrated that it was actually the support staff at the Secretariat who drafted a significant number of panel rulings – and thus creating the *de facto* precedent in the international trade law.[108] Therefore, there is also a risk concerning such a secretariat existing in the Multilateral Investment Court framework. The permanent supporting staff could play a major role in the adjudicating process and set the tone for future arbitral awards.

iii. Appellate proceedings

CETA includes a proposal to introduce an appellate stage of proceedings. The treaty provides for "the establishment of a multilateral investment tribunal and appellate mechanism".[109] The main reason for the two-tier proceedings is to ensure that "the appellate body would create a body of decisions to provide helpful precedents and consistency".[110] The appellate body, similar to the WTO Appellate Body would review errors of law.[111] On the one hand, appeal proceedings contradict the finality of the arbitral awards. On the other hand, it has been argued that an appellate stage will improve the quality and consistency of arbitral awards.[112] An appellate stage would introduce a corrective mechanism but also the court of first instance would be encouraged to produce a clear, consistent and coherent judgement to previous similar cases. In its proposal, the

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[104] Eduardo Zuleta, 'The Challenges of Creating a Standing International Investment Court' in Jean E Kalicki and Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System* (Brill NV 2015) 403, 417.

[105] Bungenberg and Reinisch (n 82) 55.

[106] Céline Lévesque, 'The European Commission Proposal for an Investment Court System:' Investor-State Arbitration Series 59, 98.

[107] Krzysztof J Pelc and Joost Pauwelyn, 'The WTO's trade dispute appeal system could end on Dec. 10. Here's what you need to know" (*The Washington Post*, 12 May 2019) <https://www.washingtonpost.com/politics/2019/12/05/wtos-trade-dispute-appeal-system-could-end-dec-heres-what-you-need-know/> accessed 30 May 2021.

[108] Joost Pauwelyn and Krzysztof Pelc, 'Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement' (2019) SSRN Electronic Journal.

[109] Article 8.29 CETA: "The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements".

[110] Luis González García, 'Making Impossible Investor-State Reform Possible' in Jean E Kalicki and Anna Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System* (Brill NV 2015) 424, 430.

[111] Howse (n 9) 233.

[112] Mbengue and Schacherer (n 81) 263.

EU stated that time limits should be introduced in order to ensure that the appellate mechanism does not result in delays in the proceedings.[113]

The downside is that the introduction of the appellate stage of the proceedings may significantly prolong the adjudicating process. Despite the time limits to decide on the appeals, one needs to look no further than to the WTO Appellate Body. In its beginnings, it was predicted that only a fraction of panel reports would be appealed.[114] The reality turned out to be quite different. As of 2007, 70 percent of cases were appealed[115]. This number has been increasing and in 2016 amounted to nearly 90%[116].

There is a risk that with the (potentially) increasing investment deputes, an appellate stage of proceedings will significantly prolong the dispute resolution process. That might be the case depending on the number of the appeals.

iv. Independence and impartiality of adjudicators

The proposal to establish a permanent court with appointed arbitrators also aims atproviding a greater trust in the process through ensuring independence and impartiality of the judges. In CETA, pursuant to Article 8.27, the judges hold permanent appointments and "thus cannot wear a double hat".[117] A concern has been expressed that currently arbitrators can simultaneously serve as arbitrators and counsels to clients – wear a double hat – which resulted in a decrease of public trust.[118] Having a standing court with appointed judges would allow to eliminate the current risk of conflicts of interest of arbitrators. It has been advocated that judges of a permanent court would provide longer tenures and ultimately result in greater independency and impartiality of adjudicators *ad hoc* arbitrators who have an interest in securing future appointments.[119] Thus, arbitrators could be tempted to adjudicate in the interest of the party who appointed them.

Following a regional appointment model proposed by legal scholars would also ensure even cultural representation.

On the other hand, however, the proposed system of appointment of the arbitrators may create more imbalance. Under the current system, the arbitrators are appointed by the parties, which gives them an equal power to make a decision on the composition of the arbitral tribunal. In line with the proposed reform, arbitrators would be solely appointed by the States. There is a risk that such one-sided appointments would weaken the idea of a truly party-neutral arbitral tribunal.[120] A risk that was mentioned in legal writing was that only "pro-state" individuals would be chosen. It could lead to tilting the system in favor of the States. That could also be a result of the profile of the chosen arbitrators. The States may be unintentionally prone to selecting arbitrators with more experience in governmental and diplomatic positions than in private sector. That is even more so, since CETA introduces a vital change in the appointment system. So far, one of the main challenges to ISDS concerned the "double-hat" practice, allowing the arbitrator to act as a counsel in other proceedings. Under Art. 8.30 CETA, the arbitrators "shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement". It means that the system itself,

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113 Investment in TTIP and beyond – the path to reform (n 27) 8.
114 Peter van der Bossche, *The law and policy of the World Trade Organization* (CUP 2008) 288.
115 Bossche (n 114) 288.
116 Fabry and Tate (n 58) 294.
117 Howse (n 9) 213.
118 Zuleta (n 104) 411.
119 Lee M Caplan (n 93) 58.
120 Sonja Heppner, 'A critical appraisal of the investment court system proposed by the European Commission' 72(2) Dispute Resolution Journal (2017) 108.

would favor appointment of academics, former government officials and former judges. It is therefore highly unlikely that practicing lawyers will be interested in the position and even if, those would only be "established players" who can afford to act only as arbitrators.[121]

The party-appointment system has been considered to enhance investors trust in ISDS.[122] Thus, the abrupt change may result in the lack of legitimacy of the Multilateral Investment Court. Moreover, it is not exactly clear what constitutes the alleged judicial bias which the EU is attempting to eliminate. ISDS already provides for procedural safeguards which ensure that cases are not heard by the arbitrators who are not impartial and independent. Similarly, the International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration serve a similar role.

Thus, eliminating the party-appointed arbitrators and introducing a one-sided system of such appointments could result in a less-balanced dispute resolution.

C. Assessment: "structural rebranding"?

The Multilateral Investment Court is perceived by some as a "re-branding exercise" since a court system "does not alter the fundamental problems within".[123] As indicated in legal writing, a mere replacement of "arbitrators with judges" without making changes to the standards of investment protection in the treaties themselves resembles more a placebo effect than a true transformation of the regime– instead of a reform of substantive norms, amendments to dispute resolution constitute only a touch-up and do not solve the core of the issue.[124] One must take a step back and ponder about the shortcomings of ISDS that the reform aims at resolving – the issue with ISDS was not so much the format of the dispute settlement itself but the substantive obligations undertaken by the States under IIAs.

In the sections above, the author has expressed doubts whether the potential advantages are not in fact the shortcomings of the proposed reform in disguise. History teaches us based on the experience with the downfall of the Appellate Body that such dispute settlement mechanisms may not necessarily work well in practice.

The Multilateral Investment Court was criticized for being "a poor alternative" to ISDS because it "has the combined flaws of the General Agreement on Tariffs and Trade (GATT) before the World Trade Organization (WTO) was founded, the current WTO appellate body, and the maligned ISDS systems all in the basic plan".[125] International investment law – as it currently stands – is decentralized and adapts with time to changing circumstances. It has emerged organically as there was no major constitutional moment up until recently.[126] Changing the current state of play and introducing centralization, may turn out to be in fact detrimental as "FIL [Foreign Investment Law] and its self-organizing qualities demonstrate that high levels of centralization and global control are not indispensable for a regime to thrive"[127]. For example, the increasing cross-references in

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121 Lévesque (n 106).

122 Sachetim and Codeço (n 44) 25.

123 The Greens in the European Parliament, 'Multilateral Investment Court, Press Release' (*The Greens/EFA*, 20 March 2018) <https://www.greens-efa.eu/en/article/press/multilateral-investment-court-little-more-than-a-rebranding-exercise> accessed 30 May 2021.

124 Howse (n 9) 217.

125 Lauren Cole, 'Investor-State Dispute Settlement Reform: The Multilateral Investment Court Was Never The Answer' <http://www.mjilonline.org/investor-state-dispute-settlement-reform-the-multilateral-investment-court-was-never-the-answer/> accessed 30 May 2021.

126 Pauwelyn (n 12) 378.

127 ibid 416.

arbitral awards may organically lead to stability and predictability of the awards rather than introducing a formal appellate body.

Introducing the Multilateral Investment Court should go hand in hand with the careful drafting of investment protection provisions in international investment instruments as a structural re-branding is not sufficient to cure the dispute settlement system. Otherwise, it may share the fate of the Appellate Body.

V. Concluding remarks

ISDS mechanism was severely criticised in recent years. The complaints mostly concerned the asymmetric protection regime under IIAs, the unpredictability of arbitral awards and alleged lack of independence and impartiality of the appointed arbitrators. However, despite the shortcomings of the current system, it has been argued that instead of trying to amend it and introduce the Multilateral Investment Court, States "can, should, and will negotiate new IIAs".[128] Saulino and Kallmer argue that ISDS mechanism is not faulty as such. The issue rather lies with the way the investment treaties were concluded in the past – in order to attract more investments, States were willing to provide a greater protection regime. Therefore, merely replacing a dispute settlement mechanism may turn out to be a futile attempt to improve the system. The proposed replacement of "arbitrators with judges does not by any means guarantee a transformation of the regime".[129]

As far as current negotiations are concerned, there is a division amongst the members of the UNCITRAL Commission and the States do not necessarily share the EU's enthusiasm concerning the establishment of the Multilateral Investment Court. Some countries perceive ISDS system to be best suited for resolution of investment disputes, others are working towards multilateralization, however, there are differences in their approach to such a proposal.[130]. Some argue that a reform of existing IIAs with increased transparency and creation of an appellate mechanism would be sufficient.[131]

There is no doubt that the dispute settlement of investment disputes could benefit from certain tweaks, however, as underlined by legal scholars such an evolutionary change could be better suited for achieving the goals of the reform. The proposals in their current shape seem to be following the same mistakes which ultimately led to the paralysis of the WTO dispute settlement system. Introduction of mechanisms which did not work in trade regime into the investment dispute settlement may render the Multilateral Investment Court an unsuccessful enterprise.

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[128] Saulino and Kallmer (n 96).
[129] Howse (n 9) 210.
[130] Hoffman (n 80) 8.
[131] Hyoeun Yang, 'The EUs Investment Court System and Prospects for a New Multilateral Investment Dispute Settlement System' (2017) SSRN Electronic Journal.