Groningen Journal of International Law

VOLUME 10 / ISSUE 2 / 2024

International law: Open issue

GRONINGEN **JOURNAL OF INTERNATIONAL LAW**

CRAFTING HORIZONS

ISSN 2352-2674

Groningen Journal of International Law
GROJIL.ORG
BOARD@GROJIL.ORG
ISSN 2352-2674
KVK 57406375

NOTE TO THE READERS

Dear Readers,

It is with great pleasure that we introduce to you the latest issue of the Journal, Volume5 No. 2 (2023). At the outset, we as the newly appointed Board would like to take this opportunity to express our gratitude firstly, to the readers and authors – none of the Journal's past volumes would have had the reach if not for the interest of you all. Just as important have been the people at the University of Groningen Press, who have not only continued our association but also went out of their way to engage with the new Board to help us through new technical processes. The new Board is an eclectic mix of people with different experiences; while some have had a longer relationship with the Journal, few of us have taken up our roles newly with the Journal. Ensuring our smooth transition has been the previous Board, who have not only been invaluable toour roles but have also become our friends along the way. We are grateful for their constant commitment to the Journal, especially for paving the way for young scholars and students to make strides in the field of international law.

The gap between the first and second issues of this volume has been slightly longer than before. With the formation of the new Board, we have been working on evaluating the format the latest issue should take. Our choice has been to have two distinct parts within the issue itself – the first section shall focus on trends and challenges concerning international judicial procedure, and the second shall focus onsubstantive discussions on contemporary issues. Owing to this demarcation, we are excited to inform you that there has been a renewed interest in the Journal from authors throughout the world. Though we received a lot of manuscripts, we have had to make choices; to introduce some articles in this issue while retaining others for thenext.

We have chosen to introduce the first section of the issue with the paper by Nsikan Abasi-Odong, who poses the research question of what could be, in these troubled and stimulating times, the proper international judicial forum for adjudicating environmental disputes along with its protectionist undertones, in a neutral manner. The paper mostly focuses on a comparative analysis of the International Court of Justice and the Dispute Settlement Body of the World Trade Organization. Therein, the author suggests the ICJ as the more appropriate option owing to its neutral and general nature.

The other papers in this section have specific regional affiliations. The second paper by Candan Yilmaz, argues the 'three-step' reasoning of the European Court of Human Rights in evaluating testimonies rendered by anonymous and absent witnesses. The author argues that this reasoning exposes fallacies as it is applied to both kinds of witnesses, while the Court had asserted that the two types had to be dealtwith differently owing to the unique difficulties in obtaining evidence from them.
The final article of this part is written by Joel Adelusi Adeyeye, who focuses on the expansion of the jurisdiction of the ECOWAS Court of Justice and the inclusion (or possible application in its judgments) of the African Charter of Human and People's Rights and other international human rights law instruments. The author argues that this expansion had failed to empower the Court in judging the landmark Habré case while posing interesting questions on the relationship between the domestic and international criminal jurisdiction to bring to justice those who committed offenses amounting to international crimes.

The second part of the issue offers the authors' takes on substantive issues in general international law. The first paper by Francisco Lobo on *jus cogens* discusses the fascinating albeit problematic source of law while trying to define what could be considered a peremptory norm of international law (*jus cogens).* He highlights the concept in his work by considering the specific obligation of the prohibition of committing genocide.

The second paper, by Tareq Ahmed Al-Fahdawi, analyses an interesting contemporary topic, i.e. the treatment of cyber-attacks as a 'use of force' underInternational Law. Though oft-debated, the author moves away from a mere general discussion in considering such attacks as a 'use of force', he tries to apply *ius ad bellum*and *ius in bello* concepts in defining the finality of such attacks, to invoke the responsibility of the states.

The next paper is written by Gurwinder Singh and deals with a classic question of statehood - Does the recognition of a government have an impact on the existence of a State? By analyzing the position of the Taliban regime in Afghanistan, the author deals not only with the question of formal acceptance by States but also considers democratic governance of a State as an aspect of discussion, separate from a rule-of- law conception. The author attempts to show how such a 'Western' requirement mightnot be relevant for all states.

Dharshan Weerasekera's paper relates closely to the spirit of the previous one. He exposes how powerful states use international institutions to monitor the developing world and its respect for International Law. In this regard, the author assesses the possibility of reforming the UN system and ensuring the total equality ofStates, without having monitoring mechanisms only in respect of a specific group of States.

To conclude this issue of the Journal, Giovanni Dall'Agnola, in his submission, debates the promotion of food security through the multilateral WTO system on the trade of agricultural products. Considering the WTO as the appropriate forum, the author emphasizes the need to reform this system to provide more efficient protectionfor States that depend on agriculture as the primary sector of their economy.

In closing, the GroJIL Editorial Board would like to thank everyone who has been involved over the past year, despite their personal and professional commitments. The Board specifically recognizes the immense effort made by the editors, the backbone ofthe Journal, to prepare each article for publication, and expresses gratitude for their continued commitment and splendid work. We on behalf of the Board, wish the readers a great new year and hope to receive more of your work for future issues.

Happy reading!

Anjana Sathy
President & Editor-in-Chief

Luigi Sammartino
Publishing Director

Groningen Journal of International Law

GROJIL.ORG
BOARD@GROJIL.ORG

ISSN 2352-2674
KVK 57406375

Groningen Journal of International Law

Crafting Horizons

About

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

Mission

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of intemational 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.

Groningen Journal of International Law
GROJIL.ORG
BOARD@GROJIL.ORG
ISSN 2352-2674
KVK 57406375

Groningen Journal of International Law ISSN: 2352-2674 KvK: 57406375

Groningen Journal of International Law
GROJIL.ORG
BOARD@GROJIL.ORG
ISSN 2352-2674
KVK 57406375

Groningen Journal of International Law

volume 10, issue 2

Table of Contents

Topic Submissions

Open Submissions

The International Court of Justice: A Proper Forum for the Balanced Adjudication of Trade-Environment Disputes

Nsikan-Abasi Odong*
DOI: 10.21827/GroJIL.10.2.1-30

Keywords:
DISPUTE SETTLEMENT BODY, WORLD TRADE ORGANIZATION, INTERNATIONAL COURT OF JUSTICE, SUSTAINABLE DEVELOPMENT, CARTAGENA BIOSAFETY PROTOCOL, PRECAUTIONARY PRINCIPLE

Abstract:
The World Trade Organization's (WTO) Dispute Settlement Body (DSB) sometimes adjudicates cases with environmental undertones while hearing trade disputes. Considering that the DSB is mainly responsible for the application of WTO international trade rules to these cases, it is arguable whether the DSB is the most appropriate adjudicatory forum on cases with environmental undertones. The article analyses four cases decided by the DSB: (1) *The United States – Restrictions on Imports of Tuna (Tuna-Dolphin I)*, (2) *the United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)*, (3) *the European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Biotech Product's case),* and (4) *the United States – Import Prohibition of Certain Shrimp and Shrimp Products (the US Shrimp case). It also analyses* four cases with trade and environment considerations decided by the International Court of Justice (ICJ): (1) *Whaling in the Antarctic (Australia v Japan)*, (2) *Gabčíkovo-Nagymaros (Hungary v Slovakia), (3) Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)/Construction of a road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* and (4) *Pulp Mills on the River Uruguay (Argentina v Uruguay).* From the analysis, this article finds that the ICJ, rather than the DSB, would be the appropriate arbiter of trade cases with environmental undertones. This article finds that, unlike the DSB, the ICJ has a history of balanced adjudication of cases with trade-environment conflict and appears a better fit to decide cases with elements of trade and environment. As such, this option would guarantee a more neutral avenue for the adjudication of trade-environment conflicts.

---

* Nsikan-Abasi Odong holds an LLD from the University of Ottawa, Canada. He was a Rule of Law scholar, and a recipient of the Environment and Sustainability Scholarship and the International Doctoral Scholarship of the University of Ottawa. His thesis investigated how constitutional environmental rights could be deployed to tackle environmental degradation in the Niger-Delta area of Nigeria. He has published articles in various journals and presented conference papers on issues related to environmental governance. Odong was previously an associate in the law firm of Udo Udoma & Belo-Osagie, a grade A law firm in Nigeria, where he supervised the firm's Uyo office. The author acknowledges that the analysis of the case of the *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* in this article, has been used in another article in a different context and that article has been submitted for consideration for publication. Also, the ideas in this article were first presented by the author on 30 June 2021, at the 2021 Global Ecological Integrity Group International Conference, in Montreal, Quebec, Canada held from 28 June to 2 July 2021. The author acknowledges that the feedback received from the Conference participants has helped in restructuring the argument in this article. E-mail: <nodon050@uottawa.ca>.

I. Introduction

While settling trade disputes between WTO members, the DSB consisting of the Appellate Body (AB) and the Panel, adjudicates environmental cases with unfavorable outcomes. This article contends that the ICJ may be a better fit to adjudicate the trade and environment conundrum because: (1) going by the antecedents of the DSB in resolving trade disputes with environmental implications, the DSB seems to superintend trade rules (which they are to give effect to) over environmental concerns, and (2) the ICJ has developed a healthy body of precedents (both procedural and substantive) on environmental disputes,[1] and the review of the cases indicate that the ICJ would be far more even-minded when considering the seemingly competing goals of environmental protection and trade.

The seeming impatience by the DSB over environmental issues is understandable because the DSB is mandated to interpret and apply the WTO trade rules to cases, but the ICJ, on the other hand, is not saddled with such a limitation on applicable rules and would be neutral in the adjudication of the cases.

This article is divided into two parts and construes trade loosely to include other economic activities. Part I discusses the antecedent of the DSB and reveals a propensity by the DSB to superintend trade rules over environmental concerns. To buttress the point, the article analyses four cases decided by the DSB: The *Tuna-Dolphin I;*[2] the *Tuna-Dolphin II;*[3] *the Biotech Product's case;*[4] and *the US Shrimp case*[5] which support the claim that the DSB superintends trade rules over the environment. Part II discusses the even-handed adjudication of cases with environmental complexities by the ICJ. It analyses four cases decided by the ICJ to support this assertion. The first case, *Whaling in the Antarctic*[6] will reveal the ICJ's awareness of environmental considerations even in the face of trade interests. The second case, *Gabčíkovo-Nagymaros,*[7] demonstrates the ICJ's ability to be neutral in its adjudication of the seeming competing environmental and trade goals. Lastly, two cases, *Costa Rica v Nicaragua / Nicaragua v Costa Rica*[8] and the *Pulp Mills case*[9] will reveal the balanced approach employed by the ICJ in dealing with the competing issues of environment and trade. Based on the analysis, this article concludes that the ICJ seems the most appropriate adjudicatory forum for cases with a trade-environment conflict.

---

1 Tim Stephens, 'The Settlement of Disputes in International Environmental Law' in Shawkat Alam et al (eds) *Routledge Handbook of International Environmental Law* (Routledge 2013) 175, 179-180.

2 *The United States – Restrictions on Imports of Tuna (Tuna-Dolphin I)* (03 September 1991) WT/DS21/R - 39S/155.

3 *The United States – Restrictions on Imports of Tuna (Tuna-Dolphin II)* (16 June 1994) WT/DS29/R.

4 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (29 September 2006) WT/DS291/R, WT/DS292/R and WT/DS293/R.

5 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R.

6 *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (Judgment) [2014] ICJ Rep 226.

7 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

8 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665.

9 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14.

II. Antecedents of the DSB indicate a propensity to prioritise trade rules over environmental concerns

Alessanda Guida opines that the protection of human health (and by extension, the environment) 'can be considered an implicit WTO goal for at least two reasons'.[10] First, the WTO's contribution to attaining United Nations (UN) Sustainable Development Goals (SDGs) aims to protect human health.[11] It is conceded that the WTO has put in place mechanisms to assist in the attainment of SDGs, including its recently released 2023 update on the WTO's Contribution to Attaining UN Sustainable Development Goals.[12] However, as shown in the 2023 update, international trade is still the main focus of the WTO and platforms such as these are seen by the WTO as avenues to primarily further international trade. As contained in the 2023 update, the WTO's interest is to review the

> contribution of international trade and the multilateral trading system to attainment of the SDGs and to development in general. The […] process therefore gives the WTO the opportunity to delve into SDGs where connections with trade have not been examined in detail up to now.[13]

Perhaps, it was in this wise that Tim Stephens opines that there 'is certainly the prospect that the WTO will be a roadblock to progressive environmental measures'.[14] Also, even if the WTO commitments to the attainment of SDGs was eco-centric, this policy statement, WTO's Contribution to Attaining UN Sustainable Development, is not on the same pedestal with the WTO Agreements which are the main tools that the DSB uses in adjudicating trade-environment cases.

Secondly, Guida further argues that

> the absence of an overriding and paramount goal also implies a lack of hierarchy between WTO objectives. After all, the lack of hierarchy between economic, environmental and social objectives represents a prerequisite to achieving the WTO goal of sustainable development.[15]

On the contrary, a careful look at the WTO/General Agreement on Tariffs and Trade (GATT Agreements) indicates that international trade is the paramount consideration of the WTO. For instance, there is no mention of the environment or health in the preamble

---

[10] Alessandra Guida, *Biosafety Measures, Technology Risks and the World Trade Organization: Thriving and Surviving in the Age of Biotech* (1st ed, Routledge 2022).

[11] ibid.

[12] 'WTO's Contribution to Attaining UN Sustainable Development Goals: 2023 Update to the High-Level Political Forum' (*World Trade Organization*) <https://www.wto.org/english/res_e/booksp_e/un_hlpf23_e.pdf> accessed 8 January 2024.

[13] ibid 4.

[14] Stephens (n 1) 183.

[15] Guida (n 10) 46.

to the GATT.[16] In the words of Joel Trachtman, the WTO 'law has as its focus the promotion of a liberal trading system. The primary purpose of WTO law is not to promote environmental protection'.[17] Indira Carr corroborates this by arguing that the WTO/GATT 'primarily seemed to promote the exploitation of resources with prosperity as the objectives'.[18]

Interestingly, the decision of the DSB may be the most significant indication of the priority that the WTO accords the environment in relation to international trade. The DSB is so central to the WTO that Guida opines that while

> the agreements are at the heart of the WTO, its dispute-settlement mechanism is "the most far-reaching [consequence]" of the international trade system. The WTO dispute-settlement system […] has been described as "probably the most powerful international dispute system in the world".[19]

From the foregoing, the analysis of the trade-environment cases decided by the DSB might be the clearest revelation of how the WTO sees the environment: as a cast aside in favour of international trade. Although Trachtman argues that the DSB 'does not explicitly specify the body of applicable law that WTO adjudicators are assigned to interpret and apply',[20] on the contrary, by Article 2(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Rules and Procedures), the DSB is mandated to interpret and apply WTO trade rules to disputes before it,[21] in a predictable manner.[22] This makes it difficult for the DSB to give adequate consideration to environmental concerns in competition with trade. For these reasons, Jeffrey Dunoff would argue that

> many of the international conflicts between liberalized trade and environmental protection have been considered under the auspices of the GATT. However, this body has no mandate to advance environmental interests. Where conflict exists, GATT practice invariably subordinates environmental interests to trade interests.[23]

---

[16] An excerpt from the preamble provides: '[r]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, Have through their Representatives agreed as follows'.

[17] Joel Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58(2) Harvard International Law Journal 273.

[18] Indira Carr, 'International Trade Rules and Environmental Effects' in Shawkat Alam et al (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013) 547, 550.

[19] Guida (n 10) 43-44.

[20] Trachtman (n 17) 302.

[21] 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (World Trade Organization) <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s1p1_e.htm> accessed 8 January 2024. Art 2(1) provides that the DSB 'is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements'.

[22] Article 3(2) provides that the 'dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.

[23] Jeffery L Dunoff, 'Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes' (1994) 15(4) Michigan Journal of International Law 1043, 1045-1046.

The article will analyse four cases: the Panel's decision in the *Tuna-Dolphin I* and *II,* the *Biotech Product's case* and the AB's decision in the *US Shrimp case* to ground the argument on the inevitability of the elevation of trade concerns over the environment since the DSB is expected to interpret and apply the WTO trade rules to disputes submitted to it.

a. Tuna-Dolphin I and II

These two cases on similar facts decided by the WTO Panel, that have profound ramifications in terms of the trade-environment conundrum, will be discussed at this point. The facts and the analyses done by the two different Panels that heard the cases were very similar and both Panels, inevitably, arrived at the same conclusion. From the foregoing, it may not serve any useful purpose to do an in-depth review of both cases. This article will give greater attention to the 1994 case (*Tuna-Dolphin II*) because it is later in time and the Panel that decided it had the benefit of the earlier 1991 decision (*Tuna-Dolphin I)* and ample opportunity to have charted a different path, if it had wished to do.

Tuna Fishermen often use dolphins to identify the location of tuna in the Eastern Tropical Pacific Ocean (ETP) because dolphins and tuna often flock together. Once dolphins are located, tuna fishermen, using purse-seine nets, will swoop on them, expecting to catch tuna incidentally.[24] This resulted in high mortality rate of dolphins such that in 1986 alone, about 133,000 dolphins were killed through this process.[25] Determined to protect, preserve, and conserve the dolphin stock, the United States (US) enacted the *Marine Mammal Protection Act 1972* (MMPA).[26] The MMPA placed an embargo on taking and exporting marine mammals generally and their products into the US (section 101(a)).[27] However, on the fulfilment of certain conditions, permits may be issued for the taking and importation of sea mammals into the US (section 104(b)(2)).[28] Sequel to these provisions, the US placed an import ban (primary embargo) on yellowfin tuna and yellowfin tuna products coming from States that used purse-seine nets to harvest for yellowfin, which incidentally catches dolphin more than the acceptable limit prescribed by the MMPA.[29] The MMPA also specified that any State, called 'intermediary nation' who intends to export yellowfin tuna or yellowfin tuna products into the US must declare and show proof that in the last six months, it had not imported prohibited products from States where the US had placed a direct ban on. Without

---

24 *Tuna-Dolphin II* (n 3) [2.2].

25 ibid.

26 The Marine Mammal Protection Act of 1972 as Amended [1972] 16 USC 1371 <https://www.fisheries.noaa.gov/s3/2023-05/mmpa-2018-revised-march-2019-508.pdf> accessed 8 January 2024.

27 It provides that there 'shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States'.

28 It provides that any 'permit issued under this section shall— (2) specify— (A) the number and kind of animals which are authorized to be taken or imported, (B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported, (C) the period during which the permit is valid, and (D) any other terms or conditions which the Secretary deems appropriate'.

29 *Tuna-Dolphin II* (n 3) [2.9]-[2.11].

such proof, these States were placed on 'intermediary ban' from taking and exporting marine mammals generally and their products into the US (section 101(2)(D)).[30]

Just like Mexico in the earlier 1991 case,[31] the European Economic Community (EEC) and the Netherlands sued the US within the WTO DSB, arguing that the import bans (both the primary and intermediate embargoes) on yellowfin tuna and tuna products were inconsistent with the provisions of Article III of the GATT[32] and Article XI of the GATT[33] and do not qualify as exceptions under Article XX of the GATT.[34] On the contrary, the US urged the Panel to find, among others, that the intermediary nation ban was in line with the provisions of Article XX(d) of the GATT, while the primary nation ban was in line with the provisions of Article XX(b) and (g) of the GATT.[35]

i. Whether the MMPA was consistent with Article III and XI of the GATT

In its analysis of the provisions of Article III,[36] the Panel observed that the essence of Article III is to afford a particular foreign product the same treatment afforded to a domestic product of the same kind.[37] That in terms of the acceptable harvesting method, the MMPA regime did not treat imported tuna differently from domestic tuna harvested from within the US, therefore, the trade embargo was consistent with Article III.[38]

On the conflict between MMPA and Article XI of the GATT, the Panel observed that Article XI forbids the imposition of any form of prohibition or restrictions on imported goods, other than duties, taxes, or charges.[39] The Panel then held that the MMPA measures were not duties, taxes, or charges but were prohibitions or restrictions, therefore inconsistent with the provisions of Article XI(1) of the GATT.[40]

---

30 *Tuna-Dolphin II* (n 3) [2-12]. Section 101(2)(D) provides that the US 'shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States'.

31 ibid [3.1]-[3.2].

32 Article XIII(I) of the GATT provides that no 'prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted'.

33 Article XI(1) of the GATT provides that no 'prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party'.

34 *Tuna-Dolphin II* (n 3) [3.1].

35 ibid [3.2(C)].

36 For instance, Article III(1) provides that the 'contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production'.

37 *Tuna-Dolphin II* (n 3) [5.8].

38 ibid [5.9].

39 ibid [5.10].

40 ibid.

ii. Whether the MMPA measures could be upheld under Article XX(g) of the GATT

Having declared that the MMPA measures were inconsistent with the provisions of Article XI of the GATT, the Panel then proceeded to analyse whether the import bans could be upheld as exception to Article XI under the provisions of Article XX(g) of the GATT.[41] The Panel adopted a three-way analysis: (1) whether the import ban related to the conservation of exhaustible natural resources, (2) whether the measures were 'made effective "in conjunction" with restrictions on domestic production or consumption'[42], and (3) whether the import bans were applied in a way that amounted to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[43]

ii.i. Whether the import bans related to the conservation of exhaustible natural resources

The Panel engaged in a two-prong analysis under this rubric. First, it determined whether dolphins qualified as exhaustible natural resources for the purpose of Article XX(g). Contrary to the position taken by the EEC, the US had argued that dolphins, which the import bans sought to conserve were exhaustible natural resources.[44] The Panel agreed and held that

> dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource.[45]

Next, the Panel determined whether measures to converse exhaustible natural resources under Article XX(g) could apply extra-territorially. The EEC and the Netherlands had argued that conservation measures intended to satisfy the provisions of Article XX(g) could not be made to apply outside the territory of the country adopting such measures, in this case, the US. However, the US argued that the text of Article XX(g) did not provide such limitations.[46] The Panel also agreed with the US and held that there was no valid reason in support of the assertion that conservation measures premised under Article XX(g) cannot apply extra-territorially.[47]

ii.ii. Whether the MMPA measures were 'made effective "in conjunction" with restrictions on domestic production or consumption'

The Panel proceeded to determine the second of the three questions under two rubrics: first, whether the import bans 'related to' conserving exhaustible natural resource and second,

---

41 Article XX provides that subject 'to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures […] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

42 *Tuna-Dolphin II* (n 3) [5.10].

43 ibid.

44 ibid [5.13].

45 ibid.

46 ibid [5.14].

47 ibid [5.20].

whether the MMPA measures 'were made effective "in conjunction with" restrictions on domestic production or consumption'.[48]

The Panel proceeded to determine the first issue. According to the Panel, central to the determination of the first issue was the meaning of words 'related to'. The Panel defined 'related to' to mean 'primarily aimed'.[49] The Panel then analysed whether the measures under the MMPA could be 'considered to be primarily aimed at the conservation of an exhaustible natural resource, and primarily aimed at rendering effective restrictions on domestic production or consumption'.[50] The Panel observed that the US imposed (both primary and intermediate) export bans on some States and it did not matter whether those States' tuna fishing techniques did not harm dolphins, as long as those States' dolphin conservation measures were at variance with the MMPA measures, the States were banned from exporting tuna into the US.[51] The Panel then noted that the MMPA import bans were made to compel States to change their conservation measures to align with the US measures and therefore, their immediate focus could not be to further the conservation of dolphins, an exhaustible natural resource.[52] From the foregoing, the Panel held that the MMPA measures were at variance with the provisions of Article XX(g) of the GATT and having held so, the Panel refused to determine the third question that it had initially raised.[53]

First, the Panel based its determination of the second question on whether the MMPA measures 'related to' conserving dolphins, an exhaustible natural resource.[54] With respect to the Panel, the second question that the Panel set out to determine was whether the measures were 'made effective "in conjunction" with restrictions on domestic production or consumption'.[55] Instead, the Panel segmented the issue into two and proceeded to consider the first which is whether the primary and intermediary nation embargoes imposed by the US on yellowfin tuna could be considered to be 'related to' the conservation of an exhaustible natural resource within the meaning of Article XX (g).[56] This question, in my opinion, is not different from the first question that the Panel decided in favor of the US, which is whether the measures adopted by the MMPA related to the conservation of exhaustible natural resources. Yet the Panel came to a different conclusion here.

Second, by determining the second question through the lens of whether the MMPA measures related to the conservation of exhaustible natural resources, rather than whether the MMPA 'made effective "in conjunction" with restrictions on domestic production or consumption',[57] the Panel failed to properly address the central issue for determination under question two. It is tempting to argue that if the Panel had looked at the correct issue, whether the MMPA measures were crafted to, and indeed applied equally between domestic and international dolphin farmers, the Panel probably would have come to a different decision, because the Panel had earlier admitted that the measures were applied equally between domestic and international dolphin farmers.

---

48 *Tuna-Dolphin II* (n 3) [5.21].
49 ibid [5.22].
50 ibid [5.23].
51 ibid [5.23]-[5.24].
52 ibid [5.24].
53 ibid [5.27].
54 ibid [5.22].
55 ibid [5.10].
56 ibid [5.21].
57 ibid [5.21].

> The Act also prohibits the import into the United States of tuna or tuna products harvested by a method that results in the incidental killing or serious injury of marine mammals in excess of United States standards. In order to meet this requirement, the tuna exporting country must prove that it has fishing technology and a rate of incidental taking comparable to those of the United States.[58]

Third, having erroneously held as above, the Panel refused to consider the third question: whether the measures adopted by the MMPA were applied in a way that amounted to 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[59] Therefore, the opportunity to determine the third question and provide further indications on how environmental issues are treated within the DSB was lost.

iii. Whether the MMPA was consistent with Article XX(b) of the GATT

Again, the Panel adopted a three-way analysis by determining whether the import bans were, first, 'to protect human, animal or plant life or health'; second, '"necessary" to protect human, animal or plant life or health'; and third, applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[60]

On the first question whether the import bans were to protect human, animal or plant life or health, parties had agreed that the import bans were to protect dolphins and could properly come under the rubric of Article XX(b) but disagreed on whether such measures could be extended to have extraterritorial reach. While the US argued that it could, the ECC argued the contrary.[61] To decide this issue, the Panel looked at the wording of Article XX(b) and noted that the text did not contain any jurisdictional limitation regarding the geographical area where living resources could be protected.[62] From the foregoing, the Panel held that the MMPA measures to protect dolphins in in the ETP met the requirements of Article XX(b) of the GATT.[63]

On the second question whether the import bans were necessary to protect human, animal or plant life or health, the Panel observed that the import bans were absolute in that they were imposed irrespective of whether the States had dolphin conservations measures or not, as long as such measures were not in consistent with the MMPA measures.[64] The Panel further observed that these import bans alone did not have the potentials to advance the US dolphin conservation objectives.[65] The Panel then concluded that import bans were measures aimed at forcing other States to adopt comparable dolphin conservation policies and therefore do not satisfy the necessity requirements of Article AA(b) of the GATT.[66] Having not met the necessity requirement, the Panel did not answer the third question, ie whether the import bans

---

58 *Tuna-Dolphin II* (n 3) [5.3].
59 ibid [5.27].
60 ibid [5.29].
61 ibid [5.30].
62 ibid [5.31].
63 ibid [5.33].
64 ibid [5.36]-[5.37].
65 ibid [5.37].
66 ibid.

were applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or in a manner which would constitute a disguised restriction on international trade'.[67]

The central issue that the Panel set out to determine under this rubric was whether the import bans were necessary to protect human, animal or plant life or health. As argued by Guida, WTO member States 'can adopt measures to safeguard human, animal or plant life as well as health only if considered necessary. Defining 'necessary' becomes, accordingly, fundamental to understanding when protective measures can be implemented in the context of such exception'.[68] But in their wisdom, the Panel deviated from that approach and instead proceeded to analyse, as presented above, the overarching nature of the measures and how it would force States to make changes to their own tuna fishing policies comparable to that of the US. This, in my opinion, made the Panel gloss over the real question that the Panel ought to have answered under this rubric. The Panel started off on a good footing when it stated that it intended to

> examine[] the second of the above three questions, namely whether the primary and intermediary nation embargoes imposed by the United States on yellowfin tuna could be considered to be "necessary" for the protection of the living things within the meaning of Article XX (b).[69]

The Panel further 'noted that, in the ordinary meaning of the term, "necessary" meant that no alternative existed'.[70] However, the Panel did not further analyse the necessity of the MMPA measures, only to conclude that 'measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b)'.[71] It could be argued that if the Panel had evaluated the necessity of the import bans, it probably would have upheld the import bans. Conversely, at the very least, an analysis of the necessity of the import bans would have enriched the jurisprudence under this rubric.

Furthermore, after its finding that the import ban did not meet the necessity requirement under Article XX(b), the Panel did not see the need to analyse the third question it had identified.[72] It may be argued that by basing its conclusion on a wrong premise, the Panel arrived at a wrong decision, which in effect, led to the loss of a rare opportunity to have had a pronouncement on the three question under Article XX(b).

iv. General comments

Although the Panel in the 1994 case did not elaborate on this point, one of the reasons that the Panel in the 1991 case refused to uphold the conservation measures of the MMPA was because the US was not able to show that these measures were necessary and having explored all other options, there no alternatives to them. The 1991 Panel had pointed toward international cooperation as one viable option that the US could have explored to conserve

---

67 *Tuna-Dolphin II* (n 3) [5.29].
68 Guida (n 10) 49.
69 *Tuna-Dolphin II* (n 3) [5.34].
70 ibid [5.35].
71 ibid [5.39].
72 ibid.

dolphins.[73] International cooperation certainly presents a viable conservation option, but there are challenges with international cooperation, as international cooperation is not a magic wand.

First, the 1994 Panel noted that the US had pioneered and initiated, alongside Costa Rica, the creation of the Inter-American Tropical Tuna Commission (ITTC) in 1949 towards the conservation of tuna. In 1976 and 1986, the focus of the ITTC was broadened to include dolphins.[74] Despite this, the 1994 Panel observed that an estimated 133,000 dolphins were needlessly killed in the process of fishing for tuna in 1986 alone.[75] This is indicative that more than international cooperation is needed to conserve dolphins.

Second, this article concedes that another window that could open through international cooperation could be by way of negotiating a treaty to conserve dolphins. However, successfully negotiating a treaty might prove increasingly difficult today because of vested interest and political leanings of States. For instance, developing States often feel that the environmental agenda is a means to slow their development.[76] According to Ruth Gordon, 'environmentalism came at a particularly inauspicious time for the Global South, which feared environmentalism would slow its development',[77] as such, the '[G]lobal South continued to insist on development as its main priority'.[78] From the foregoing, leaving dolphin conservation to future treaty-making may not seem viable. Furthermore, there may not be much zeal for treaties to conserve dolphins as many States are experiencing treaty fatigue due to the existence of too many treaties with corresponding obligations to fulfil.[79] It may therefore be problematic to nudge States towards negotiating a treaty which means domestic measures to conserve dolphins as exemplified the MMPA seems such a viable alternative.

The decision in this case did not come as a surprise because the DSB is set up to apply and uphold trade agreements against environmental norms and, as such, the Panel's interpretation of these trade-enabling agreements is done through the GATT's lens. Tim Stephens argues that in 'more recent decisions panels have not been quite so willing to look beyond the strictures of the WTO agreements themselves'.[80] This was evident in the case under review as the Panel did not shy away from declaring 'that the dispute settlement procedures cannot add to or diminish rights of contracting parties under the General Agreement'.[81]

From the decision, it seems that the DSB has developed at least three mechanisms to achieve this aim. First, the DSB has developed the jurisprudence around a narrow interpretation of Article XX of the GATT, which in effect, lowers the threshold for environmental agenda by making it harder for environmental consideration to scale through the requirement of Article XX of the GATT.[82] The Panel declared that

---

73 *Tuna-Dolphin I* (n 2) [5.28].
74 *Tuna-Dolphin II* (n 3) [2.3].
75 ibid [2.2].
76 David Boyd, *The Environmental Rights Revolution* (UBC Press 2012) 34.
77 Ruth Gordon, 'Unsustainable Development' in Shawkat Alam et al (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015) 50, 52, 65.
78 ibid.
79 Donald Anton, '"Treaty Congestion" in Contemporary International Environmental Law' in Shawkat Alam et al (eds) *Routledge Handbook of International Environmental Law* (Routledge 2013) 651.
80 Stephens (n 1) 184.
81 *Tuna-Dolphin II* (n 3) [5.43].
82 Carr (n 18) 553.

> [t]he long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement. If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would [not] be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.[83]

Second, the DSB seems to deliberately dab environmental questions with a trade brush, to be able to subjugate and interpret environmental questions from a trade lens. For instance, in the case under review, the Panel decided that the

> issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction.[84]

With respect to the Panel, the issue was as much about the US' conservation objective as much as anything else. That was why the Panel 'consequently found that the policy to conserve dolphins in the eastern tropical Pacific Ocean, which the United States pursued within its jurisdiction over its nationals and vessels, fell within the range of policies covered by Article XX(g)'.[85] The Panel even noted the US pioneering effort with Costa Rica in creating the ITTC in 1949 to conserve tuna and later, dolphin.[86] With the deliberate framing of the question this way, putting the emphasis on the import bans, instead of the conservation of exhaustible natural resource, the Panel deliberately took the sting away from conservation and therefore made it easy for the Panel to decide the case from the lens of trade as against the clearly environmental agenda of conserving dolphins that are going extinct.[87]

Third, there seems to be a pretense within the DSB that there is no hierarchy between environmental norms and trade rules, ie that both are on an equal footing, to give a façade of balanced adjudication of these competing goals. For instance, the Panel 'noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement'[88] and that 'the relationship between environmental and trade measures would be considered in the context of preparations for the World Trade Organization'.[89] For a casual onlooker, this platitude could give the impression of a balanced adjudication between the competing environmental and trade goals. However, as seen in the decision, trade goals seem

---

83 *Tuna-Dolphin II* (n 3) [5.26].
84 ibid [5.42].
85 ibid [5.20].
86 ibid [2.3].
87 ibid [5.42].
88 ibid.
89 ibid [5.43].

to trump environmental considerations, and it seems that this is not about to change in the foreseen future. Guida puts it succinctly thus,

> [k]eeping this implicit pre-eminence of trade interests "will continue to skew WTO outputs in favour of trade and commercial interests to the potential detriment of social justice and other non-trade interests". Further, this imbalance renders it unlikely that the WTO goal of sustainable development can be achieved.[90]

Because of this trade-furthering mindset of the DSB, experts fear that the WTO will use its trade agreements to stifle national environmental efforts as seen in the case. On this, Trachtman argues

> that WTO law relating to trade and environment is not internally coherent. Its anti-discrimination prohibitions seem to apply to invalidate good faith regulatory action. In connection with its related environmental exceptions, the Appellate Body has failed to follow its own doctrine which calls for authentic balancing of trade and environmental values.[91]

Unfortunately, the trade furthering mindset of the DSB has been extended to international environmental efforts. As argued by Guita, State parties to the WTO 'can be prevented from implementing international law obligations not related to trade interests'.[92] This seems to be the case with the Panel's decision in the *Biotech Product's case* which is the focus of the next segment of the article. But all these may be indicative that another international adjudicatory body, preferably the ICJ, should adjudicate trade-environment cases. This seems a much fairer and neutral approach.

b. Biotech Product's case

The propensity to prioritise trade over the environment played out in the *Biotech Product's case*. The US, Canada and Argentina lodged complaints with the DSB, against an alleged general moratorium placed by the European Union (EU) and the country-specific moratoria placed by five individual EU member States on the importation of certain genetically modified products (GMOs) from their respective States. They contended that the EU's actions were contrary to several provisions of the WTO trade agreements. A Panel was constituted to hear the consolidated complaints.[93]

i. Analysis by the Panel

The complainants argued that the suspension by the EU of the process for approving the importation of GMOs and the additional measures put in place by some EU States constitute moratoria.[94] The EU in its defense denied the claim. However, it acknowledged a delay in approving the importation of GMOs into its territory due to the fact that its regulatory framework was based on the precautionary principle of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the Biosafety Protocol) which allows case-by-case

---

90 Guida (n 10) 64.
91 Trachtman (n 17) 275.
92 Guida (n 10) 64.
93 *Biotech Product's case* (n 4) 1-5.
94 ibid 19.

analysis of GMOs products and their potential risks to human health and the environment.[95] The EU argued that in line with the precautionary principle, its approach was to identify, assess and prevent the 'risks to human health and the environment from each of these GMOs'.[96] The EU argued that the delay was not in conflict with the WTO trade rules.[97]

To determine whether there were moratoria, the Panel looked at (1) whether there was an interim freeze on approval of GMOs, and (2) whether such an interim freeze was deliberate.[98] On the first ambit, the Panel considered, among others, the fact that during the contested period of October 1998 to August 2003, the EU did not give any approval for placement of GMOs in its territory, despite various applications.[99] Also, the Panel reviewed the actions of individual EU member States and observed that despite the EU's approval concerning the placement of MS1/RF1 oilseed rape (EC-89) and MS1/RF2 oilseed rape in the market, France for instance, failed to give its consent since June 1997 and 'did what was within its power to prevent these products from being approved'.[100] The Panel, therefore, concluded that there were moratoria in the EU. On the second ambit, the Panel reviewed documents and statements from EU's highly placed officials, confirming that there was a general freeze on further approval for GMOs.[101] The Panel therefore held that there was, indeed, moratoria in the EU.[102]

ii. Is moratoria challengeable within the WTO?

Having established that there were moratoria, the Panel proceeded to determine if the moratoria were consistent with the WTO trade rules, from two angles. First, the Panel took cognizance of the EU's argument that its procedure for approval for GMOs was not challengeable under the WTO because it was a practice and not a measure.[103] Second, the Panel also noted the fact that, apart from the general *de facto* moratorium placed by the EU, there were country-specific moratoria placed by five EU member States.[104]

Regarding the first angle, the Panel held that acts or omissions include *de jure* as well as *de facto* measures and therefore EU's measure is challengeable within the WTO trade dispute mechanism.[105] On the second limb, the Panel noted that measures challengeable under the DSB could be an amalgamation of various measures and held that 'the mere fact that the moratorium is the result of the application of separate decisions by the Group of Five countries and the Commission does not prevent it from being a challengeable measure'.[106] The Panel therefore concluded that the moratoria were challengeable within the WTO trade rules.[107]

---

95 *Biotech Product's case* (n 4).65.
96 ibid.
97 ibid 66.
98 ibid 462.
99 ibid 443.
100 ibid 559-560.
101 ibid 426.
102 ibid 462.
103 ibid 617.
104 ibid 31, 618. The States are France, Germany, Austria, Italy, Luxembourg, and Greece.
105 ibid 618.
106 ibid 618-619.
107 ibid 619.

iii. Is the moratorium inconsistent with the first clause of Annex C(1)(a) and Article 8 of the *SPS Agreement?*

In its analysis, the Panel used one GMO application, in this case, MS8/RF3 oilseed rape as a test case, to determine if the EU had delayed making a decision on allowing its importation into EU territory. The Panel noted that between March 2000 and October 2002, the EU did not summon a meeting of its Regulatory Committee in furtherance of the application processes and that such a period was 'unjustifiably long, and that it can reasonably be inferred from surrounding circumstances that the Commission's inaction was a consequence of the general moratorium on approvals'.[108] Consequently, the Panel held that the deliberate undue delay was a breach of the EU's commitment within the meaning of the first clause, Annex C(1)(a) of the SPS Agreement.[109]

As regards Article 8 of the SPS Agreement, the Panel had established that its breach is tied to the breach of the first clause of Annex C(1)(a) of the SPS Agreement. The Panel, therefore, held that since the EU had breached the provision of the first clause of Annex C(1)(a) of the SPS Agreement, it necessarily followed that the EU had also breached the provision of Article 8.[110] From the analysis, especially with the inability of the Panel to give vent to the provisions of the Biosafety Protocol, it seems an uphill task, within the DSB mechanism, to achieve equal considerations for environmental concerns with trade issues, because the DSB primarily interprets and applies trade rules to disputes before it. This decision reinforces the argument that the DSB may not be a suitable platform to adjudicate on trade matters with environmental implications.

c. US Shrimp case

Sequel to its Endangered Species Act, 1973,[111] the US issued a regulation in 1987 mandating the use of permitted turtle excluder devices (TEDs) on shrimps harvesting vessels.[112] On 21 November 1989, the policy was applied universally with the enactment of section 609 of Public Law 101-162[113] which, among others, placed an import ban in the US on shrimps harvested without these turtle conservation techniques.[114] The legislation further provided an exception to States who would apply for and obtain certification from the US regarding their inability to comply with the provisions of section 609.[115]

In 1991, two types of certification processes were put in place for States desiring to obtain certification from the US.[116] The certification framework was further revised via the

---

[108] *Biotech Product's case* (n 4) 680. Annex C(1)(a) provides that parties 'shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that: (a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products'.

[109] ibid 681.

[110] ibid 683. Article 8 provides that parties must 'observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement'.

[111] Public Law 93-205 [1973] 16 United States Code 1531.

[112] *US Shrimp case* (n 5) 2.

[113] Public Law 101-162 [1989] 16 United States Code 1537.

[114] ibid section 609(b)(1).

[115] ibid section 609(b)(2).

[116] *US Shrimp case* (n 5) 2.

1996 guideline,[117] stipulating the attestation on a Shrimp Exporter's Declaration form that the imported shrimp into the US was harvested in compliance with section 609.[118] Additionally, the 1996 Guidelines put in place different sanctions for non-compliance with section 609.[119] While the 1991 regulations had exempted some States from the import ban for three years for failure to comply with section 609,[120] the 1996 guideline took away the privilege and applied the ban worldwide.[121]

Malaysia, Thailand, Pakistan and India[122] lodged complaints before the DSB on the ban and a Panel was constituted to determine the complaints.[123] The panel held among others, that the US import ban on shrimp harvested without the TEDs was in conflict with the provisions of articles XI:1, XX and the chapeau to Article XX of the GATT 1994.[124] The ban was subsequently declared a 'threat to the multilateral trading system'.[125] The US appealed the decision to the AB, contending among others, that the Panel was wrong in holding that section 609, which seeks to conserve sea turtles, an endangered species, was outside the contemplation of both Article XX of the GATT 1994 and its chapeau.

i. Analysis by the AB

The AB proceeded to decide if sea turtles qualify as an exhaustible natural resource, within the contemplation of Article XX(g) of the GATT 1994.[126] The AB noted that Article XX(g) of the GATT covers both non-living and living natural resources because what

> modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible to depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.[127]

Consequently, the AB held that sea turtles were exhaustible living resources.

The AB proceeded to find out whether sea turtles were under threat of extinction and noted that the 'exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of […] CITES' and 'may be affected by trade'.[128] It therefore concluded that sea turtles come under

---

[117] The 1991 Guidelines (10 January 1991) 56 Federal Register 1051; the 1993 Guidelines (18 February 1993) 58 Federal Register 9015; the 1996 Guidelines (19 April 1996) 61 Federal Register 17342.

[118] *US Shrimp case* (n 5) 3.

[119] 1996 Guidelines (n 118) 17344.

[120] *US Shrimp case* (n 5) 4.

[121] ibid 5.

[122] ibid 1-2.

[123] ibid 2.

[124] ibid.

[125] ibid 6.

[126] ibid 47. Article XX(g) of the GATT 1994 provides that subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[127] ibid.

[128] ibid 50.

the ambit of Article XX(g) of the GATT 1994.[129] The AB then proceeded to determine if section 609 is a measure seeking the conservation of an exhaustible natural resource.[130] Having noted its turtle conservationist agenda, the AB concluded that within the contemplation of Article XX(g) of the GATT 1994, section 609 qualifies as a measure to conserve a depleted natural resource.[131]

Unfortunately, trade consideration superseded conservation measures as the AB, in the final analysis, held that although section 609 was a measure to conserve a depleted resource, it was applied discriminately on States contrary to the provisions of the chapeau of Article XX, and therefore inconsistent with Article XX of the GATT 1994.[132]

Despite the overwhelming evidence of the threat of extinction of sea turtles, because of the unrestricted trade and the mandate of section 609 to rein in this unrestrained trade, unfortunately, the AB's decision seems to further unrestrained trade on sea turtles. Like the *Biotech's case*, this case reveals that trade considerations will always be given paramountcy over environmental concerns within the DSB as the DSB is mandated to apply the WTO trade rules to its dispute settlements obligations. The way out may well be to embrace the ICJ in the adjudication of the trade cases with environmental implications.

III. ICJ's even-handed adjudication of cases with environmental complexities

One factor that indicates that the ICJ would be a better forum to adjudicate on matters involving the environment would be the fact that the ICJ has developed a healthy body of precedents involving disputes with environmental considerations and so is already schooled in the nuance of environmental adjudications.[133]

This article will look at four of such cases decided by the ICJ, which may indicate ICJ's even-handedness in the resolution of the trade and environment conflict. They are the *Whaling in the Antarctic,* the *Gabčíkovo-Nagymaros,* the *Costa Rica v Nicaragua/Nicaragua v Costa Rica* and the *Pulp Mills case.* The cases are discussed below.

a. Whaling in the Antarctic

Before the ICJ, Australia instituted proceedings against Japan, contending that Japan's Whale Research Program (JARPA II) under Special Permit in the Antarctic, is inconsistent with Japan's obligation under the *International Convention for the Regulation of Whaling 1946* (ICRW) or under other international instruments aimed at conserving aquatic mammals and the marine ecosystem.[134] Consequently, Australia sought, among others, an order asking Japan to desist from the execution of JARPA II.[135] New Zealand intervened and contended, among others, that by virtue of the provision of Article VIII of the ICRW, whaling was only allowed

[129] *US Shrimp case* (n 5) 51.
[130] ibid.
[131] ibid 53-54.
[132] ibid 75.
[133] Stephens (n 1) 179-180.
[134] *Whaling in the Antarctic* (n 6) 234.
[135] ibid 238.

for exclusive scientific purposes but that JARPA II was not for scientific research, rather, it was an excuse to engage in large-scale commercial whaling.[136]

The ICJ narrowed down the issue for determination to the question whether Japan's JARPA II contravenes the provisions of the ICRW for which Japan is a signatory?[137] To determine the issue, the ICJ had to first interpret the provisions of Article VIII(1) of the ICRW which creates an exception for whaling if it is for exclusive scientific purposes.[138] The ICJ noted that the provision must be interpreted in accordance with the overall objective of the ICRW which is to ensure the conservation of all species of whales while allowing for their sustainable exploitation.[139]

i. Construing JARPA in the light of Article VIII of the Convention

The ICJ proceeded to determine if JARPA II qualifies as an exception under Article VIII of the ICRW.[140] The ICJ noted Japan's use of a lethal instead of non-lethal method to catch whales 'on a relatively large scale'.[141] There was evidence that the lethal method yields more catch than its non-lethal counterpart. The ICJ also noted Japan's admission that it could use non-lethal method to catch whales and still achieve the same scientific purpose and held that if 'this JARPA II research objective can be achieved through non-lethal methods, it suggests that there is no strict scientific necessity to use lethal methods in respect of this objective'.[142] The ICJ further observed that the actual catch of whales was far more than what was stated as being needed for the research and that this 'cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research'.[143] The ICJ noted that for the fin and humpback whales, the decision on numbers to be caught was not scientifically determined but 'a function of political and logistical considerations' and this 'further weakens the purported relationship between JARPA II's research objectives and the specific sample size targets for each species'.[144]

Furthermore, JARPA II did not have either a tentative or definite end date with the ICJ noting that 'with regard to a programme for purposes of scientific research, as Annex P indicates, a "time frame with intermediary targets" would have been more appropriate'.[145]

In addition, the ICJ observed the scant research output from JARPA II. For instance, despite the completion of the first phase, Japan could only present two publications from JARPA II and they did not even 'relate to the JARPA II objectives'.[146] The ICJ concluded

---

136 *Whaling in the Antarctic* (n 6) 242.

137 ibid 246.

138 Article VIII(1) of the ICRW provides that '[n]otwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted'.

139 *Whaling in the Antarctic* (n 6) 251.

140 ibid 260.

141 ibid 290.

142 ibid 289.

143 ibid 290.

144 ibid.

145 ibid.

146 ibid 291.

that in the 'light of the fact that JARPA II has been going on since 2005 and has involved the killing of about 3,600 minke whales, the scientific output to date appears limited'.[147]

Based on these, the ICJ held that 'the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention'.[148]

ii. Advancement of whales conservation over trade

In this case, it could be argued that the ICJ considered conservation measures in contention with trade in whales. To protect and conserve the whale mammal from exploitation, ostensibly for trade purpose, the ICJ readily applied the provisions of the ICRW

> which was prompted by concerns over the sustainability of the whaling industry. This industry had increased dramatically following the advent of factory ships and other technological innovations that made it possible to conduct extensive whaling in areas far from land stations, including in the waters off Antarctica.[149]

This decision boosts confidence in the ability of the ICJ to give due consideration to both conservation measures and trade. As demonstrated in both the *Biotech Product's* and *US Shrimp cases,* it is doubtful if the DSB would have come to a similar outcome, if it heard the case, with its penchant for elevating trade interests over environmental concerns.

b. Gabčíkovo-Nagymaros

The dispute in this case arose out of the failure to implement, and the subsequent termination by Hungary, of the 1977 Treaty between Hungary and former Czechoslovakia, which was for the joint building and utilisation of the Gabčíkovo-Nagymaros Barrage System to be constructed in the Danube River.[150] The Barrage System, in which each party was expected to fund the project in its territory, was geared towards 'the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding'.[151]

By Article 1 of the Treaty, two locks were to be built, one at Gabčíkovo in Czechoslovakia and the other at Nagymaros in Hungary, with both locks designed to constitute 'a single and indivisible operational system of works'.[152] Hungary, out of environmental concerns, abandoned the project and failed to construct the Nagymaros phase.[153] With work in advanced stage in the Gabčíkovo end, Slovakia (now successor to Czechoslovakia) decided to go alone and conceived another project (Variant C) to utilise the facilities already built in Gabčíkovo.[154] Hungary objected to this and consequently terminated the Treaty.

---

147 *Whaling in the Antarctic* (n 6).
148 ibid 293.
149 ibid 246.
150 *Gabčíkovo-Nagymaros* (n 7) 11.
151 ibid 18.
152 ibid 20.
153 ibid 31.
154 ibid 31-33.

i. Analysis by the ICJ

The ICJ had to determine if Hungary was justified in abandoning the project.[155] Having noted that by abandoning the project, Hungary had either suspended or rejected the Treaty, the ICJ proceeded to decide if Hungary was justified to breach the Treaty provision on grounds of protecting the environment.[156] Although the ICJ agreed with Hungary that environmental concerns constituted an essential interest and reiterated 'the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind',[157] however, the ICJ declared that the project's impairment to the environment was not imminent and certain.[158] Moreover, the ICJ noted that Hungary had the capacity to avert the occurrence of the impairment to the environment while still honoring its Treaty obligation.[159] Finally, the ICJ noted that by virtue of the provisions of Articles 15 and 19 of the Treaty, which allows for a review of the project specification, Hungary could have discussed with Slovakia regarding its environmental concerns and sought ways to vary the project.[160]

From the foregoing, the ICJ concluded that the doctrine of *pacta sunt servanda* applied to the case and declared that Hungary's termination of the Treaty had no legal effect.[161] On Slovakia's operation of the Variant C, the ICJ noted that the project was already in an advanced stage at Slovakia's end when Hungary withdrew from the project, in the circumstance, Slovakia was justified to explore other alternatives.[162] However, it noted that Slovakia's operation of Variant C was at variance with the Treaty provision and held that Variant C should be made to comply with the Treaty provisions.[163]

ii. Sanctity of an economic treaty over the environment: pacta sunt servanda

What tipped the scale against Hungary was the recognition and application by the ICJ of the principle of *pacta sunt servanda*.[164] Indeed, the ICJ acknowledged the considerable impact of the project on the environment and was

> mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[165]

The ICJ was also aware of the negative impact of trade on the environment by admitting that all through the ages, mankind has, for economic and other reasons, constantly interfered with nature' and that this 'was often done without consideration of the effects upon the environment […] and to a growing awareness of the risks for mankind – for present and future generations'.[166]

---

155 *Gabčíkovo-Nagymaros* (n 7) 29.
156 ibid 39.
157 ibid 41.
158 ibid 42–43.
159 ibid 43-45.
160 ibid 68.
161 ibid 82.
162 ibid.
163 ibid 79.
164 ibid 78-79.
165 ibid 77-78.
166 ibid 78.

The ICJ then recommended the concept of Sustainable Development as a panacea for a balanced and middle-of-the-road approach to trade and environmental concerns thus, the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.[167] The ICJ, therefore, enjoined the parties

> to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses.[168]

The conclusion that could be drawn from the decision is that the ICJ was not willing to superintend environmental concerns over an economic treaty, despite clear evidence of negative environmental impact. Those parties should respect economic agreements they willingly enter and if there are concerns, should seek agreement variations as unilateral actions are not acceptable. This decision is indicative that the ICJ would be more even-handed in deciding cases with both trade and environmental concerns than the DSB.

C. Costa Rica v Nicaragua

In the first of the two cases involving the same parties and subject matter, Costa Rica instituted proceedings complaining about Nicaragua's violation of its territorial sovereignty through Nicaragua's occupation and subsequent dredging of the San Juan River in Costa Rica.[169] Costa Rica also complained, among others, that the dredging caused damage to its wetland and ecosystem.[170] In the second suit filed by Nicaragua, Nicaragua alleged the violation of its sovereignty and the causing of environmental harm following the construction of a major road in the border area along the San Juan River by Costa Rica.[171]

i. Issues in the Costa Rica v Nicaragua's case

The major issue in the dispute was the issue of sovereignty over the disputed territory which will determine the aggressor. The ICJ relied on the *Treaty of Limits 1858*, entered by both parties regarding the disputed area and upheld Costa Rica's sovereignty over the disputed area, it then declared that Nicaragua's occupation of the disputed area and the subsequent activities it carried out breached Costa Rica's sovereignty, therefore Nicaragua was liable for 'reparation for the damage caused by its unlawful activities'.[172]

ii. Violations of international environmental law

The ICJ proceeded to find out if Nicaragua had breached both procedural and substantive international environmental norms.[173] On procedural obligations, the ICJ noted the obligation to carry out an Environmental Impact Assessment (EIA) under international law, especially in zones with common environmental interest but held that from the evidence, Nicaragua's

---

[167] *Gabčíkovo-Nagymaros* (n 7).
[168] ibid.
[169] *Costa Rica v Nicaragua / Nicaragua v Costa Rica* (n 8) 673.
[170] ibid 680.
[171] ibid 674.
[172] ibid 703.
[173] ibid 705.

activities were not enough to provoke momentous transboundary injury to necessitate Nicaragua to carry out EIA.[174] On Nicaragua's failure to notify and consult Costa Rica on the dredging of San Juan River, the ICJ held that because there was no international duty on Nicaragua to conduct EIA, therefore, there was equally no duty to notify or consult.[175]

On substantive obligations concerning transboundary harm, the ICJ noted the decrease in the water flow in San Juan River but held that there was no evidence signifying that the dredging was the cause of this, because

> other factors may be relevant to the decrease in flow, most notably the relatively small amount of rainfall in the relevant period. In any event, the diversion of water due to the dredging of the Lower San Juan River is far from seriously impairing navigation on the Colorado River.[176]

The ICJ, therefore concluded that based on available evidence, there was no proof that the dredging had caused any transboundary harm to Costa Rica.[177]

iii. Issues in Nicaragua v Costa Rica

Here, the ICJ employed the same method used in the first case by first considering if there were breaches of both procedural and substantive international environmental obligations by Costa Rica.[178] On breach of procedural obligations, the ICJ first considered if Costa Rica had an obligation to conduct EIA.[179] The ICJ then proceeded to restate the principle of law that the duty of due diligence that a State owes to others, entails the prior ascertainment of the

> risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity.[180]

To determine if Costa Rica owed Nicaragua an obligation to conduct EIA, the ICJ proceeded to determine if the road project had posed any transboundary risk to Nicaragua. To determine this issue, the ICJ looked at the dimension of the road project and the background surrounding its execution.[181] On the dimension, the ICJ discovered that the road project was massive, spanning about 160 km in length out of which 108.2 km of it was along the San Juan River and that the road will either pass through or closer to wetland of international importance in both States 'heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive'.[182] From the foregoing, the ICJ held that there was significant risk of transboundary harm arising from the road project warranting the conduct of EIA, as such, the failure by Costa Rica to conduct an EIA, before

---

174 *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 8) 705-707.
175 ibid 708-710.
176 ibid 712.
177 ibid.
178 ibid 718.
179 ibid 720.
180 ibid.
181 ibid 720.
182 ibid 720-721.

embarking on the road project on the border between the two States, constituted a breach of obligation to carry out a risk assessment of significant movement of transboundary harm.[183]

On the breach of substantive obligations, Nicaragua argued that the construction of the road caused significant damage to the San Juan River, through among others, the pollution of the river by sediment from the road construction.[184] The ICJ noted that from evidence, sediments deposited into the river as a result of the road construction was very negligible and held that 'the road is contributing at most two per cent of the river's total load. It considered that significant harm cannot be inferred therefrom, particularly taking into account the high natural variability in the river's sediment loads'.[185]

Nicaragua had also argued that the road project had harmed the river's ecology and impaired the water quality, but the ICJ dismissed the allegation on grounds of lack of evidence to substantiate the allegation.[186] In the final analysis, the ICJ held that Costa Rica had violated its obligation to conduct EIA[187] but since there was no evidence indicating any link between the road construction and any substantial transboundary injury, Nicaragua's allegation that Costa Rica had violated its substantive duties arising from customary international law regarding transboundary harm was dismissed.[188]

iv. ICJ's balance of environmental protection with the right to development

From the ICJ's decision, it may be inferred that the ICJ was not prepared to superintend environmental consideration over development which would have been the case if the ICJ had halted the road construction project on grounds of environmental impairment. Having admitted the economic impact of the road on Costa Rica, the ICJ decided that the minimal environmental impact of the road project was not enough to scuttle the construction of the road.[189] By this, the ICJ seems to elevate the right to development above minor environmental inconveniences and this may indicate a disposition towards a balanced approach to the adjudication of disputes with environmental considerations as against the attitude of the DSB which is a consistent bias in favor of trade.

d. Pulp Mills case

In the *Pulp Mills case*, Argentina instituted proceedings against Uruguay, contending that Uruguay had breached a joint treaty, the *Statute of the River Uruguay* 1975, specifying how to jointly utilise the resources in the River Uruguay. Argentina complained that by unilaterally building two pulp mills on River Uruguay, Uruguay breached various procedural and substantive provisions of the Treaty.[190]

On procedural breaches, Argentina contended that Uruguay did not comply, among others, with the Treaty's procedural obligations on the construction of both the ENCE (CMB)

---

[183] *Costa Rica v Nicaragua/Nicaragua v Costa Rica* (n 8) 722.
[184] ibid 729.
[185] ibid 729, 731.
[186] ibid 736.
[187] ibid 739.
[188] ibid 737.
[189] ibid 720.
[190] Uruguay and Argentina, Statute of the River Uruguay (signed 26 February 1975 and registered 17 December 1982) No. 21425.

and Botnia (Orion) Mills.[191] The ICJ noted that Article 1 of the Treaty provided for procedural obligations including the duties to inform, notify, and negotiate, on the part of any State initiating projects that seeks the utility of shared resources.[192]

By Article 7 of the Treaty, the initiating State must inform the Comisión Administradora del Río Uruguay (CARU), which is the administrative body set up by the Treaty to regulate such projects, so that CARU could look into the potential of the project to cause transboundary environmental harm in the territory of the other party.[193] The ICJ noted that Uruguay did not communicate to CARU, despite repeated requests for information by CARU, on the projects, rather, Uruguay proceeded to issue EIA for both projects without the involvement of CARU.[194] On the basis of these findings, the ICJ held that Uruguay breached the provisions of Article 7 of the Treaty.[195]

On Uruguay's obligation to notify Argentina of the plans to construct the mills, the ICJ noted that the initiating state, by virtue of Article 7 of the Treaty, must inform the other party of its plans to cite any project, which is likely to cause transboundary environmental harm, along the border and such information should be accompanied by an EIA.[196] The essence of the notification, as provided in Article 8 of the Treaty is to enable the notified party to also participate in the conduct of the EIA.[197] The ICJ observed that Uruguay only notified Argentina after its internal conduct and approval of the EIA to construct the mills.[198] On the basis of the above, the ICJ concluded that Uruguay breached its procedural duty to inform Argentina as provided in Article 7 of the Treaty.[199]

On substantive obligations, Argentina contended, among others, that regarding the Orion Mill, Uruguay breached its obligation under Article 41(a) to prevent pollution and preserve the aquatic environment, since Uruguay in operating the mill, was discharging substances from the mill into the river. These discharges had not only made the river stagnant, but it had also reversed its flow.[200] The ICJ, however, observed that the discharges complained about were not significant when compared with 'the receiving capacity and sensitivity of the waters of the river'.[201] From the foregoing, the ICJ held that 'in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute'.[202]

---

[191] *Pulp Mills case* (n 9) 40.

[192] ibid 51.

[193] Article 7 provides that '[i]f one Party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the regime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other Party'.

[194] *Pulp Mills case* (n 9) 57.

[195] ibid 58.

[196] ibid 59, 60.

[197] ibid 60. Article 8 provides that the 'notified Party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification'.

[198] *Pulp Mills case* (n 9).

[199] ibid.

[200] ibid 40. Article 41(a) provides that without 'prejudice to the functions assigned to the Commission in this respect, the Parties undertake: (a) To protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies'.

[201] *Pulp Mills case* (n 9) 86.

[202] ibid.

Argentina had also argued that Uruguay had breached its substantive obligation by failing to consult those leaving within the vicinity of the mills, before embarking on the projects. But the ICJ observed in the contrary that before and after the conduct of the EIA, Uruguay had consulted extensively, the affected communities in both States and had conducted at least 80 meetings.[203]

On the production technology used in the Botnia Mill, Argentina argued that Uruguay had failed to prevent pollution from the plant as a result of Uruguay using inferior technology in the operation of the mill, which is a breach of Article 41(a) of the Treaty.[204] The ICJ noted that the duty of due diligence which involves not only averting pollution but also guarding and conserving the marine ecosystem around the River Uruguay necessarily

> entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment.[205]

The ICJ observed that the mill uses the bleached Kraft pulping technology which is the leading technology with over 80 per cent of the mills in the world currently using the same, as such, 'there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced'.[206]

On the effect of the mills on biodiversity, Argentina asserted that Uruguay had breached its obligation under Article 41 of the Treaty by its failure to adopt procedures to safeguard and conserve biological diversity within the River Uruguay.[207] The ICJ noted parties' treaty obligations under Article 41 of the Treaty, to safeguard the marine environment, to respect international commitments to conserve biodiversity and protect habitat and maintain water quality by refraining from discharging effluent into the river but held that from available evidence, Uruguay did not breach its duty to conserve the marine ecosystem.[208]

i. Accommodation of environmental and economic concerns, through sustainable development

The above decision may indicate the disposition of the ICJ which is to strike a balance between the competing economic and environmental goals through the concept of sustainable development. Of note is the fact even though the ICJ re-affirmed the customary international environmental norms of prevention and due diligence,[209] the ICJ proceeded to hold that there is the need not only to

> reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development.[210]

---

[203] *Pulp Mills case* (n 9) 87.
[204] ibid 88.
[205] ibid 88, 89.
[206] ibid 89.
[207] ibid 99.
[208] ibid 100.
[209] ibid 56.
[210] ibid 74.

Expatiating further, the ICJ observed that the

> attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other.[211]

The ICJ found support for its position in the provision of Article 27 of the Treaty and held that the provision 'embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'.[212] The appraisal of these decisions seem to suggest ICJ's propensity to determine each matter on its merit as against the DSB's predisposition to superintend trade and economics over the every other consideration.

ii. Recommendation

There is the likelihood that the DSB will continue to subordinate environment to trade in carrying out its adjudicatory responsibilities.[213] Despite this, some experts are of the view that the ICJ is not the proper forum to adjudicate on the trade-environment disputes for the reasons including: first, that the ICJ would not be neutral in handling the competing environment – trade disputes. Dunoff argues

> that neither trade bodies, like the GATT […] nor adjudicatory bodies, like the ICJ […] ought to resolve these issues. Instead, trade-environment conflicts should be heard before an institution that recognizes the interdependent nature of global economic and environmental issues and that has a mandate to advance both economic development and environmental protection.[214]

However, at the risk of reopening the argument already made in Part II of this article, contrary to the assertion, as shown in the four cases analysed, the ICJ has displayed a sensitivity to the issues in a way that does not only recognise the interdependence of trade and environment but has actually emphasised the significance of all the sectors.

Second, it has been argued that a satisfactory adjudication of the cases involving trade and environment would require accessibility of expert opinions which is not readily available to the ICJ. In the circumstance, a body primed to access expert opinions is more suitable to adjudicate on these cases than the ICJ.[215] Patricia Birnie et al present a slightly different argument. According to them, the

---

[211] *Pulp Mills case* (n 9).

[212] ibid. Article 27 provides that the 'right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in articles 7 to 12 when the use is liable to affect the regime of the river or the quality of its waters'.

[213] Dunoff (n 23) 1046.

[214] ibid.

[215] ibid 1046.

> principal potential weakness of the ICJ and the ITLOS as forums for the settlement of some categories of environmental disputes lies not in their comprehension of international law relating to the environment but in their limited ability to handle scientific evidence and technical expertise.[216]

However, these arguments seem to downplay certain practices of the ICJ. For instance, Article 34(2) of the Statute of the International Court of Justice (ICJ Statute) mandates the ICJ to ask and receive expert opinions in its adjudicatory processes.[217] In addition, Article 57 of the Rules of the International Court of Justice also allow parties before the ICJ to rely on expert opinions in the conduct of their cases before the ICJ.[218] The ICJ usually considers and applies these expert opinions in the adjudication of cases before it. For instance, in the *Whaling in the Antarctic*, the ICJ wrote to remind parties of their rights under Article 57 and requested that they call expert witnesses.[219] Australia and Japan took the opportunity to call expert witnesses to support their respective cases and the witnesses were examined by adverse parties.[220] The ICJ then placed reliance on the expert opinions in its adjudication of the case, especially in construing the meaning of 'scientific research', which was central to the case.[221]

Third, it has been argued that the ICJ is not suitable to handle trade-environment cases because the ICJ does not have the ability to enforce its decisions. According to Jeffrey Dunoff, the ICJ has been held back by 'a perceived lack of bite' and proceeded to give the following examples:

> However, on several occasions, nations have refused to comply with Court directives. For example, in the Anglo-Iranian Oil Co. Case, Iran refused to obey the ICJ's order forbidding the nationalization of a British corporation until the Court's final judgment. Similarly, in the Fisheries Jurisdiction Case, Iceland disregarded the Court's order not to enforce a fifty mile fishing zone pending the Court's disposition of actions filed by the U.K. and West Germany. More recently, in the United States Diplomatic and Consular Staff in Teheran Case, Iran refused to comply with the Court's Interim Order and Final Judgment to release U.S. citizens taken hostage at the U.S. Embassy in Teheran, Iran.[222]

This argument does not take into consideration the workings of the ICJ. It is not within the mandate of the ICJ to enforce its judgment. That remit is actually with the UN Security

---

[216] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed, Oxford University Press 2009) 255.

[217] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993. Article 34(2) of the ICJ Statute provides that the ICJ 'may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative'.

[218] Rules of the Court (adopted 14 April 1978, entered into force 1 July 1978). Article 57 provides that 'each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission to the other party'.

[219] *Whaling in the Antarctic* (n 6) 14.

[220] ibid 14, 15.

[221] ibid 34.

[222] Dunoff (n 23) 1090-1091.

Council by virtue of Article 94(2) of the UN Charter, if the judgments of the ICJ are not being obeyed, it is the UN Security Council that ought to be held responsible and not the ICJ.[223] Besides, non-compliance with judgments is not peculiar to the ICJ because the DSB has also suffered the same fate. For instance, two years after the final decision in the *US Shrimp case,* the US did not comply with the decision, and this necessitated another round of litigation leading to the setting up of another Panel to begin compliance proceedings in order to get the US to implement the judgment.[224] The fact of State sovereignty and the absence of an international enforcer would make enforcement challenging for any international adjudicatory body. The UN probably has more devices to enforce ICJ decisions than any other adjudicatory system.

Fourth, it is argued that the delay in hearing and disposing of matters by the ICJ makes it unsuitable to adjudicate trade-environment disputes which would require urgent disposition of cases. Dunoff opines that parties who desire their cases

> resolved quickly will find the [ICJ] […] "uninviting" […] a long time passes before the Court renders a decision […] the Court took eight years to reach a decision in the Barcelona Traction Case and six years in the South West Africa Cases.[225]

It is conceded that trade-environment disputes ought to be decided with dispatch because the issues are time-sensitive but slow adjudicatory processes is not peculiar to the ICJ. Even the DSB has suffered from a comparatively worse fate. From 10 December 2019, the AB could not sit to determine appeals from the Panel because it has not been able to form a quorum.[226] By Article 2(4) of the Rules and Procedures, members of the AB are selected by the consensus of the WTO members.[227] The US has become increasingly critical of the decisions handed down by the DSB and has used it veto to prevent fresh selection of members to the AB.[228] The tenure of the last appointed member of the AB expired on 30 November 2020, since then, the AB has been totally grounded.[229] This impasse is not likely to be resolved soon as the presidency of Joe Biden in the US has continued to maintain the veto which started during the presidency of Barack Obama and continued through the presidency of Donald Trump. According to Guida, 'the WTO judiciary is […] undergoing a profound crisis ignited by both Trump and Biden administrations, which has paralysed the WTO's ability to resolve trade disputes between countries by blocking new appointments to the Appellate Body'.[230]

---

[223] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. Article 94(2) provides that if 'any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ] […] the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment'.

[224] 'United States — Import Prohibition of Certain Shrimp and Shrimp Products' (*World Trade Organization)* <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm> accessed 8 January 2024.

[225] Dunoff (n 23) 1091.

[226] 'Appellate Body Annual Report for 2019-2020' (*World Trade Organization* July 2020) 7 <https://www.wto.org/english/tratop_e/dispu_e/ab_anrep_2019_e.pdf> accessed 8 January 2024.

[227] 'Appellate Body Rules and Procedures' (n 21). Article 2(4) of the Rules and Procedures provides when 'the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus'.

[228] 'The WTO Appellate Body Crisis – a Way Forward?' (*Clifford Chance*, November 2019) 2-3 <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf> accessed 8 January 2024.

[229] 'Dispute Settlement-Appellate Body' (*World Trade Organization)* <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 8 January 2024.

[230] Guida (n 10) 6.

For these reasons, the ICJ seems a better fit than the DSB to adjudicate on trade-environment disputes. Making a pitch for the ICJ, it has been argued that

> [t]he primary judicial forum for resolving international legal disputes is the ICJ. The Court is 'the principal judicial organ of the United Nations,' and all members of the United Nations are parties to the ICJ Statute. The ICJ is competent to decide environmental disputes, and commentators have repeatedly called for greater use of the Court to resolve international environmental disputes.[231]

Another reason in favor of the ICJ adjudicating on the trade-environment cases is because these cases sometimes conflate other areas of law and would require adjudication by a forum with a broader mandate than the DSB. According to Patricia Birnie et al:

> Moreover, it is not easy to identify what is an environmental case. Cases may raise environmental issues, whether legal or factual, but they rarely do so in isolation. The Gabčíkovo-Nagymaros Case, for example, is as much about the law of treaties, international watercourses, state responsibility, and state succession, as it is about environmental law. Much the same could be said about the Pulp Mills litigation. In these circumstances the parties need a generalist court, not a specialist one.[232]

From the subject-matter perspective, the ICJ would have jurisdiction to try these cases since, as provided by Article 36(2) of the ICJ Statute, the ICJ is a multi-purpose court with unlimited jurisdiction including the construction of WTO instruments.[233] On party jurisdiction, the ICJ has a wider jurisdiction than the DSB. By Article 93(1) of the UN Charter, all the members of the UN are automatically parties to the ICJ Statute[234] and currently, the UN has 193 members.[235] In addition, there could be a situation where a party is not a member of the UN, but such a party will still have standing before the ICJ by virtue of Article 35(3) of the ICJ Statute which provides that a non-State member of the UN could still invoke the jurisdiction of the ICJ if such a party agrees to contribute to defray the expenses the ICJ will incur in respect of the matter.[236] Conversely, as at 29 July 2016, the WTO had 164 members and only WTO members would be subject to the DSB's jurisdiction.[237] From a jurisdictional point-of-view, the ICJ would be competent to adjudicate on trade-environment disputes.

IV. Conclusion

This article exposes the unsuitability of the DSB to preside over cases with environmental elements on grounds that trade will always be prioritised over environmental concerns. This

---

[231] Dunoff (n 23) 1086.

[232] Birnie et al (n 216) 255.

[233] ICJ Statute (n 217) 135. Article 36(2) provides that the ICJ has jurisdiction to hear all matters relating to 'a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation'.

[234] UN Charter (n 223) 141. Article 93(1) provides that all UN members 'are *ipso facto* parties to the Statute of the International Court of Justice'.

[235] 'About Us' (*United Nations*) <https://www.un.org/en/about-us/> accessed 8 January 2024.

[236] ICJ Statute (n 217) 135.

[237] 'Members and Observers' (*World Trade Organization*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 8 January 2024.

may be inescapable since the DSB is mandated to interpret and apply WTO trade rules in the settlement of disputes before it. As argued by David Park, 'the very premise of the WTO, that of free-trade, directly conflicts with environmental preservation and protection'.[238] In essence, the DSB seeks to elevate trade over other considerations, however, this disposition has its drawbacks, which includes the bringing of 'trade and environmental interests into conflict'.[239] Perhaps, it was for these reasons that the WTO Committee on Trade and Environment 'has recommended that, where possible, disputes concerning multilateral environmental agreements are settled under these agreements, rather than through the WTO'.[240]

On the other hand, the ICJ is not encumbered by these issues and as revealed by the trade-environment cases it has decided, has a propensity to be neutral. While the exact meaning and breath of sustainable development is up for debate,[241] the ICJ leaves no doubt that the middle-of-the-road approach which balances the economic and environmental concerns through the concept of sustainable development is an effective way to reconcile the trade and environment objectives. This approach is a more plausible one, as against the one-sided approach developed and sustained by the DSB. Indeed, we are already walking a tightrope and the signs are ominous as far as the global environment is concerned. We are on the verge of what Carmen Gonzalez terms a global environmental catastrophe, with the warning that 'the global economy has already transgressed four of the nine planetary boundaries critical to the planet's self-regulating capacity'.[242] With this, it may be timely for a deliberate balancing of environmental consideration with trade and economic interests and the DSB is not set up to deliver on this mandate.

****

[238] David Parks, 'GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation' (1997) 15(2) UCLA Journal of Environmental Law and Policy 151, 152.

[239] Paul Cough, 'Trade-Environment Tensions: Options Exist for Reconciling Trade and Environment' (1993) 19(2) EPA Journal 29 <http://www.ciesin.org/docs/008-065/008-065.html> accessed 8 January 2024.

[240] Birnie et al (n 216) 261.

[241] Christian Becker, *Sustainability Ethics and Sustainability Research* (Springer 2012) 9.

[242] Carmen Gonzalez, 'Bridging the North-South Divide: International Environmental Law in the Anthropocene' (2015) 32(2) Pace Environmental Law Review 407.

Should the European Court of Human Rights Treat the Anonymous and the Absent Witness Equally? The Application of the Same Three-Step Test

Candan Yılmaz*
DOI: 10.21827/GroJIL.10.2.31-50

Keywords:
ANONYMOUS WITNESS, ABSENT WITNESS, EUROPEAN COURT OF HUMA N RIGHTS, EUROPEAN CONVENTION ON HUMAN RIGHTS, ECHR, ECTHR, AL-KHAWAJA TEST, THREE-STEP TEST

Abstract:
The 'right to (cross)-examination' is regulated in Article 6(3)(d) of the European Convention on Human Rights (ECHR). However, this right is not absolute and can, under circumstances, be limited. This is notably the case when evidence given by anonymous or absent witnesses is presented in court.

In the prominent *Al-Khawaja and Tahery* judgement, the European Court of Human Rights (ECtHR) listed three principal requirements which was later called the three-step test for the admissibility of testimonies of absent witnesses. Although the situation generated by the admission as evidence of testimonies by absent witnesses and by anonymous witnesses differs, the ECtHR appears to have gradually applied the same test to both types of testimonies to assess whether their admissibility violates the defence rights under Article 6(3)(d) ECHR.

Even though the three-step test is important, the ECtHR has contradictory judgments on the admissibility of evidence by absent and anonymous witnesses. This study will thus analyse and evaluate this judicially-created test by discussing the differences between anonymous and absent witnesses.

1 Introduction

The European Convention on Human Rights (ECHR), adopted in 1950 and entered into force in 1953, was a reaction to the serious human rights violations that Europe witnessed during the Second World War.[1] The ECHR provides and protects predominantly civil and political rights and, most importantly, human rights. Currently, Article 6 ECHR has become the essential standard for determining the fairness of criminal proceedings in Europe.[2]

According to Article 6 ECHR

* MA, LLM. PhD candidate at the University of Groningen. E-mail: <c.yilmaz@rug.nl>. ORCID ID: <https://orcid.org/0000-0001-7944-9019>. This article is the updated and improved version of the author's LLM thesis titled 'The Application of the Same Three-Step Test by the European Court of Human Rights to the Anonymous and the Absent Witness*: Should They Be Treated Equally?'* presented to Maastricht University in 2019. This research was funded by the Republic of Türkiye.

1 David Harris and others, *Law of the European Convention on Human Rights* (Oxford University Press 2018) 3.

2 Sarah Summers, *Fair Trials* (Hart Publishing 2007) xix.

> 3. Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 6(3)(d) ECHR is called 'the right to (cross)-examination', and the scope of this provision only interests the persons who are charged with a criminal offence.

The right to cross-examination is a 'minimum right' that is necessary to prepare and conduct the defence and to guarantee that the accused is able to defend themselves equally with the prosecutor.[3] This provision is also called 'the right to confrontation'[4][5], because a defendant has the right to challenge, examine, and cross-examine a witness against themselves.[6]

Thus, Article 6(3)(d) ECHR is considered to be crucial for the adversarial nature and fairness of a criminal trial,[7] and widely regarded as fundamental.[8] The essence of the problems in which Article 6 (3)(d) is relevant is that a witness could not be examined in a proper and effective way. The practical limitations in the opportunities of testing the witness are anonymous and/or absent witnesses.[9] Those exemptions should be scrutinised carefully in order not to jeopardise the defence rights. It has been, thus, stated that witness testimony is the most problematic part of the right to challenge the evidence.[10] In this article, the restrictive effect of admitting statements of an anonymous witness or an absent witness at a criminal trial, its impact on the rights of the defence, and the European Court of Human Rights' (ECtHR) approach to this issue will be discussed.

In general, the accused must be granted the right to examine the witness against themselves in every trial.[11] However, as given, this right can be limited. If testifying at a criminal trial with their identity revealed at an open trial poses a serious risk for a witness, several safety precautions could be taken in order to shield the witness from harm. Even in the most powerful States, bringing justice to everyone is difficult since the people who witnessed crimes are generally afraid for their or their families' lives which, in turn, makes them reluctant to provide opposing evidence. If the result of acts or threats is the silence of a witness who is the only potential evidence, it would allow the perpetrators to act with

---

3 Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press 2012) 277; Harris and others (n 1) 467.

4 The Sixth Amendment to the Constitution of the United States of America provides that 'in all criminal prosecutions, the accused shall enjoy the right […] to be confronted with the witnesses against him'. See 'Sixth Amendment' (*Cornell Law School Legal Information Institute*) <https://www.law.cornell.edu/constitution/sixth_amendment> accessed 9 January 2024; Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2019) 4 Criminal Law Review 265. '[…] international human rights instruments do not refer to a right of "confrontation" as such. Article 6 of the ECHR and art. 14 of the International Covenant on Civil and Political Rights (ICCPR) both state that the defendant has a right to examine witnesses against him. This right may conveniently be called a right of challenge, entitling a defendant to cross-examine witnesses against him as to their credibility and reliability. Confrontation in the first two forms will normally imply a right of challenge also, but the converse is not true'.

5 Dennis (n 4) 256. '[…] although there is universal acceptance that some right to confrontation exists, there is little consensus as to its scope. Accordingly, any idea that there is a single unified right of confrontation with a generally agreed content would seem to be a myth'.

6 Stefano Maffei, *The Right to Confrontation in Europe: Absent, Anonymous and Vulnerable Witnesses* (Europa Law Publishing 2012) 4.

7 H L Ho, 'Confrontation and Hearsay: a Critique of Crawford' (2004) 8(3) *International Journal of Evidence & Proof* 147.

8 Dennis (n 4) 266.

9 *Asani v the former Yugoslav Republic of Macedonia* App no 27962/10 (ECtHR, 01 May 2018) [36].

10 Koen Vriend, *Avoiding a Full Criminal Trial* (Springer 2016) 37.

11 Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (Beck/Hart 2014) 161, para 145.

impunity. Therefore, granting witnesses anonymity or allowing them to not be present at trial are measures needed to shield the witness identity from the public or from the other parties at trial. However, accepting their evidence could establish a threat to the defence rights.[12]

There are some measures that could be taken in order to guarantee their safety. For instance, bringing the anonymous witness to the courtroom in disguise, using a pseudonym, giving evidence behind screens or in a different room with a sound link or video link connection with distortion, or allowing the defence to submit written questions[13] to the investigating judge. The defence should be prohibited from asking questions about their identity or asking anything that might identify them.[14] Not knowing who is giving the evidence against them is an important limitation when it comes to producing counterevidence or to assess the credibility and reliability of the witness. For example, the witness may have their own reasons for making a false statement. Furthermore, not knowing the identity, not seeing the witness' facial expressions or gestures, and not hearing their voice, makes it harder to assess the credibility of the witness.

There are, also, types of being absent, since this unavailability could have a myriad of reasons ranging from death, physical or mental incapacity to illness, travel or disappearance.[15] Protection of the well-being and privacy of the witness, especially in sexual abuse or child molestation cases,[16] can be another reason. Apart from those types of absent witnesses, there are privilege-granted persons by law, such as spouses, fiancées, and close relatives of the accused who do not have to testify or give evidence to incriminate their relatives. In addition, co-defendants, who used their right to remain silent and their right against self-incrimination, are also accepted as absent witnesses.[17] For instance, in the case of *Vidgen,*[18] the co-accused in the case invoked their right to remain silent as a protection against self-incrimination. Furthermore, certain professions also have the privilege, such as lawyers, doctors, and psychologists.

Given the limitations, sufficient counterbalancing factors are needed to make sure that the defence has the opportunity to compensate these handicaps under which they laboured, and the sufficiency of the factors should be determined in correspondence with the level of the anonymity and/or the type of being absent.

---

12 Yvonne McDermott, *The Right to a Fair Trial in International Criminal Law* (PhD Thesis at NUI Galway, August 2013) 89-90 <https://aran.library.nuigalway.ie/handle/10379/3947> accessed 9 January 2024.

13 Some inquisitorial jurisdictions recognise testimonies of witnesses upon written questions submitted by the defence, while in common law jurisdictions, oral questions addressed at trial are allowed. For more information see Janet Ainsworth, 'Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models' (2015) 2(1) Language and Law 1-11.

14 Keane and McKeown (n 3) 157.

15 *Murtazaliyeva v Russia* App no 36658/05 (ECtHR, 18 December 2018) (Dissenting Opinion of Judge Pinto de Albuquerque) [57].

16 *Şandru v Romania* App no 33882/05 (ECtHR, 15 January 2014). In that case, the minor victim who was allegedly raped was confronted with her alleged aggressor [61]. Because a minor can easily be affected emotionally and psychologically by testifying at a public hearing about being a victim of a sexual crime, the District Court could have taken special cautions to protect the victim, while protecting the defence rights [64]-[66]. Unlike in *Gani v Spain* 61800/08 (ECtHR, 09 September 2013), in *Şandru* the domestic court could not provide procedural safeguards for the defence, which led to a violation of Article 6(1) and Article (3)(d) of the ECHR.

17 Maffei (n 6) 49-53.

18 *Vidgen v the Netherlands* App no 29353/06 (ECtHR, 10 October 2012) [42].

In *Al-Khawaja and Tahery*, the ECtHR observed that, 'while anonymous and absent witnesses are not identical, the two situations are not different in principle',[19] because each of them results in a potential difficulty for the exercise of the rights of the defence. In general, this implies that every defendant has the right to know and confront their accusers and the witnesses to their suspected crime, as well as being able to challenge the evidence that was provided against them while mounting a defence.

Several cases regarding the inability to challenge the testimony of anonymous and/or absent witnesses are brought before the ECtHR. In the prominent *Al-Khawaja and Tahery* judgement, the ECtHR set out three overarching requirements, which will be unfolded and explained later. To briefly mention, the ECtHR created the three-step test in order to assess the testimonies of both anonymous and absent witnesses whether they violate the defence rights under Article 6(3)(d) ECHR; (1) the 'good reason' for non-attendance, (2) the 'sole or decisive' rule, and (3) the 'counterbalancing factors'. These standards for the evaluation of the evidence have been criticised because the ECtHR has applied them inconsistently. This situation is defined as the most significant deficiency in the case law of the ECtHR to date, since there are obvious signs that the right to confrontation is easily sacrificed against seemingly competing interests, and it is stated that the ECtHR law does not take this essential right as seriously as necessary.[20] Even though this statement is too firm, the inconsistencies in the application of the three-step rule are incontrovertible.[21]

The central research question of this study is the same as its title: Should the ECtHR treat the anonymous and the absent witness equally? To answer this question properly, certain questions must first be addressed: What are the differences between absent and anonymous witnesses and to what extent do they limit the defence rights? How did the ECtHR develop the three-step rule? To what extent does the ECtHR apply the same three-step test to both anonymous and absent witnesses?

This article is divided into four main sections to provide a better discussion. After this introduction, Section 2 provides, firstly, the definitions of the notions 'anonymous witness', 'absent witness', and 'anonymous absent witness' according to the ECtHR case law; then deliberates on balancing fair trial rights and the admissibility of absent and anonymous witness testimonies. Furthermore, the 'three-step test' is discussed, and each step will be individually but shortly examined. In Section 3, the ECtHR's approach to the absent and anonymous witness are scrutinised, and simultaneously, the differences between the absent witness and anonymous witness are unfolded. Eventually, in Section 4, the final review is expressed, and the answer to the main research question is sought in the light of the explanations given in the previous sections.

2 Balancing fair trial rights and the admissibility of absent and anonymous witness testimonies

To be able to start the discussion it is important to provide, first, the definitions. According to ECtHR case law, a person whose statements are introduced as evidence, but who does not give an oral statement in court, is also regarded as a witness.[22] A co-accused[23] and

---

[19] *Al-Khawaja and Tahery v the United Kingdom* App no 26766/05 and 22228/06 (ECtHR, 15 December 2011) [127]; also repeated in *Bakır v Turkey* App no 2257/11 (ECtHR, 11 October 2020) [31]; *Süleyman v Turkey App no* 59453/10 (ECtHR, 17 November 2020) [62].

[20] Maffei (n 6) 109.

[21] Even the Grand Chamber of the ECtHR itself accepts the inconsistencies. See *Schatschaschwili v Germany* App no 9154/10 (ECtHR, 15 December 2015) [111]-[113].

[22] *Kostovski v Netherlands* App no 11454/85 (ECtHR, 20 November 1989) [40].

[23] *Lucà v Italy* App no 33354/96 (ECtHR, 27 May 2001) [41].

experts[24] who give evidence are also considered to be witnesses. Even though the ECtHR case law lacks a clear definition, in *Lucà v Italy*, it is stated that

> where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply.[25]

The aforementioned clearly shows that the term 'witness' has an 'autonomous' meaning in the Convention system,[26] as do other terms mentioned in the ECHR.

In general, the accused must be granted the right to examine the witness against them in every trial.[27] However, this right can be limited as briefly given above. The next explanations will focus, in turn, on these two categories of witnesses whose evidence might endanger the rights of the defence.

2.1 Absent witness

The 'absent witness' could be defined as the witness whose out-of-court testimony is used by the court to determine the guilt or innocence of the defendant because the witness is absent when called upon to testify at the trial.[28] Out-of-court witness testimonies are often unsworn and in the absence of the defendant or their counsel.[29] The ECtHR has not provided any definition for the notion of the absent witness. However, absent witnesses are called 'unavailable witnesses'[30] and their testimony is named as 'untested witness evidence'[31] in the ECtHR case law.

2.2 Anonymous witness

The 'anonymous witness' is defined as the person who provides evidence and whose identity is shielded from the accused and the defence counsel by measures taken by the domestic courts.[32] In the concept of anonymous witness, especially the difficulty between the necessity to protect the society and the rights of the defence are balanced.[33] In the

---

[24] 'Recommendation No R(97)13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence' (10 September 1997) R(97)13 para 1: '[w]itness means any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition also includes experts as well as interpreter'.

[25] *Lucà v Italy* (n 23) [41].

[26] ibid; *Engel and Others v the Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 08 June 1976) [81]; *Vidal v Belgium* App no 12351/86 (ECtHR, 22 April 1992) [33]; Maffei (n 6): '[a]utonomous interpretation is necessary in order to prevent Member States from circumventing their obligation under the ECHR. To take a simple example, if national definitions were allowed to prevail, classification of a certain offence as "disciplinary" or "administrative" at the domestic level would result in the immediate surrender of the guarantees afforded by Article 6(3) to "criminal" defendants'.

[27] Grabenwarter (n 11) 161, para 145.

[28] Maffei (n 6) 49.

[29] ibid.

[30] *Murtazaliyeva v Russi*a (Dissenting Opinion of Judge Pinto de Albuquerque) (n 15) [57].

[31] See *Issa and Others v Turkey* App no 31821/96 (ECtHR, 30 March 2005) [79]: 'the Court cannot attach any decisive importance to the video footage since this is untested and at most circumstantial evidence'; *Schatschaschwili v Germany* (n 21) [123]; *Tău v Romania* App no 56280/07 (ECtHR, 23 July 2019) 9.

[32] Gert Vermeulen, Wendy De Bondt and Yasmin Van Damme, *EU Cross-Border Gathering and Use of Evidence in Criminal Matters: Towards Mutual Recognition of Investigative Measures and Free Movement of Evidence?* (Maklu 2010) 141; Maffei (n 6) 55.

[33] Simone Lonati, 'Anonymous Witness Evidence before the European Court of Human Rights: Is It Still Possible to Speak of Fair Trial?' (2018) 8(1) European Law Review 121.

ECtHR case law, however, it has an autonomous meaning. In the case of *Papadakis v the former Yugoslav Republic of Macedonia*, the witness, whose identity remained undisclosed to the defence and his legal representatives, was a sworn police officer, but the applicant knew the mentioned officer's physical appearance, yet not the real name.[34] Since the applicant met the agent at least once, the Court stated that 'despite the protection of the witness's identity, the Court does not consider that he was to be regarded anonymous within the meaning of the Court's case-law'.[35] The ECtHR reiterates the same approach in *Dončev and Burgov v the former Yugoslav Republic of Macedonia*.[36]

It should be noted that the witness anonymity is criticised under the justice system. The jury, which is entitled to examine the evidence in adversarial systems, does not know the name, occupation, or address of the anonymous witnesses,[37] while, in inquisitorial systems, the investigating judge knows the identity of the witness. According to *Van Mechelen and Others* and *Kostovski*, the statement of an anonymous witness must have been taken down by a judge who is aware of the identity of the witness. However, there is no mention of the jury.[38] This leads to inequality between the systems on the same subject.

It is explicated that there are three forms of anonymous witnesses.[39] The first category of this type of witnesses is mainly, but not exclusively, undercover police officers,[40] who have met with the accused while investigating.[41] Therefore, their anonymity is 'limited'; this means that the judge shall not disclose the identity of the witness, and if necessary, shall take measures to preclude the disclosure of the identity.[42] The second category includes witnesses who fear for their or their family's lives, health, or safety.[43] They are

---

34 *Papadakis v the former Yugoslav Republic of Macedonia* App no 50254/07 (ECtHR, 26 May 2013) [90].

35 ibid.

36 *Dončev and Burgov v the former Yugoslav Republic of Macedonia* App no 30265/09 (ECtHR, 12 June 2014) [51].

37 Ruth Costigan and Philip A Thomas, 'Anonymous Witnesses' (2000) 51(2) Northern Ireland Legal Quarterly 326, 333.

38 *Van Mechelen and Others v the Netherlands* App no 21363/93, 21364/93, 21427/93, 22056/93 (ECtHR, 23 April 1997) [40]; *Kostovski v the Netherlands* (n 22) [43].

39 A Beijer and A van Hoorn, 'Report on Anonymous Witnesses in the Netherlands' in E H Hondius (ed), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (Intersentia 1998) 523-548 <dspace.library.uu.nl/bitstream/handle/1874/43921/b25.pdf> accessed 9 January 2024.

40 *Van Mechelen and Others v the Netherlands* (n 38) [56]. The ECtHR decided that the police officers are different from victims and witnesses because they owe a general duty of obedience to the State and they have links with the prosecution, hence, they cannot use the anonymity in every case, it should be exceptional. The ECtHR made it clear that police are 'ordinary' citizens and this judgement resulted in much commotion. See Beijer and van Hoorn (n 39) 530-532.

41 See Jill E B C van Voorhout, 'Intelligence as Legal Evidence: Comparative Criminal Research into the Viability of the Proposed Dutch Scheme of Shielded Intelligence Witnesses in England and Wales, and Legislative Compliance with Article 6 (3) (d) ECHR' (2006) 2(2) Utrecht Law Review 119, 140: '[w]hilst every use of shielded and anonymous witness testimony restricts fundamental defence rights, three aspects which mutually affect each other and that are inherent to this construction increase restrictions even further: (a) the general non-disclosure of intelligence and information concerning the officer's identity, (b) the duty of secrecy, and (c) the mandatory consent of the officer before the transcript is submitted to the defence'.

42 Beijer and van Hoorn (n 39) 548: '[t]his means that the judge does not disclose the witness's identity and, where necessary, takes measures to prevent his identity from being disclosed, such as making the witness unrecognisable by means of make-up or a disguise, or making eye contact impossible between the accused and the witness. These measures do not prevent direct questioning of the witness or an appearance at the trial'.

43 *Doorson v the Netherlands* App no 20524/92 (ECtHR, 26 March 1996) [70]. According to this case, if the life, liberty or security of a witness or a victim is at stake; taking special measures of protection by the Member State is not a possibility, but an obligation, according to the Article 8.

generally granted 'complete'[44] anonymity. The last category is comprised of witnesses who appear in police reports by providing information without providing their identity. Being informants, they are not properly examined as a witness; they only provide some information to the police. For that reason, the evidence that is provided by an informant could be used only in cases where the defence is not willing to examine the witness.[45] Therefore, the second category of anonymous witnesses could be considered to be of the utmost importance.

2.3 Anonymous absent witness

Anonymous witnesses could also be absent occasionally, and their earlier statements could be admitted into evidence.[46] In such a case, the limitation to the right to examine the witness and the right to confrontation reaches its depths.[47] In the ECtHR case law, there have been a few cases that have dealt with anonymous-absent witnesses, such as *Kostovski,*[48] *Van Mechelen and Others,*[49]*, Windisch,*[50] *Saïdi,*[51] *Lüdi,*[52] *Scholer,*[53] *Süleyman,*[54] and *Çongar and*

---

[44] Beijer and van Hoorn (n 39) 548: '[t]his may mean that the defendant, his counsel or both are denied access to the hearing. For reasons of fairness the legislature has stipulated that the Public Prosecutor may not be present either when the defence is denied access. The examining magistrate gives the absent defendant, counsel and public prosecutor the opportunity to present the questions they wish to ask by telecommunication or – alternatively – in writing'.

[45] Beijer and van Hoorn (n 39) 532.

[46] According to the Legal Guidance of Hearsay of The Crown Prosecution Service: '[w]hatever the reason for the absence of the witness, the statement of a witness who is both absent and anonymous will not be admissible under section 116 of the Criminal Justice Art'. See 'Hearsay' (Crown Prosecution Service) ≤https://www.cps.gov.uk/legal-guidance/hearsay> accessed 9 January 2024.

[47] Maffei (n 6) 60.

[48] *Kostovski v the Netherlands* (n 22) [18]: '[t]he anonymous witnesses themselves were not heard at the trial. Contrary to a defence submission, the official reports drawn up by the police and the examining magistrates on the hearings of those witnesses were used in evidence'.

[49] *Van Mechelen and Others v the Netherlands* (n 38) [14]: '[t]he Regional Court convicted the accused of attempted manslaughter and robbery with the threat of violence. The evidence identifying the applicants as perpetrators of these crimes was constituted by the statements made before the trial by the anonymous police officers, none of whom gave evidence before either the Regional Court or the investigating judge'.

[50] *Windisch v Austria* App no 12489/86 (ECtHR, 27 September 1990) [3]: '[t]he applicant complains under Article 6 para. 3 (d) of the Convention that the Regional Court convicted him exclusively on the basis of evidence given by two anonymous witnesses who were not heard by the Court and whom he had no opportunity to examine'.

[51] *Saïdi v France* App no 14647/89 (ECtHR, 20 September 1993) [44]. The testimonies of the drug users who desired to remain anonymous 'constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial'.

[52] *Lüdi v Switzerland* App no 12433/86 (ECtHR, 15 June 1992): '[i]n order to preserve the anonymity of the undercover agent, the court declined to call him as a prosecution witness' [n 16]; '[i]n this case the person in question was a sworn police officer whose function was known to the investigating judge. Moreover, the applicant knew the said agent, if not by his real identity, at least by his physical appearance, as a result of having met him on five occasions' [49]; '[…] the concern to preserve the undercover agent's anonymity derived from the need to continue with the infiltration of drug-dealing circles and protect the identity of informers' [45].

[53] *Scholer v Germany* App no 14212/10 (ECtHR, 18 December 2014) [52]: '[t]he witnesses were thus both absent from the applicant's trial and anonymous in the sense that their true identity was unknown to the defence, the applicant having met the witnesses in person under their false identities'.

[54] *Süleyman v Turkey* (n 19) [101]: '[…] considering that the applicant had suffered a particularly serious restriction in terms of his ability to properly and fairly test the reliability of the evidence given by witness X as a result his being both "absent" and "anonymous" within the meaning of its case-law under Article 6 § 3 (d) of the Convention […]'.

Kala.[55] The main question in those cases was about whether the anonymous-absent witness' testimony had been corroborated. It has been claimed that if supporting evidence had been presented, the ECtHR would have probably held that there has been no violation of Article 6(1) read in conjunction with Article 6(3)(d).[56]

It should be underlined that in the mentioned cases, the ECtHR did not treat the anonymous absent witnesses as a distinct category of witnesses. The Court, however, discerns no effective procedural safeguards to compensate for the absence of the anonymous witness.[57] Therefore, providing the opportunity to submit written questions cannot be not regarded as a sufficient safeguard to counterbalance the limitation faced by the defence in exercising its fundamental right to examine the witness, in case of an anonymous absent witness.[58]

The Court in *Hayward* has found that reading out the testimony of an anonymous absent witness at trial does not violate Article 6(3)(d) ECHR if the testimony does not play a decisive role.[59] However, this decision has been criticised because it suggests that the Member States are not expected to ensure the attendance of anonymous witnesses, even though it is repeatedly requested by the accused when the conviction is not solely or decisively based on their testimony.[60] As the anonymous absent witness is the combination of two categories of witnesses that pose different limitations on the defence rights, the ECtHR should approach and examine it with utmost scrutiny.

2.4 Historical background of the 'three-step' test

As previously cited, an anonymous or absent witness could pose a serious threat to defence rights, primarily the right to (cross)-examination. In general, all of the evidence must be produced at a public hearing in the presence of the accused, according to ECtHR case law and Article 6 ECHR. As a general rule, Article 6(3)(d) ECHR cannot not be interpreted as a requirement that all questions are to be put forward directly by the defence. However, in every case, an adequate and proper opportunity to challenge and examine the witness should be given to the accused.[61]

Article 6(3) ECHR must be read together with Article 6(1) ECHR, because they both require the Contracting States to take positive steps to allow the accused to examine witnesses against them.[62] In cases where a defendant is not allowed to examine or have examined witnesses against them, the fairness as a whole will certainly be harmed. When

---

55 *Çongar and Kala v Turkey* App no 62013/12 and 62428/12 (ECtHR, 18 January 2022) [12]: '[f]urthermore, the Court discerns no effective procedural safeguards capable of compensating for the absence of the anonymous witness'.

56 Maffei (n 6) 100.

57 *Çongar and Kala v Turkey* (n 55) [12].

58 ibid.

59 *Hayward v Sweden* App no 14106/88 (ECtHR, 6 December 1991) 22.

60 Maffei (n 6) 101.

61 *Vronchenko v Estonia* App no 59632/0 (ECtHR 9, 18 October 2013) [55].

62 *Trofimov v Russia* App no 1111/02 (ECtHR, 02 May 2009) [33]; *Sadak and Others v Turkey (No. 1)* App no 29900/96, 29901/96, 29902/96 and 29903/96 (ECtHR, 17 July 2001) [67].

the majority of breach cases are taken into consideration, [63] it will be seen that the ECtHR always[64] decided on Articles 6(3) and 6(1) ECHR together.

It is worth revealing that assessing the properness of the admission of a witness statement is not a task of the ECtHR. As the Court has consistently held, the admissibility of evidence is principally an issue for criminal procedural regulations of the national legal systems and, as a general rule, it is for the national courts to assess the evidence before them;[65] however, determining whether the proceedings as a whole were fair when the evidence obtained from anonymous and absent witnesses is used for a conviction is.

In the ECtHR case law, several cases have been concerned with the inability to challenge the testimony of anonymous witnesses. The *Kostovski* (1989) case was the first important case dealing with the statements of anonymous witnesses. In this case, the witnesses had not been heard in court and the witnesses' statements had been taken down (in writing only) in the absence of both the accused and his counsel. This meant that there was no opportunity at all for the defence to question the witnesses. Hence, the ECtHR held that there had been a violation of Article 6(1) and (3)(d) ECHR.

In *Van Mechelen and Others*, the Court set strict requirements that were retrieved from the *Kostovski* judgement: if the identity of the anonymous witness remains shielded to the defence, then the judge who takes the statement must be aware of the identity of the witness and the reasoned opinion of the judge on the witness' reliability and the reasons for remaining anonymous have to be explained in the official report. In addition, the defence has to be provided, in some way, with the opportunity to examine the witness or put questions to the witness. According to the same judgement, a written document which includes the statement of an anonymous witness may be used as evidence,

> if (a) the defence has not at any stage of the proceedings asked to be allowed to question the witness concerned, and (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and (c) the trial court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection.[66]

This rule was actually created for anonymous witness evidence in 1989 and repeated in 1997, however the Court evolved its judgement, in the *Al-Khawaja* case in 2011, into having the same three-step test for both absent and anonymous witness evidence.

To better comprehend this development, the prominent Grand Chamber's *Al-Khawaja and Tahery* judgement must be elaborated on. The case was a combination of two different applications against the United Kingdom. In the *Al-Khawaja* case, the accused was charged with indecent assault and one of his accusers died before the trial phase began, therefore the accuser's statement which was given to the police was read to the jury.[67] In *Tahery*, the defendant had been convicted for wounding with intent to commit grievous

---

[63] *Avaz Zeynalov v Azerbaijan* App no 37816/12 and 25260/14 (ECtHR, 22 April 2021); *Bonev v Bulgaria* App no 60018/00 (ECtHR, 08 September 2006); *F and M v Finland* App no 22508/02 (ECtHR, 17 October 2007); *Gabrielyan v Armenia* App no 8088/05 (ECtHR, 10 July 2012); *Kostovski v the Netherlands* (n 22); *Lucà v Italy* (n 23); *Lüdi v Switzerland* (n 52); *Schatschaschwili v Germany* (n 21); *Vasilyev and Others v Russia* App no 38891/08 (ECtHR, 22 September 2020); *Yagublu and Ahadov v Azerbaijan* App no 67374/11 and 612/12 (ECtHR, 30 January 2020). In all of these cases, the ECtHR held that there was a violation of Articles 6(3)(d) and 6(1) of the Convention together.

[64] On the contrary, in *Kornev and Karpenko v Ukraine* App no 17444/04 (ECtHR, 21 January 2010) the ECtHR held that there was only a violation of Article 6(3)(d) ECHR.

[65] *Kostovski v the Netherlands* (n 22) 39; *Doorson v the Netherlands* (n 43) 67; *Van Mechelen and Others v the Netherlands* (n 49) 50; *Saïdi v France* (n 51) 43.

[66] *Van Mechelen and Others v the Netherlands* (n 49) [40]: *Kostovski v the Netherlands* (n 22) [43].

[67] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [3].

bodily harm, based on the evidence of a witness who was frightened to testify in court.[68] Those two cases, which were held together, were concerned with absent witnesses with different reasons for absence. In this joint *Al-Khawaja and Tahery* judgement, the Court set out three overarching requirements. First, there had to be a good reason for being absent.[69] Second, a conviction based solely or decisively on the statement of an absent witness could only be compliant with Article 6 ECHR if; third, there are sufficient counterbalancing factors, including providing strong procedural safeguards, to let a fair and appropriate assessment of the evidence. The ECtHR, in its following judgments, consistently underlined and reiterated those principles.

In *Schatschaschwili* the application of Article 6(3)(d) ECHR was about not being granted the opportunity to examine absent victims/witnesses who refused to attend the hearing relying on medical certificates which indicated that 'they were in an unstable, post-traumatic emotional and psychological state'.[70] In this judgement, the three steps which were set in *Al-Khawaja and Tahery* were reiterated with the name 'three steps of the *Al-Khawaja* test'. Subsequently, the test started to be known as the *'Al-Khawaja* test' or 'three-step test'.[71] In *Schatschaschwili*, the Grand Chamber also clarified the three-step test, stressing that the lack of good reason for non-attendance of a witness does not, by itself, automatically equate to the unfairness of the trial,[72] thus the Court shall go on considering the other steps of the test. After the *Al-Khawaja and Tahery* judgement, the ECtHR started to apply the same test to the testimonies of both anonymous and absent witnesses,[73] in order to assess whether they violate the defence rights under Article 6(3)(d) ECHR,[74] even though *Al-Khawaja and Tahery* was not about anonymous witnesses. As will be discussed later, this application may pose an issue.

It is important to mention that in 2021, the ECtHR extended the application area of the three-step test, by accepting that the same rule applies when the witness was not absent, anonymous, or *per se*, but the accused was denied the opportunity to confront the witness.[75] Therefore, when witnesses do appear in court, but neither the accused nor their counsel can examine them, the *Al-Khawaja* test is, still, applicable.[76] In other words, the Court accepted the fact that absence of the witness equals the inability to examine the witness for any reason.

In addition, the ECtHR also ruled recently that invoking the right to remain silent does not automatically mean that the accused will not examine the witness. Therefore, the Court considers that an accused's right to cross-examine witnesses against them cannot be conditioned on their waiving of the right to remain silent.[77]

---

68 *Al-Khawaja and Tahery v the United Kingdom* (n 19).

69 While summarising *Al-Khawaja and Tahery* (n 19), the ECtHR states in *Lučić v Croatia* App no 5699/11 (ECtHR, 27 May 2014) [73] and in *Štefančič v Slovenia* App no 18027/05 (ECtHR, 25 January 2013) [37]: 'the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance […]'. Hence, according to the ECtHR, the intended and desired testimony has to be taken from a witness who is ready before the court to give evidence orally.

70 *Schatschaschwili v Germany* (n 21) [118].

71 The general principles regarding absent witnesses have been restated and summarised in *Seton v the United Kingdom* App no 55287/10 (ECtHR, 12 September 2016) [58]-[59]; also, recently in *Chernika v Ukraine* 53791/11 (ECtHR, 12 March 2020) [41].

72 *Schatschaschwili v Germany* (n 21) [113].

73 ibid.

74 *Ellis and Simms v the United Kingdom* App no 46099/06 and 46699/06 (ECtHR, 10 April 2012) [75].

75 *Fikret Karahan v Turkey App no* 53848/07 (ECtHR, 16 March 2021) [42].

76 ibid [38].

77 *Keskin v the Netherlands App no* 2205/16 (ECtHR, 19 January 2021) [55].

According to the latest version of the three-step test, the questions that are addressed in each case are: 1. Whether there had been a 'good reason' for the witnesses' non-attendance; 2. Whether the witness statements had been 'sole or decisive' evidence; and, if yes, 3. Whether there had been adequate 'counterbalancing' measures. Steps of the three-step test should be examined one by one.

2.5 Elements of the 'three-step' test

2.5.1 The 'good reason' for non-attendance

In order to admit the testimony of an absent witness as evidence, the preliminary question of whether there is a good reason for absence of the witness should first be examined.[78] The ECtHR uses different wordings while examining this criterion; good reason for the witness's absence,[79] good reason for non-attendance of a witness,[80] good reason for the failure to have the witness examined,[81] or an interesting one, good reason for the rejection of the applicant's request to hear the witness.[82] The essence is that there must be a good reason for the limitation of the rights of the defence.

For the good reason rule, the Court in *Al-Khawaja and Tahery* stated that there can be a number of reasons why a witness may not attend the trial. When it comes to being absent based on the fear of repercussions, it requires close examination by the trial court. In order to excuse a witness from testifying at court by reason of fear, the trial court must be convinced that all available alternatives would be inappropriate or impractical, such as witness anonymity and any other special measures.[83] According to the judgement, if there is an opportunity to become anonymous for a witness who has a reason to fear, then the trial court cannot decide that the absentee has admissible grounds. Hence, it could be interpreted that having an anonymous witness is more acceptable for a fair trial.

The court must have legitimate factual or legal grounds not to secure a witness's attendance at trial.[84] The reasons could be death,[85] fear,[86] health grounds,[87] or a witness unreachability[88] including their detention abroad.[89] For absent witnesses, if the impossibility of examining the witnesses or having them examined is because they are missing, the authorities must make a reasonable effort to secure their presence.[90] In *Trofimov*, the ECtHR indicated that if a witness is serving prison time at the time his attendance is required at court, not making any effort in that respect cannot amount to a *good reason* for absence, since the court has the full authority to transfer detainees to courtrooms.[91] The absence of the witness in the State where the proceedings are being

---

78 *Ter-Sargsyan v Armenia* App no 27866/10 (ECtHR, 27 January 2017) [46]; *Rudnichenko v Ukraine* App no 2775/07 (ECtHR, 11 October 2013) [104].

79 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [61].

80 *Ter-Sargsyan v Armenia* (n 78) [47[; *Keskin v the Netherlands* (n 77) [63]; *Al-Khawaja and Tahery v the United Kingdom* (n 19) [119]; *Adayev v Russia* App no 10746/08 (ECtHR, 08 November 2016) [19].

81 *Rudnichenko v Ukraine* (n 78) [104].

82 *Vronchenko v Estonia* (n 61) [57].

83 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [120]-[125].

84 *Schatschaschwili v Germany* (n 21) [119].

85 *Mika v Sweden* App no 31243/06 (ECtHR, 27 January 2009) [37].

86 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [120]-[125].

87 *Bobeş v Romania* App no 29752/05 (ECtHR, 09 October 2013) [39]-[40]; *Vronchenko v Estonia* (n 61) [58].

88 *Schatschaschwili v Germany* (n 21) [139]-[140].

89 *Štefančič v Slovenia* (n 69) [39].

90 *Karpenko v Russia* App no 5605/04 (ECtHR, 24 September 2012) [62]; *Damir Sibgatullin v Russia* App no 1413/05 (ECtHR, 24 September 2012) [51]*; Pello v Estonia* App no 11423/03 (ECtHR, 10 December 2007) [35]; *Bonev v Bulgaria* (n 63) [43] *Lucčić v Croatia* (n 69) [79]-[80].

91 *Trofimov v Russia* (n 62) [36].

conducted is not in itself a sufficient reason to justify their absence at trial;[92] nor is the fact that the witness resides in another part of the same country.[93] In addition, the Court stated in *Al-Khawaja and Tahery* that 'before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable'.[94] In *Süleyman v Turkey,* the *mutatis mutandis* approach is taken after *Al-Khawaja and Tahery*. According to the judgement,[95] when the anonymous witness was summoned to give oral evidence before a court other than the trial court, the ECtHR will assess also whether there are good reasons for the witness not to attend the trial and admitting the witness's evidence.

2.5.2 The 'sole or decisive' rule

The second step is examining whether the witness' statement was sole or decisive evidence in the case. The origin of the sole or decisive rule is found in *Unterpertinger*.[96] In this judgement, the Court stated that if a conviction is solely or 'mainly' based on untested witness evidence, there must be a good reason for not being able to question the witness, otherwise the defence rights would be 'unduly' restricted.[97] If there is no good reason to justify being unavailable and the conviction is based solely or decisively on unavailable witness's testimony, a violation of Article 6(3)(d) ECHR occurs.[98] Later, the Court set out almost the same decision in *Lucà* by stating that when an untested witness testimony is used as sole or decisive evidence for a conviction and when the accused does not have the opportunity to examine the witness, that practice is incompatible with the guarantees the ECHR provides.[99]

After those judgments, the Court in *Al-Khawaja and Tahery* made it clear that 'sole' means the only evidence against the accused, and 'decisive' 'should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case'.[100] The ECtHR additionally noted that if 'the untested evidence of a witness is supported by other corroborative evidence',[101] the examination of being decisive is tied to the strength of the supportive evidence. Hence, 'the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive'.[102]

In academia, it was claimed that while the sole or decisive rule is still vague, the vagueness is not that challenging after the ECtHR has accepted that where the hearsay evidence is strong, the sole or decisive rule can be overruled.[103] Although this issue will be discussed later, it could be claimed that the rule remains vague because of the ECtHR's varying judgments.

---

92 *Gabrielyan v Armenia* App no 8088/05 (ECtHR, 10 July 2012) [81].
93 *Faysal Pamuk v Turkey* App no 430/13 (ECtHR, 18/01/2022) [51]-[58].
94 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [125].
95 *Süleyman v Turkey* (n 19) [66].
96 ibid [128].
97 *Unterpertinger v Austria* (1986) Series A no 110 [33].
98 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [128].
99 *Lucà v Italy* (n 23) [40].
100 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [131]; *Puljić v Croatia* App no 46663/15 (ECtHR, 08 October 2020) [26].
101 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [131].
102 ibid.
103 Mike Redmayne, 'Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber' (2012) 75(5) The Modern Law Review 865, 870.

In light of the *Horncastle No. 1* decision of the Supreme Court of the United Kingdom, the Grand Chamber in *Al-Khawaja and Tahery* considered the sole or decisive rule again.[104] As a result, the Grand Chamber decided that neither the application of the sole or decisive rule in an inflexible manner, nor ignoring it entirely would be correct.[105] Where a conviction is based solely or decisively on untested witness evidence, the ECtHR must subject the proceedings to the most searching scrutiny.[106]

The question that should be asked by the Court is whether there are sufficient counterbalancing factors, including measures that permit a fair and proper assessment of that evidence. In *Al-Khawaja and Tahery*, the ECtHR departed from its *Lucà* judgement by accepting that sufficient counterbalancing factors could prevent the finding of a violation in case of decisive witness evidence.[107] This issue will be addressed under the following title.

2.5.3 The 'counterbalancing factors'

The final step is examining whether there were sufficient counterbalancing factors. The ECtHR accepts that, even if there is a good reason for a witness to be absent, not having any 'counterbalancing factors' to compensate for the difficulties caused by the admission of the untested testimony as evidence causes a violation of Article 6(3)(d) of the ECHR.[108] The Grand Chamber underlined that counterbalancing factors must permit a fair and proper assessment of the reliability of the evidence.[109] When a domestic court had approached an untested witness testimony with caution, the ECtHR accepted this approach as an important safeguard, if the domestic court noted in its decision that it was aware that the untested statement carries less weight.[110]

In addition, the ECtHR stated that if the evidence of the absent or anonymous witness had a very important influence over the outcome of the trial, in other words, if it was sole or decisive, it does not automatically cause a breach of Article 6(1); however it could jeopardise the defence rights and safeguard measures, therefore, should be taken to achieve a balance between the rights of the defence and the importance of the evidence presented.[111] The Court reiterated in 2021 that when an untested evidence carries significant weight since there is little or no direct evidence to incriminate; sufficient counterbalancing factors are required to compensate for the consequential difficulties caused to the defence by its admission.[112]

The ECtHR also reiterates that these counterbalancing factors must serve a fair and appropriate assessment of the reliability of the evidence.[113] In cases where there is a witness who cannot be questioned at trial, significant safeguards should be offered to the defence, for example: providing an opportunity to put questions indirectly or in writing,[114] to give

---

[104] Adam Jackson, 'Hearsay Evidence which is the 'Sole or Decisive' Evidence upon which a Conviction is Based and Compliance with Article 6 of the European Convention on Human Rights: Horncastle and Others v The United Kingdom (App. No. 4184/10)' (2015) 79(2) The Journal of Criminal Law 92.

[105] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [146].

[106] ibid [147].

[107] ibid [147], [165].

[108] *Adayev v Russia* (n 80) [19].

[109] *Schatschaschwili v Germany* (n 21) [114].

[110] ibid [126].

[111] ibid [106].

[112] *Dodoja v Croatia* App no 53587/17 (ECtHR, 24 June 2021) [44]; See also, *Al-Khawaja and Tahery v the United Kingdom* (n 19) [161].

[113] *Schatschaschwili v Germany* (n 21) [125].

[114] ibid [129]; *Ellis and Simms v the United Kingdom* (n 74) [74].

their own version of the events, to cast doubt on the credibility of the witness[115] with finding motives for lying,[116] to point out inconsistencies and incoherencies,[117] to warn the jury about the need to approach the statement with care,[118] or to show in court the video footage of the absent witness interrogation at the investigation phase.[119] For evidence given by anonymous witnesses, the defence needs to be granted the opportunity at any stage of the proceedings to confront and question the witness[120] or to test the reliability of the witness.[121]

However, the examples provided by the Court are not exhaustive, thus for every case, the ECtHR could assess any counterbalancing factor used whether it was sufficient enough to safeguard the defence rights. Hence, the 'counterbalancing factors' rule can be adapted to every single case for both anonymous and absent witnesses. For example, when a defendant has the opportunity to give their own version of the events and to cast doubt on the credibility of an absent witness; cannot solely be regarded as a sufficient counterbalancing factor in order to compensate for the handicap under which the defence laboured.[122] Furthermore, domestic courts must provide sufficient reasoning when rejecting the arguments raised by the defence.[123] In this respect, the ECtHR has not been ready to accept a solely formal examination of the shortcomings in the questioning of witnesses by the domestic higher courts, when their reasoning could be seen as an attempt to validate the wrongful procedure instead of providing the applicant with any counterbalancing factors to compensate for the handicaps under which the defence had to face because of not being able to examine a witness.[124]

The ECtHR doubts whether any counterbalancing factors would be sufficient to justify the untested statement which was sole or decisive evidence for a conviction.[125] In addition, the Court determines whether the proceedings as a whole were fair, because the requirement of sufficient counterbalancing factors must be fulfilled 'not only in cases in which the evidence given by an absent witness was the sole or the decisive basis for the applicant's conviction'.[126] The overall fairness of the proceedings includes an examination of both the importance of the untested evidence for the case and of the counterbalancing measures taken to balance the handicaps with which the defence was confronted.[127]

When the ECtHR is convinced that there is no good reason for absence or anonymity, and in addition, when such testimonial evidence retrieved from an anonymous or absent witness is used solely or decisively to reach the conviction, the Court does not find it necessary to examine further to search whether there are sufficient counterbalancing factors.[128] The reason is that the ECtHR applies the three-step rule literally step by step, and if the results of the first and second steps are cumulatively unsatisfactory, the Court

---

115 *Asani v the former Yugoslav Republic of Macedonia* (n 9) [52].
116 *Ellis and Simms v the United Kingdom* (n 74) [74].
117 *Schatschaschwili v Germany* (n 21) [131].
118 *Horncastle and Others v the United Kingdom* App no 4184/10 (ECtHR, 16 March 2015) [142].
119 *Dimović and Others v Serbia* App no 7203/12 (ECtHR, 06 May 2019) [62].
120 *Şandru v Romania* (n 16) [67]-[68]; *İshak Sağlam v Turkey* App no 22963/08 (ECtHR, 10 October 2018) [51]; *Asani v the former Yugoslav Republic of Macedonia* (n 9) [52]; *Lučić v Croatia* (n 69) [82]-[84].
121 *Kostovski v the Netherlands* (n 22) [43]; *Cabral v the Netherlands* App no 37617/10 (ECtHR, 28 November 2018) [37].
122 *Palchik v Ukraine* App no 16980/06 (ECtHR, 02 March 2017) [47]-[48].
123 *Prăjină v Romania* App no 5592/05 (ECtHR, 7 January 2014) [58].
124 *Al Alo v Slovakia* App no 32084/19 (ECtHR, 10 February 2022) [65].
125 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [37].
126 *Schatschaschwili v Germany* (n 21) [116].
127 *Gani v Spain* (n 16) [41]; *Doorson v the Netherlands* (n 43) [76]; *Visser v the Netherlands* App no 26668/95 (ECtHR, 14 February 2002) [47].
128 *Visser v the Netherlands* (n 127) [50]-[52].

concludes that the proceedings as a whole were not fair, and stops before considering the third step.

Thirteen years after the *Visser* case, the Court in *Horncastle and Others* held that according to the facts of the case, there was a good reason for the absence/anonymity of the witness but that the evidence was neither sole nor decisive for the conviction, and thus the ECtHR stopped the test before considering the third step, by jumping to the conclusion that there had been no violation of Article 6(1) and 6(3)(d).[129] In other words, when the ECtHR ruled that when the absent or anonymous witness evidence is not used solely or decisively to reach a verdict, there is no need to analyse counterbalancing factors to assess whether the absence or the anonymity of the witness was compensated to the defence by the domestic court. Having an absent or anonymous witness on a case, as already mentioned several times above, is a limitation on the defence rights, and thus must be counterbalanced. Thus, the test should be considered as a whole, and thus, the third step should not be omitted. Counterbalancing factors considered appropriate should, obviously, differ cases where the evidence was used solely or decisively and cases where not being used in such a manner. Nevertheless, a compensating factor should always be provided for the defence when there is a good reason for a witness to be absent and/or anonymous. At the end, as the ECtHR always reiterates that three interrelated steps of the test should be taken together to determine whether the criminal proceedings, as a whole, are fair.[130] In instances in which the counterbalancing factors are absent, there simply cannot be overall fairness.

In addition, reaching out absent witnesses should also be accepted among counterbalancing factors. If the authorities had tried to find the whereabouts of missing witness, but could not,[131] this should not be enough to accept the testimony solely or decisively to reach a conviction. Ultimately, it is the State's duty to take positive steps to ensure fair trial. Moreover, just one attempt should not be considered as a counterbalancing factor, although it might be accepted as a good reason for absence, because if the witness is not found, the defence did not have the opportunity to challenge the evidence. When it comes to cases where the witness's unavailability is caused by death, serious illness, or where they are co-defendant in the case and invoke their privilege against self-incrimination, or being the privilege-granted persons by law, there is no possible sufficient safeguard measure to be found which could balance the handicap.[132] Therefore, the ECtHR should approach the cases with absent witnesses with utmost scrutiny. If the Court finds convictions that are based solely or decisively on testimonies of an unreachable witness who is not examined by the defence are compliant with Article 6 ECHR, then that is contrary to the overall fairness of a trial, regardless of which counterbalancing factors are taken.

3 Scrutinising the ECtHR's approach: should they be treated equally?

After providing the definitions of the absent witness, the anonymous witness, and the absent anonymous witness, and explaining the ECtHR's three-step test, in this Section, problematic components of the explanations delivered above will be underlined to initiate

---

[129] *Horncastle and Others v the United Kingdom* (n 118) [151].

[130] *Schatschaschwili v Germany* (n 21) [118]; *Avaz Zeynalov v Azerbaijan* (n 63) [115].

[131] *Isgrò v Italy* App no 11339/85 (ECtHR, 19 February 1991) [32].

[132] For a similar approach see *Al-Khawaja and Tahery v the United Kingdom* (Joint Partly Dissenting and Partly Concurring Opinion) (n 19) 61-71.

discussion, with an effort to avoid repetition. The first issue to be elaborated on is the creation of the rule and the second is the differences between absent and anonymous witnesses. To conclude Section 3, the ECtHR's application of the three-step test will be critiqued.

3.1 Creation of the rule

The first issue to be discussed is the creation of the rule by the ECtHR. As illuminated above, the *Kostovski* judgement can be accepted as the first case that started the path to the creation of a three-step rule. The judgement, delivered in 1989, was on anonymous witness evidence. In *Van Mechelen and Others* in 1997, the Court again reiterated its opinion on anonymous witnesses. Later, in *Al-Khawaja and Tahery* in 2011, the Court set out the three-step rule, and in 2015, confirmed the three-step rule in its *Schatschaschwili* judgement. Nevertheless, in the two last-mentioned decisions were not on anonymous witnesses, but absent witnesses. The Court, however, has never mentioned that this rule was originally created for the absent witness or the anonymous witness or for both. However, over time, the ECtHR began to apply this rule to both types of the witnesses[133] without mentioning it straightforwardly, or underlining this feature of the rule, directly.

The ECtHR also applies the three-step test as an automatic rule in each and every case in which a violation of Article 6(3)(d) ECHR is brought forward,[134] without revaluating the rule. The Court has always followed the same order to examine; (i) whether there was a good reason for non-attendance,[135] (ii) whether the evidence was sole or decisive, and (iii) whether there were sufficient counterbalancing factors;[136] as if it were a solid rule from written law that requires a strict application. Therefore, it can be stated that the three-step rule is now an automatic rule for the ECtHR.

In *Stafford*, the ECtHR holds that; 'while the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law'[137] This can be an explanation of why the Court applies the same rule every time without questioning it.[138] The main argument for upholding the principles of foreseeability and legal certainty is setting standards to upgrade the quality of justice of the Contracting States' legal systems. However, the ECtHR further stated in the very same

---

[133] *Ellis and Simms v the United Kingdom* (n 74) [75].

[134] See, *Asani v the former Yugoslav Republic of Macedonia* (n 9] [38]-[53]; *Balta and Demir v Turkey* App no 48628/12 (ECtHR, 23 June 2015) [40]-[62]; *Cabral v the Netherlands* (n 121) [32]-[38]; *Çongar and Kala v Turkey* (n 55) [10]; *Dimović and Others v Serbia* (n 119) [50]-[64]; *Faysal Pamuk v Turkey* (n 93) [45]-[48]; *Horncastle and Others v the United Kingdom* (n 118) [136]-[151]; *İshak Sağlam v Turkey* (n 120) [42]-[55]*; Kostovski v the Netherlands* (n 22) [38]-[45]; *Lučić v Croatia* (n 69) [73]-[88]; *Palchik v Ukraine* (n 122) [40]-[52]; *Rastoder v Slovenia* App no 50142/13 (ECtHR, 28 February 2018) [57]-[66]; *Rudnichenko v Ukraine* (n 78) [103]-[110]; *Seton v the United Kingdom* (n 71) [60]-[70]; *Schatschaschwili v Germany* (n 21) [110]-[165]; *Štefančič v Slovenia* (n 69) [38]-[47]; *T.K. v Lithuania* App no 14000/12 (ECtHR, 12 June 2018) [95]-[97]; *Tău v Romania* (n 31) [54]-[68]; *Ter-Sargsyan v Armenia* (n 78) [48]-[57]; *Van Wesenbeeck v Belgium* App no 67496/10, 52936/12 (ECtHR, 18 September 2017) [96]-[112]; *Vronchenko v Estonia* (n 61) [55]-[66]; *Ziberi v North Macedonia* App no 2166/15 (ECtHR, 06 June 2019) [31]-[43].

[135] According to *Avaz Zeynalov v Azerbaijan* (n 63) [114]: "whether (i) there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements in evidence'.

[136] According to *Schatschaschwili v Germany* (n 21) [107]: '(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair'.

[137] *Stafford v The United Kingdom* App no 46295/99 (ECtHR, 28 May 2002) [68].

[138] See Dennis (n 4) 271 for an affirmative view which claims that the ECtHR has been correct in insisting on this requirement of the compatibility of absent or anonymous evidence with the defendant's right to examine witnesses against him.

paragraph that 'a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.[139] One could claim that the automatic feature of the test, which was implicitly added after the creation of the rule, might cause the judges of the ECtHR feel like they are bound by the Court's previous judgments, even though they are not bound legally.

All persons are equal before the law and are entitled to equal protection under the law and that therefore there is an argument to be made for strictly applying the same rules with an eye on foreseeability and legal certainty.[140] Numbering the three-step rule, automatically one after the other,[141] and examining every case by strictly applying the same test, restrains the ECtHR's breadth. This automatic attitude towards the anonymous and the absent witness cases may even harm the Court's dynamic and evolutive approach, even though one may claim that the Court is trying to educate domestic courts by applying the same rule strictly, to show them the way so as to assess the admissibility of absent and/or anonymous witness, and to fulfil its goal to achieve maximum respect for the ECtHR in the domestic systems. If the test was created differently for absent and anonymous witnesses, then this opinion actually could be supported better. Thus, the judges of the ECtHR should not feel bound by the old cases and rules created ages ago, and they should feel free to evolve and improve[142] it for the better over time.

As a result, it can be said that the three-step rule is not created to be applied to the testimonies of both absent and anonymous witnesses. It is not set as an automatic rule, either.

3.2 Differences between absent and anonymous witnesses

The second issue to be discussed is the differences between these types of witnesses. As explained shortly above, the absent and anonymous witnesses are quite different when it comes to how they can potentially limit the defence rights and because of those differences. The ECtHR rightfully noted in *Al-Khawaja and Tahery* that 'while anonymous and absent witnesses are not identical, the two situations are not different in principle',[143] since they result in a potential difficulty for the defence rights. Generally, this infers that every defendant has the right to know and confront their accusers and the witnesses to their alleged crime, and to be able to challenge the evidence provided against them. The right to confrontation includes challenging the probity, credibility, truthfulness, and reliability of the witness, as well as having the witness orally examined.[144]

Despite stating that they are not different in principle, the Court also gave the main distinction between them in *Ellis and Simms*; absent witnesses cannot be subjected to an examination by defence,[145] at least not during the trial. However, in contrast with anonymous witnesses, absent witnesses' identity will be known, therefore their possible

---

[139] *Stafford v The United Kingdom* (n 137).

[140] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(111) art 7.

[141] For the decision-making model, which is created from the ECtHR case law, see Bas Wilde, 'Summary: Silent Witnesses: The Right to Examine Prosecution Witnesses in Criminal Cases (Article 6 para 3 (d) ECHR)' in Bas Wilde (ed), *Stille getuigen: Het recht belastende getuigen in strafzaken te ondervragen (artikel 6 lid 3 sub d EVRM)* (Denventer 2015) 643, 644.

[142] See Ergul Çeliksoy, 'Overruling "the Salduz Doctrine" in Beuze v Belgium: The ECtHR's Further Retreat from the Salduz Principles on the Right to Access to Lawyer' (2019) 10(4) New Journal of European Criminal Law 1-21.

[143] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [127]; also repeated in *Bakır v Turkey* (n 19) [31].

[144] *Al-Khawaja and Tahery v the United Kingdom* (n 19) 127.

[145] *Ellis and Simms v the United Kingdom* (n 74) [74].

motives to lie could be found.[146] On the contrary, the defence cannot gather any information about anonymous witnesses' identities, backgrounds, and motives, and hence there is a lack of ability to prove their reliability, credibility, and their motives, which could be vindictive, untruthful, or erroneous.[147] For this reason, the ECtHR defined this problem as 'an almost insurmountable handicap'.[148] Despite the challenge this presents, the defence would, still, have the opportunity to (cross)-examine the witness.[149]

In *Asani,* the Court stated that the application of the same consistent approach to both types of witnesses is unsurprising.[150] However, bearing in mind that different types of witnesses cause different challenges to the defence; it is actually possible to find it surprising. It is a fact that the Court approaches every case uniquely, however it does not mean that the Court differentiate its approach, knowingly and willingly, towards anonymous and absent witnesses. It should not be forgotten that there is also a combination of these witness types: the anonymous-absent witness, the ECtHR should approach this issue, as being on thin ice.

3.3 Critique of the test

The three-step test, which was created to evaluate the anonymous and/or absent witness evidence, has been criticised for inconsistent application;[151] since it may undermine the validity of the standards set by the Convention.[152] Even the Court itself admits that there are inconsistencies in the application of the rule.[153] As it is stated also above, this situation is defined as the most significant deficiency in the case law of the ECtHR to date, as there are clear signs that the right to confrontation is easily sacrificed against seemingly competing interests.[154] Even if this statement is too bold, the inconsistencies in the application of the three-step rule are incontrovertible.[155]

In the application of the first step, which is searching for a good reason for the absence or the anonymity of a witness,[156] there is no exhaustive list of good reasons set by the ECtHR, as it should be. According to the type of the witness and the features of the case, the Court decides whether the reason is good enough. For the third step, which is called counterbalancing factors, there is no exhaustive list of factors either. The only necessity is that the counterbalancing factors applied in the case must permit a fair and appropriate assessment of the testimony of an absent or anonymous witness.[157] Therefore, it could be claimed that the ECtHR applies the first and third steps of the rule, differently in each case, as it should. It allows the ECtHR to be dynamic and evolutive.

When it comes to the sole or decisive rule, there are some inconsistent decisions, as shortly stated above. The *Al-Khawaja and Tahery* judgement initially set out the three-step

---

146 Also repeated in *Süleyman v Turkey* (n 19) [63].
147 *Kostovski v the Netherlands* (n 22) [42]; *Bakır v Turkey* (n 19) [33].
148 *Windisch v Austria* (n 50) [28].
149 ibid [74]; *Bakır v Turke*y (n 19) [34].
150 *Asani v the former Yugoslav Republic of Macedonia* (n 9) [36].
151 Laura Hoyano, 'What is Balanced on the Scales of Justice?' (2014) 4 Criminal Law Review 22.
152 Bettina Weisser, 'The European Convention on Human Rights and the European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe' in Darryl Brown, Jenia Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 89-113, 112.
153 *Schatschaschwili v Germany* (n 21) [111]-[113].
154 Maffei (n 6) 109.
155 *Schatschaschwili v Germany* (n 21) [113].
156 See the suggestions for the development of the case law on good reason rule: Stephanos Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 1993) 201.
157 *Asani v the former Yugoslav Republic of Macedonia* (n 9) [41]; *Schatschaschwili v Germany* (n 21) [125].

rule. The Court points that the second rule should not be applied in a very stringent manner. According to the ECtHR, thus, if the testimony of untested witness is used solely or decisively to reach the decision of conviction, it does not automatically result in a breach of the fair trial,[158] since the sole or decisive rule should be applied with serious scrutiny but allowing a certain flexibility.[159]

The ECtHR also stated that if a conviction is solely or decisively based on an absent witness's testimony, this conviction could be compliant with the right to a fair trial if sufficient counterbalancing factors are taken into account by the domestic court.[160] Which means that the dangers of admitting such evidence would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards.[161] Thus in each case, the Court should evaluate whether the counterbalancing factors were sufficient enough and assess fairness of the case, when an absent and/or anonymous witness testimony is used solely or decisively to reach a verdict.

However, a conviction solely or decisively based on reading the written testimony of an absent witness, even if there are counterbalancing factors, should not be compatible with Article 6(3)(d) ECHR.[162] The Court stated that the domestic court, which accepts the testimony of an absent witness as evidence, should show that they are aware this statement carries less weight because of the inability to (cross)-examine the witness.[163] However, the question remains: how can a testimony carry less weight, but at the same time lead to a conviction solely or decisively?

A similar approach is taken by Judges Sajó and Karakaş in their Joint Partly Dissenting and Partly Concurring Opinion of *Al-Khawaja and Tahery*.[164] According to the Judges, where there is testimony of an absent witness who is not examined by the defence, no procedural safeguards can effectively counterbalance this handicap, because the defence rights will be restricted to an extent that is incompatible with the right to a fair trial. As a result, the Court should turn back to *Doorson* judgement in which it concluded that 'even when "counterbalancing" procedures are found to sufficiently compensate the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements'.[165] This decision should be applied to the untested testimonies of both anonymous and absent witnesses in order to protect the accused from being convicted based on sole or decisive evidence, which is untested. Because of the danger of the admission of such testimony solely or decisively to reach the conviction decision, it would constitute a very important issue.[166]

---

158 *Ter-Sargsyan v Armenia* (n 78) [46]; *T.K. v Lithuania* (n 134) [95].

159 *Şandru v Romania* (n 16) [59]; *T.K. v Lithuania* (n 134) [95].

160 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [147].

161 *T.K. v Lithuania* (n 134) [95].

162 Just as how it was set in *Lucà v Italy* (n 23) [40].

163 *Schatschaschwili v Germany* (n 21) [126]; *Al-Khawaja and Tahery v the United Kingdom* (n 19) [157]; *Puljić v Croatia* (n 100) [29]. These cases state that 'where statements by witnesses whom the defence has had no chance to examine before or at trial underpin the conviction in a decisive manner, the disadvantage is of such a degree as to constitute in itself a violation of Article 6 which no procedural safeguards can effectively counterbalance'.

164 See *Al-Khawaja and Tahery v the United Kingdom* (n 19) 61-71.

165 *Doorson v the Netherlands* (n 43) [76].

166 *Gani v Spain* (n 16) [42].

4 Conclusion

In Section 1, four questions were posed: What are the differences between absent and anonymous witnesses and to what extent do they limit the defence rights? How did the ECtHR develop the three-step rule? To what extent does the ECtHR apply the same three-step test to both anonymous and absent witnesses? Should the European Court of Human Rights treat the anonymous and the absent witness equally?

As previously cited, according to the ECtHR, anonymous witness and absent witness are not identical, yet they are not different in principle.[167] The Court also provided the main difference between absent and anonymous witness; the absent witnesses cannot be subjected to an examination by defence[168] and it is a major challenge for the defence. It could be argued which one is more challenging: providing the defence with the opportunity to put questions to an anonymous witness; or knowing the identity of an absent witness and instead of questioning them, being able to research the background and investigate the credibility and motives of them. As the anonymous absent witness is the combination of two categories of witnesses that pose different restrictions to the defence rights, it should be approached with utmost scrutiny by the ECtHR. However, the Court appears to have failed to underline the fundamental distinctions between these three different notions.

Several cases in the ECtHR case law have dealt with the challenges of anonymous witnesses and absent witnesses; *Kostovski*, *Van Mechelen and Others*, *Al-Khawaja and Tahery,* and *Schatschaschwili* judgments were discussed above, chronologically. The ECtHR, over time, has formulated the following three-step test for the assessment of untested witness evidence that has been complied with under Article 6(3)(d): 1. Whether there had been a 'good reason' for the witnesses' non-attendance; 2. Whether the witness statements had been 'sole or decisive' evidence; and, if yes, 3. Whether there had been adequate 'counterbalancing factors'. As it has been previously highlighted that this judicially-created test has been used as an automatic test to evaluate the testimony of the absent witness, the anonymous witness, and the anonymous absent witness; even in cases where the defence was denied the opportunity to confront the witness.

Consequently, a nuanced distinction in the application of the Court's three-step test to distinguish between absent witnesses, anonymous witnesses, and anonymous absent witnesses would be more appropriate. Moreover, the ECtHR should underline the differences between anonymous witness, absent witness, and also anonymous absent witness to recognise the varying challenges that the defence faces. This acknowledgement would also be relevant when applying the third step of the test; the counterbalancing factors.

****

[167] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [127].
[168] *Ellis and Simms v the United Kingdom* (n 74) [74].

ECOWAS Court of Justice: its linkage with the African Charter on Human and People's Rights

Joel Adelusi Adeyeye*
DOI: 10.21827/GroJIL.10.2.51-71

Keywords:
ECOWAS COURT, JURISDICTION, HUMAN RIGHTS, LINKAGE, ENFORCEMEN T OF JURISDICTION

Abstract

This article considers the Community Court of Justice (CCJ) of the Economic Community of West African States (ECOWAS) and its linkage with the African Charter of Human and People's Rights (ACHPR). No doubt when ECOWAS was established in 1975, the main objective was the economic integration of the sub-regional body. At the beginning, the CCJ was listed as one of the mandates of the economic bloc, but it was not until 1991 that the first Protocol which created the CCJ and which gives its composition and its functioning was adopted. The Revised Treaty of 1993 also provided for the establishment of the CCJ in its Article 15. The Protocol now makes references to the African Charter on Human and Peoples Rights (ACHPR) of the African Union (AU). Not only this, the Protocol also made reference to other international human rights instruments. The main objective of this work is to bring to fore that the jurisdiction of the CCJ is expansive and broad, and that the CCJ failed to utilise the expansive jurisdiction in the matter of the late President of Chad, Hissene Habre, against the Republic of Senegal, by ruling that the Senegalese court could not try him because this will violate the principle of non-retroactivity of penal law. This ruling led to the establishment of the Extraordinary African Chambers (a special criminal tribunal) that later tried Habre. Also, where it is appropriate and desirable, a comparison between, on the one hand, the CCJ and, on the other hand, African sub-regional courts and courts of international organisations will be made. It is also the contention of this article that the CCJ ought to have an Appeal Chambers, as a core international best practice. This work will adopt the doctrinal methodology and the data collection method is content analysis.

I. Introduction

The Economic Community of West African States (ECOWAS) was founded the Lagos Treaty of 1975.[1] The Treaty established a Regional Economic Community (REC) in the West African

* LLB, BL, LLM, PhD, Solicitor and Advocate of the Supreme Court of Nigeria, formerly a Magistrate, Senior Lecturer and Ag. Head, Department of Private and Property Law, Faculty of Law, Redeemer's University, Ede, Osun State, Nigeria. Phone number: +234 803 076 1629. E-mails: <adeyeyej@run.edu.ng> and <joeladeadeyeye@gmail.com>.

1 Treaty of Lagos (signed 28 May1975) No 14843 (ECOWAS Treaty of 1975) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5560/download> accessed 11 January 2024.

sub-region and provided a roadmap for the economic integration of the sub-region. The community adopted a Revised Treaty of 1993.[2] The Revised Treaty provides that:

> [t]he aims of the community are to promote cooperation and integration leading to the establishment of an economic union in West Africa in order to raise the living standard of its peoples and to maintain and enhance the economic stability, foster relations among member states and to contribute to the progress and development of the African continent.[3]

Although the 1975 Treaty of the sub-regional body provided for the establishment of the Community Court of Justice (CCJ) of ECOWAS, it was the 1991 Protocol Article 15 of the Revised Treaty of 1993 that created the CCJ. Also, the CCJ finds its basis under the provisions of Article 15 of the Revised Treaty of ECOWAS and Article 6 which mentions it as one of the institutions of the community. The Protocol relating to the CCJ sets out the composition, powers, procedure and the jurisdiction of the CCJ.[4] Furthermore, the Protocol clearly states that the CCJ is the principal legal organ of ECOWAS with the main function of resolving disputes relating to the interpretation and application of the provisions of the Revised Treaty and the annexed Protocols and Conventions. Although the Protocol on the CCJ was adopted in 1991, the CCJ only became operational in 2001 following the appointment and swearing in of its pioneer Justices.[5]

Though the CCJ has been in existence since 2001, many community citizens are unaware of its existence or of its mandate, jurisdiction, practice, and procedure. Since ECOWAS has transformed from ECOWAS of States to ECOWAS of Peoples, the member States and community citizens are the stakeholders in ECOWAS and all its institutions,[6] as community Court, the ECOWAS CCJ works with the member States and the community citizens.[7] In the light of the above, this work will interrogate the human right mandate of the CCJ and argue that the CCJ has not fully utilised the broad and expansive mandate as vested in her by the legal instrument that established her. This is so because the CCJ ruled that the Senegalese court lacks the powers to exercise jurisdiction and try the former Chadian president, the late Hissene Habre.

This paper is divided into three parts. Part I discusses the jurisdiction of the CCJ, the qualification, composition and tenure of the justices, the access to the court, the concept of non-exhaustion of local remedies, and the advisory from the CCJ. Part II discusses the CCJ's missed opportunity of not recommending the late President of Chad Hissene Habre for trial in Senegal. Finally Part III discusses the various challenges and the suggested recommendations thereto. In its methodology, this work considers the various legal texts by

---

2 Economic Community of West African States (ECOWAS) Revised Treaty (signed 24 July 1993) Vol 2373, 1-42835 (ECOWAS Revised Treaty of 1993) <https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf> accessed 11 January 2024.

3 ibid art 3.

4 ECOWAS, 'Protocol A/P.1/7/91 on the Community Court of Justice' (signed 6 July 1991, entered into force on 5 November 1996) A/P1/7/91 <http://www.courtecowas.org/wp-content/uploads/2018/11/Protocol_AP1791_ENG.pdf> accessed 11 January 2024.

5 Amos Osaigbovo Enabulele, *Teachings on Basic Topics in Public International Law* (Lap Lambert Academic Publishing 2014) 333.

6 ECOWAS Treaty of 1975 (n 1) art 4(d). This article provided for the Tribunal of the Community, which was not called a CCJ then. There was also no Protocol of the CCJ then.

7 Enabulele (n 5) 325.

ECOWAS and also made a comparative analysis with other sub-regional, regional, and international legal instruments.

II. The linkage

Jurisdiction is the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.[8] The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by similar means.[9] At inception, the ECOWAS CCJ faced jurisdictional challenge under its original Protocol.[10] But this Protocol was promptly revised after the first set of cases brought by individuals were dismissed by the CCJ for want of jurisdiction to accept direct claims from individuals, and as a result of which the CCJ fell out of use.[11]

Intriguingly, the ECOWAS CCJ, like all of other sub-regional courts in Africa, interprets and applies the African Charter.[12] The jurisdiction of the CCJ to apply the African Charter is based on the Revised Treaty of ECOWAS, wherein State parties undertook to adhere to the recognition, promotion, and protection of human rights in accordance with the provisions of the African Charter on Human and People's rights.[13] In the same vein, the Tribunal of the Common Market for Eastern and Southern Africa (COMESA) also provides individual direct access to its court, the COMESA Court of Justice.[14] The same goes to the East African Court of Justice (EACJ), which is the judicial organ of the East African community.[15] The jurisdiction of the CCJ is prescribed by the Revised Treaty, the Protocol of the CCJ as amended and other ECOWAS community texts. The CCJ has contentious and non-contentious jurisdiction. The Revised Treaty provides as follows:

---

8 Federal Supreme Court of Nigeria, *Madukolu v Nkemdilim* [1962] 1 ALL NLR (Pt 4) 587; [1962] 2 SCNLR 341.

9 Amos Osaigbovo Enabulele and D U Odigie, 'African Charter on Human and People's Rights: Has the Long Walk to Effective Human Rights Enforcement in Africa Ended?' (2014) 2(1) The Journal of International Law and Diplomacy 3.

10 Protocol A/P1/7/91(n 3). The original challenge was whether the CCJ could entertain cases from individual community citizens. See CCJ, *Olajide v Federal Republic of Nigeria* (27 April 2004) ECW/CCJ/APP/01/04 where the CCJ ruled that it could not entertain individual complaints by community citizens.

11 ECOWAS, 'Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2 9 and 39 of Protocol A/P1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol' (19 January 2005) A/SP.1/01/05 <http://www.courtecowas.org/wp-content/uploads/2018/11/Supplementary_Protocol_ASP.10105_ENG.pdf> accessed 11 January 2024. It was only Article 3(4) of the Supplementary Protocol of the CCJ of 2005 that stated that the CCJ, in addition to its other jurisdiction, can determine violation of human rights occurring in any member State.

12 CCJ, *SERAP v Nigeria* (30 November 2010) ECW/CCJ/JUD/18/1. This decision affirmed the powers of the CCJ to apply the African Charter.

13 ECOWAS Revised Treaty of 1993 (n 2) art 4.

14 Agreement Establishing a Common Market for Eastern and Southern Africa (concluded 5 November 1993, entered into force 8 December 1994) art 26 <http://www.comesacompetition.org/wp-content/uploads/2016/03/COMESA_Treaty.pdf> accessed 11 January 2024.

15 The Treaty for the Establishment of the East African Community (signed 30 November 1999, entered into force 7 July 2000) art 9 <https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf> accessed 11 January 2024.

> Any dispute regarding the interpretation or the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols. Failing this, either party or any other member states or the authority may refer the matter to the Court of the community whose decision shall be final and shall not be subject to appeal.[16]

Between 2001 and 2005 when the Protocol was finally amended, only two cases were filed before the CCJ and both were filed by individuals directly. In view of the fact that individuals did not have direct access to the CCJ by virtue of Article 9(3) of the Protocol of the CCJ at the material time, the CCJ held that it had no jurisdiction to entertain both matters. It is significant to note that no Member State or institution of ECOWAS within the period filed any case before the CCJ or even sought for an advisory opinion. Therefore, the problem of lack of direct access to the CCJ by individuals was of great concern to the court and other stakeholders.

This was clearly the issue in the case of *Olajide v Federal Republic of Nigeria*.[17] The claimant, a Nigerian community citizen, filed the matter for a violation of the community law in closing the Nigerian- border with the Republic of Benin. However, the CCJ concluded that on the examination of the extant Protocol, the Applicant could not bring proceedings other than as provided in Article 9(3) of the Protocol. This case made it clear that the limited scope of the jurisdiction of the CCJ, and denial of access to the CCJ to individuals, were grave and amounted to the fundamental limitation on the lives of private West African individuals. The then president of the CCJ, Justice Donli, urged formulators of the act to broaden its scope to enable individuals to bring actions before the Court as there are cases which members' States cannot bring on behalf of its nationals.[18]

Article 9(4) of the Protocol on the CCJ, as amended, provides that 'the Court has jurisdiction to determine cases of violation of human rights that occur in any member state'. Because of the importance of the human rights jurisdiction of the CCJ, this article shall further analyse some key elements of the human rights jurisdiction of the CCJ. The CCJ has held that human rights protection is a cardinal and fundamental value of ECOWAS CCJ. In *Bakary Sarre & 28 ors v Republic of Mali*, where the CCJ held as follows:

> The Court recalls that one of the fundamental principles of the community featuring Article 4 of the Revised Treaty of 1993 is the recognition, promotion and protection of human and people's rights in accordance with the provisions of the Africa Charter on Human and People's Rights; the Protocol on Democracy, Election and Governance 2007, which was the forerunner of the expansion in the powers of the Court to cover human rights violations, was adopted by the community state, which according to its preamble is "mindful of the ratification of the African Charter on Human and Peoples Rights and other International human rights instruments by the majority of the community states […] that the guarantee in each of the community states, of the rights contained in the African Charter on Human and Peoples' Rights and other, international instruments, were set out in Article 1 of this instruments. Under the domain of constitutional convergence, human rights protection thus constitutes a cardinal and fundamental value for the community".

It should, however, be noted that the human rights jurisdiction of the CCJ is very fluid and indeterminate. There is no catalogue of human rights and the Protocol does not state the

---

16 ECOWAS Revised Treaty of 1993 (n 2) art 76(1)(2).

17 *Olajide v Federal Republic of Nigeria* (n 10).

18 ibid.

applicable human rights instruments. This lacuna has presented the CCJ a great opportunity to define and delimit the scope and legal parameters of its human rights mandate. The fact that CCJ does not have its own catalogue of rights was noted by the CCJ in the case of *Ugokwe v FRN,*[19] where the CCJ held that:

> [i]n Articles 9 and 10 of the Supplementary Protocol, there is no specification or cataloguing of various human rights but by the provision of Article 4 paragraph (g) of the Treaty of the community, the community states of the Economic community of West African States (ECOWAS) are enjoined to adhere to the principles including 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and People's Rights. Even though there is no cataloguing of the rights that the individuals or citizens of ECOWAS may enforce, the inclusion and recognition of the African Charter in Article 4 of the Treaty of the community behooves on the Court by Article 19 of the Protocol of the Court to bring in the application of those rights catalogued in the African Charter.[20]

The CCJ has also held that the scope of its human rights mandate is expansive. In *Linda Gomez and others v The Republic of the Gambia*,[21] where the CCJ stated that:

> [a]rticle9(4) of the Protocol on the Court as amended clearly gives this Court jurisdiction over any human rights violation that occur within community states of ECOWAS. The Court's human rights jurisdiction is expansive; indeed Article 10(d) of the Protocol as amended lays down only two conditions necessary to the admissibility of human rights causes that occur within ECOWAS community states. The Court has given many decisions establishing the extent, scope and legal boundaries of its human rights mandate.[22]

By virtue of Article 4(g) of the Revised Treaty and the Protocol on Democracy, Election and Governance, the CCJ applies the African Charter on Human and Peoples Rights (ACHPR).[23] The CCJ will also apply against any community State any international human rights instruments adopted or ratified by the community States, such as Universal Declaration of Human Rights (UDHR),[24] International Covenant on Civil and Political Rights (ICCPR),[25] and International Covenant on Economic, Social and Cultural Rights.[26] In *SERAP v Federal Republic of Nigeria,*[27] where the CCJ held that:

> […] even though ECOWAS may not have adopted a specific instrument recognizing human rights, the Court's human rights protection mandate is exercised with regard to all the international instruments, including the African Charter on Human and Peoples' Rights, the

---

19 CCJ, *Jerry Ugokwe v Nigeria* (7 October 2005) ECW/CCJ/JUD/03/05.

20 ibid [29].

21 CCJ, *Linda Gomez and others v The Republic of the Gambia* (2013) CCJELR 307 [28]-[30].

22 ibid 310.

23 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter on Human and Peoples' Rights).

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

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

26 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR).

27 CCJ, *SERAP v Federal Republic of Nigeria* (2012) CCJELR 349, 358.

> International Covenant on Civil and Political Rights, the international Covenant on Economic, Social and Cultural Rights, etc to which the community states of ECOWAS are parties.[28]

That these instruments may be invoked before the CCJ reposes essentially on the fact that all the community States parties to the Revised Treaty of ECOWAS have renewed their allegiance to the said legal instruments, within the framework of ECOWAS. Consequently, by establishing the jurisdiction of the CCJ, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international legal instruments they are signatory to. This reality is consistently held by the CCJ. See *Henri v Republic of Cote d'Ivoire*[29] and *Tasheku v Federal Republic of Nigeria.*[30] In *Henry v The Republic of Cote d'Ivoire*[31] the CCJ held that the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights are legal instruments that all ECOWAS member states, including the State of Cote d'Ivoire are signatories. At the community level, their eminent importance has been underlined, notably by the affirmation from all member states which vowed to expressly respect them.[32]

The commitment to the African Charter on Human and People's Rights is derived from its ratification by each of the ECOWAS community States, of two fundamental instruments, which are (1) the ECOWAS Revised Treaty and (2) the Protocol relating to Democracy Elections and Governance. As to the commitment to the Universal Declaration of Human and Peoples' Rights, its pre-eminent place in human rights law, as recognised by the ECOWAS community is as drawn by its mention in the preamble of the aforementioned Protocol. The rights recognised and affirmed by these legal instruments constitute international obligations, for member States within the scope of general international law and community law. By affirming their commitment expressly to these international legal instruments relating to human rights, the community and its component units (State parties) have surely in mind, the core element of the United Nations (UN) system which is enshrined in the UDHR and ICCPR, as well as the core as the expression of values of authentic civilization which they are ready to uphold.[33]

Consequently, while examining the extension of its jurisdiction over cases of human rights violation within the community landscape, the CCJ takes into consideration, not only the African Charter on Human and Peoples' Rights, but also, the UN' basic instruments, namely the UDHR and the ICCPR. These UN legal instruments were, at least, accepted by West African States, which have ratified or signed them. The CCJ notes that the State of Cote d'Ivoire ratified the ICCPR in 1992 and ratified the Supplementary Protocol to that Convention in 1997 as was held in *Henry v The Republic of Cote d'Ivoire*.[34] This same principle is also applicable to *SERAP v President, Federal Republic of Nigeria*[35] and *Koraou v Republic Of Niger,*[36]where the CCJ's ruling was the same. And in the matter between *SERAP v Federal*

---

28 *SERAP v Federal Republic of Nigeria* (n 27) 340.
29 CCJ, *Henri v Republic of Cote d'Ivoire* (17 December 2009) ECW/CCJ/JUG/04/09.
30 CCJ, *Tasheku v Federal Republic of Nigeria* (12 June 2012) ECW/CCJ/RUL/12/12.
31 *Henri v Republic of Cote d'Ivoire* (n 29).
32 ibid 297-298.
33 Enabulele (n 5).
34 *Henri v Republic of Cote d'Ivoire* (n 29) 298.
35 CCJ, *SERAP v President, Federal Republic of Nigeria* (30 November 2010) ECW/CCJ/JUD/09/10.
36 CCJ, *Koraou v Republic Of Niger* (27 October 2008) ECW/CCJ/JUD/06/08.

Government Of Nigeria[37] where the Federal Government of Nigeria suspended the operations of Twitter in Nigeria, the applicant went to CCJ to challenge the suspension describing it as unlawful and inconsistent with the provisions of the ACHPR[38] and the ICCPR,[39] both of which Nigeria is a State party. The Nigerian government, however, urged the CCJ to dismiss it, arguing that the sub-regional court lacked the jurisdiction to entertain it. The CCJ ruled that it had the requisite jurisdiction to hear the matter and that by suspending the Twitter operation, Nigeria violated the rights of the applicant to the enjoyment of freedom of expression, access to information, and fair hearing.

a. Qualification, composition and tenure of the judges

The Protocol of the CCJ provides that the CCJ shall be composed of independent judges selected and appointed by the authority of Heads of States and Government from nationals of member States who are persons of high moral character and possess the qualification required in their respective States for appointment to the highest judicial office or are jury-consults of recognized competence in international law. It further provides that the CCJ shall consist of seven members who shall elect a president and vice president from among their members. It should be noted that the number of judges of the CCJ was reduced from seventh five in 2017.[40] Under the 1991 Protocol of the CCJ, the tenure of the judges was staggered and they were appointed for a renewable five-year term. In 2006, the tenure of the judges of the CCJ was reduced to four years non-renewable.[41]

The judges of the CCJ have security of tenure and cannot be removed from office except for gross misconduct or inability to perform the functions of office as a judge by reason of physical or mental disability. Their method of appointment is void of any political influence and guarantees their independence. As mentioned should possess a high moral character and qualification for appointment to the highest judicial officers or be a jurist-consults of recognized competence in international law. In addition, the authority normally selects from a list of persons nominated by members States that have vacancies in the CCJ. The decision of June 2006 establishing the judicial council of the community, adopted by the authority of Heads of State and Government, provides clear guidelines for the recruitment and discipline of the judges of the CCJ.[42] The decision establishes the Judicial Council of the community, which is responsible for the recruitment and disciple of judges of the CCJ. It is composed of the Chief Justices of the Supreme Courts of community States.

Vacant positions of membership of the CCJ are required to be advertised by the member States that the positions have been allocated. The Rules of Procedure of the community Judicial Council provides that 'member states to which vacant posts of Judges have been allocated shall ensure wide publicity of such positions as well as transparency and competitive criteria with a view to enlisting candidates from their most qualified nationals'.[43]

---

37 CCJ, *SERAP v Federal Government Of Nigeria* (2021) ECW/CCJ/RUL/03/21.

38 African Charter on Human and Peoples' Rights (n 23) art 9.

39 ICCPR (n 25) art 19.

40 ECOWAS, 'Assembly Decision at the 51st Summit' (June 2017) A/DEC.2/5/17.

41 ECOWAS, 'Supplementary Protocol A/SP.2/06/06' (14 June 2006) A/SP.2/06/06 art 4(1), new paragraph 1.

42 ECOWAS, 'Establishing the Council of the Community' (14 June 2006) A/DEC.2/06/06.

43 ECOWAS, 'Regulation C/REG 23/12/07 Adopting the Rules of Procedure of the Community Judicial Council' (15 December 2007) C/REG 23/12/07.

The Revised Treaty guarantees the independence of the ECOWAS CCJ specifically provides that 'the Court of Justice shall carry out the functions assigned to it independently of the community states and the institutions of the community'.[44] In addition, the Protocol of the CCJ, as amended, also provides that the CCJ shall compose of independent judges.[45] *Insane v Republic of the Gambia,*[46] the CCJ declared *inter alia* that the CCJ is independent of all the institutions of ECOWAS and the member states. Also in *Falana & Amor v Republic of Benin*,[47] the CCJ stated as that:

> […] Article 15(1) of the Revised Treaty of ECOWAS stipulates in clear terms that, 'The Court of Justice shall carry out the function assigned to it independently of the member states and the Institutions of the community.' The provision, if given its literal interpretation, would defeat the submission and objection by the 10th Defendant, in respect of the composition of the panel of judges, in the case. The Court is independent of the member states. Consequently, the objection is untenable and accordingly rejected.[48]

b. Access to the court

The specific provision that governs access to ECOWAS CCJ for human rights complaints is Article l0(d) of the Protocol on the CCJ as amended, which provides that

> Access to the Court is open to the following: Individuals on application for relief for violation of their human rights; the submission of application for which shall not be anonymous; norbe made whilst the same matter has been instituted before another International Court/or Adjudication.

The *locus classicus* on the interpretation of Article 10(d) of the Protocol on the CCJ is *Dexter Oil Ltd v Liberia*,[49] where the CCJ harmonised its previous decisions and clarified its interpretation of Article 10(d) of the Protocol on the CCJ by limiting access to the CCJ for human rights violation to only individuals with a few exceptions where corporations can maintain action for human rights violations in respect of violation of the right of fair hearing, right to property, and right to expression. In the words of the CCJ:

> The time is ripe to revisit the interpretation of "*Toute Personne Victime*" as decided in the above cases in order to reconcile the divergent jurisprudence and with a well-reasoned decision of the issues for the guidance of the parties, lawyers appearing before the Court and scholars. "Whereas the English text of article 10(d) clearly states individuals (natural persons), the French texts of the same Article states *toute personne victime*" (every person that is a victim)'. Personne in the French text includes an individual who is a physical person and a corporate body which is a juristic person. The key word however is that the personne must be a victim of human rights violation. It is the opinion of this Court that, if Article 10 (c) (English and French Texts) categorically includes both individual and corporate bodies, same would have been repeated in 10 (d) if that was the intention of the drafters of the law. The Court therefore affirms that it is not the intention of the statute to accommodate corporate legal person in Article 10 (d) of both versions of the text. In order to harmonize the prior inconsistent decisions of the Court as highlighted above, this Court in the exercise of its inherent powers hereby departs from all

---

44 ECOWAS Revised Treaty of 1993 (n 2) art 15(3).
45 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11) Article 3.
46 CCJ, *Essien v Republic of Gambia* (29 October 2007) ECW/CCJ/APP/05/07.
47 CCJ, *Falana & Anor v Republic of Benin* (24 January 2012) ECW/CCJ/JUD/01/12.
48 ibid 118.
49 CCJ, *Dexter Oil Ltd v Liberia* (6 February 2019) ECW/CCJ/APP/03/19.

> decisions wherein corporate body are accommodated under Article 10 (d) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005, and affirms only individuals have access for Human Rights violation except in internationally accepted conditions.[50]

There are only two conditions for admissibility of applications for human rights violation under Article 10(d)(ii) of the Protocol as amended. They are: (1) that the application must not be anonymous; (2) that the application must not be pending before another international court. The CCJ has applied the conditions in Article 10(d)(ii) of its Protocol, as amended, in its jurisprudence. In *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v The Federal Republic of Nigeria & Anor*.[51] The CCJ noted that for an application to be admissible before it the application must not be lodged anonymously rather, it must be lodged by identifiable parties. In the words of the CCJ:

> We note that this Application is lodged in this Court by SERAP, a non- governmental organization purportedly on behalf of alleged victims of human rights violation, who are not specifically identified or identifiable. To plead a case before this Court one must have suffered a personal harm. In support of this position, the texts controlling provides: "Access to the Court is open to […]Individuals on application for relief for violation of their human rights and the same text, for the purposes of accurate identification of such victims, add that: […]the submission of the application for which shall not be anonymous".[52]

In *Saidykhan v Republic of the Gambia*[53] the CCJ reiterated that applications for human rights violations can only be declared admissible where the application is not lodged anonymously, and where the same matter is not be before another international court. Also in:

> Article 10(d) of the Supplementary Protocol on the Court of Justice expressly grants jurisdiction to this Court with regards to human rights violations except that the application should not be anonymous, and the same matter should not be before another International Court. This is a provision of the Statute which cannot be ousted by implication.[54]

Also in *Ayika v Republic of Liberia*,[55] the CCJ ruled that the case was admissible notwithstanding the fact that it was alleged to be pending before the Supreme Court of a community State. It stated that:

> the pendency of an action before the Liberia Supreme Court is no bar to proceedings before this court; and, lastly that the exhaustion of local remedies is not a prerequisite in this court. It also decides that since the case is ripe for hearing the application for expedited hearing is rendered

---

50 *Dexter Oil Ltd v Liberia* (n 49).

51 CCJ, *Registered Trustees of the Socio-Economic Rights &Accountability Project (SERAP) v The Federal Republic of Nigeria & Anor* (14 October 2015) ECW/CCJ/JUD/19/16.

52 ibid 23.

53 *Saidykhan v Republic of the Gambia* (16 December 2010) ECW/CCJ/JUD/08/10.

54 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11); See also, Stephen Temitope, 'The Human Rights Jurisdiction and Jurisprudence of the Community Court of Justice of ECOWAS' (17 December 2020). <https://ssrn.com/abstract=3750610> accessed 18 January 2024.

55 CCJ, *Ayika v Republic of Liberia* (8 June 2012) ECW/CCJ/APP/07/11.

> irrelevant, and any decision will serve no useful purpose.[56]

c. Enlargement of the jurisdiction

The Supplementary Protocol adopted in 2005 expanded the jurisdiction of the CCJ and for the first time and gave direct access to individuals to access the CCJ in respect of certain causes of action. In addition to its primary mandate of interpreting and applying the Revised Treaty, Protocols, Conventions, and Supplementary Acts, the CCJ has competence to adjudicate on disputes relating to the legality of Regulations, Directives, Decisions, and other subsidiary legal instruments adopted by ECOWAS or the failure by member States to honor their obligations under the Treaty, Conventions and Protocols and other community texts. The Court also has competence to adjudicate on disputes relating to non-contractual liability of the community. It also has jurisdiction in respect of actions relating to damages against a community institution or an official of the community for any act or omission in the exercise of official functions.[57] The authority of Heads of State and Government can also grant the CCJ the power to adjudicate on any specific dispute that it may refer to the CCJ other than those specified in the Protocol.[58]

d. Advisory opinions

The CCJ has jurisdiction to give advisory opinion in respect of legal questions brought before it. The provision in respect of advisory opinion as contained in the Protocol which provides as follows:

> The Court may, at the request of the Authority, Council, one or more member states, or the Executive Secretary, and any other institution of the community, express, in an advisory capacity, a legal opinion on questions of the Treaty. Requests for advisory opinion as contained in paragraph 1 of this Article shall be made in writing and shall contain a statement of the questions upon which advisory opinion is required. They must be accompanied by all relevant documents likely to throw light upon the question.[59]

The advisory opinion is given in public and in the exercise of its advisory functions; the CCJ shall be governed by the provisions of the above Protocol which apply in contentious cases where the CCJ recognises them to be applicable. The CCJ has issued several advisory opinions at the request of the ECOWAS Commission.[60]

---

56 *Ayika v Republic of Liberia* (n 55) 238.

57 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11).

58 ibid art 9(8); ECOWAS Revised Treaty of 1993 (n 2) art 7(3)(g).

59 ECOWAS, 'Protocol A/P.1/7/91' (n 4) art 10.

60 See ECOWAS, 'Advisory Opinion, Requested by the President of the ECOWAS Commission' (6 December 2016) ECW/CCJ/ADV.OPN/01/16 685 <http://www.courtecowas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2016-ENGLISH.pdf> accessed 18 January 2024; ECOWAS, 'Request for Advisory Opinion from Executive Secretary of ECOWAS relating to Article 23 (11) of the Rules of Procedure of the community Parliament and the Provisions of Article 7 (2) and 14 (2) (f) of the Protocol on the community Parliament' (5 December 2005) ECW/CCJ/ADV.OPN/01/05 55 <http://www.courtecowas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2004-2009-ENGLISH.pdf> accessed 18 January 2024; See also ECOWAS, 'Request by the President of ECOWAS Commission on Renewal of the Tenure of the Director General and Deputy Director General of GIABA' (16 June 2008) ECW/CCJ/ADV.OPN/01/08 201 <http://www.courtecowas.org/wp-content/uploads/2023/04/CCJE-LAW-REPORT-2004-2009-ENGLISH.pdf> accessed 18 January 2024.

e. The concept of non-exhaustion of local remedies

Exhaustion of local remedies (domestic) is usually the first step in seeking redress for human rights violations. It is a step that requires a person attempt to use the available national legal protections to seek justice or reparation for the violation or abuse, appealing as necessary until the claim can be pursued no further at the national level. If such a person does not receive an adequate remedy from a national body, such a person may submit the complaint alleging human rights violations, for consideration by an international court or tribunal.

However, one key element of the human rights mandate of the CCJ is that exhaustion of local remedies is not a requirement. This is in contradistinction with the African Court of Human and People's Rights that makes the exhaustion of local remedies a core principle before filing a matter before the court.[61] In real terms, international customary law and the African Court of Human and Peoples' Rights' practices are equivalent. In this sense, the exhaustion of local (domestic) remedies rests on the principle that international bodies should supplement State institutions and should not get involved unless the human rights violation cannot be resolved at the national court. In this wise, before submitting a complaint to an international court or tribunal, for example a UN treaty body or a regional human rights court, an individual or organization must first attempt to remedy the situation using national proceedings. Generally, it requires that claims for human rights violation be first of all brought before the highest national authority, often the highest court of that nation State. The amended Protocol provides that access to the CCJ is open to individuals on application for relief for violation of their human rights on the condition that the application is not anonymous nor be made whilst the same matter has been instituted before another international court for adjudication.[62] The CCJ has therefore decided emphatically in a long line of cases, that exhaustion of local remedies is not a requirement under ECOWAS community texts for human rights litigation, such as in *Essien v Republic of The Gambia,*[63] *Koraou v Republic of Niger*[64] *and Saidy Khan v Republic of The Gambia*.[65]

The African Charter requires authors of communications to exhaust local remedies before resorting to the procedures of the African Commission 'unless it is obvious that this procedure is unduly prolonged'.[66] This provision implies and assumes the availability, effectiveness, and sufficiency of domestic adjudication procedures. If local remedies are unduly prolonged, unavailable, ineffective, or insufficient, the exhaustion rule will not bar consideration of the case.[67] The African Commission will decline to receive a case as long as domestic remedies are available, effective, and sufficient. According to the Commission, 'a

---

61 African Charter on Human and Peoples' Rights (n 23) art 56. This article sets forth the criteria for consideration and admissibility from complainants seeking to lodge cases before African Commission or before the CCJ; see African Commission on Human and Peoples' Rights, *Dawda Jawara v Gambia* (11 May 2000) Comm No 147/95 and 149/96.

62 ECOWAS, 'Protocol A/P.1/7/91' (n 4) art 10(d).

63 *Essien v Republic of The Gambia* (n 46).

64 *Koraou v Republic Of Niger* (n 36).

65 CCJ, *Saidy Khan v Republic of The Gambia* (16 December 2010) ECW/CCJ/APP/11/07.

66 Nsongurua J Udombana, 'So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97American Journal of International Law 1.

67 *Dawda Jawara v The Gambia* (n 61).

remedy is available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint'.[68]

In *RADDHO v Zambia*,[69] the Government of Zambia objected on grounds of non-exhaustion of domestic remedies to a case filed on behalf of several hundreds of West African nationals expelled en masse by Zambia. In dismissing Zambia's objection and upholding the admissibility of the communication, the Commission reasoned that Article 56(5) of the Charter 'does not mean […] that complainants are required to exhaust any long remedy which is found to be, as a practical matter, unavailable or ineffective'.[70] The Commission pointed out that the victims and their families concluded that the remedies referred to by the respondent State were as a practical matter unavailable.[71]

These principles, in the jurisprudence of the Commission, extend to those cases where it is 'impractical or undesirable' for a victim or applicant to approach domestic courts.[72] This is applicable in many cases to victims of torture and forced displacement.

Indeed, a regime of impunity for torture would trigger an exception to the exhaustion requirement. The African Commission took this view in *OMCT et al v Rwanda*,[73] in which it considered the Rwandan government's mass expulsion of Batutsi Burundian refugees to Burundi. In its 1996 decision, the Commission held on the question of admissibility that 'in view of the vast and varied scope of the violations alleged and the large number of individuals involved […] remedies need not be exhausted'.[74] On the merits, the Commission found multiple violations of the African Charter, including due process rights and the prohibition against torture and cruel, inhuman and degrading treatment. The Commission further held that Article 12(3) of the Charter 'should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State',[75] and that Article 12(4) effectively prohibits refoulement of asylum seekers and refugees, making it also part of the protection against torture. It is also arguable that the absence of effective remedies against torture would constitute an exception to the rule requiring exhaustion of domestic remedies as this would in reality mean the absence of sufficient or adequate remedies.

In practice, the authors of communications should indicate not only the available remedies but also the efforts made to exhaust such remedies. Communications should similarly state any difficulties, legal as well as practical, encountered in trying to utilise available remedies and should describe the outcome of efforts made. In *Stephen O. Aibe v*

---

68 ibid 31-33.

69 Communication 71/92, *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* (2000) 6 IHRR 825.

70 ibid.

71 ibid.

72 Communication 27/89, 46/91, 46/91, *Organisation Mondiale Contre la Torture et al v Zaire* (1996) 27/89-46/91-49/91-99/93

73 ibid

74 ibid; but see, Communication 162/97, *Mouvement des Refugies Mauritaniens au Senegal v Senegal* (2000) AHRLR 287 (ACHPR 1997), in which the Commission, on grounds of non-exhaustion of domestic remedies, declined to consider a communication initiated on behalf of Mauritanian refugees in Senegal who alleged wide ranging violations against Senegalese security forces.

75 ibid; it should be stressed that the right guaranteed in art 12(3) of the African Charter is that to 'seek and obtain asylum'. The African Charter is unique in this respect in including an implicit obligation on the States Parties to grant asylum once the circumstances stipulated in the article are fulfilled.

Nigeria,[76] the Commission declared a communication inadmissible because the complainant had alleged that he sought redress before 'several authorities'. The Commission has no indication in the file before it that there was any proceeding before the domestic courts on the matter. In a latter case, *Rights International v Nigeria*,[77] finalized in 1999, a person fleeing the dictatorship in Nigeria was eventually accorded refugee status in the USA. As he took to flight for fear of his life, the person was not required to return to Nigeria in order to exhaust local remedies.

At the Commission's 27th session, held in October 2000, three further cases concerning this question were finalised. In two of them, the Commission followed the line of argument established in previous cases. In one of the cases, *Dawda Jawara v Gambia*,[78] a previous Head of State submitted a complaint related to his deposition and events following the coup d'état that removed him from power .In the third case, *Legal Defence Centre v The Gambia,*[79] the Commission seems to have deviated from its own jurisprudential approach, without justification. In this case, the Commission required exhaustion of local remedies by a complainant in a situation analogous to those just discussed. The complainant was a Nigerian journalist, based in The Gambia, who was ordered to leave The Gambia after his reporting caused embarrassment to the Nigerian Government. Ostensibly, the Journalist was deported to 'face trials for crimes he committed in Nigeria'. His deportation took place within a very short time, and he was not arrested or prosecuted. Despite the uncontested allegation presented as part of his argument that he cannot return to The Gambia because the deportation order was still valid, the Commission for the first time, and in clear disregard of its jurisprudence, including two findings taken during the very same session, required that a complainant that had fled or was otherwise forced to leave a country to instruct counsel in the country that he had left. This requirement may place an unreasonable and insurmountable financial and logistical burden on victims in similar circumstances.

The finding also contradicts a line of cases dealing specifically with deportation, in which the exhaustion of local remedies was not required. Under circumstances of mass expulsion that prevented a group of West Africans in Zambia and in Angola from challenging their expulsion, the Commission did not require them to attempt exhaustion of local remedies in the countries to which they had been expelled.[80]

The effect of this is far-reaching because victims of human rights violations may choose to directly approach the ECOWAS CCJ without exhausting local remedies at the national courts. Although the exhaustion of local remedies is a well-recognised principle of customary international law, the CCJ has held that it can be waived or legislated away as was held in *Saidykhan v Republic of the Gambia*.[81] The CCJ also refused the invitation to treat the lack of provision for exhaustion of local remedies as a *lacuna* in the law that it can fill in, using its

---

[76] Communication 252/2002, *Stephen O Aigbe v Nigeria* (2003) AHRLR 128 (ACHPR 2003).

[77] Communication 215/98, *Rights International v Nigeria* (2000) AHRLR 254 (ACHPR 1999).

[78] *Dawda Jawara v The Gambia* (n 61).

[79] Communication 219/98, *Legal Defence Centre v The Gambia* (2000) AHRLR 121 (ACHPR 2000).

[80] *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* (n 69); Communication 159/96, *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997).

[81] ibid.

judicial discretion.[82] In *Saidy Khan v The Republic of the Gambia*[83] the CCJ held that:

> [t]he drafters of the Supplementary Protocol clearly decided against making the exhaustion of local remedies a condition precedent to the accessibility of this Court in human rights violation causes. The fact that there is a rule of customary international law in support of the view that local remedies ought to be exhausted before a plaintiff can properly go before international Courts is not in doubt. However, this is not an inflexible rule. It can be legislated away or even parties can compromise it. Article 10(d) of the Supplementary Protocol is an example of legislating out of the rule of customary international law regarding the exhaustion of local remedies. With the enactment of the Supplementary Protocol, ECOWAS member states expressly dispensed with the customary international law rule regarding the exhaustion of local remedies before access is granted to Plaintiffs coming before this Court.[84]

In *Obioma C Ogukwe v Republic of Ghana*[85] the CCJ held that:

> [t]he jurisprudence of this Court is rich in its decision that the exhaustion of local remedies is not a precondition to come before the Court. The Applicant can come directly without having to first institute a suit in the domestic court, or, he can institute such a in this Court while that other suit is pending, thus it is possible to maintain both suits simultaneously.[86]

f. Reference from national courts of community states

A very important aspect of its mandate as a CCJ is in respect of preliminary rulings. Since the CCJ has exclusive jurisdiction in respect of the interpretation and application of ECOWAS community texts,[87] national courts of member States are required to refer issues of interpretation of community texts to the ECOWAS CCJ in order to ensure uniformity in the interpretation of community texts. Specifically, the Protocol as amended provides that:

> [w]here in any action before a court of a community State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations; the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.[88]

The European Court of Justice (ECJ) exercises similar jurisdiction under the concept of a preliminary ruling, although the issue of referral is discretionary as stipulated above, it appears to be more evolved in the practice of ECJ for preliminary rulings.[89] This concept of a preliminary ruling as practiced by the ECJ is yet to take place in the context of regional integration in Africa. No national court of a member State has referred a matter for the interpretation of ECOWAS community texts to the CCJ.

---

82 ibid.
83 ibid.
84 *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Zambia* (n 69); *Union Interafricaine des Droits de l'Homme and Others v Angola* (n 80).
85 CCJ, *Obioma Co Ogukwe v Republic of Ghana* (2016) ECW/CCJ/JUD/20/16.
86 ibid 9.
87 ECOWAS, 'Supplementary Protocol A/SP.1/01/05' (n 11) art 23(1).
88 ibid art 10(f).
89 Consolidated Version of the Treaty on the Functioning of the European Union (2008) OJ C 306/1 art 267.

g. ECOWAS CCJ does not operate as an appellate court over national courts

The CCJ has also made it crystal clear in several decisions that it does not have appellate jurisdiction over the decisions of national courts. In *Frank Ukor v Rachad Lalaye and the Government of the Republic of Benin*,[90] the CCJ in its judgment stated that:

> [w]e therefore agree with Counsel to the 2nd Defendant that he acts complained of by the Applicant/Plaintiff are devoid of violation of Human Rights. We therefore state that there is a serious misconception as to whether the complaint of the seizure and confiscation of the truck and goods therein, upon the Court order, violates the rights of free movement of goods which Counsel hinges upon as Human Rights violation. It is trite that a valid order of the Court stands until any person dissatisfied with same makes the move by following the relevant judicial process to set it aside. Consequently, this Court which has no appellate jurisdiction over the decisions of the Courts of member state, cannot act as one through this process that Counsel of the Applicant/Plaintiff impressed upon it to enforce. On this note, this Court declines to act outside its mandate as specified in Protocol A/P 1/7/91 and the Supplementary Protocol (A/SP.1/0]I/05) which clearly spelt out such mandate.[91]

In *Derry & 2 others v The Republic of Ghana*,[92] the CCJ further reiterated that it is not an appellate court and will only admit cases from national courts where human rights violations were alleged in the course of the proceedings. Article 4 of the Supplementary Protocol amended the Protocol of the CCJ by the insertion of a new Article 10 in the Protocol of the CCJ in respect of access to CCJ. It provides access to the CCJ to member States, individuals, corporate bodies and staff of institutions of ECOWAS in respect of certain causes of action.

h. Practice and procedure before the CCJ

The Practice and Procedure of the CCJ is governed by Protocol A/P1/7/91, the Rules of Procedure of the CCJ and instructions to Chief Registrar and Practice Direction. The Procedure of the CCJ is divided into two parts, written procedure and oral procedure. The written procedure shall consist of the application, the defence, the reply or counter-statement, the rejoinder and any other briefs or documents in support. The Oral procedure shall consist of hearing of parties, agents, witness, experts, advocates or counsels. The CCJ has through its jurisprudence established its practice and procedure relying on its Protocol, Rules of Procedure and general principles of law in numerous decisions. It must be noted that the ECOWAS CCJ is an international court and its practice and procedure is different from that of the national courts. It is therefore advisable that lawyers that want to appear before the ECOWAS CCJ are familiar with its practice and procedure.

---

[90] CCJ, *Frank Ukorv Rachad Lalaye and the Government of the Republic of Benin* (2 November 2007) ECW/CCJ/APP/04/05.

[91] *Frank Ukorv Rachad Lalaye and the Government of the Republic of Benin* (n 90) 145.

[92] CCJ, *Derry & 2 others v The Republic of Ghana* (29 April 2019) ECW/CCJ/JUD/17/19; see also *Jerry Ugokwe v Nigeria* (n 19).

III. The opportunity missed by ECOWAS CCJ in Hissene Habre's trial

With the vast human rights jurisdiction of this CCJ, it was therefore a surprise why this CCJ will rule that the matter of Hissene Habre cannot be tried in Senegal.[93] Habre ruled the Republic of Chad between 1982 and 1990 was accused of human rights, humanitarian rights abuses, torture and genocide.[94] According to Magliveras:

> Habre belongs to that generation of brutal African dictators who destroyed their countries 'structures and institutions and sentenced their population to underdevelopment and to extremely low standard of living. In their turn, the policies pursued by these dictators have resulted in their countries' inability to take full advantage of the economic growth and expansion that Africa has experienced.[95]

A commission of inquiry was thereby setup by his successor in office, late Idris Deby who was also killed in a battle in 2021. By this period, Hissene Habre has already fled to Senegal. The report of the commission concluded that Habre's regime led to 'more than 40,000 victims, more than 80,000 orphans, more than 30,000 widows, more than 200,000 people left with no moral or material support as a result of this repression'.[96] The commission recommended the prosecution of those involved in the crimes. As a result, in 2008, Hissene Habre was prosecuted *in absentia* in Chad and sentenced to death.[97] In the years that followed, Chad failed to secure his extradition from Senegal and the enforcement of his sentence.

At the same time, inspired by the Pinochet case, in which a Spanish court exercised universal jurisdiction to hear a case brought against the former Chilean dictator,[98] civil society groups intensified their efforts to try Habre in Senegal. Led by Human Rights Watch, they filed an application before the Senegalese court in January 2000. Habre was subsequently indicted, and his lawyers challenged the criminal prosecution. In April 2000, Senegalese Court of Appeal of Dakar dismissed the indictment, finding a lack of jurisdiction.[99]

Under increasing international pressure, in 2005, Senegal reported the case of Hissene Habre to African Union (AU) for an African solution. In January 2006, the Assembly of Heads of State and Government of the AU established an expert committee to advice on the situation. The resulting report was discussed during the following Summit and

---

93 Akin Olawale Oluwadayisi, 'An Assessment of the Statute and Mandate of the Economic Community of West African States Towards Advancing her Member Nations' (2020) 2(2) International Journal of Comparative Law and Legal Philosophy 125.

94 Kameldy Neldjingaye, 'The Trial of Hissene Habre in Senegal and Its Contribution to International Criminal Law' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 185; 'The Trial of Hissene Habre' (*Human Rights Watch*, 2007) <http://www.hrw.org/legacy/backgrounder/africa/habre0107/> accessed 12 December 2024.

95 Konstantinos D Magliveras, 'Fighting Impunity Unsuccessfully in Africa: The African Union and Habre case' (Paper for Albany Law School, New York, 12-14 April 2012).

96 ibid.

97 ibid.

98 Steve Czajkowski, 'Chad Court Sentences Ex-Dictator Habre to Death in Absentia' (*JURIST,* 16 August 2008) <https://www.jurist.org/news/2008/08/chad-court-sentences-ex-dictator-habre/> accessed 19 April 2022.

99 Elihu Lauterpacht, C J Greenwood and A G Oppenheimer, 'Introductory Note: In re Augusto Pinochet Ugarte' (August 2002) 119 ILR 1.

the AU mandated Senegal to try Habre on behalf of the continent.[100] In response, and with the plan to organize the trial, Senegal amended its domestic law,[101] but Habre complained to the CCJ about the retrospective nature of the new legal framework. The CCJ found a retroactivity problem, holding that the new laws violated Habre's rights.[102] According to Alter, Helfer and McAllister:

> We had low expectations for the ECOWAS Court. Human rights violations, destabilizing coups, and civil unrest are sadly commonplace in West Africa, and domestic legal instruments are generally weak. We anticipated that national governments in such a region would resist giving an international court the power to review human right claims from private litigants. And if officials did give the court such authority, we expect that they put in place political checks to carefully control the judges and their decisions. What we found - based on a review of ECOWAS Court decision and more than two dozen interviews with judges, community officers, government officials, attorney, and Non-Governmental Organization – was quiet different. The member states gave the ECOWAS Court a broad human right jurisdiction, and they have eschewed opportunity to narrow the Court's authority.[103]

The above is quite true and it is surprising and alarming that the CCJ rules against the prosecution of late Habre. In the interim, Senegal complained that it had delayed prosecuting Habre due to his obligation to obey the ECOWAS CCJ judgment.[104] The ECJ made an equivalent shift in the 1970s, more recently, courts associated with other sub-regional economic communities, most notably, the East African Court of Justice (EACJ) and the Tribunal of the Southern African Development Community (SADC Tribunal), have made similar moves. In all three instances, however, the judges themselves asserted the authority to adjudicate human rights claims. In Africa, the political and legal consequences of these bold assertions of competence are still unfolding, but early evidence indicates that the EACJ and the SADC Tribunal have faced greater opposition from governments than has the CCJ.[105]

The ECOWAS CCJ judgment led the Government of Senegal to engage in negotiations with the AU for an alternative solution. The agreement signed on 22 August 2012, is the result of these negotiations. The agreement includes the Statute of the Extraordinary African Chambers (EAC) that provides the operational criminal code for

---

[100] *Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 128.

[101] African Union, 'Decision on the Hissene Habre Case and the African Union' (2006) AU Doc Assembly/AU/Dec. 103 (VI); African Union, 'Decision sur le Process D'Hissene Habre et L'Union Africaine' (2006) AU Doc Assembly/AU/Dec.127 (VII) (July 2006). The Republic of Senegal to prosecute and ensure that Hissene Habre is tried, on behalf of AU, by a competent Senegalese court with guarantees for fair trial.

[102] CCJ, *Hissene Habre v Senegal* (18 November 2010) ECW/CCJ/JUD/06/10.

[103] Karen J Alter, Laurence R Helfer and Jacqueline R McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 American Journal of International Law 737, 738.

[104] *Obligation to Prosecute or Extradite* (n 100) [110]. The ICJ rejected Senegal's argument, holding that 'Senegal's duty to comply with its obligations under the (UN) Convention (Against Torture) cannot be affected by the decision of the ECOWAS Court of Justice'.

[105] Solomon Ebobrah, 'Litigating Human Right Before Sub-regional Courts in Africa' (2009) 17(1) African Journal of International and Comparative Law 79; Lucyline Nkatha Murungi and Jacqui Gallinetti, 'The Role Sub-Regional Court in the African Human Rights System' (2010) 7 International Journal of Human Rights 119.

prosecution. The EAC tried Habre and found him guilty on all on all the charges. His appeal against conviction and sentence was equally dismissed by the Appellate Chambers of the EAC.[106]

In addition, in *David v Uwechue*,[107] the CCJ have also rejected litigants' attempts to assert human right claims against individuals, corporations, and sub national political bodies. The same ratio was also decided in *Hassan v Nigeria.*[108] This was also the case in *SERAP v Nigeria,*[109] where the CCJ did not order the Nigerian government to allocate whatever funds needed to educate all primary school age children. Instead, based on evidence that particular funds had been embezzled from the national education program, the CCJ ordered Nigeria to take the necessary steps to provide the money to cover the shortage while the government at the same time makes efforts to recover the looted funds and the prosecution of those found culpable. This CCJ in the above named cases ought to have made the ancillary orders that would have compelled the government to do the needful.

IV. Challenges of the CCJ

The CCJ faces a lot of challenges in its operations, some of which are briefly discussed. First, the issue of the enforcement of the judgment of the CCJ is most profound. The ECOWAS Revised Treaty and the Protocol on the CCJ have provisions in respect of the binding nature of the judgments of the CCJ. Specifically, the Revised Treaty provides that '[j]udgments of the Court of Justice shall be binding on member states, the institutions of the community and on individuals and corporate bodies'.[110] Also, the Revised Treaty went further to provides '[…] failing this, either party or any other member State or the Authority may refer the matter to the Court of the community whose decision shall be final and shall not be subject to appeal'.[111] Decisions of the CCJ are final and immediately enforceable. Again the Protocol of the CCJ as amended provides that '[d]ecisions of the Court shall be read in open court and shall state the reasons on which they are based, subject to the provisions on review contained in this Protocol, such decisions shall be final and immediately enforced'.[112] On the other hand, the Protocol on the CCJ as amended provided that 'member states and institutions of the community shall take immediately all necessary measures to ensure execution of the decision of the Court'.[113] In *Essien v Republic of the Gambia*[114] the CCJ declared that 'this Court is the highest judicial organ of the community (ECOWAS) and its decisions are not appealable and are therefore binding on all the member states'.

On the enforcement of the judgment of the court, Onabulele and Bazuaye observed that:

> […] the problem of ineffective enforcement of the right of individuals still pervading the African continent despite the proliferation of international human rights Courts/Tribunals in Africa, locates, not in the will and independence of the judges, as is often the case with municipal

[106] EAC, *The Prosecutor General v Hisseine Habré* (Appeal Judgment) (27 April 2017).
[107] CCJ, *David v Uwechue* (11 June 2010) ECW/CCJ/APP/04/09.
[108] CCJ, *Hassan v Nigeria* (15 March 2012) ECW/CCJ/APP/03/10.
[109] *SERAP v Nigeria* (n 12).
[110] ECOWAS Revised Treaty of 1993 (n 2) art 15(4).
[111] ibid art 76(2).
[112] ibid art 20(2).
[113] ibid art 23(3).
[114] *Essien v Republic of Gambia* (n 46).

> courts, but in the willingness of African States to give the court the legal bulldog teeth to function effectively.[115]

Nothing can be further than this. In *Garba v The Republic of Benin*,[116] the applicant, a community citizen complained of his inhuman treatment by the Beninois immigration officials and got judgment in his favour pursuant to African Charter on people and Human Rights. The court delivered judgment in his favour but he was unable to enforce the judgment.

Article 24 of the Protocol on the CCJ as amended provides the method of enforcement of the judgments of the CCJ. Specifically, Article 24(2) provides that the

> execution of any decision of the Court shall be in the form of writ of execution, which shall be submitted by the Registrar of the Court to the relevant member state for execution according to the rules of civil procedure of the member state.

Also, Article 24(4) of the Protocol on the CCJ as amended provides that '[a]ll member states shall determine the competent national authority for the purpose of receipt and processing of execution and notify the Court accordingly'.

Second, accessibility of this CCJ to citizens of member states of ECOWAS is also of great concern. This is a single court serving fifteen States. Notwithstanding that this CCJ goes on assizes to member States is not adequate at all. The percentage of citizens that are aware of the existence of this court is very low. Three, the funding of this sub-regional court is also a matter of utmost concern. Most member States of ECOWAS are unwilling to pay their annual accessed contributions to this body that will in turn fund the CCJ. Fund is needed for promoting the activities of the CCJ so that citizens of member States will be aware of her existence. On the same note, the judgments of the CCJ need to be well-reported in the official languages of the CCJ, ie, English, French, and Portuguese.

V. Recommendations

This work recommends that there ought to be an Appeal Chambers of the CCJ as a key best practice. It is pertinent to mention that the national court of each member state has appellate courts. Even the Extra-ordinary Chambers that tried Hissene Habre had appellate Chambers. Paul said 'I appeal to Caesar' and Festus replied 'since you have appealed to Caesar you will go to Caesar'.[117] Under human rights law, the right to appeal is universally accepted under various charters including ICCPR, the American Convention on Human Rights, the European Convention on Human Rights and the African Charter. However, appeal process may vary between legal systems, for example: one may be required to obtain leave to appeal or may only appeal on paper without oral hearing. Also, the basis of appeal may differ. For example, the European Court of Human Rights (ECHR) has established that in common law jurisdictions, a judgment from a court of first instance (trial court) may be appealed only on the basis of an error in fact or law which may be substantive or procedural.[118] Similarly the East African Court of Justice has explained that a higher court

---

[115] Enabulele (n 5).
[116] CCJ, *Garba v The Republic of Benin* (17 February 2010) ECW/CCJ/APP/09/08.
[117] The Book of Acts of the Apostles (The Holy Bible) 25:11-12.
[118] See *Krombach v France* App no 29731/96 (2001).

only has jurisdiction to decide matters of appeal on errors of law or fact or procedural irregularities.[119]

There are no effective remedies when a victim is denied access to an effective appeal.[120] In the Sudan cases *(Law office of Ghazi Suleiman v Sudan)*,[121] the Commission described the right to an appeal as 'a general and non-derogable principle of international law'. The Commission defined an 'effective appeal' in the Sudan cases as one that 'subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice'.[122] It held that domestic legislation in both Mauritania and Nigeria that permitted the executive the prerogative to confirm decisions of first instance tribunals, in lieu of a right of appeal, violated Article 7(1)(a).[123]

Second, virtual filing and hearing of cases should be introduced. This will enable ECOWAS citizens living outside Abuja, Nigeria to have the opportunity of being heard by the CCJ. Third, it is also imperative for the CCJ to collaborate with national courts of members States in respect of enforcement of its decisions. According to the revised Treaty of the CCJ, this provides that 'all member states shall determine the competent national authority for the purpose of receipt and processing of execution and to notify the court accordingly'.[124] As at 2021, only six member states, Nigeria, Guinea, Mali, Burkina Faso Togo, and Ghana have complied with the treaty obligation.[125] The non-enforcement of the judgment of the CCJ affects to a very large extent the credibility of the CCJ. It is also suggested that the Protocol of the CCJ should be amended to make provisions for legal aid by the community members for indigent litigants whose rights might have been violated. Counsel should be encouraged to take up pro-bono cases for poor litigants.

Fourth, the CCJ should have both criminal and civil jurisdictions so as to try the so called 'warlords' and those involved in unconstitutional change of government in the West Africa sub-region. Thus, there will be no need to set up an *ad hoc* tribunal like the Extraordinary African Chambers like the one that tried Hissenne Habre in Senegal.

Finally, the protocol of the CCJ should be amended to include a non-derogation clause which itself will prevent state parties from enacting laws that will oust the jurisdiction of the CCJ from entertaining some fundamental human right cases.[126] In comparison with the Inter-American human right system, the Inter-American Convention on Human Right though technically, is not a treaty that is legally binding, it is still considered by the Inter-American Court of Human Rights and the Inter-American Commission on human rights as

---

[119] See the case of *Attorney General of United Republic of Tanzania v African Network for Animal Welfare* (2014) Appeal No 3 of 2014 61-62.

[120] Frans Viljoen & Chidi Odinkalu, *The Prohibition of Torture and Ill-Treatment in the African Human Rights System: A Handbook for Victims and their Advocates* (2nded, OMCT Handbook Series Vol 3 2014)

[121] Law Office of Ghazi Suleiman v Sudan, 'Communication 222/98, 229/99, Sixteenth Activity Report' (2003) AHRLR 143 (ACHPR 2003).

[122] ibid.

[123] ibid.

[124] ECOWAS Revised Treaty of 1993 (n 2) art 24.

[125] 'ECOCOURT Bulletin' (*ECOWAS Court of Justice*, October 2021) <http://www.courtecowas.org/wp-content/uploads/2022/01/Bulletin-External-Court-Session-Edition.pdf> accessed 29 July 2022.

[126] Ali Abdi Jibril, 'Derogation from Constitutional Rights and its Implication under the African Chapter on Human And People's Rights' Law, Democracy And Development' (2013) 17 Law, Democracy & Development 78.

a credible source of human rights provisions that member states must abide by.[127] As a matter of fact and law many earlier human rights instrument such as the UDHR are so reflected in the American Convention on Human Rights, it becomes binding in the sense that states under the American Human Rights system, commit 'to respect the rights and freedoms recognized' in the Convention as stipulated in Article 1 of the American Convention. A clear example of the occurrence of such can be seen in the case of *Tanganyika Law Society & Anor v Tanzania*[128] where amendments to the Tanzanian Constitution violated the right of the citizens accorded by the African Charter, hence an issue of incompatibility of domestic and regional legislation. Even though the African Court in its decision highlighted on the obligation to cure the incompatibility found in domestic laws, this can be viewed as an obligation limited to Tanzania except and until it is incorporated as a binding legislation in the Charter. Thus, this could be fixed by taking reference from the Inter-American system approach.[129]

VI. Conclusion

In this work the history of ECOWAS CCJ has been traced. The composition, powers, and jurisdiction of the CCJ has been discussed. The argument of this paper is that with the expansive and very broad powers of the ECOWAS CCJ, the CCJ was seized of the matter of Hissenne Habre rather than ruling on the principle of non-retroactivity of laws and punishment under Article 7 of the African Charter; Article 8 of the UDHR and Article 3(4) of ICCPR, this CCJ ought to have entertained this matter. With the recent increase of unconstitutional changes of government in the sub-region and the attendant or envisaged rise in the abuse of human and humanitarian rights, this court needs to be pro-active. If the recommendations listed above are implemented, it will greatly enhance the realization of the objectives for setting up the CCJ.

---

[127] Ebrima Sowe, 'The Weakness of the of the African Human Rights System in Comparison with the Inter-American Human Rights System' (Academic Paper at the University of the Gambia, 2019) <https://www.grin.com/document/509902> accessed 2 August 2022.

[128] *Law Society & Anor v Tanzania* App No 011/2011 (13 June 2014) IHRL 3931.

[129] ibid.

'Here Be Dragons': Mapping the Legal Contours of *Jus Cogens* in International Law

Francisco Lobo*
DOI: 10.21827/GroJIL.10.2.72-90

Keywords:
JUS COGENS, LEGAL THEORY, SECONDARY RULES, PUBLIC ORDER, HUMAN SECURITY

Abstract:
The purpose of this article is to demystify *jus cogens* rules by trying to map their legal contours. After defining *jus cogens* and providing a theoretical scaffolding drawn from elementary works on legal theory, the household *jus cogens* prohibition of genocide is analysed in light of such notions. As a result, *jus cogens* norms are characterised both as primary rules of behaviour and as secondary rules of change for legal production, constituting an international public order that serves as a tool for international law to safeguard human security.

I. Introduction: A tale of snakes and dragons

'Here Be Dragons'. Such is the way early cartographers would warn sailors about the dangers of venturing into uncharted waters, back when our modern world was just beginning to be discovered and carved out in the fashion of European conceptions – much as modern international law was, which not accidentally was born as *Jus Publicum Europaeum* around the same time Europe set out to expand in a world that now could be measured, mapped, and conquered.[1]

Centuries later, a most noteworthy exchange took place at one of the erstwhile European outposts of the New World, first christened as New Amsterdam, and later known the world over as New York.

It was a hot May afternoon inside the United Nations building. The experts who composed the International Law Commission (ILC) had been required to trade their regular venue in Geneva for the Organization's headquarters in New York, as the celebration of a special occasion, the seventieth anniversary of the Commission, was in order that year. The formal etiquette of the morning session had receded and some of the (male) members had succumbed to rolled up sleeves and unbuttoned shirts. Suddenly, in the midst of a heated discussion, one of the commissioners illustrated his disagreement with one of his colleagues in the following way: 'You, sir, remind me of a folk tale about a painter, who was so good at his trade that he always finished his work before his colleagues. When he was once asked to

* Doctoral Researcher, Department of War Studies, King's College London. LLM in International Legal Studies, NYU. LLM in International Law, LLB, University of Chile. Lecturer of Legal Theory and International Law. Email address: jfl383@nyu.edu

1 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (*Telos Press 2006) 70, 86-100; See also Martti Koskenniemi, *To the Uttermost Parts of the Earth* (Cambridge University Press 2021).

portray a snake, after doing it faster than any other painter, he was still not satisfied and felt the need to add legs to his snake. So do you with international law, sir. Myself, I prefer to depict the law as it is, and not as I would like it to be'. His colleague's response followed shortly after: 'Well, you know, I also strive to depict the law as I believe it stands in the present. As for your story, let me say that a snake with legs is but a dragon, and they can be quite real; we even name people after them'. A relieved general laughter from the weary audience ensued, and right after, the first commissioner rejoined: 'Well, sir, I finally understand why we are usually at odds with each other in matters of international law. Whereas I pursue the Commission's objective of codifying international law, I see you favour the objective of progressive development'.

And thus it was, how a witty exchange at the headquarters of the organisation that represented the apex of centuries of international law development summarised the existential tension engraved in the ILC's genetic code, between codification and progressive development of international law,[2] between snakes and dragons.

What are peremptory norms of general international law, better known as *jus cogens,* then? Are they snakes or dragons? Since they work as veritable checks on the autonomy of the will of states, we may say that they resemble the *non plus ultra* exhortation conveyed by cartographers to sailors to prevent them from going into places that are off limits: 'Here Be Dragons'. On the other hand, characterising *jus cogens* solely as a dragon that is yet to be progressively developed risks ignoring the very important fact that states already acknowledge the existence of such norms as a reality of international law, as verifiable as the existence of snakes in the world. In fact, sometimes states rely on the same examples of *jus cogens* norms to advance opposite political agendas, as evidenced by the ongoing legal dispute regarding genocide between Russia and Ukraine at the International Court of Justice (ICJ).[3] This form of 'legal polytheism'[4] bears out the contestability, as well as the currency, of this particular normative standard.

As a result of this ambiguity surrounding the concept of peremptory norms of international law, the legal nature – yet not the existence – of *jus cogens* is still heavily debated, as evidenced by the current work of the ILC on the topic propelled by the Special Rapporteur on Peremptory Norms of General International Law (*Jus Cogens*), Professor Dire Tladi.[5]

This investigation purports to map the legal contours of *jus cogens* norms, so as to contribute to their demystification by providing a better analytical understanding of their complex normative reality. It is only by 'venturing into the *terra nova* of international *jus*

---

[2] UNGA Res 174 (21 November 1947) UN Doc A/RES/174(II) 105. Annexed to this resolution is the Statute of the International Law Commission 1947, art 1(1): '[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.'

[3] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Request for the Indication of Provisional Measures: Order) [2022] ICJ Rep 211.

[4] Francisco Lobo, 'Return to Mount Olympus: "Legal Polytheism", Jus Cogens Norms, and the Conflict in Ukraine' (*RCIR: Research Centre in International Relations*, 2022) <https://kclrcir.org/2022/07/05/return-to-mount-olympus/> accessed 24 September 2023.

[5] See generally the documents at the ILC website on the topic, including the works of the Special Rapporteur, materials produced by the ILC, and commentaries submitted so far by governments: 'Analytical Guide to the Work of the International Law Commission: Peremptory norms of general international law (*Jus cogens*)' (*ILC*) <https://legal.un.org/ilc/guide/1_14.shtml#top> accessed 20 December 2023.

cogens',[6] to quote Judge Cançado Trindade, that we might reach a clearer comprehension of this complex legal phenomenon.

In that spirit, this analysis aims at overcoming prior derisive portrayals of *jus cogens* as 'mysterious',[7] 'magic',[8] 'Sherlock Holmes',[9] 'Superman',[10] or as a 'giant on stilts'.[11] What all these trenchant images have in common is that they question the very existence of *jus cogens* as a legal category, in line with the aforementioned characterisation of it as a mythological dragon. Much of this debate has unfolded in the midst of international law scholarship. In this article, however, I would like to take a step back and approach the phenomenon from the perspective of elementary legal theory, that an 'integrated legal and philosophical research method'[12] may shed light on the conceptual contours of *jus cogens* and, hopefully, provide some analytical clarity.

Much as cartographers were once aided by the sciences of geography and topography, this endeavour will draw on the analytical tools that can be found in legal theory. Where states cannot trespass due to political considerations, legal theory can and must freely explore the nature and contours of *jus cogens.* Thus, whereas some have chosen a more practical approach steering clear of theoretical elucubrations,[13] while more recent contributions have even prioritised the moral importance of *jus cogens* rules thus subordinating its legal aspects to such significance,[14] this inquiry will endeavour to make use to the utmost of all the analytical tools that legal theory has to offer and that have been so far mostly neglected in the *jus cogens* literature. Indeed, for all the debate that the topic of *jus cogens* has prompted in international law since the adoption of the Vienna Convention on the Law of Treaties (VCLT), it is astonishing how little international scholars have relied on foundational notions of legal theory and legal philosophy.[15] This is symptomatic of the regrettable lack of communication

---

6 Inter-American Court of Human Rights *Advisory Opinion OC-18*, *Juridical Condition and Rights of Undocumented Migrants* (2003) (Concurring Opinion of Judge Antonio Cançado Trindade) IHRL 3237 [69].

7 Asif Hameed, 'Unravelling the Mystery of *Jus Cogens* in International Law' (2014) 84(1) British Yearbook of International Law 52-102.

8 Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19(3) European Journal of International Law 491-508.

9 Dinah Shelton, 'Sherlock Holmes and the Mystery of *Jus Cogens*' (2015) 46 Netherlands Yearbook of International Law 23-50.

10 Anthony D'Amato, 'It's a Bird, it's a Plane, it's Jus Cogens!' (1990) 6(1) Connecticut Journal of International Law 1-6.

11 Stefano Congiu, 'The History, Challenges and Hope of a "Giant on Stilts"' (2015) 7 Plymouth Law and Criminal Justice Review 47-60.

12 Claudio Corradetti and Mattias Kumm, 'Why *Jus Cogens*? Why a New Journal?' (2019) 1(1-4) Jus Cogens 1-4.

13 ILC, 'First Report on *Jus Cogens* by Dire Tladi, Special Rapporteur' (2 May-10 June and 4 July-12 August 2016) UN Doc A/CN.4/693, 23.

14 Adil Ahmad Haque, 'Peremptory Norms and Fundamental Values' (Talk at the North South University Department of Law, 16 August 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192022> accessed 25 January 2023.

15 Robert Kolb being somewhat an exception. See Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Hart Publishing 2015) 1-14; See also Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 163-185.

that has of old existed between legal theorists and international lawyers,[16] which has only started to recede timidly in recent years.[17] This theoretical inquiry purports to be another modest step in the right path of reconciliation between legal theory and international law.

The investigation will be divided as follows: First, *jus cogens* will be briefly defined and characterised as a normative category that belongs to contemporary public international law (II). Second, some basic notions of normative theory will be offered (III). Building on this theoretical scaffolding, *jus cogens* will be ascribed to the category of norms of legal production, also known as secondary rules of change, as well as to the more traditional primary rules (IV). After that, the function of *jus cogens* as a limit to the contractual freedom of states will be explained as a dimension of an international *ordre public* (V). Such an international public order will be further explored in light of the purpose of international law, including the fundamental values that it aims to safeguard (VI). Finally, some concluding remarks will be offered (VII).

II. Peremptory norms of general international law (*jus cogens*)

This is not the place for a reconstruction of the history of *jus cogens,* modest as this contribution aims to be and thorough as previous studies have already been published on the subject.[18] Suffice it to state that albeit formulated as a Latin formula, *jus cogens* is essentially a modern concoction of which Roman law had no notice. To be sure, Roman law did have a body of rules which private citizens could not dispose of in their particular pacts, but they correspond to 'public law' as opposed to 'private law', the *summa divisio* of Roman law as envisaged in the Institutes of Justinian.[19]

Following what has been dubbed the 'pre-history' of *jus cogens,* from Roman law to modern codification, the proper 'legislative history' of *jus cogens* begins not so long ago, in the 1950s, with the works of successive Special Rapporteurs commissioned by the ILC to study the topic of the law of treaties.[20] The outcome of such a Herculean task came finally in 1969, with the signing of the VCLT, perhaps one of the most authoritative legal texts as far as the ILC practice is concerned, since it is relied on profusely in most debates held within that body.

The Vienna Convention for the first time mentions and defines the concept of *jus cogens,* in its Article 53, which reads as follows:

> Treaties conflicting with a Peremptory Norm of General International Law (*Jus Cogens*)
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States

---

16 John Austin is partly to blame due to his characterisation of international law as 'international morality' early in the 19th century. See John Austin, *The Province of Jurisprudence Determined* (1832) 1-30, 281. Hart is also accountable for this, as he characterised international law as an underdeveloped legal order. See Herbert L A Hart, *The Concept of Law* (3rd ed, Oxford University Press 2012) 213-237.

17 See Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41(1) Philosophy and Public Affairs 16 et seq; Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) 28(1) European Journal of International Law 203-232.

18 Antonio Gómez Robledo, *El Jus Cogens Internacional: Estudio Histórico-Crítico* (Universidad Nacional Autónoma de México 2003) 1-52; ILC, 'First Report on *Jus Cogens'* (n 13) 9-22; Carnegie Endowment for International Peace, *The Concept of Jus Cogens in Public International Law: Papers and Proceedings Conference in Lagonissi, Greece* (Carnegie Endowment for International Peace 1967).

19 Gómez Robledo (n 18) 2.

20 ibid 21-52.

> as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Despite the fact that the shorthand *jus cogens* is also used in some domestic legal systems to refer to non-disposable rules of public law,[21] today it is broadly recognised as a typical normative category of international law, not only by scholars, but also by states and international bodies.[22]

As formulated in the VCLT, its function is very clear, at least so far as the law of treaties is concerned: it is a limit on the kind of treaties states can sign with each other, out of respect for what the international community of states as a whole deems peremptory and therefore non-derogable. Its importance to other sources of international law, namely custom, principles, unilateral acts, and resolutions by international organisations, has also been actively debated at the ILC.[23] However, this study will focus only on the least disputed function of *jus cogens* as it pertains to the law of treaties.

But whether relating to treaties or to other sources of public international law, *jus cogens* rules belong to the broader category of legal norms, and therefore they share the same ontological traits with any other kind of legal rule. Such features need to be ascertained and clarified before moving on further in this inquiry on the legal contours of *jus cogens.*

III. Basic notions of normative theory

As stated in the introduction, we will now draw on the rich language of legal theory to try to map the legal contours of *jus cogens* rules more precisely.

A 'norm' or 'rule'[24] is the basic unit of study of legal science, much as a cell is the basic unit of study of biology, or an atom is the basic unit of study of physics.[25] But, what is a norm? Anecdotal history has it that the foremost legal positivists of the twentieth century, Hans Kelsen and HLA Hart, were once arguing about the nature of norms during a seminar at Berkeley University. After Hart inquired to exhaustion 'what is a norm?', Kelsen finally lost his temper and yelled: 'A norm is a norm!'[26]

However, Kelsen had elsewhere provided a more satisfactory definition of a norm as a command to regulate human behaviour,[27] following in the footsteps of another renowned legal positivist of the European tradition, John Austin.[28] More precisely, the norm is the *meaning*

---

21 ILC, 'Second Report on *Jus Cogens* by Dire Tladi, Special Rapporteur' (1 May-2 June and 3 July-4 August 2017) UN Doc A/CN.4/706, 4; Kolb (n 15) 2.

22 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Request for the Indication of Provisional Measures: Order) (n 3).

23 ILC, 'Third Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur' (30 April–1 June and 2 July–10 August 2018) UN Doc A/CN.4/714.

24 In what follows these two terms shall be used as interchangeable notions, unless otherwise stated.

25 Hans Kelsen, *Pure Theory of Law*, (2nd ed, University of California Press 1967) 4, 70.

26 Agustin Squella Narducci, *Introducción al Derecho* (Editorial Jurídica de Chile 1999) 37-38.

27 Kelsen (n 25) 4.

28 Austin (n 16) 5-6.

enclosed within a normative statement reached through interpretation,[29] and in that sense, a normative statement can be characterised as a 'normative container'.[30]

Now, the concept of a 'norm' can be classified into several different categories, following the works of Georg von Wright and of Max Black in deontic logic.

According to von Wright, when we talk about a 'norm' we can be referring to several different entities, including: 'rules', 'prescriptions', 'directives', 'customs', 'moral principles', and 'ideal rules'.[31] Alternatively, Black identifies four main categories of rules: 'regulations', 'instructions', 'maxims', and 'principles'.[32] Not surprisingly, then, Black concludes that the word rule 'is like a playing card used in many different games'.[33]

In what matters here, insofar as this is an inquiry into the nature of *jus cogens* rules as a type of legal norm , the most relevant categories from each taxonomy are what von Wright calls 'prescriptions' and what Black calls 'regulations'. Both categories comprise the essential components of what is usually understood as a legal norm.

A 'prescription' is a norm aimed at regulating human behaviour. It is issued by an authority, it is addressed at a subject, it has to be promulgated, and it is backed with a sanction in case of non-compliance.[34] Thus, what von Wright calls the 'normative kernel' of a prescription includes the *authority* that issues the norm, the *subject* at whom it is addressed, and the *occasion*, ie the time and place for the norm to be observed. Other elements of a prescription are its *character* (whether it mandates, prohibits or allows certain conduct), its *content* (the specific act or activity being regulated), and its *condition of application* (ie the logical state of affairs that must exist for the rule to make sense).[35]

Thus, prescriptions or regulations correspond to what we know as legal rules. As we shall see when we illustrate all these categories with an example, *jus cogens* rules are legal norms in this sense, at least *prima facie*. Thereby, we can speak properly of '*jus cogens* prescriptions or regulations'.

Finally, in order to better understand the legal phenomenon, it is worth mentioning HLA Hart's masterful critique of John Austin's imperative theory of legal rules.[36] According to Hart, Austin focused solely on commands that prescribe or prohibit a given physical action, which Hart calls 'primary rules'. Yet, there are other kinds of legal rules which do not refer to physical actions but to other rules, thereby receiving the name of 'secondary rules'[37] which we will analyse in the next section.

---

[29] Jerzy Wroblebski, *Constitución y Teoría General de la Interpretación Jurídica* (Civitas 1985) 23; Isabel Lifante Vidal 'Un Mapa de Problemas Sobre la Interpretación Jurídica' in Isabel Lifante Vidal (ed), *Interpretación Jurídica y Teoría del Derecho* (Palestra Editores 2010) 37-64; See also Riccardo Guastini, 'Legal Interpretation: the Realistic View' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer 2019) 1-9; Riccardo Guastini, *Teoría e Ideología de la Interpretación Constitucional* (Trotta 2010) 29-37.

[30] Squella Narducci (n 26) 215.

[31] Georg Henrik von Wright, 'Norm and Action' (*The Gifford Lectures*, 1963) <www.giffordlectures.org/books/norm-and-action> accessed 5 May 2021, Ch I.

[32] Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Cornell University Press 1962) 109-113.

[33] ibid 106.

[34] von Wright (n 31) Ch I, para 5.

[35] ibid Ch V.

[36] Austin (n 16) 30.

[37] Hart, *The Concept of Law* (n 16) 79-99.

IV. The legal theory of *jus cogens* norms

It is time now to apply the theoretical scaffolding laid down in the previous section to a rule of *jus cogens* from real state practice. For that purpose, the quintessential rule of *jus cogens* concerning what has been dubbed 'the crime of crimes', the prohibition of genocide, shall be used as a pedagogical device. This does not preclude the application of the legal theory undergirding *jus cogens* to other such prohibitions as they may be found in existing case law.[38] But for this limited analytical endeavour, the examination of one household prohibition will suffice to illustrate the theoretical concepts used here and satisfy the purposes of this inquiry.

The prohibition of genocide enjoys today an undisputed status as a *jus cogens* rule, as acknowledged by states, courts, international organisations, and scholars alike.[39] It has also been included on first reading, and preserved upon second reading, by the ILC in its illustrative

---

[38] The prohibitive overtones of the ILC's non-exhaustive list calls to mind what Lon Fuller dubs the minimalist 'morality of duty,' as opposed to a more maximalist 'morality of aspiration'. See Lon Fuller, *The Morality of Law* (Yale University Press 1969) 5-6; As for case law, some examples regarding traditional rules of *jus cogens* include: for the prohibition of piracy, see High Court of Australia *The Queen v Tang* [2008] HCA 39 [111]; for the prohibition of slavery, see United States Court of Appeals for the Seventh Circuit *Sampson v Federal Republic of Germany* [2001] 250 F.3d 1145, 1154, n 5; for the prohibition of war crimes, see Supreme Court of Justice of Argentina *Chile v Arancibia Clavel* [2004] ILDC 1082 [28]; for the prohibition of crimes against humanity, see Supreme Court of Chile *Víctor Raúl Pinto v Relatives of Tomás Rojas* (Decision on Annulment, No 3125-04) [2007] ILDC 1093 [29]–[31]; for the prohibition of genocide, see Supreme Court of The Philippines *Muna et al v Romulo et al* [2011] GR No 159618, ILDC 2059 [40]–[50], [89]–[94]; for the prohibition of torture, see Supreme Court of New Zealand *Attorney General v Ahmed Zaoui and ors* [2005] ILDC 81 [51]; for the right of self-determination, see Case C-104/16 P *Council of the European Union v Front populaire pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario)* [2016] ECR 953 [21]; the prohibition of aggression, see House of Lords *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19 [114].
Some examples concerning less traditionally accepted rules of *jus cogens* include: for the right to life, see Federal Supreme Court of Switzerland [BGer] *Nada (Youssef) v State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (Administrative Appeal Judgment) [2007] Case No 1A 45/2007, BGE 133 II 450, ILDC 461 (CH 2007) [7.3]; for respect for human dignity, see Special Court for Sierra Leone *Prosecutor v Kallon and Kamara* [2004] (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) [2004] SCSL-04-15-PT-060-I [71]; for enforced disappearance, see Inter-American Court of Human Rights *La Cantuta v Perú* (Judgment) [2006] Series C No. 162 [160]; for the prohibition of terrorism, see Court of Cassation of France (Civil Division) *Réunion Aérienne v Socialist People's Libyan Arab Jamahiriya* [2011] No 09-14743, 150 ILR 630, 634–5 [9].

[39] William Schabas, *Genocide in International Law: The Crime of Crimes* (2nd ed, Cambridge University Press 2009); Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd ed, Oxford University Press 2014) 289-326; Antonio Cassese and Paola Gaeta, *International Criminal Law* (3rd ed, Oxford University Press 2013) 109-130; Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (Weidenfeld & Nicolson 2016) 377-387; ILC, 'Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur' (29 April–7 June and 8 July–9 August 2019) UN Doc A/CN.4/727, paras 78-83. Alongside the prohibition of genocide, Dire Tladi proposed the following norms as examples of *jus cogens* to the ILC in 2019: (i) Norms previously recognised by the ILC as possessing a peremptory character, whether in its comments to the draft articles on the law of treaties (1966) or its comments on the draft articles on state responsibility (2001): the prohibition of aggression; the prohibition of slavery; the prohibition of apartheid and racial discrimination; the prohibition of crimes against humanity; the prohibition of torture; the right to self-determination; and the basic rules of international humanitarian law or the prohibition of war crimes (para 60); (ii) Other possible norms of *jus cogens*: the prohibition of enforced disappearance; the right to life or the prohibition of arbitrary deprivation thereof; the principle of non-refoulement; the prohibition of arbitrary arrest; the right to due process of law; and the prohibition of terrorism (paras 122-136).

list of *jus cogens* norms.[40] Further, the contemporary relevance of the prohibition of genocide is evinced by recent developments in the international arena,[41] including: the initiation of procedures at the ICJ by Gambia against Myanmar in November 2019, for breaches of the 1948 Genocide Convention; the eleventh-hour decision by the former Trump administration in January 2021 to label as genocide the acts being committed by the Chinese government against the Uyghurs in Xinjiang; the acknowledgement in April 2021 by the United States of the Armenian genocide perpetrated by Turkey in the early twentieth century; and more recently, the institution of proceedings by Ukraine against Russia at the ICJ for the misapplication of the 1948 Genocide Convention in 2022. In this last dispute, some intervening third states, such as Malta, have underscored the importance to interpret the 1948 Genocide Convention (including its compromissory clause) in light of the peremptory nature of the prohibition.[42]

Now, beyond its colloquial, and somewhat trite use in common speech, 'genocide' is a term of art in international law that has a precise legal definition, which can be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. As it sets forth the meaning of a legal term, such a treaty can be classified as what has been previously characterised as a 'definitional' legal rule.

Article II of the Convention defines genocide in the following terms:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

---

[40] ILC, 'Report of the International Law Commission: Seventy-first session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10 para 56; ILC, 'Peremptory Norms of General International Law (*jus cogens*): Seventy-third session' (18 April–3 June and 4 July–5 August 2022) UN Doc A/CN.4/L.967, 6:

Conclusion 23: Non-exhaustive list

> Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(a) The prohibition of aggression;
(b) The prohibition of genocide;
(c) The prohibition of crimes against humanity;
(d) The basic rules of international humanitarian law;
(e) The prohibition of racial discrimination and apartheid;
(f) The prohibition of slavery;
(g) The prohibition of torture;
(h) The right of self-determination.

[41] Simon Tisdall, 'China, Myanmar and now Darfur…the horror of genocide is here again' (*Guardian*, 2023) <https://www.theguardian.com/commentisfree/2023/jul/02/china-myanmar-and-now-darfur-the-horror-of-genocide-is-here-again> accessed 26 December 2023.

[42] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (Verbatim Record, 20 September 2023) <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230920-ora-02-00-bi.pdf> accessed 24 September 2023, 38-41.

The previous normative statement, when interpreted in search for its meaning, yields the following type of norm: it is what Black calls a 'regulation' and von Wright calls a 'prescription', aimed at ruling human behaviour. Continuing with von Wright's categories, we identify the following elements in the genocide prescription. First, the *authority* that issues the norm corresponds to all those states that have ratified the Genocide Convention, plus all those states that have adhered to the contents therefrom by way of customary international law. Moreover, it is the 'international community of states as a whole' the normative authority who has elevated this prescription to the rank of *jus cogens*, following Article 53 of the VCLT.

Second, the *subject* is also the international community of states as a whole, as well as other actors who could commit genocide – eg irregular non-state armed groups, and of course, individuals who can be held accountable through international criminal law instruments, such as the Rome Statute of the International Criminal Court.[43] Although for Hobbes and Austin the notion of a self-addressed rule made no sense, Hart successfully disproved their hypothesis by characterising legal rules that bind also the normative authority as something akin to promises.[44] It is worth mentioning that this prohibition, as well as *jus cogens* rules in general, have an *erga omnes* character when it comes to its subjects, which means they are addressed to the entire community of states.[45] Yet, this does not mean that every *erga omnes* rule is at the same time a *jus cogens* rule,[46] although the opposite is true, as *erga omnes* merely refers to a universe of subjects at whom the rule is addressed, not to its contents or rank.[47] For instance, respect for the high seas and outer space as common heritage of humankind, although an *erga omnes* obligation, does not amount to a rule of *jus cogens.*[48] Arguably, other environmental obligations enjoying an *erga omnes* status have not yet reached the *jus cogens* threshold.[49]

Third, the *occasion* of this rule pertains to every possible place and every possible time since its adoption, as it is a peremptory rule of general international law.[50] Fourth, the *character*

---

[43] Rome Statute of the International Criminal Court (adopted 7 July 1998, entered into force 1 July 2002) 1287 UNTS 3, art. 6: 'For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group;
e. Forcibly transferring children of the group to another group.'

[44] Hart, *The Concept of Law* (n 16) 43. See also Jochen von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law' (2012) 4(3) Goettingen Journal of International Law 659-675.

[45] *Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3 [33].

[46] Besson (n 15) 174-175.

[47] Rosalyn Higgins, *Problems and Process: International Law and How We Use It'* (Oxford University Press 1994) 167; M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga* Omnes' (1996) 59(4) Law and Contemporary Problems 63-74; Gonzalo Aguilar Cavallo, 'El Reconocimiento Jurisprudencial de la Tortura y de la Desaparición Forzada de Personas Como Normas Imperativas de Derecho Internacional Público' (2006) 12(1) Ius et Praxis 127, 128.

[48] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press 2015) 255-258.

[49] ILC, 'Fourth Report on *Jus Cogens*' (n 39) para 136.

[50] ibid para 21. The possibility of a regional *jus cogens* is a matter of debate at the ILC and is dealt with by Dire Tladi, Special Rapporteur.

of this rule is clearly prohibitive, as are most *jus cogens* rules,[51] with the exception of a few positive imperatives such as respect for the self-determination of peoples. Fifth, the *content* of the rule is also very straightforward: the conducts that are forbidden include the killing, causing serious bodily or mental harm, imposing conditions to bring about the physical destruction in whole or in part, imposing measures aimed at preventing births, and forcibly transferring children from a national, ethnical, racial, or religious group as such. Finally, the *condition of application* of the rule includes the fact that there exist in practice different national, ethnical, racial, and religious groups; as well as all the other 'truisms'[52] about those human groups, including their mortality, their need to feed, to reproduce, and to have all the other material and spiritual conditions for their subsistence as a discrete group.

As per the legal sources of this particular prescription, the material source is of course the direct antecedent of the 1948 Convention, that is, the Holocaust perpetrated by the Nazi regime against Jewish, Polish, Roma, and other peoples, although the roots of totalitarianism go deeper back into Western history.[53] The formal sources, on the other hand, are all those legal procedures that have resulted in this rule, as well as the normative statements or normative containers where this prescription is enclosed. This comprises, *lato sensu,* the 1948 Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Rome Statute, and all the expressions of customary law, general principles of law, judicial decisions, legal writings, unilateral acts, and resolutions of international organisations, that refer to the same contents. Indeed, it is important to underscore that it is not these formal sources that reach the status of *jus cogens,* but rather the norms or contents (namely the meanings) that they encapsulate as normative containers.[54]

As a legal rule, the prohibition of genocide can be classified as a prescription governing physical or kinetic state behaviour, as well as a norm used for the creation of other abstract legal rules, a double nature that we may ascertain according to the different legal consequences arising from the breach of this important standard.

Indeed, every prescription entails the imposition of a sanction in case of non-compliance,[55] so much so that towering positivists, such as John Austin and Hans Kelsen, identified sanctions, and the possibility of resorting to force in particular, as the essence of a proper or complete legal rule.[56] However, as we said before, Hart challenged this assumption and showed that there are some rules whose breach does not entail the imposition of a sanction by force, and they are not any less legal for that: 'secondary rules'.

According to Hart, a legal system is the union of 'primary rules,' ie rules referring to physical acts whose breach entails forcible legal measures or sanctions; and 'secondary rules', ie those rules referring to primary rules and conferring legal powers upon certain agents. Secondary rules are further divided into 'rules of adjudication' (for settling legal disputes about the application of primary rules), the master 'rule of recognition' (to identify, unify and confer

---

51 For instance, the prohibition of piracy, the prohibition of slavery, the prohibition of aggressive war, and the prohibition of torture. See M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42(1) Virginia Journal of International Law 81-162; Cezary Mik, '*Jus Cogens* in Contemporary International Law' (2013) 33 Polish Yearbook of International Law 27-93.

52 Hart, *The Concept of Law* (n 16) 193-200.

53 Hannah Arendt, *The Origins of Totalitarianism* (Harvest Books 1973); Sven Lindqvist, *Exterminate All the Brutes* (Granta 2018).

54 Besson (n 15) 171; Aguilar Cavallo (n 47) 126.

55 von Wright (n 31) Ch I, para 5.

56 Austin (n 16) 8; Kelsen (n 25) 33, 50-51.

validity upon a legal system), and 'rules of change' (enabling private and public agents to create, modify, and extinguish legal rules, also referred to as 'rules of legal production').[57] Hart clarifies that these rules of change do not entail a sanction when they are not duly observed, but a different kind of consequence: nullity. Just as when in a game the consequence of not following the right procedure to score a goal is not a 'non-goal' or 'minus-one-goal' or the expulsion of the ineffective player from the field, but only the (mathematical) fact that no goal has been scored, the same happens with nullity for breaching a secondary rule of change. Thus, Hart explains that nullity is not a sanction, like imprisonment or death, but only the logical consequence of not having followed correctly the procedure set forth in the law to produce the desired legal result.[58]

Applying all this to *jus cogens* norms, we obtain that they cannot be so readily classified merely as prescriptions or primary rules of behaviour. They can also be characterised as secondary rules of change, or rules of legal production, on account of the consequences that follow whenever they are breached.[59] Indeed, as explained in the Special Rapporteur's Third Report on Peremptory Norms of General International Law (*Jus Cogens*), discussed during the seventieth session of the ILC, nullity is the chief consequence for the breach of a rule of *jus cogens.*[60] As a matter of fact, said consequence was recently discussed at the ILC under the understanding that only matters of secondary rules would be dealt with on that occasion, excluding primary rules pertaining to the international criminal responsibility of individuals.[61]

To be sure, the primary rule prohibiting the perpetration of genocide entails sanctions properly so called under international law, both for individuals (as punishment for an international crime), and for states (as remedies to redress an internationally wrongful act). Yet, when it comes to legal production, *jus cogens* rules can be also characterised as secondary rules of change whose breach entails the nullity of a given legal instrument. It is depending on the legal consequence at hand, whether sanctions or nullity, that we may characterise *jus cogens* rules alternatively as Hartian primary or secondary rules of international law.

V. International public order

'Public order', also referred to in English as 'public policy',[62] is an operational notion in contract law that has existed at least since the times of the Code Napoléon. Its main function is to limit the free will of the parties to engage in contracts. Its original formulation can be found in Article 6 of the Code Napoléon, which sets forth: '[i]t is not lawful to escape by private contract the application of laws which concern public order and *bonos mores*'.[63]

---

57 Hart, *The Concept of Law* (n 16) 91-99.

58 ibid 33-35. In this sense, secondary rules of change are the closest to what von Wright calls 'directives' and Black calls 'instructions' that we can find within the legal system.

59 Ulf Linderfalk, 'The Source of *Jus Cogens* Obligations – How Legal Positivism Copes with Peremptory International Law' (2013) 82(3) Nordic Journal of International Law 369, 375.

60 ILC, 'Third Report on *Jus Cogens*' (n 23) para 30.

61 ILC, ' Report of the International Law Commission: Seventieth Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 para 141.

62 G Husserl, 'Public Policy and Ordre Public' (1938) 25(1) Virginia Law Review 37.

63 From the original: 'On ne peut déroger par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs.' See Maître J B Bernier, 'Public and Ordre Public' (1929) 15 Transactions of the Grotius Society 84, 89.

According to JB Bernier, Article 6 is the necessary corollary of Article 1134 of the same Code, which enshrines the principle of contractual freedom.[64]

Now, Bernier defines 'public order' in the legal sense as:

> […] the collection of conditions – legislative, departmental, and judicial – which assure, by the normal and regular functioning of the national institutions, the state of affairs necessary to the life, the progress, and to the prosperity of the country and of its inhabitants.
>
> *It may, therefore, rightly be said that the whole of the law has as its chief object the organisation and the maintenance of public order* (original emphasis).[65]

In what matters here, public order as a limit on contractual freedom has been projected from private law into other areas of the law, including international law, both private and public.[66] Regarding the former, Kent Murphy explains: '[p]ublic policy in private international law functions to reject foreign laws repugnant to the forum's sense of morality and decency, to prevent injustice in the special circumstances of the parties before the court, and to affect choice of law'.[67]

As for public international law, in 1926 Hersch Lauterpacht wrote in his doctoral thesis titled *Private law analogies in international law*: '[t]he fundamental structure of private law contracts and international law treaties is essentially the same'.[68] He then adhered to another author's comparison between contracts that are void due to public policy considerations as defined in municipal law, and treaties that are void because they infringe upon 'public morality' as defined by international law.[69]

Years later, in his 1953 report to the ILC as Special Rapporteur on the Law of Treaties, Lauterpacht commented the topic of the 'legality of the object of a treaty' in the following terms:

> It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallised in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilised nations which the International Court of Justice is bound to apply by virtue of Article 38 (3) of its Statute.[70]

---

64 Bernier (n 63) 89. Art 1134: Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi. ('Contracts legally entered into take the place of law for those who have entered into them. They can only be abrogated by mutual consent. They must be entered into in good faith').

65 ibid 84.

66 Catherine Kessedjian, 'Public Order in European Law' (2007)1(1) Erasmus Law Review 26.

67 Kent Murphy, 'The Traditional View of Public Policy and *Ordre Public* in Private International Law' (1981) 11(3) Georgia Journal of International and Comparative Law 591, 607.

68 Hersch Lauterpacht, *Private Law Analogies in International Law* (PhD Thesis) (LSE 1926) 67.

69 ibid 68.

70 ILC, 'Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur' (24 March 1953) UN DOC A/CN.4/63, 155.

As we can see, Lauterpacht indirectly refers here to *jus cogens* rules as limits to the contractual freedom of states celebrating treaties, when he mentions standards of 'international morality so cogent' that might render a treaty illegal, and therefore, void.

A more explicit connection between international public order and *jus cogens* has been later suggested by Catherine Kessedjian: '[t]hese mandatory rules have different sources. They are either created by the states unilaterally to protect the fundamental values of their society, or they are created at the regional level, or even at an international/multilateral level. If created within the international legal order, they may qualify as *jus cogens* rules'.[71] However, we must pay heed to the conditional formulation used by Kessedjian, as not every rule of the so called 'international public order', as understood, for instance, in international arbitration law, amounts to a *jus cogens* norm, such as minimum standards of due process of law.[72]

In sum, the main function that *jus cogens* rules have regarding the law of treaties, as secondary rules of change, is to act as a limit on the contractual freedom of states, much as *ordre public* standards operate in domestic contract law. It is in this sense that we may characterise *jus cogens* as a veritable limit of international public order upon the free will of states, in the form of what is known as 'contractual *jus cogens*'.[73]

At this point, it is worth pointing out that Robert Kolb resists the public order theory and instead characterises *jus cogens* as a legal technique used to avoid fragmentation of domestic and international law, by preventing the principle of *lex specialis derogat generali* from operating.[74] In this sense, Kolb conceives of *jus cogens* as something akin to Hart's secondary rule of recognition, which holds the entire normative system together. However, Kolb expressly rejects the implication of *jus cogens* entailing some kind of normative hierarchy, which is essential to the master rule of recognition. Moreover, for Kolb *jus cogens* is but the reverse of the *lex specialis* principle, thus amounting to a technique for solving antinomies or conflicts of norms.[75] Yet, it is important to bear in mind that *jus cogens* operates precisely before a new rule is born into the legal life, as a public order limit at the genetic stage of legal production, so the issue of conflict of norms does not have a chance to arise. Therefore, *jus cogens* cannot be characterised as a legal technique for solving antinomies – for which we already have the hierarchical, chronological, and speciality principles,[76] but rather as a legal device to thwart normative acts that contravene international public order from becoming legal rules.

Now, a corollary of the secondary rule thesis explained in the previous section pertains to another heavily debated topic in international law, one that is closely related to the public order role of *jus cogens*: immunity of state officials for acts in breach of *jus cogens* norms. There is agreement that so-called 'personal immunity' is always applicable since it is but a procedural defence aimed at enabling the performance of functions that are important for international relations, including those of heads of state and government, and ministers of foreign affairs. It

---

71 Kessedjian (n 66) 26.

72 Juan Carlos Marín González and Rolando García Mirón, 'El Concepto de Orden Público como Causal de Nulidad de un Laudo Tratándose de un Arbitraje Comercial Internacional' (2011) 24(1) Revista de Derecho 117-131.

73 Kolb (n 15) 13.

74 ibid 3.

75 ibid.

76 Riccardo Guastini R, 'Antinomias y Lagunas' (1999) 29 Revista Jurídica Anuario del Departamento de Derecho de la Universidad Iberoamericana 437-450.

does not refer to the substance of the legal claim levelled against the defendant.[77] On the other hand, some authors, Special Rapporteur Tladi included,[78] believe that immunity *ratione materiae* can never apply for breaches of *jus cogens,* due to the heinousness of the acts involved. In fact, this position can also be explained from the perspective of *jus cogens* norms as secondary rules for legal production. Indeed, the purpose of immunity *ratione materiae* is to protect acts performed by every public official of a state because they are 'official or public acts'.[79] But it is only by virtue of secondary rules for legal production that such acts acquire the category of 'official' in the first place, at least from a purely legal (not a political) perspective. Without the legality conferred upon those material acts by secondary rules of change they would just not be registered by the legal system, namely they would not exist in the eyes of the law. Rules for legal production include certain criteria, including a normative authority, a procedure, and some limits of content that the new rule must respect.[80] Such limits are provided for by what has been here characterised as public order. If a public official breaches a *jus cogens* rule, then the logical result can only be that the new act is not born into the legal life, thereby never gaining the category of 'official' and therefore not warranting the application of immunity *ratione materiae.* It is not a 'non-goal' scored by the official and their state, but merely a failed goal of no normative consequence, not registered or recognised by the law. This idea was already recognised in the 1998 *Pinochet* case, where the British Lords determined that acts contrary to *jus cogens,* in particular torture, fall 'outside what international law would regard as functions of a head of state' and therefore could not be deemed to be official acts.[81]

Finally, there are two points that must be raised before moving on to the next section of this article. First, the characterisation of *jus cogens* rules as norms of public order that limit the contractual freedom of states does not amount to saying that *jus cogens* rules are equal to an international constitution. Much has been written about global constitutionalism,[82] and it is not the purpose of this article to linger in that area. Suffice it to say that public order and constitutional law are not the same, and that international law has so far developed only the former in a sufficiently operational fashion – what Robert Kolb calls the 'narrowest sense' of the international public order argument.[83]

Second, Lauterpacht's remarks on the international *ordre public* remind us that *jus cogens* rules can have several formal sources, including treaty law, customary law, and general principles of law, the former being but the content enclosed within such normative containers. It is now to these contents of *jus cogens* that we must turn, in order to ascertain the importance of peremptory rules for international law as a teleological normative system.

---

77 Cassese and Gaeta (n 39) 318-319.

78 ILC, 'Third Report on *Jus Cogens*' (n 23) para 123.

79 Cassese and Gaeta (n 39) 318.

80 Kelsen (n 25) 230; 271.

81 *Regina v Bow St Metro* [1998] 3 WLR 1457; See also Anita Johnson, 'The Extradition Proceedings Against General Augusto Pinochet: Is Justice Being Met Under International Law?' (2000) 29(1) Georgia Journal of International and Comparative Law 203-222.

82 Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer 2010) 727-760; Mattias Kumm, 'Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law' (2016) 14(4) International Journal of Constitutional Law 697-711; Martti Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8(1) Theoretical Inquiries in Law 9-36.

83 Kolb (n 15) 32.

VI. The purpose of international law

Among the many differences of opinion that HLA Hart and Ronald Dworkin had, one stands out for the purposes of our inquiry. It does not directly pertain to *jus cogens* rules, not even to international law as a normative system. It rather refers to the law more generally, and in particular, to its purpose. According to Dworkin – who, in this point oddly enough agreed with a hard-core positivist such as Hans Kelsen – the 'point' or purpose of the law is to justify coercion.[84] Hart, on the other hand, did not agree that there is a purpose to the law as a normative system. Rather, his reply to Dworkin on this point was that the law merely provides 'guides to human conduct and standards of criticism of such conduct'.[85] As applied to international law, Hart's reply would read that 'international law provides guides to state conduct and criticism of such conduct'.

Yet, the question remains: to what end does the law provide such guides to human conduct? Hart himself gives us a hint of what is the ultimate purpose of any legal system. According to him, the law is a social arrangement for the continuance existence of a human group, not a set of rules for a 'suicide club'.[86] Hart states that 'there are certain rules of conduct which any social organisation must contain if it is to be viable'.[87] Here *must* means *ought to,*[88] ie a 'necessary' means to attain an end (in Kant, 'hypothetical imperatives', or in von Wright, 'anankastic statements'[89]). Hart calls these principles of practical reason based on basic truths about human nature 'the minimum content of natural law', a somewhat unfortunate expression that tends to confuse students of his work. These truisms about human nature are: human vulnerability, approximate equality, limited altruism, limited resources, and limited understanding and strength of will.[90]

In sum, the ultimate point or purpose of the law as a set of guides to human conduct is to keep its subjects alive, duly paying heed to all their needs and vulnerabilities. Is this conclusion transferrable to international law?

In a posthumous essay titled *A New Philosophy for International Law,* Ronald Dworkin tries to answer the question about the justification of coercive political power as applied to international law.[91] The 'basic interpretive principle' underlying international law is, according to Dworkin, the need for states to accept feasible and shared constraints on their own power, so as to protect the human rights of citizens and foreign nationals.[92] He concludes that the goals of international law, as may be found in the Charter of the United Nations being interpreted in its best light, are: (i) the protection of political communities from external aggression; (ii) the protection of their citizens from domestic barbarism; (ii) enabling coordination among states; and (iv) allowing people to participate in their own governance.[93]

---

84 Ronald Dworkin, *Law's Empire* (Hart Publishing 2012) 93; Kelsen (n 25) 33.

85 Hart, *The Concept of Law* (n 16) 248-249.

86 ibid 192. For a similar development of the following argument as applied to contemporary nuclear power, see Francisco Lobo, 'Abolishing atomic warfare? Nuclear power and natural-international law in the twenty-first century' (2019) 10(2) Transnational Legal Theory 1-27.

87 Hart, *The Concept of Law* (n 16) 193.

88 Herbert L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 593, 613; see also Hart, *The Concept of Law* (n 16) 190.

89 von Wright (n 31) Ch I, para 7.

90 Hart, *The Concept of Law* (n 16) 193-200.

91 Dworkin, 'A New Philosophy for International Law' (n 17) 2-30.

92 ibid. 17.

93 ibid 22.

Thus, Dworkin arguably endorses the modern doctrine that reinterprets sovereignty as the 'responsibility to protect',[94] which is also in line with Jeremy Waldron's and Eyal Benvenisti's notion of sovereign states as true 'trustees of humanity' charged with safeguarding the wellbeing of their citizens.[95]

Further, Richard Epstein has argued that what Hart proposed was a 'not-so-minimum content of natural law', after all, for the law is also concerned with maximising human flourishing and wellbeing, and that includes international law.[96] In this sense, even before the Second World War, Alfred Verdross had already concluded: '[…] the following tasks most certainly devolve upon a state recognized by the modern international community: *maintenance of law and order within the states, defence against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad*'.[97] (original emphasis)

In the same vein, James Crawford has advocated for the existence of the 'rule of law' in international law, whereby human flourishing can be attained.[98] Like Joseph Raz, Crawford believes that the rule of law is a virtue of the legal system, including the international legal system.[99] Similarly, Jeremy Waldron thinks that the purpose of the rule of law as applied to the international realm is the protection of populations committed to the charge of states.[100]

In sum, building on the ideas of all these towering scholars of legal philosophy and international law, we can conclude that the point or purpose of international law is, at the very least, to preserve human life, and even more so, to attain human flourishing and wellbeing (or prosperity in Bernier's formula), states and their sovereignty being but the vehicle through which such goals can be reached.

This conclusion echoes the reconstruction that sovereignty has experienced during the past decades as 'responsibility', which has paved the way for the doctrine of the responsibility to protect to emerge and gain acceptance in the international community.[101] Preceding and underlying such reconstruction we find the doctrine of 'human security' first mentioned in the

---

94 International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (2001); Alex J Bellamy, *The Responsibility to Protect: A defence* (Oxford University Press 2014).

95 Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) European Journal of International Law 315-343; Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) American Journal of International Law 295-333.

96 Richard A Epstein, 'The Not So Minimum Content of Natural Law' (2005) 25(2) Oxford Journal of Legal Studies 219, 226, 228; John Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press 2011) 149-150.

97 Alfred von Verdross, 'Forbidden Treaties in International Law' (1937) 31 American Journal of International Law 571, 574.

98 James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014) 468.

99 ibid 353; Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 208.

100 Waldron, 'Sovereigns' (n 95) 325; Jeremy Waldron, 'The Rule of International Law' (2006) 30(1) Harvard Journal of Law and Public Policy 15-30. On the two families within the rule of law literature, ie the instrumental or formal version vis-à-vis the substantive version, see Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69(4) Boston University Law Review 783-791; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 91-113; On the 'international rule of law' see further Stéphane Beaulac, 'Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Bloomsbury Publishing 2009) 197, 204; Simon Chesterman, 'An International Rule of Law?' (2008) 70 New York University Public Law and Legal Theory Working Papers 14-25; Mattias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Virginia Journal of International Law 19-32.

101 Bellamy (n 94).

1994 Development Report published by the United Nations Development Program.[102] Thus, we can reformulate the characterisation of international law as a teleological system whose main purpose is to safeguard human security, states being the vehicles and agents responsible for making it so.

As an anthropocentric doctrine,[103] the notion of human security entails respect for human dignity and non-discrimination, both values that are deeply entrenched in the spirit and instruments of modern public international law.[104]

Now, how can we connect *jus cogens* rules to this teleological account of international law? Special Rapporteur Tladi had already proposed the following Draft Conclusion No 3 in his very first report on *jus cogens*: '[…] 2. Norms of jus cogens protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable'.[105] But, which values are those?

Thomas Weatherall has recently suggested a connection between the value/principle of human dignity and *jus cogens* rules. According to him, 'safeguarding the dignity of the human being represents the ultimate goal of legal and social order'.[106] Yet, the connection between human dignity and *jus cogens* has not been thoroughly studied, he thinks.[107] His own account of human dignity as a foundation of *jus cogens* rules is compelling, although it conflates dignity with 'humanity' and 'human rights',[108] which are arguably intertwined, yet not identical, notions.[109] Hence, we must find the appropriate link between *jus cogens* and the purpose of international law outside of the already challenging area of 'dignitarian jurisprudence'.[110]

We have stated that, beyond their *prima facie* characterisation as primary rules of behaviour, *jus cogens* norms have also a very important function as secondary rules of change in relation to the law of treaties. They operate as a limit on the contractual freedom of states, the same way *ordre public* works as a limit in domestic contract law. Thus, *jus cogens* rules constitute a veritable 'international public order', to quote Lauterpacht, that sets boundaries

---

[102] United Nations Development Programme, *Human Development Report 1994* (Oxford University Press 1994) 22 et seq.

[103] Gerd Oberletiner, 'Human Security: A Challenge to International Law?' (2005) 11(2) Global Governance 185-187.

[104] See, among others, the Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III); American Declaration of the Rights and Duties of Man (adopted 2 May 1948); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966 entered into force 3 January 1976) 999 UNTS 171; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; Arab Charter on Human Rights (adopted 15 September 1994); Convention for the Protection of Human Rights and Dignity of the Human Being in Biomedicine (adopted 4 April 1997, entered into force 1 December 1999) ETS 164; Protocol No. 13 to the European Convention on Human Rights (adopted 3 May 2002, entered into force 1 July 2003) ETS 187; ASEAN Human Rights Declaration (adopted 18 November 2012).

[105] ILC, 'First Report on *Jus Cogens*' (n 13) 74.

[106] Weatherall (n 48) 41.

[107] ibid 54.

[108] ibid 54-66.

[109] David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 Yale Journal of International Law 85, 109-116.

[110] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012) 15.

on what states can freely agree on. Or as Judge Cançado Trindade once put it when addressing the permissibility of waivers of jurisdiction among states and *jus cogens*: 'any purported waiver by a State of the rights inherent to the human person would, in my understanding, be against the international *ordre public*, and would be deprived of any juridical effects'.[111]

But *jus cogens* rules are also part of the teleological system of international law. Therefore, *jus cogens* rules share the same ultimate goal or purpose with the rest of international legal institutions, that is, the promotion of human security. A cursory overview of the foremost examples of *jus cogens* rules should suffice to confirm this statement: the prohibition of genocide, the prohibition of crimes against humanity, the prohibition of aggressive war, the prohibition of slavery, the prohibition of torture, and the promotion of the self-determination of peoples. All of them can be said to safeguard human security in the end.

The international public order represented by *jus cogens* requirements as secondary rules of change, therefore, is but another normative tool – alongside judicial settlement of disputes and international law enforcement of primary rules of behaviour – that the international legal system uses to ensure the fulfilment of its ultimate goal, the protection of human security. Thus, it seems appropriate to conclude this section paraphrasing Bernier's definition of public order as 'the collection of conditions – legislative, departmental, and judicial – which assure, by the normal and regular functioning of the [inter) national institutions, the state of affairs necessary to the life, the progress, and to the prosperity of the country [t he world] and of its inhabitant'.

VII. Concluding remarks

In this article we have set out on a journey to try and map the legal contours of *jus cogens* rules, so as to demystify them as a heavily used political tool and try to ascertain the true meaning of their *non plus ultra* message for states not to venture into forbidden normative waters.

Building on the theoretical scaffolding provided by rudimentary notions of legal theory, as applied to one of the foremost peremptory prohibitions in contemporary international law, the ban on genocide, we have concluded that *jus cogens* norms are legal rules that amount to prescriptions or regulations. Further, depending on their legal consequences, whether sanctions or nullity, we have found that *jus cogens* rules can be alternatively characterised as Hartian primary or secondary rules of international law.

As Hartian secondary rules of change for legal production, their main function is to work as a limit on the contractual freedom of states, much as *ordre public* standards operate in domestic contract law. It is in this sense that we have characterised *jus cogens* rules as a veritable limit of 'international public order' upon the free will of states – including that of the permanent members of the UN Security Council.[112]

Furthermore, building on the ideas of towering scholars of legal philosophy and international law, we have found that the point or purpose of international law is, at the very least, to preserve human life, and even further, to attain human flourishing and wellbeing (or prosperity in Bernier's formula). Hence, international law has been characterised here as a teleological system whose main purpose is to safeguard human security. States are the agents upon whom the responsibility to protect human security bears. As an anthropocentric

---

[111] *Jurisdictional Immunities of the State (Germany v Italy)* (Dissenting Opinion of Judge Cançado Trindade) [2009) ICJ Rep 136 [124].

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Separate Opinion of Judge ad hoc Elihu Lauterpacht) [1993] ICJ Rep 440 [100].

doctrine, human security entails respect for the values/principles of human dignity and non-discrimination.

As an integral part of this teleological normative system, *jus cogens* rules of international public order share the same ultimate goal or purpose with the rest of international legal institutions, that is, the promotion of human security. Indeed, a cursory overview of the main examples of *jus cogens* rules suffices to confirm this statement: the prohibition of genocide, the prohibition of crimes against humanity, the prohibition of aggressive war, the prohibition of slavery, the prohibition of torture, and the promotion of the self-determination of peoples. All these *jus cogens* rules aim at safeguarding human security, and therefore, the values/principles of human dignity and non-discrimination.

In conclusion, the international public order constituted by *jus cogens* standards as secondary rules of change for legal production is but another normative tool – besides judicial settlement of disputes and international law enforcement of primary rules of behaviour – that the international legal system uses to ensure the fulfilment of its ultimate purpose, the protection of human security. Such is the creature that states may not disregard when navigating the vast and agitated waters of international law in the twenty-first century.

****

Cyber Warfare as a Use of Force against Third-Party Countries: The Perspective of International Law

Dr Tareq Hamid AL-Fahdawi*
DOI: 10.21827/GroJIL.10.2.91-102

Keywords:
RUSSIA, UKRAINE WAR, CYBER WARFARE, THIRD-PARTY STATES, CYBER WEAPONS, USE OF FORCE, INTERNATIONAL LEGAL RESPONSIBILITY

Abstract

The use of force in international relations takes different forms and changes year by year due to the development of cyber technology. The problem mentioned in this study is that the Charter of the United Nations (UN Charter) and international law have not considered weapons development and future weapons that may be used in international relations, as Russia has used such weapons during the war against Ukraine. Unfortunately, cyber technologies were used to deter and weaken Ukraine's chance to gain an advanced result on the ground. Although such cyber operations can cause the same physical damage as other weapons, the international community is still struggling to determine whether using a cyber weapon is considered a use of force. This study argues that cyber attacks against third-party countries that support Ukraine during the war may count as the use of force and a breach of Article 2(4) of the UN Charter.

I. Introduction

Since the onset of the war between Russia and Ukraine in February 2022, there has been a significant shift in the landscape of warfare. As a direct consequence of this conflict, Russia has launched cyber attacks against third-party States that have not been involved in any direct military action in this war, particularly States that have supported Ukraine in various capacities. Russia has targeted States that have offered direct or indirect military assistance to Ukraine, imposed sanctions, or opposed the invasion of Ukraine during the United Nations (UN) Security Council meeting in 2022.[1] Russia used cyber malware against these third-party States instead of fighting them directly. The use of this new generation of technology represents a new dimension in warfare. It serves as a means of exacting revenge while avoiding the potential international legal repercussions of direct attacks. By utilising cyber attacks, Russia was able to retaliate against other countries without engaging in traditional warfare. However, these actions violated the principles enshrined in the UN Charter and international law.

* Dr Tareq Hamid AL-FAHDAWI is a researcher and lecturer at the University of Anbar, Centre for Strategic Studies in Iraq. Email: tareq.al-fahdawi@uoanbar.edu.iq.

1 Sean Lyngaas, 'Russian-Speaking Hackers Knock US State Government Websites Offline' (*CNN Politics*, 5 October 2022) <https://amp-cnn-com.cdn.ampproject.org/c/s/amp.cnn.com/cnn/2022/10/05/politics/russian-hackers-state-government-websites/index.html> accessed 5 January 2024.

Notably, on 24 February 2022, Ukraine's critical institutions, including the Ministry of Foreign Affairs, Ministry of Defense, Ministry of Internal Affairs, the Security Service of Ukraine, and the Cabinet of Ministers, encountered network disruptions in what NetBlocks identified as a cyber attack.[2] While the war was between Russia and Ukraine, Russia extended its cyber attacks to other States. Between January and March 2023, the top three States that were impacted by Russia's attacks were Poland, which received 173 cyber attacks, Latvia, which received 92 cyber attacks, and the United States (US), which received 83 cyber attacks, most of which were by anonymous Russian actors.[3] In addition, there were a large number of cyber attacks against French, German, and European politicians. These cyber attacks were meant as a retaliation to the support that Ukraine gained from other States during the war. In March 2023, the website of the French National Assembly was temporarily disabled by Russian hackers through a Distributed Denial-of-Service (DDoS) Attack. In a message shared on Telegram, the hackers viewed the attack on the French government as a response to its support of Ukraine during the conflict.[4] In the same month, an unsuccessful DDoS attack was launched against a German defence firm for the same reason. According to a Kon briefing on 11 October 2023, nearly 33 States have fallen victim to cyber attacks, with some, such as the US, experiencing as many as 1,979 attacks.[5] This happened in addition to the cyber attacks against the US and European politicians who publicly denounced Vladimir Putin's invasion of Ukraine. In this case, Russia utilised its cyber capabilities in an offensive strategy that aligned with its foreign policy mission. It is clear that cyber attacks and their implications are considered as a use of force that breaches Article 2 of the UN Charter, which is significant for preserving international peace and security.

The primary question here is, to what extent does the current international legal framework that encompasses the UN Charter and associated instruments, sufficiently regulate and manage cyber attacks and offensive cyber activities used against third-party countries? Therefore, this study argues that the impact of weapons, whether malware or physical, share common ground. Before delving into why cyber attacks should be considered a breach of the UN Charter, it is imperative to explore the development of cyber weapons and understand their usage in the realm of human life and international relations. By exploring these aspects, this research aims to contribute to the ongoing discourse surrounding the use of cyber weapons, their legal ramifications, and the imperative to shape a robust framework that effectively governs cyberspace.

II. Development of weapons

---

2 @Netblocks, 'Confirmed: #Ukraine's Ministry of Foreign Affairs, Ministry of Defense, Ministry of Internal Affairs, the Security Service of Ukraine and Cabinet of Ministers websites have just been impacted by network disruptions; the incident appears consistent with recent DDOS attacks' (*X*, 24 February 2022) <https://twitter.com/netblocks/status/1496498930925940738?s=20&t=tUz_SlNzCPGv9r0sQT-q_g> accessed 5 January 2024.

3 Cyber Peace Institute, 'Quarterly Analysis Report Q1 January to March 2023: Cyber Dimensions of the Armed Conflict in Ukraine' (*CyberPeace Institute,* 2023) <https://reliefweb.int/report/ukraine/cyber-dimensions-armed-conflict-ukraine-q1-2023> accessed 5 January 2024.

4 Laura Kayali, 'Russian Hackers Strike French National Assembly Website' (*Politico*, 27 March 2023) <https://www.politico.eu/article/french-national-assembly-website-russian-cyberattack-hack-kremlin-emmanuel-macron/> accessed 5 January 2024.

5 Bert Kondruss, 'MOVEit Hack Victim List' (*Kon Briefing*, 20 December 2023) <https://konbriefing.com/en-topics/cyber-attacks-moveit-victim-list.html> accessed 5 January 2024.

Due to the unnecessary suffering inflicted on civilians using weapons in conflicts, the UN regulations divide weapons into conventional and non-conventional weapons.[6] This distinction is based on how much unnecessary suffering the weapons could cause to civilians and combatants. Conventional weapons are any weapons that can be used without excessively injurious and indiscriminate effects, or those that have not been prohibited by convention.[7] Non-conventional weapons are those that have been prohibited by UN conventions, such as Weapons of Mass Destruction (WMD), which include biological, chemical, and nuclear weapons.[8] Non-conventional weapons are prohibited from being used due to the unnecessary suffering and harm they may cause to current and future generations.

All member States that have signed the conventions preventing non-conventional weapons share that responsibility, because the consequences of using these weapons may transcend national borders.[9] This means that the consequences will not be limited to the States in conflict and will likely affect others. For example, when any State uses a nuclear weapon, radioactive fallout can travel through the air to neighbouring States, and have both immediate and long-term impacts. The World Health Organization (WHO) adopted a major report in 1987 regarding the use of nuclear weapons, which concluded that they have serious impacts on human health:

> The report noted *inter alia* that the blast wave, thermal wave, radiation and radioactive fallout generated by nuclear explosions have devastating short- and long-term effects on the human body, and that existing health services are not equipped to alleviate these effects in any significant way.[10]

International law divides weapons that can be used in conflict based on the fundamental principles of the law of armed conflict, such as distinction, military necessity, proportionality, and unnecessary suffering.[11] Therefore, non-conventional weapons are used less often and are considered to be less dangerous to civilians because their use is regulated nationally or internationally, and any party who violates those regulations are likely to be subject to prosecution before international or domestic courts. However, more recently, a new generation of weapons has emerged that is capable of launching attacks through cyberspace to target computer systems and achieve results comparable to traditional weapons.

---

6 'Weapons of Mass Destruction' (*United Nations*) <https://www.un.org/disarmament/wmd/> accessed 5 January 2024; See also, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (adopted 10 October 1980, entered into force 2 December 1983) 2260 UNTS 82.

7 International Committee of the Red Cross, '1980 Convention on Certain Conventional Weapons: Legal Factsheet' (*ICRC*) <https://www.icrc.org/en/document/1980-convention-certain-conventional-weapons> accessed 5 January 2024.

8 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45.

9 Treaty on the Prohibition of Nuclear Weapons (opened for signature 20 September 2017, entered into force 22 January 2021) UN Doc A/CONF.229/2017/8.

10 International Committee of the Red Cross, 'Humanitarian Impacts and Risks of Use of Nuclear Weapons' (ICRC, 29 August 2020) <https://www.icrc.org/en/document/humanitarian-impacts-and-risks-use-nuclear-weapons#_ednref3> accessed 5 January 2024.

11 Sean Watts, 'Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War' (2015) 91 International Law Studies 540, 543; See also Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Bloomsbury Publishing 2008) 46.

Cyber weapons represent a new generation of weapons capable of launching attacks through cyberspace to disrupt computer systems and achieve desired outcomes. Unlike conventional and non-conventional weapons, cyber weapons possess unique characteristics that make them particularly complex. During the war against Ukraine, Russia has used weapons that can effectively target and inflict damage on desired objectives while operating covertly, leaving minimal traces of attribution. Consequently, cyber weapons have emerged as powerful tools in contemporary conflicts, significantly contributing to the destabilisation of the international community. Their impact extends to the compromise of State infrastructures, including transportation and healthcare systems, and their deployment as malware to target nuclear programs.[12]

III. Cyber weapons

A cyber weapon is malware or computer code designed to be used and damage the structure or operation system of any program run by a computer,[13] that has 'the aim of threatening or causing physical, functional, or mental harm to structures, systems, or living beings'.[14] This malware is usually used to attack and destroy information systems or cause physical damage. Malware or cyber weapons have been used on numerous occasions to cause direct physical damage (such as in the 2010 cyber attack against Natanz in Iran),[15] or to change information or the results of an election (such as in the 2014 Ukraine parliamentary elections).[16] Therefore, cyber weapons can be deployed for both political and military purposes.

There are numerous instances where cyber weapons have been deployed. The first malware called Stuxnet was used as a cyber weapon against the nuclear program in Iran. Stuxnet was developed by NSA and Israel's Unit 8200.[17] It was a worm capable of attacking a target connected to the public internet, and it could also attack through a USB drive or a connection with a shared printer to access Windows systems running WinCC and PCS 7 programs. Simply put, it was a new generation of malware.[18] This worm was designed to sabotage the Iranian nuclear program and prevent Iran from enriching uranium to develop nuclear weapons. In the first month of his presidency, Barack Obama ordered that this malware be used against Iran.[19] The purpose of Stuxnet was to attack the

---

12 International Committee of the Red Cross, 'Cyber Warfare: Does International Humanitarian Law Apply?' (*ICRC*, 25 February 2021) <https://www.icrc.org/en/document/cyber-warfare-and-international-humanitarian-law> accessed 5 January 2024.

13 Peeter Lorents and Rain Ottis, 'Knowledge Based Framework for Cyber Weapons and Conflict' (paper presented at the Conference on Cyber Conflict, Tallinn, Estonia, 2010) 139 <https://ccdcoe.org/uploads/2018/10/Lorents-et-al-Knowledge-Based-Framework-for-Cyber-Weapons-and-Conflict.pdf> accessed 5 January 2024.

14 Emilio Iasiello, 'Are Cyber Weapons Effective Military Tools?' (2015) 7(1) Military and Strategic Affairs 23, 24.

15 James P Farwell and Rafal Rohozinski, 'Stuxnet and the Future of Cyber War' (2011) 53(1) Survival 23.

16 Tim Maurer, 'Cyber Proxies and the Crisis in Ukraine' in Kenneth Geers (ed), *Cyber War in Perspective: Russian Aggression against Ukraine* (NATO CCD COE Publications 2015) 81.

17 David E Sanger, *The Perfect Weapon: War, Sabotage, and Fear in the Cyber Age* (Broadway Books 2019) 9.

18 Josh Fruhlinger, 'Stuxnet Explained: the First Known Cyberweapon' (*CSO Online*, 31 August 2022) <https://www.csoonline.com/article/562691/stuxnet-explained-the-first-known-cyberweapon.html> accessed 5 January 2024.

19 David E Sanger, 'Obama Order Sped Up Wave of Cyberattacks Against Iran' (*The New York Times*, 1 June 2012) <https://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?pagewanted=all> accessed 5 January 2024.

Programmable Logic Controller (PLC) at the Natanz nuclear program in Iran.[20] In 2010, the attack achieved its purpose of destroying a large number of centrifuges.

Stuxnet's development was a revolution in modern warfare in several important ways, including the cost of the attack, the results, and the legal responsibility. Compared with a physical attack, the use of a cyber weapon is much easier. For example, in 1981, Israel attacked the Iraqi nuclear program using a surprise airstrike, which carried significant risk factors. For instance, the mission could have failed if Iraq had managed to shoot down Israel's aircraft. Additionally, if the aircraft were intercepted while crossing the airspace of Arab countries to Iraq, it could potentially have escalated tensions and cause conflicts with those countries. This attack killed eleven Iraqi soldiers and civilians,[21] and was a clear violation of Iraq's sovereignty and international law. Thus, Israel clashed with the international community as the attack was a breach of Article 2(4) of the UN Charter.[22] The attack was also a violation of the 1974 General Assembly resolution that defined the crime of aggression as 'bombardment by the armed forces of a State against the territory of another state or the use of any weapons by a State against the territory of another State'. When Iraq had launched a missile attack against Israel in 1991 during the second Gulf War, some experts argued that it was Iraq's response to what had happened in 1981.[23]

More recently, on 3 January 2020, the US launched an airstrike on Baghdad to assassinate the Iranian Quds Force commander Qassem Soleimani, and the Popular Mobilization Forces' (PMF) deputy chief Abu Mahdi al-Muhandis.[24] Although the attack took place in Iraq, outside Iranian territory, and both States were thousands of kilometres away from the US, Iran responded by launching ballistic missiles against the US base in Iraq.[25] This was Iran's response to an attack by the US, and the chosen target was within range of Iran's missiles. Iran launched another retaliation attack in cyberspace, this time against Israel. In March 2022, 'two Israeli media outlets were hacked […] with warnings from an Iranian propaganda video linked to the second anniversary of the assassination of top general Qassem Soleimani'.[26] Although this cyber attack caused no physical damage, it was a clear threat to Israel's national security, showing that Iran was capable of breaching Israel's information security at will. These two examples show that the US needs to consider that some States, like Iran, could use military force to respond to a direct attack, while also attacking via cyberspace if the target is outside the range of its missiles. In this

---

[20] Dale Peterson, 'Offensive Cyber Weapons: Construction, Development, and Employment' (2013) 36(1) Journal of Strategic Studies 120.

[21] P W Singer, 'Stuxnet and its Hidden Lessons on the Ethics of Cyberweapons' (2015) 47(1) Case Western Reserve Journal of International Law 79, 85.

[22] Målfrid Braut-Hegghammer, 'Revisiting Osirak: Preventive Attacks and Nuclear Proliferation Risks' (2011) 36(1) *International Security* 101, 116.

[23] Avner Cohen and Benjamin Frankel, 'Gulf War Saved Iraq From Nuclear Attack: Mideast: Israelis have been Spared from Having to Use their Ultimate Weapons against a Difficult Foe' (*Los Angeles Times*, 22 February 1991) <https://www.latimes.com/archives/la-xpm-1991-02-22-me-1449-story.html> accessed 5 January 2024.

[24] 'Intelligence Briefing: A Thousand Hezbollahs: Iraq's Emerging Militia State' (*New Lines Institute*, 4 May 2021) <https://newlinesinstitute.org/iraq/a-thousand-hezbollahs-iraqs-emerging-militia-state/> accessed 5 January 2024.

[25] 60 Minutes, 'Never-Before-Seen Video of the Attack on Al Asad Airbase' (28 February 2021) <https://www.youtube.com/watch?v=lGP7hZQuTL0> accessed 5 January 2024.

[26] Toi Staff, 'Jerusalem Post Website Hacked with Iran Warning on Anniversary of Soleimani Killing' (*The Times of Israel*, 3 January 2022) <https://www.timesofisrael.com/israeli-news-sites-hacked-with-iran-warning-on-anniversary-of-soleimani-killing/> accessed 5 January 2024.

way, as in this study, the cyber attacks by Russia against third-party countries need to be categorised as a use of force if they are for military purposes.

IV. The differences between cyber weapons and other weapons

A cyber weapon is different from other weapons, in that it can be hidden and the perpetrator can be anonymous. The Stuxnet attack on the nuclear program in Iran illustrates this difference. The attack was hidden for a long time, and Iran did not suspect that it had happened because their system was not linked to the internet.[27] The attack also showed the progress of the development of cyber weapons, which can damage not only computer systems but hardware as well.[28] Cyber weapons have affected many States' elections by changing the outcomes to make the losers of elections actually the winners, such as what happened in the 2020 US elections and the 2014 Ukraine elections. Even in 2016, the US Intelligence Community (USIC) claimed that Russia was responsible for hacking political organisations to influence the outcome of the US elections.[29] In this case, the hackers' success resulted in consequences both within and outside the US, undermining democracy and international law.[30] For these reasons, cyber weapons must be given urgent attention by the international community.

V. The position of international law

a. The use of force in international law and cyber warfare

In Article 2(4) of the UN Charter, the prevention of the use of force is mentioned as the main principle of international law. It mandates that

> all members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The international community admits that the use of force in Article 2(4) covers the prohibition of the use of conventional and non-conventional weapons such as 'bacteriological, biological and chemical devices and nuclear and thermonuclear weapons'.[31] However, the term 'force' as mentioned in Article 2(4) is not precisely defined and its exact meaning remains unclear.

The definition of force is important for international peace and security, as leaving it undefined makes international law unable to maintain international peace by preventing new generations of weapons from being used in international conflicts. Neither the UN Charter, the International Court of Justice (ICJ) nor the General Assembly have clearly defined whether the use of force is limited to armed force or whether it can include other forms of warfare.[32] This unclear definition has led to a debate between scholars to define the term, some of whom have defined force as 'any action by a state in breach of the norms of international law as stated in the UN Charter and in other international conventions.

---

27 Singer (n 21) 82.

28 ibid 83.

29 'Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security' (*Homeland Security*, 7 October 2016) <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> accessed 5 January 2024.

30 David P Fidler, 'The US Election Hacks, Cybersecurity, and International Law' (2016) 110 American Journal of International Law (2016) 337.

31 Christopher C Joyner and Catherine Lotrionte, 'Information Warfare as International Coercion: Elements of a Legal Framework' (2001) 12(5) European Journal of International Law 825.

32 Heather Harrison Dinniss, *Cyber Warfare and the Laws of War, Vol. 92* (Cambridge University Press 2012) 40.

This may include the use of military, financial, or political methods'.[33] However, the term 'force' is mentioned in the UN Charter's preamble and Articles 41 and 46 as an armed force. Although in some of the articles of the UN Charter (such as in Article 44), the term has been expressed as 'force' without the adjective 'armed', the force in this Article means armed force.[34] Article 51 of the UN Charter authorises the Security Council to take the necessary measures to 'maintain international peace' and security as an inherent right to self-defence in case of any armed attack against the member States. In this Article, UN members' authorisation to use force is clear: the meaning of 'force' here is armed force.

In several cases, the ICJ has interpreted the use of 'force' as meaning armed forces, such as in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*.[35] In this case, the ICJ considered that the US violated Article 2(4) of the UN Charter and customary international law when the US supported the *contra* rebels against the legitimate government in Nicaragua and mined Nicaraguan ports. The ICJ considered the US as responsible for any direct and indirect involvement in the use of force. However, the ICJ determined that providing funds to the *contra* rebels was not a breach of the UN Charter, or of customary international law.[36] This case confirms that 'force' as defined in the UN Charter refers to armed force: the ICJ determined the mining of Nicaraguan ports to be a violation of Article 2(4), but the provision of funding to the rebels was not.

Therefore, the question arises: can cyber weapons such as Stuxnet, Trojan horses, viruses, or worms be considered as 'armed force' under current international legal rules and be covered by Article 2(4) of the UN Charter? Cyber warfare is interwoven with conventional weapons and the use of cyber weapons in the cyberspace can cause physical damage, just as damage is caused by the use of armed force in the physical space. Both can be considered to be armed attacks. To explain when the use of cyber weapons can be covered by Article 2(4) of the UN Charter, the next section will discuss the use of cyber weapons from the perspective of international law.

b. The use of cyber weapons and international law

From the perspective of international law, the question of whether cyber operations can be considered a use of force under Article 2 of the UN Charter is a matter of complexity and significance. In 1996, the ICJ considered the prevention of the use of force as applying 'to any use of force, regardless of the weapons employed'.[37] This opinion seems to make the point that there is no limit to the definition of the use of force, which means cyber operations could fall within the definition. However, there are differing opinions. In 2021, François observed that almost all commentators ended up with three main approaches for cyber operations that qualified as a use of force according to Article 2 of the UN Charter.[38] These three main approaches are based on the target, the instrument, and the consequences of the cyber operation. Under the target approach, to consider a cyber operation use of

---

[33] Oxford Dictionaries, *Oxford English Dictionary, Vol. 7* (Oxford University Press 2013) 235.

[34] Marco Roscini, *Cyber Operations and the Use of Force in International Law* (Oxford University Press 2014) 45.

[35] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

[36] Dinniss (n 32) 50.

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

[38] François Delerue, 'Covid-19 and the Cyber Pandemic: A Plea for International Law and the Rule of Sovereignty in Cyberspace' (paper presented at the 13th International Conference on Cyber Conflict (CyCon), 2021) 288 <https://ccdcoe.org/uploads/2021/05/CyCon_2021_Delerue.pdf> accessed 5 January 2024.

force, the target penetrated must be critical national infrastructure. This is based on the legal doctrine of self-defence, since when critical infrastructure is attacked, the State can consider the attack as a use of force against its territory. In such cases, the State can use force for self-defence.[39] However, the question here is how to determine 'critical national infrastructure'.

For instance, Section 1016 of the 2001 US Patriot Act defines critical infrastructure as

> systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.[40]

Here, it is clear that any attack against US interests, whether in physical or virtual space, is a use of force. Under international law, the US has a right to self-defence when this occurs. In August 2012, there was a cyber attack virus launched on the Saudi oil company *Aramco*, which destroyed data on almost 30,000 computers.[41] While *Aramco* is one of the largest oil producers in the world and the attack caused a lack of oil leading to global power shortages, some scholars argued that the destruction of data did not qualify as a use of force.[42] In this instance, the target approach was used, and the cyber attack was not considered a use of force because the oil company did not meet the definition of 'critical national infrastructure'.

As previously discussed, the instruments used in cyber operations are viruses or codes (malware) used to attack computers and cause damage to the data or physical damage to the hardware. These instruments are very hard to identify, especially with the rapid development of technologies, which makes it difficult to determine which software should be counted as a weapon that qualifies as a use of force. Therefore, focusing on the consequences of a cyber attack helps determine whether a cyber operation qualifies as a use of force.

Adopting the consequences of cyber operations as the determinant is a good strategy when considering cyber operations as a breach of Article 2 of the UN Charter. This strategy is based on whether the cyber operation caused virtual damage, physical destruction, or death. If any of the aforementioned types of destruction happened, the operation will be considered a use of force that breaches Article 2 of the UN Charter, as the US and most scholars have adopted.[43] As technology is currently part of everyday life, and systems such as health systems, power stations, and other things required for human life could be affected by cyber operations, then a cyber attack could indirectly cause death, injury, or physical damage. The indirect effect does not mean that the cyber operation is not a military intervention, because 'in the Nicaragua judgment, the ICJ expressly recognized that intervention that uses armed force can occur either directly or indirectly'.[44]

---

39 Delerue (n 38) 288.

40 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 (2001) 115 STAT 273.

41 'Saudi Aramco says Cyber Attack Targeted Kingdom's Economy' (*Alarabiya News*, 9 December 2012) <http://www.alarabiya.net/articles/2012/12/09/254162.html> accessed 5 January 2024.

42 Michael N Schmitt, 'Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defense, and Armed Conflicts' in *Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for U.S. Policy* (The National Academies Press 2010) 151, 164.

43 Delerue (n 38) 288.

44 *Nicaragua v United States of America* (n 35); See also Roscini (n 34) 50.

This judgment clearly explains that the member States of the UN are prohibited from being involved in any kind of threat or use of force. So long as a cyber attack has the ability to cause physical damage, breach information privacy, or cause economic damage, it is prohibited under Article 2(4) of the UN Charter. However, the question here is whether the cyber attack can come under the jurisdiction of international law regardless of the accused, or whether it must be committed by a State to be considered a use of force according to Article 2(4) of the UN Charter. In this case, the attack must be launched by a State, as non-State actors are not subject to international law, and the cyber operation must have the potential to cause physical damage, breach information privacy, or cause economic damage as mentioned above. In addition, the use of cyber weapons must be used in international relations in order to be a breach of Article 2(4) of the UN Charter.

VI. Russian cyber operations on third-party countries

a. Overview of Russia's cyber operations during the war with Ukraine

At the beginning of an armed conflict between Russia and Ukraine, offensive cyber operations may hold significant importance.[45] However, when the situation turned on hostilities and the shooting war started, the role of cyber warfare diminishes and becomes an 'auxiliary role'.[46] This is unlike traditional military weapons, as the traditional weapons can physically occupy territory or consistently cause widespread destruction on an industrial scale. While numerous scholars and intelligence staff described the cyber operations as 'failed strategically in disabling Ukraine's defences'.[47] Western government officials argued that Russian cyber operations were extensive and strategically effective, which resulted in the destabilisation and intimidation of the Ukrainian government, armed forces, and civilian population.[48] Jon Bateman mentioned the views of several officials regarding the impact of Russia's cyber operations in the war against Ukraine.[49] In April 2022, David Cattler and Daniel Black, acting intelligence officials with NATO, contended that cyber operations had been Russia's most significant military success in the war against Ukraine. Jeremy Fleming, the director of the UK's General Communications Headquarters (GCHQ), dismissed the notion that cyber operations had not played a role, calling it a fallacy. Additionally, Matt Olsen, the US Assistant Attorney General for national security, went so far as to describe the situation as 'a hot cyberwar carried out by the Russians'.[50] The impact of Russia's cyber operations during the war against Ukraine highlights a significant aspect: Russia reduced its cyber operations directed at Ukraine while intensifying them against third-party countries. This shift in cyber operations allowed Russia to pursue its foreign policy objectives by attempting to minimise or restrict any

---

45 Ariel Eli Levite, Integrating Cyber Into Warfighting: Some Early Takeaways From the Ukraine Conflict (*Carnegie Endowment for International Peace*, 18 April 2023) 10 <https://carnegieendowment.org/2023/04/18/integrating-cyber-into-warfighting-some-early-takeaways-from-ukraine-conflict-pub-89544> accessed 5 January 2024.

46 ibid.

47 Jon Bateman, 'Russia's Wartime Cyber Operations in Ukraine: Military Impacts, Influences, and Implications' (*Carnegie Endowment for International Pe*ace, 16 December 2022) 5 <https://carnegieendowment.org/2022/12/16/russia-s-wartime-cyber-operations-in-ukraine-military-impacts-influences-and-implications-pub-88657> accessed 5 January 2024.

48 ibid.

49 ibid.

50 ibid.

support to Ukraine, to undermine international opposition to its actions and achieve its military goal on the ground in Ukraine.

b. Targeting third-party States

The Russian government has engaged in harmful cyber activities for cyber espionage, suppressing specific social and political entities and harming regional and international third-party States due to their support of Ukraine.[51] During the war with Ukraine, Russia launched cyber attacks against third-party States. In first quarter of 2023, the Cyber Peace Institute stated that 575 cyber attacks targeted three main sectors, ie public administration, transportation, and financial sector, which were mainly located in Poland, the US, and Germany.[52] Russia attacked these States and others in the cyberspace to deter their support for Ukraine, and to let the Russian troops on the ground gain advantage in the war. Russia strategically utilised cyber attacks as a means of launching war by subverting the infrastructure of third-party States. This approach provides an alternative to traditional diplomacy, producing outcomes akin to warfare but with reduced costs and risks. Specifically, subversion plays a significant role in cyber operations targeting third-party countries actively supporting the war in Ukraine against Russia. These cyber operations, backed by Russia, leverage cyberspace to deter and weaken these third-party countries, thereby alleviating pressure on Ukrainian resistance forces and allowing Russia to gain an advantage on the ground. In addition, cyber warfare has appeared as a powerful weapon in the recent Israel-Palestine conflict, with digital attacks paralleling physical combat.[53] The conflict saw cyber attacks on crucial infrastructure, media websites, and emergency services on both sides of the crisis. During this war, different cyber groups, including some of these groups linked to Russia, actively targeted Israeli government systems. Some attacks were ideologically driven, while others were aimed at financial gain. Notably, the Israeli cyber police froze Hamas' cryptocurrency channels to disrupt their funding, as Hamas had received around $21 million in cryptocurrency since 2021.[54] This underscores the evolving role of cyber warfare in contemporary conflicts.

VII. Ethical consequences

The development of computer technology showed the need for the international community to have ethics regarding cyber conflict and the use of computers in general[55] due to the potential dangers and instability caused by the use of cyber weapons. These ethical policies could range from the 'no first use' of cyber weapons (like any other dangerous weapons), to allowing the use of cyber weapons for proportionate response to other cyber attacks, or the complete prohibition of cyber weapons, as their potential impact could be equal to weapons of mass destruction.[56]

---

51 'Cybersecurity and Infrastructure Security Agency' (*Cybersecurity & Infrastructure Security Agency*, 2023) <https://www.cisa.gov/topics/cyber-threats-and-advisories/advanced-persistent-threats/russia> accessed 5 January 2024.

52 Cyber Peace Institute (n 3).

53 Ante Batovic, 'Middle Eastern Conflict Reflects Global and Evolving Nature of Cyber Warfare' (*Crisis24*, 13 October 2023) <https://crisis24.garda.com/insights-intelligence/insights/articles/middle-eastern-conflict-reflects-global-and-evolving-nature-of-cyber-warfare> accessed 5 January 2024.

54 ibid.

55 Neil C Rowe, 'Ethics of Cyber War Attacks' in Lech Janczewski and Andrew Colarik (eds), *Cyber Warfare and Cyber Terrorism* (IGI Global 2007) 105, 109.

56 John Arquilla, 'Ethics and Information Warfare' in Z Khalilzad, J White and A Marshall (eds), *The Changing Role of Information in Warfare* (RAND Corporation 1999) 379, 396.

There are numerous incidents that show the need for ethics. In 2010, the US and Israel developed and used Stuxnet to attack Iran's nuclear program, which was considered an attack on the sovereignty of Iran. This cyber attack was launched because both the US and Israel believed Iran was developing the program for military use, not just for civil purposes. This attack against the Iranian nuclear program was a breach of the UN Charter's prevention of the use of force. There was no evidence that the program would be for military use because Iran has the right to construct a nuclear program for civil purposes.[57] Therefore, to stop the program and avoid contravening Article 2 of the UN Charter, the US used a cyber attack, cleverly attacking and destroying the program without legal consequences as long as the attackers remained anonymous. Later, however, this cyber weapon became the basis for establishing a new generation of weapons that increased illegal activities all over the world. Discovering this cyber attack on Iran's nuclear program led cyber security researchers to begin research to design code that could be used for illegal activities. In addition, personal information became susceptible to cyber weapons as cyber criminals learned to easily hack the information and use it for illegal activities.[58]

The consequences of Stuxnet were unexpected. Both developed and developing third-nations began a race to create and use cyber weapons. Although the US and Israel tried to prevent Iran from building nuclear capability, neither country had anticipated that after the discovery of Stuxnet, Iran would begin to develop cyber weapons.[59] According to computer security experts, the Stuxnet attack did not prevent Iran from developing nuclear power, but it delayed the programme for two years at best. Stuxnet's discovery was a turning point and a revolution in the history of cyber weapons, as many States began to develop cyber weapons to curb future cyber attacks. This implies that the cyber attack resulted in an increase in activity overall. Another unexpected result was the possibility of out-of-control cyber weapons causing damage to other sectors, which occurred when Stuxnet, directed at Iranian nuclear facilities, infected other States' facilities.[60] According to Eugene Kaspersky, 'Stuxnet had "badly infected" the internal network of a Russian nuclear plant after the sophisticated malware caused chaos in Iran's uranium facilities in Natanz'.[61] This case shows how even the designers of cyber weapons can find it hard to control them.

The use of cyber weapons caused a delay in counterterrorism, and terrorists started to use these weapons in their activities. In June 2015, the first International Conference on Computer Security in a Nuclear World discussed the capacity of terrorist groups to use cyber weapons, and it was noted that the cyber capabilities of ISIS (the Islamic State in Iraq and Syria) had recently increased.[62] Furthermore, in 2015, the US official security department revealed that ISIS had attempted to hack the US power system. Hence, this is one of Stuxnet's main consequences: terrorists and other non-State actors can obtain the technology from private companies and use it to threaten a State's stability.

---

57 International Atomic Energy Agency, 'The Texts of the Agency's Agreements with the United Nations' (1959 October 30) UN Doc INFCIRC/11.

58 Arquilla (n 56) 216.

59 Farwell and Rohozinski (n 15) 24-35.

60 Phil Muncaster, 'Stuxnet Infected Russian Nuke Power Plant – Kaspersky' (*The Register*, 11 November 2023) <https://www.theregister.com/2013/11/11/kaspersky_nuclear_plant_infected_stuxnet/> accessed 6 January 2024.

61 ibid.

62 ibid.

VIII. Conclusion

This study concludes that the use of cyber weapons must be defined as a use of force in all operations because, although they are virtual weapons that perpetrators use in cyberspace, they are nonetheless used as weapons. Moreover, there must be a clear definition of 'force' in international law because leaving the definition uncertain may allow cyber weapons and other weapons developed in the future to remain outside the scope of international law. The current definition of 'critical infrastructure' leaves a gap that perpetrators could use when attacking any State. In addition, the use of force for self-defence is further complicated due to the lack of clarity as to whether or not the infrastructure attacked is considered 'critical infrastructure.' The use of cyber weapons will have consequences for international peace and security as these types of weapons are available for the use of both State and non-State actors.

The use and availability of cyber weapons for all States, whether developed or developing States, raises numerous genuine moral questions and international legal issues, given that they can cause enormous destruction at much less cost than traditional weapons. Fewer civilian casualties occur from cyber weapons in comparison to operations that use conventional weapons, such as Israel's operation in 1981 against Iraq's nuclear program by conventional weapons, which caused the death of 11 civilians and soldiers. On the other hand, the 2010 cyber attack against the Iranian nuclear program did not kill anyone but achieved the same result, which (when looking at the attack from a consequences approach) means the use of the cyber weapon should be considered equal to conventional weapons. However, their use by terrorist organisations undermines counterterrorism efforts, because terrorist groups and non-State actors find cyber weapons easy to use in their activities. Overall, the evolving role of cyber operations and Russia's targeting of third-party States during the war with Ukraine underscore the complex and multifaceted nature of modern warfare. These cyber operations have demonstrated the potential for significant impact beyond conventional military means, posing new challenges to international security and necessitating a comprehensive understanding of cyber warfare in the context of armed conflicts.

In addition, the discussion in this study shows an important point regarding the future of cyber weapons. Cyber weapons still need more legislation regarding ethics because they have the capacity to attack computer systems, leaving computerised systems (such as States' health systems) as well as human lives in a vulnerable state. Failing to consider cyber weapons as a high priority in ethics and law will directly endanger human lives.

****

Identifying the Legitimacy of the Taliban Government and the Resurrection of Peace in Afghanistan

Gurwinder Singh*
DOI: 10.21827/GroJIL.10.2.103-118

Keywords:
CUSTOMS, PLURALISTIC SOCIETY, RECONCILIATION, INTRA AFGHAN PE ACE, NORMATIVE LEVEL, EMIRATE

Abstract

A government's legality and its recognition need to be tested through the lenses of international law where the government changes through unconstitutional measures. The Taliban's coming to power in Afghanistan is through unconstitutional and undemocratic means. Its control over Afghanistan raises questions about the fundamental nature of international law, politics, the State's internal governance, and issues crucial for international peace. These matters although of primary concern, however, compromised to a secondary position as their accomplishment is contingent on peace being restored and guaranteed by the class of people in the ruling hierarchy. Since the Taliban government is not recognised by many States, it puts to test, the international law criteria for recognizing the government of the State. The reluctance shown by the comity of nations in recognizing the government, further raises the related issue of international law, that how the comity of nations can create an inroad for human rights and peace in Afghanistan. The objective to establish peace in Afghanistan, by identifying the legitimacy of the Taliban regime, touches the core aspect of *de jure* government as recognized by international law and is also a key concern for setting the trust of Afghan people in international law and international institutions. This article sets the premise to know the position of international law, for recognising a government in a State where the change of government is not established by legal measures and therefore not recognised by other nations. Besides, the author attempts to explore the possibilities of setting the foundation and establishing human rights and related objectives for sustainable peace in Afghanistan. The author sets the dialectical discourse, for setting a roadmap to achieve peace in Afghanistan by applying international law provisions through international institutions.

I. Taliban and interface with democratic principles: a new equation for the comity of nations

The comity of nations for establishing a relationship with a new State or with a newly elected government relies both on the principles of international law and the internal legal system of the said State. There are certain positive norms of international law for whose effectiveness democracy is considered a better political option. However, this strand can

* The article is part of a project entitled 'ANALYSING THE RELEVANCE OF INDIAN LEGALTRADITIONS IN THE LEGAL SYSTEM OF SAARC NATIONS' sponsored by SEED Grant of Institute of Eminence Status of Banaras Hindu University, India.

be subject to critical analysis as many point to the hollowness of the democratic system of several States and still maintaining trust among the comity of nations.[1] The present Taliban government after attaining power and its interface with democratic principles and international law obligations, is setting a new equation for its recognition before the comity of nations. Law in practice of a State is often defined by the people at the helm of affairs and in Afghanistan, presently it is the Taliban that is controlling the political system. The present Taliban regime took over the power not by democratic means but by waging armed aggression against the elected government.[2] This regime has re-established the Islamic Emirate of Afghanistan (IEA)[3] and has further brought changes in the style of governance by making substantive modifications to the theoretical and structural basis of the political, administrative, and judicial setup. However, there is a big contrast between the democratic setup and the Emirate as established by the Taliban.[4]

As is popularly known, in a democratic setup, citizens have the right to elect their representatives and sovereignty lies with them based on the concept of popular sovereignty. On the contrary, the present Taliban regime has shown their willingness to establish an Islamic system of government and the State to be referred as an Islamic Emirate. The conception of the Emirate according to the Taliban is State governed based on Islamic text. Citizens in a democratic setup choose their representatives through universal suffrage. In the Emirate, there is no command except that of Allah, and the State is ruled by an *Emir*, (a commander of the faithful) chosen by *Shura-Ahl al-hallwal-aqd (*a limited group of Islamic leaders).[5] In an established democracy 'at least in theory', no one is above the law and the law is passed by elected representatives in such a system. On the other hand however, the *Emir* has near absolute executive, legislative and judicial authority. However, there are no strict provisions for the accountability of Emir. Individual rights and freedoms are also to the limits of *Sharia* (body of religious law that forms part of Islamic traditions) and as determined by *Emir* and selected *Ulema* (a body of Muslim scholars).

A question that thus arises is what kind of government can restore peace in Afghanistan and can also achieve the goal of an inclusive State along with respect for Islam. Establishing peace in Afghanistan is not simply to set a roadmap for democratic changes in the internal system but to forge a state-to-state relationship among the comity of nations as recognised by international law, which demands a certain predictable social, political, legal order based on certain standards of values.[6] Accomplishing the objectives of peace requires social reconstruction in Afghanistan. Such social reconstruction can be engineered through social and cultural bridges formed between various Afghan tribes. Demographically, Afghanistan consists of several tribes, and the origin of people inhabiting this country remains diverse. However, historically there are instances of inter-mingling of various ethnic groups over a period of time but the majority of Afghan tribes

---

1 Jan Klabbers and others, 'International Law and Democracy Revisited: Introduction to the Symposium' (2021) 32(1) European Journal of International Law 9-15.

2 Gilles Dorronsoro, 'The Taliban's Winning Strategy In Afghanistan' (*Carnegie Endowment for International Peace*, 29 June 2009) <https://carnegieendowment.org/files/taliban_winning_strategy.pdf> accessed 28 January 2023.

3 Alex Thier, 'The Nature of the Afghan State: Republic vs. Emirate' (*United States Institute of Peace*, November 2020) <https://www.usip.org/sites/default/files/Afghanistan-Peace-Process-The-Nature-of-the-Afghan-State-Republic-vs-Emirate.pdf> accessed 20 January 2023.

4 ibid.

5 Golam Mohiuddin, 'Decision-Making Style in Islam: A Study of Superiority of Shura (Participative Management) and Examples from Early Era of Islam' (2016) 8(4) European Journal of Business and Management 79, 80.

6 Court of Appeals of the State of New York, *Russian Republic v Cibrario* [1923] 235 NY 255.

have tried to maintain distinct ethnic, physical, and linguistic differences.[7] Often, rigidities related to tribal and cultural identities have led to bloody conflicts among the tribes. The new Taliban regime and its mentors require considerable determination to govern Afghanistan and establish peace in the society that remains fragmented from historical times because of ethnic and tribal conflicts. Setting the objective to attain a balance between the conflicting interests of various tribes and groups, Afghanistan needs a political, judicial, and administrative system based on a federal democratic structure, that facilitates reconciliation among the various tribes.

II. The rule of law as a western model vis-à-vis tribal system of governance

The rule of law is a key to constitutional values and rights, and through the judicial system it also enables a State to meet international obligations. The constitutional system of Afghanistan is at a very nascent stage of development. The present Afghanistan constitution is not very much based on western ideas of liberal democracy.[8] Western political thinking idealises the democratisation of societies, which promotes the idea of ending the set of inherited rights and privileges and aims to assure equal rights, to all its citizens without any discrimination.[9] The tribal power hierarchies, not based on elected governments and undermining the basic rights of citizens fail the test of political modernity. The political methodology adopted by the Taliban is outside the purview of legality and fails the test of modern methods to define the rights of people and apply the law for the attainment of justice.[10]

While aiming for gradually achieving modernity in the Afghan legal system, a comparative perspective between the Afghan tribal system and the political system that follows Dicey's rule of law[11] can set the premise for the gradual reconstruction of social order. In a social setup based on the rule of law, political leaders are chosen through elections and cannot have a power structure like a tribal system based on a strict hierarchy without checks and balances.[12] These leaders are made accountable through institutional procedures. In the tribal form of governance, the tribal leaders characterise themselves as superior to the common people and work through the set of their followers. Regarding the centre of power and stability, when the control of tribal leaders gets weaker, the tribal society can be in a state of chaos. Once a tribal leader declines, there starts shift in power. With the shift in power, the people often shift their support to a new tribal leader or to a new tribe.[13]

---

7 Martin Ewans, *Afghanistan: A Short History of Its People and Politics* (Harper Perennial 2002) 4-5.

8 Amin Tarzi, 'Islam and Constitutionalism in Afghanistan' 2012 (5) Journal of Persianate Studies 205-243.

9 J S McClelland, *A History of Western Political Thought* (Routledge 2005) 266-267.

10 '8834th meeting: Secretary-General Urges Council to "Stand as One", Ensure Human Rights Respected in Afghanistan, as Delegates Call for Protection of Civilians' (16 August 2021) UN Doc UN SC/14603.

11 Albert Venn Dicey, *Introduction to the Study of Law of Constitution (*Macmillan 1915) xxxvi.

12 Adelphi Alexander Carius, Adelphi Lukas Rüttinger and Adelph Achim Maas, 'Developing National Sustainable Development Strategies in Post-Conflict Countries' *(United Nations Department of Economic and Social Affairs Division for Sustainable Development*, June 2011) <https://sustainabledevelopment.un.org/content/documents/1039guidancenotes2.pdf> accessed 10 December 2022.

13 Antonio Giustozzi and Noor Ullah, 'Tribes and Warlords in Southern Afghanistan, 1980-2005' (*Crisis State Research Centre LSE*, September 2006) <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp7.2-tribes-and-warlords-in-southern-afghanistan.pdf> accessed 15 December 2022.

Talibs believe that they are fighting to set up an order run by Ulama.[14] Adding further to this, they aim to create a *sharia*-based setup for implementing *Din*, the religion of God. The head of the State under the Taliban's regime is essentially with unlimited and unaccountable power. The Emir is the head of the State and obedience to him is deemed crucial. Afghanistan to date, is primarily a rural country with a negligible industrial base and high illiteracy. The uneducated rural population or those confined to the traditional system are the core basis of support for the Taliban. In the present Afghan power structure, tribal leaders and militia commanders form the key components.[15] The rules as applied by the Taliban are in contrast to the fundamentals of a democratic system, however, formation of the Taliban government has unified tribal leaders and militia commanders of various ethnic groups to an extent. This unification, however, is not based on the rule of law, rather on the rule of decree[16] as the Taliban has set its objectives for the entire Afghan nation to be governed with moral principles based on theocracy and not based on universally acknowledged democratic values. The kind of laws the Taliban applies mainly is derivative from Islamic religious texts. The reason for such practices as advocated by the Taliban is its proclamation of moral principles and for applying such codes.[17]

Linking Afghanistan and Afghan society with the international community requires the identification of values that are common nationally and internationally and a road map drawn through international law tools. Taliban rejects liberal democracy and its features. It is expected that Afghanistan when ruled by the Taliban will adhere to basic human values acceptable to the community of nations such as, good governance, respecting human rights, creating pluralistic societies and a policy of international appeasement. Working in furtherance of such goals seems a remote possibility, that can be reasonably explained owing to the lack of democratic ideas in their setup. In the absence of democratic values in the power system, the political will that sets the goals for human rights in general and individual rights cannot be translated into reality.

III. International law and legal position of the Taliban government

Referring to the conventional practices followed by the States, for recognition of a State and government, a State under international law can give recognition either to a *de facto* government, political entity, or a group controlling the state of affairs of a nation or having control over part of the territory of a State in question.[18] The question of legality of a government and its recognition by international law arises when the government in a State in question, is changed through unconstitutional or unconventional measures. These background conditions set the proposition for international law to explore and characterise the preconditions, for a State to recognise the government of another State subject to fulfilling objective conditions. International law sets pre-conditions for the recognition of

---

[14] Haroun Rahim and Ali Shirvani, 'Is Taliban Story Going to be the Iranian Story? The Islamic Emirate v. the Guardianship of the Jurist (Wilayat Faqih)' (2021) 17(1) Manchester Journal of Transnational Islamic Law & Practice 23, 28.

[15] William Byrd, 'Lessons from Afghanistan's History for the Current Transition and Beyond' (*United States Institute of Peace,* September 2012) <https://www.usip.org/sites/default/files/SR314.pdf> accessed 8 March 2023.

[16] Ananya Jain, 'Rule of Law and its Application in the Indian Polity' (2018) 1(3) International Journal of Law Management & Humanities 2-4.

[17] 'Afghanistan: COI Repository 1 Sept 2021 - 31 Dec 2022' (*Asylos/Clifford Chance,* December 2022) <https://www.asylos.eu/Handlers/Download.ashx?IDMF=e3400d01-e5c8-474b-9473-5ea1ae009109> accessed 08 March 2023.

[18] Malcolm Shaw, *International Law* (Cambridge University Press 2019) 337.

the State but the same is not the practice for recognising the government. The customary practices followed by the nations for recognition of a newly formed government are relatively different from the recognition of a newly formed State.

The term recognising a government can be further explained, as constituting acceptance of a particular political situation by the recognising State, both in terms of the relevant factual situation and legal consequences that follows the recognition.[19] Having set this as a legal basis, further, conditions can be set for recognition of the Taliban government in Afghanistan by the comity of nations. The Taliban took over the capital city of Kabul on 15 August 2001 after a prolonged armed assault against the elected government of President Ghani. They declared the formation of their own government after President Ghani fled Afghanistan.[20] This change in the regime of Afghanistan through non-constitutional measures raises questions about the Taliban government's recognition under the established rules of international law. The majority of the nations, showing their concern for the 'rule of law', for day-to-day internal administration, have set pre-conditions to the recognition of the Taliban as the new government. The prominent pre-conditions are respect for human rights, political stability, assurances at the political level and in the context of international law obligations, that Afghanistan will not be used as a ground for training terrorists,[21] and that the Taliban ensures basic rights for women.

Such agenda setting as a precursor to recognition of the government, leads to the debate, of how conditional recognition of government by the other States can establish the efforts for long-lasting peace being restored in this country. The second relevant question is, if the government is not given recognition by other nations, then what is the position of international law on the recognition of that particular State? Referring here the present-day practices, States no longer consider the recognition of governments as a matter of international law obligation on their part, as this has become a matter of personal choice by the States. However, international law draws a distinction between recognising a State and recognising the government of a State.[22] Recognition of a State constitutes a unilateral act, entirely at the discretion of the State recognising that other one. The recognition of a State creates a presumption that it possesses the key characteristics of a State[23] within the meaning of international law. The State is accorded *de jure* recognition, which means, legally the essential conditions are fulfilled.[24] On the contrary *de facto* recognition has relatively less legal effect as all the required conditions are not fulfilled or it may be that the characteristics for acquiring Statehood are not stable.[25] The issue of recognition of the government of the State, whether *de jure* or *de facto,* emphasises further examination by international law, whether a political group attains political power constitutionally or not by constitutionally recognized means. International law has little to guide when the discussion is at this crossroads, and practically seems that recognition of a government is

---

19 Anne Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14(4) International Community Law Review 381, 400.

20 'Taliban announces new government in Afghanistan' (*AlJazeera*, 8 September 2021) <https://www.aljazeera.com/news/2021/9/7/taliban-announce-acting-ministers-of-new-government> accessed 10 October 2022.

21 John F Sopko, 'What We Need To Learn: Lessons From Twenty Years of Afghanistan Reconstruction' (*Special Inspector General for Afghanistan Reconstruction*, August 2021) <https://www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf> accessed 11 August 2022.

22 Hersch Lauterpacht, 'Recognition of States in International Law' (1944) 53(3) Yale Law Journal 385, 386.

23 A State consist of territory, population, and independent and effective government.

24 Dencho Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4(1) European Journal of International Law 1, 5.

25 M J Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (Macmillan Press 1997) 17.

more of a political act for creating legal consequences. Recognition of a State or a government, through international law and further regulating relations among the States, where one seeking recognition and another recognising it, may practically get influenced by concerned facts, and significantly by the vital interest of the States and not merely by the premises as framed under international law. The unconventional methods adopted by the States on the question of recognition, metamorphise into new forms of methodologies and justifications for recognising the said government in question.[26] Recognition given to the Taliban by few of the States gets intriguing, and this requires further finding of the reasons for such recognition. The reasons can be deduced by drawing several perspectives, as recognition being given to the Taliban government by States due to interpretation of principles of international law, common factor of Islamic traditions, or bargaining based on mutual interests.

The examples can be referred, such as the relationship between the Chinese government and the Taliban. China's relationship with Afghanistan seems to be driven primarily by economic interests, for the use of natural resources, and for other strategic reasons. The BRI (Belt Road Initiative) connects China with regions in all directions. Further, the strategic expansion of China here is to put a check on the United States (US) influence in the region, while simultaneously enabling the development of the Afghan-China trade and energy corridor.[27] Secondly, China also faces tensions in its Xinjiang province, of Sunni Uyghur militant groups based near the Pakistan-Afghanistan border.[28] However, it seems some level of understanding has been attained between the two sides, as the Taliban regime has also shown interest in establishing a relationship with China, having shown their openness to Chinese investments.

Concerning Russia, it also began re-engaging with the Taliban following the establishment of the Taliban's regime in Afghanistan. The present Russian government, hopes that a relationship with the Taliban may safeguard their political interests in Central Asia. However, Russia because of its bitter experiences during Soviet Union's control over Afghanistan, from 1979 to 1989 cautiously depended upon the cooperation of other neighbours in resolving the central Asian situation. After the withdrawal of US troops, the prospect of China and Russia's co-operation in the central Asian region had evolved. [29]

For Saudi Arabian policymakers, Afghanistan is closer to their kingdom. Saudi Arabia sees Afghanistan the kingdom's neighbour and for both, strategic and cultural reasons, has developed keen interest in Afghanistan's social and political affairs. Strategic and cultural reasons cover threat from Shia population. Saudi Arabia's foreign policy is also influenced by its complex relationship with the Shia minority. Saudi Arabia by maintaining a relationship with the Taliban and recognising the legitimacy of their government tackles two points of political convergence. Firstly, keeping a check on the growing Iranian influence which is a Shia-dominated nation, and secondly, influencing

---

[26] O H Thormodsgard and Roger D Moore, 'Recognition in International Law' (1927) 12(2) Washington University Law Review 108-117 .

[27] Deon Canyon and Srini Sitaraman, 'China's Global Security Aspirations with Afghanistan and the Taliban' (*Daniel K. Inouye Asia-Pacific Center for Security Studies,* 1 August 2020) <https://www.jstor.org/stable/resrep25711> accessed 14 August 2023.

[28] Dirk van der Kley, 'China's Foreign Policy in Afghanistan' (*Lowy Institute For International Policy*, October 2014) <https://www.lowyinstitute.org/sites/default/files/chinas-foreign-policy-in-afghanistan_0.pdf> accessed 17August 2023.

[29] Brian G Carlson, 'The Taliban Takeover and China-Russia Relations' (*Center for Securities Studies Analyses in Security Policy*, November 2021) <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse294-EN.pdf> accessed 17 August 2023.

Afghanistan's educational sector, to ensure that the interpretation of Islam to be based on the conservative Sunni culture.[30]

Taliban's relation with Pakistan can be understood with Pakistan being one of its closest neighbours. Pakistan's historical connection with Afghanistan, begins in the colonial era, however both are highly cognizant of the violations of their respective territorial boundaries, as Kabul refuses to recognise the Durand line drawn by the British as a border between the two nations. Later from the period of 1950 onwards, and Cold War alignments of the nations, based on the two power blocks added different chapters on the relationship between Pakistan and Afghanistan. It was Pakistan's support for the creation of the Mujahideen along with Saudi Arabia and the US that brought the two nations politically closer to each other.[31] Recently, with the presence of Indian Aid agencies working in Afghanistan, Pakistan has shown its contention with Taliban on this issue, finally settled with reduction of India's role.

As per the practices, recognising a government also contributes to giving legitimacy both to the government and acts done by the government. Furthermore, recognition of the government and of the State can be a unilateral act of any nation but is often influenced by foreign policy concerns and are also of a political nature.[32] Once the government is recognised, the scope of its decision-making power and credibility in the international domain gets acknowledged. The recognised government's actions and its decisions are binding on the States, so far as the obligations under international laws are concerned.[33] Such governments can appoint its diplomat, can establish consular offices, and can conclude international agreements.

In the events when governments of the State acquire power through the constitutional process or there is a change in authority by constitutional measures, such authorities are *ipso facto* recognised as per international law.[34] However, recognition of government, if contingent on compliance with UN Charter and observance of the rule of law or any other conditions which at times are termed as western values of democracy, would create the scope for political bargain between the States. As such, politics and diplomacy plays crucial role in recognising the government established through unconstitutional means.[35] The act of recognising a government however needs to be tested even further by the principles of international law, for distinguishing between recognition by an external State, either as an interference in the internal affairs of the State or is it in true sense a case of recognizing a government for bringing it into mainstream of the comity of nations.

---

30 Guido Steinberg and Nils Woermer, 'Exploring Iran & Saudi Arabia's Interests in Afghanistan & Pakistan: Stakeholders Or Spoilers' (*CIDOB Policy Research Project*, April 2013) <https://www.swp-berlin.org/publications/products/fachpublikationen/Steinberg_Woermer_SaudiArabia_Interest_April2013.pdf> accessed 5 January 2024.

31 Elizabeth Threlkeld and Grace Easterly, 'Afghanistan-Pakistan Ties and Future Stability in Afghanistan' *(United States Institute of Peace,* 2021) <https://www.usip.org/publications/2021/08/afghanistan-pakistan-ties-and-future-stability-afghanistan> accessed 5 January 2024.

32 Anne Schuit, 'Recognition of Governments in International Law and the Recent Conflict in Libya' (2012) 14(4) International Community Law Review 381.

33 Miyazaki Takashi, *Chinese (Taiwan) Yearbook of International Law and Affairs, Volume 28* (Brill Nijhoff 2010) 68.

34 Shaw (n 18) 344.

35 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press 1998) 10. 'On the basis of both principle and State practice it is thus argued that recognition of governments, either as a concept of international law or indeed as a term appearing in official statements, has not been abolished'.

The recognition of a State is mentioned in Article 1 of the Montevideo Convention, whereas, there is no similar legal instrument for the recognition of government,[36] making the criteria for recognising government subjective. From this level of subjectivity, the issue to be analysed is whether the Taliban Government can be recognised under international law. Since, human rights principles and related objectives are essential components of international law, the State's practice of recognition of a government can be made contingent on the fulfilment of these conditions. Applying these accepted parameters of International law, there is no straight answer to the recognition of government but circumstances bringing the States closer and the level of conditional interaction by States, with the Taliban government, provide reason for the recognition of the Taliban government or denying such recognition. Ironically, President Ghani who was elected by constitutional procedure has left the country and has put no claims for its legitimate control of affairs.[37] The extent of influence, the Taliban had over the Afghan people, itself answers this question and, the rapid fall of the Ghani government shows the weak base of the *de jure* government. In the context of this entire event and diplomatic relations already being established by some nations as mentioned above, a proposition can be set; can the Taliban government be given *de facto* status initially?[38] *De jure* recognition means that the State giving recognition considers the recognised entity to be the government, ie the government in legal terms is representing the State.[39] An implication drawn from *de facto* recognition is that the system in question fulfils the constituent features, but seems more a matter of individual choice of a State to recognise.[40] The conditions for giving the Taliban a *de facto* recognition as a prelude to *de jure* after complying with international law requisites, can have some justifiable consequences for the Taliban government and in legal terms, some responsibility based on international law can be bestowed on them.

IV. The extent of State responsibility for the acts of Taliban

International law establishes the responsibility of the State for the conduct of government. This can further be clarified by elaborating on the relationship between the action of the government on one hand and the State being held responsible for such an action. When an action is taken by the respective government, it is considered an action of the State and the State can be held accountable for it under international law.[41] While determining the extent of State responsibility for international obligations, it is not always necessary that the concerned State is at fault rather, it could be the government has breached the agreement.

---

[36] Rüdiger Wolfrum and Christiane E Philipp, *Max Planck Yearbook of United Nations Law*, *Volume 6* (Max Planck Institute for Comparative Public Law and International Law 2002) 559, 570. There are exceptions to this general practice as well. President Obama gave recognition to National Coalition of Syrian Revolutionary and Opposition Forces in December 2012.

[37] Ayesha Malik, 'The Islamic Emirate of Afghanistan and Recognition of the Government under International Law' *(Research Society of International Law,* 2021) <https://rsilpak.org/wp-content/uploads/2021/10/afghanistan-taliban-recognition_rsil.pdf> accessed 10 January 2023.

[38] J Whitla Stinson, 'Recognition of De Facto Governments and the Responsibility of States' (1924) 9(1) Minnesota Law Review 1,2.

[39] State Department, Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan, which is not recognised by the United States as a State and is known as a Taliban-run State.

[40] Lauterpacht (n 22) 386.

[41] International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10 art 4. Article 4 (conduct of organs of a State) states that '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the Central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State'.

However, holding the State accountable if the political entity has attained power as a result of an insurrectional movement requires, widening the scope of international law and setting the objective criteria for the recognition of government. In this concern, Article 10(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states that 'an act of the government, that is formed as a conduct of an insurrectional movement, shall be considered as an act of that State, under international law'. While applying legal parameters for holding the State responsible, we need to outline the extent of responsibility that can be attributed to a State, for any such acts of the government formed by an insurrectional movement. The responsibility can be further specified by dividing, the conduct of the members of such an insurrectional movement into two categories. One, their acts purely as the conduct of private individuals, and the second, the working of the movement as a political group. The State cannot be held liable or made responsible for the conduct of private individuals. Article 10,[42] has thrown some light on establishing the responsibilities of those, who have attained power after an insurrection and making the State responsible for such acts. This is inclusive of the act of non-State groups, groups or entities involved in replacing the existing government. Such non-State actors after forming the government are responsible for the acts committed while it was part of an insurrectional movement.[43] Analysing here the control of the Taliban over Afghanistan from the perspective of international law, the issue is, since the government formed by the Taliban, is not recognised by majority of States, then how can their action be considered actions of the State and the State can be held responsible for acts violating human rights. The valid answer to this argument is that, the State is held accountable for the actions of its government, since State is in a position to have effective control over the activities of its people or the political entity. Further, international law recognises the need for stronger protection of common legal interests and values of the international community, and this can be done by setting common obligations for the States. Common legal interests are set under peremptory norms of general international law.[44] It can be inferred from the general interpretation of international law, that the Taliban government although not recognized by many States, has a responsibility for maintaining basic human rights. These responsibilities can be further identified as conditions, for recognising the government. International humanitarian law being part of International customary law, cannot be contravened simply on the pretext of non-recognition of the government. Safeguarding peremptory norms are part of international law obligations and the Taliban cannot escape from it, on the ground that its government is not being recognised by the international community. During peace efforts, Taliban leaders have clarified their wish that sanctions imposed upon them should be lifted and have agreed to ensure the basic human rights of the people living in Afghanistan.[45] Therefore, it becomes relevant to

---

42 ibid art 10.

43 ibid. Article 10 (conduct of an insurrectional or other movement) states that '1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9'.

44 James Crawford, 'Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) The American Journal of International Law 874, 880.

45 Barnett R Rubin, 'Leveraging the Taliban's Quest for International Recognition' (*United States Institute of Peace,* March 2021) <https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Talibans-Quest-for-International-Recognition.pdf> accessed 10 February 2023.

analyse the recognition of the Taliban government and the legal consequences that ensue. Ironically, the Taliban counters the allegations against them for violating human rights by creating propaganda against the Western world.

V. An insight into the effectiveness of the role of international institutions

International world order is increasingly becoming interdependent and inter-connected, which has greatly influenced international law. Prior to the Second World War, international law was applied for bilateral relations among the autonomous States and the main concern was, establishing diplomatic relations, treaties, and negotiations among nations for concerned reasons. Post Second World War, international law seems to have expanded its role through treaties and institutions in the areas that are of common concern for the majority of States. These institutions also promote coordination and expect uniform behaviour in the vast areas for the acknowledgement of multilateralism. The role of international institutions in expanding environmental law can be referred to here as an example. Institutions through treaties have tried to curb many local practices that can have effects beyond boundaries of the State. This in a way highlights the significance of norms created to control the activities endangering other nations and people. This can be compared to a situation where the State is supporting those groups of people who violate human rights and do not follow the rule of law and can ideologically be threat to peace and the peaceful existence of other cultures. Member States of the UN have acknowledged that the UN as an international institution can take initiative for establishing basic human rights standards that are binding on all the States regardless of their political structure.[46] This may come in conflict with the customary practices of the nations. Further, this initiates a debate on the reasons for the origin of any particular custom. Afghanistan when interfaced with values and standards set by international institutions finds itself in similar binaries. In the present times, we see offensive measures adopted by the Taliban against the policies of international institutions, that can be reasoned as a reactionary and rebellious attitude of the people embedded, because of the several attempts by external forces to control Afghanistan. Certainly, one cannot discount the fact, that many of the present policies in Afghanistan are forwarded by international institutions; their genesis is based on the Cold War struggle and thoughts based on neo-colonial concepts.[47] Neo-colonial concepts attempted to subdue the cultural ethos in Afghanistan, the culture based on the Subcontinent's traditions and customary practices, the instability, and the power struggle are used as favourable political conditions for big players. Despite the influence of great powers, these international institutions nevertheless do have positive objectives. Ironically, peace and stability as a part of an external effort by the international bodies and other stakeholders[48] also become a subject of political bargaining for the Taliban. The external efforts for peace and stability, because of cultural and political impediments are pushed to a secondary level, rather than forming part of the mainstream normative setup. Further, the gap between political convictions and strategic reasons for establishing peace gets widened as international institutions are not making decisions based on consensus but often apply principles that are based on majority decisions. The propaganda generated

---

[46] Jonathan I Charney, 'Universal International Law' (1993) 87(4) The American Journal of International Law 529-532.

[47] The States interested in restoration of peace for establishing trade routes and cultural linkages.

[48] The main stakeholders for restoring peace in Afghanistan are India, Pakistan, China, Russia, Arab States, Iran and several of the Central Asian countries.

by the Taliban against these institutions leads to a backlash against international institutions, by the local Afghans.

The backlash against globalisation further takes the form of economic and cultural dissension. The reasons for economic counter-reaction are obvious. The poor and unemployed in Afghanistan feel outside the system run by law and democratic setup based on a western concept. Consequently, many of the Afghan people and leaders began to question the relevant position of Afghanistan in a globalised system which they consider non-Islamic. The reasons for their questioning do have logical justifications as one cannot deny that the globalised system is also believed to have created inequalities: while some States seem to become more prosperous, others are in a debt trap. The usual perception that is created about globalization[49] through international institutions is to reduce economic inequality, provide political and social freedom, and find social security in which each family can expect to earn more and live better than the previous generation.

Another facet of this reactionary movement can be traced to cultural reasons. The cosmopolitan culture, instead of creating an inclusive environment, creates rather a hostile atmosphere in Afghanistan as local Afghan people rely on customs and traditional practices. This state of confusion has made the Afghan people dispel liberal political ideas such as multiculturism, and secularism in the name of establishing pluralism. Populist leaders and warlords have often attempted to encash this state of ambiguity. These leaders try to persuade the masses convincing them, that they are the real defenders of this land, its people, and its culture. The misunderstanding is further translated into the belief that, the reason for western interference is to culturally influence Afghanistan and gradually to establish western hegemony in the region and over Islam. Further to add here, Afghan people are tutored by Madrasas to believe that recourse to Islamic practices can save them from such influences.[50] Such beliefs put a curtain on the construction of a pluralistic legal order and democratic setup. Therefore, establishing the rule of law as a core principle for running the State by protecting the rights of all, simply remains in theory.

The evolution for long-term peace in Afghanistan further depends upon a key parameter, the foundation of a pluralistic society. The roadmap for realising the objective of a pluralistic society requires the facilitation of reconciliation through a legal process, enabled by a stable justice system.

VI. The legal system to safeguard pluralistic social order for peace in Afghanistan

Afghanistan consists of main tribes such as Pashtoon, Tajiks, Uzbeks, Hazaras, and several others. Many of these tribes follow their own system of laws based on distinct customs and practices. Afghanistan as a nation, does not seems to have a uniform set of rules to be considered, primarily for a common judicial functioning. The tribal laws that often exist in the form of unwritten practices may not be entirely in harmony with written laws and in certain circumstances may stand in contradiction to each other.[51] The reason for this contradiction can be, the way methodologies are applied to scripting the customary laws and practices into a codified system. The influence of a western approach or

---

[49] Betul Yalcin, 'Comparative Social Policy Programme' (MSc essay at the University of Oxford, 2009) <https://www.researchgate.net/publication/324331543_What_is_globalisation> accessed 10 February 2023.

[50] Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards: Final Report* (International Commission of Jurists 2003) 16, 19.

[51] Christine Zuni Cruz, 'Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law' (2001) 1(1) Tribal Law Journal 1-5.

methodological tools may not fit into the existing customary practices. Some of the common traits among these tribes are preserved and practiced as tribal pride, and this also gets complemented by rigid following of the Islamic faith.[52]

With such a social setup, it can be stated that, the people of Afghanistan are at a crossroads in bringing social transformation, to achieve a stable Afghanistan. The stability in the State, whether it evolves through the choice of the people from within, or by measures of international institutions, in either of the cases requires social transformation and relieving the people from ideologically established prisonhood by securing for them fundamental freedoms.

Sustainable peace can be accomplished based on the criteria as set by international institutions, and by the law-making bodies of the concerned nation establishing a constituent body, for drawing a constitutional plan, that features a pluralistic setup. Such a constitutional setup is required for defining the specific roles of legislator, executive, and judiciary. The present regime of Afghanistan needs to follow a constructive approach more inclined towards deductive reasoning rather than adopting the rigid method of interpretation. The International community expects from them, the resurrection of peace and stability and setting the normative basis for basic human rights.[53] The Taliban regime although following odd patterns of governing the Afghan society has finally taken the society to insularity. However, the Taliban owes a moral obligation to the international community. The recognition the Taliban government has sought from the international community is contingent on complying with certain legal obligations.

This new regime faces severe challenges in establishing the framework for the rule of law, applicable to all the tribes. Primarily, the present regime should establish a pluralistic model of Afghan society. The pluralistic social order, for having its long-term effective support base of the people up to the normative level, rests on two key features. Firstly, the ruling class acknowledges the will of various communities of the State being governed by their respective social and legal order within a common overarching legal framework as it is in the case of federal structure.

Secondly, in a State like Afghanistan where society is still based on a tribal system, the legitimate acceptance of an uncodified system of laws can be supportive of a pluralistic setup, such as in the case of the Indian system, where personal laws are exclusive of other laws.[54] This can be further explained as, laws based on customary practices of different tribes need a rightful place in the Afghan legal and judicial system, as people of specific tribes can conveniently adhere to such customary and traditional practices. This model can be affiliated with HLA Hart's conception of primary and secondary rules, and that can be further used for coordinating tribal rules and laws enacted based on the western notion of democracy. The customary practices of the tribes can be customised in the form of primary and secondary rules. Such an application of the law will act as a bridge between two different formats of rules and laws, customary practices and codified rules.[55]

The concern for peace and stability in Afghanistan is not only confined to internal regulations and governance but rather in the broader context of South Asian Association for Regional Cooperation (SAARC) and the world at large, for sustainable peace, in

---

[52] Martin Ewans, *Afghanistan: A Short History of Its People and Politics* (Harper Perennial 2002) 4.

[53] Shahzeb Shaid, 'Islamic Law of Armed Intervention for Peace and Humanitarian Purposes' (2021) 17(1) Manchester Journal of Transnational Islamic Law & Practice 59, 63.

[54] See Hindu Marriage Act [1955], Muslim Marriage Act [1939], Parsi Marriage Act [1936] in the Indian context.

[55] Matthew L M Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence' (2006) 4 Indigenous Law & Policy Center Occasional Paper Series Working Paper <https://www.law.msu.edu/indigenous/papers/2006-04.pdf > accessed 5 January 2024.

Afghanistan.[56] While considering the restoration of peace as a primary objective, the international community would also like to see things from the spectrum of a binary set of legal values. This means distinguishing, on the one hand, the parameter of legality between the Taliban's takeover and the style of governance and, on the other hand, the expectations of the international community for establishing peace and stability in the society which at times seems contradictory.[57]

Afghan society transforming from a theocratic system to a democratic one requires path-breaking measures that can transform their beliefs, faiths, and practices to modernity. Historically, there are instances of such transformation, such as the one in the European system, that choose the untrodden path to break established inequalities as a consequence of kinship ties and hereditary privileges, the consequence of monarchy, or a centralised system of authority.

Transformation of society from the old setup to the society following new norms, with the objective of establish equality, gender justice, and liberal values have become the hallmark of liberal democracy. The Taliban came to power through non-democratic, offensive methods that manifestly question the issue of their recognition as a legitimate form of government by the international community.[58] However, this debate gets diluted for practical purposes, as recognition of a State is altogether different than the recognition of the government by the international community. The recognition of a government can at times be considered an interference of a foreign nation in the internal matters of the State in question.[59] The methods adopted by the Taliban for setting their administrative set up and for establishing peace and stability in society will have long-term repercussions. The legal system to be formed on modern lines for Afghan people and society needs primarily to recognise Afghanistan as a diverse, independent country, its people belonging to different ethnicities, proud of their culture and traditions. Establishing a legal system that is inclusive to accommodate the features for a heterogenous society, faces challenges as various tribes and ethnicities cannot be bridged in a system that cannot guarantee peace.

VII. Running an extra mile with a human rights and women's rights approach

The role of human rights concepts and principles, as a developer of political and social systems can be based on the objectives as set in the constitution and objectives forwarded through rules and provisions of those international institutions, that promote multilateralism and international law. Regard must also be given, to the substantially inalienable character of human rights, its enforcement of collective values and its reach for the protection of individual freedom. Further, this construction has to be enabled for promoting and maintaining the ideals of a democratic society. The peace process, or the responsibility for establishing peace in Afghanistan is a monumental challenge. Introducing a human rights approach can be an attempt to evolve an alternative way of thinking and set the social structure with a democratic line of thinking. Human rights approaches from Afghanistan's perspective cannot be confined to asserting the natural rights of individuals as inalienable rights, but rather with a wider scope for further extension of rights, freedoms, and gender justice. Human rights can be adopted as safeguard measures against various forms of injustices and additionally as a legal

---

56 Shaid (n 53).
57 ibid 56.
58 Malik (n 37).
59 Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art 8.

instrument for putting an end to several forms of civil tension. This approach can be a tool for political modernization. Human Rights framework, undoubtedly can generate the ideas for establishing inclusiveness in society, where men and women both can be represented without gender discrimination. This is also in the light of UN Security Council Resolution 1325 on women, peace, and security. However, some issues, realising their impact on the core of the social setup, need to be addressed with much emphasis rather than expressing them in general terms.[60]

Since Afghanistan is a State and society, hurt by ongoing tribal conflict and during armed conflicts and aggression, women are the worst sufferers. With the re-emergence of idea to formulate government of the local Afghan people, whether belonging to liberal groups or hardliners in Afghanistan, women are living a life of suppression even losing their representation in any such platform for placing their issues. Short-term peace can be established with the support of armed forces and the prescripts given by established international institutions but how can that be long-lasting? Knowing that negotiations are held for achieving these objectives, but harmony and progression cannot be established further in wider dimensions, denying women even their basic involvement in educational institutions, health care system, basic protection, access to livelihood opportunities, a strong and impartial judicial system that forms the basis of human rights values. Talking about stability and peace, it requires critical evaluation of the system if, for its restoration, the price is forgoing women's rights. Establishing peace at the cost of the human rights of women is denying the equitable approach to social justice. Concerning the US and its allies and their efforts to protect women's rights while they are engaged in nation-building, ironically, this methodology, is a reflection of neo-colonialism[61] overlapping with the human rights objectives.

---

[60] Relevant Security Council Resolutions are: UNSC Res 2626 (17 March 2022) UN Doc S/RES/ 2626. This resolution extended the mandate of the United Nations Assistance Mission in Afghanistan until 17 March 2023; UNSC Res 1615 (22 December 2021) UN Doc S/RES/2615. The resolution was on the 1988 Afghanistan sanctions regime and addressed the provision of humanitarian aid to Afghanistan; UNSC Res 2611 (17 December 2021) UN Doc S/RES/2611. This resolution renewed the mandate of monitoring team supporting the 1988 Afghanistan sanctions committee for a period of one year; Selected UNSC presidential statements are: 'Statement by the President of the Security Council' (23 July 2018) UN Doc S/PRST/2018/15. This was a presidential statement on the electoral process in Afghanistan, following the conclusion of the voters' registration process on 18 July for that year's parliamentary and district council elections and for 2019 presidential elections; 'Statement by the President of the Security Council' (19 January 2018) UN Doc S/PRST/2018/2. The presidential statement emphasised the importance of advancing regional, interregional and international co-operation to achieve the stability and sustainable development in Afghanistan and Central Asian Region; 'Statement by the President of the Security Council' (24 August 2017) UN Doc S/PRST2017/15. This was a statement in the review of the implementation of UNSC Res 2255; Selected General Assembly Documents are: UNGA Res 48/208 (21 December 1993) UN Doc A/RES/48/208. The General Assembly requested the Secretary-General to dispatch a new mission to the United Nations Assistance Mission in Afghanistan, to assist with the reproachment and reconstruction efforts in Afghanistan; UNGA Res 44/15 (1 November 1989) UN Doc A/RES/44/15. This resolution emphasised the importance of Geneva Accords and encouraged the Secretary-General to facilitate a political solution to the problems in Afghanistan and Northern Pakistan; Selected Human Rights Council Documents are: (16 January 2020) UN Doc A/HRC/43/74. This was the report of the High Commissioner for human rights on the situation in Afghanistan and on technical assistance achievements in the field of human rights; HRC, 'Situation of Human Rights in Afghanistan, and Technical Assistance Achievements in the Field of Human Rights' (21 February 2018) UN Doc A/HRC/37/45. This was the High Commissioner's report on Afghanistan presented at the 37th session of the Human Rights Council; HRC, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to Afghanistan' (31 May 2017) UN Doc A/HRC/35/27/Add.3. This was a report of the Special Rapporteur on the Human Rights of the internally displaced persons in Afghanistan.

[61] Kwame Nkrumah, *Neocolonialism, the Last Stage of Imperialism (Thomas Nelson & Sons, Ltd* 1966)

VIII. Conclusions and suggestions

The political and social conditions of Afghanistan are facing an unpredictable time phase, and in such an environment creating harmony and stability seems an enduring task for the international institutions and the supporting partners. International law applied by international institutions, is premised on both natural law thinkers and legal positivists. Legal positivists have argued to achieve the objectives by setting the law as a tool for social change. An amicable social environment can be instilled by setting primarily a constitutional base for recognizing basic human freedoms, even if the government is not established by democratic means.

In this concern, suggestions are made expecting that a positive outcome can be achieved. Establishing internal stability, which is a herculean task in Afghanistan, is the key to sustainable peace, so priority should be given to the attempts for establishing and maintaining internal stability. These responsibilities to co-operate for sustainable peace, shared by the nations should be considered by some vital parameters. Peace and stability in Afghanistan are also vital for neighbouring countries of South Asia and Central Asia. Therefore these countries should make positive efforts in reconstruction and development. Their efforts can get additional support, due to the cultural and traditional similarities of Afghanistan with the Indian Sub-continent and other central Asian countries. Further, the efforts for sustainable peace are also supported by international institutions, which cannot completely withdraw from positive roles and efforts, and the accountability should be shared at different levels between neighbouring nations, international institutions, and the Western world.

Setting the objectives for stability in Afghan society also necessitates recognising Afghanistan as a State with diverse cultures for lasting peace. The success of this objective will further depend upon the preparedness of various parties to engage in long and complex political and social negotiations representing Afghanistan's ethnic, social, and political groups, including women.

Recognition of the Taliban government by some of its neighbouring states as mentioned above, for their strategic interests, by deprioritising basic values, such as human rights and other forms of basic freedoms can weaken the commitments by the States for treaty-based obligations as set by international institutions.

The next step after the objective of attaining peace should be, to focus on social reconstruction and adopting effective measures for its acceptance. The changes essentially required through reconstruction are, basic rights for women, and this should be debated even at the local level of administration, that is in the jirga. The support of jirga is essential for attaining the objectives of social reconstruction. Negotiations with tribal leaders are required for achieving those targets that are part of a general multilateral level agenda and objective criteria under international law, such as i) respect for sovereignty, ii) territorial integrity iii) commitment to the principle of non-interference in the internal affairs of Afghanistan and its neighbouring countries and iv) not allowing the use of Afghanistan's territory for hostile activities. In this concern, the international community needs to remain flexible for the talks to be meaningful. Considering the present political scenario of Afghanistan, it is advisable that the international community attempt to facilitate them, not to be rigid in giving specific shape but to support in developing the structure. The outcome can remain sustainable through the coordination of internal determinants and external support measures. Acknowledging the fact that the long-term establishment of democratic values would take decades, such measures and attempts shall always be counted as a setting of foundation stone and shall be cherished as a great contribution. A

sustainable plan will require clarity and the ability to maintain support and coherence among various international players.

The relevance of setting democratic values in Afghanistan is not only confined to peace objectives in Afghanistan but also its broader perspectives in relation to the SAARC region. This proposition can be upheld with the support of determinants, one of the key ones being the human rights approach. While resolving several social crises, achieving the objectives of social reconstruction and acknowledging women's basic rights, human rights should be given due consideration. External efforts for the resurrection of peace become subject to the international law question of recognizing the Taliban government, which has taken international law hostage for either acknowledging or denying *de facto* support to the Taliban. However, Sustainable Goal No 16 can be referred to in support of legal measures taken for restoring peace but the extent of its effectiveness depends on the recognition given to the Taliban government. Given the extent of ambiguity, that exists at the multilateral level regarding recognition given to the Taliban government, it is difficult to conceive a formal peace process through a multilateral system, not giving weightage to regional partners. The regional actors that are historically connected, can play an effective role in bringing together leaders of various ethnic groups. However, the regional actors face one question, whether it is possible for them to overcome the mutual distrust for regional coordination, as a stable Afghanistan is in the interest of all the neighbouring countries and the world at large.

****

A UNHRC Resolution of Questionable Legality on Sri Lanka and its Importance as a Catalyst for Future UN Reform

Dharshan Weerasekera*
DOI: 10.21827/GroJIL.10.2.103-140

Keywords:
SRI LANKA, CIVIL WAR, UNHRC RESOLUTIONS, UN CHARTER, ARTICLE 2(7), INTERNATIONAL LAW, HUMAN RIGHTS LAW, ARTICLE 28 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Abstract

From 2012-2019, the United Nations Human Rights Council (UNHRC) adopted a series of resolutions on Sri Lanka calling for accountability for war crimes and other crimes purportedly committed during the war against the Liberation Tigers of Tamil Eelam (LTTE). This paper challenges the traditional narrative regarding the resolutions – ie that it was a well-intentioned effort by the sponsoring nations, the United States (US) and its allies, to foster peace and reconciliation in Sri Lanka. Instead, this paper argues that in pursuing the resolutions, the UNHRC has violated the fundamental principles of the Charter of the United Nations (UN Charter) as well as the UNHRC's founding documents. The author contends that, through these resolutions, the US and its allies have developed a series of innovative tactics to enable them to intervene in the internal affairs of weak nations by using the UNHRC as a conduit. It is in the interest of the friends of the United Nations (UN) and, in general, all persons who value the rule of law in international affairs to know about what has happened so that they can advocate for the relevant reforms in order to prevent the UN from losing its credibility any further.

Introduction

The United Nations Human Rights Council (UNHRC) was established in 2006 by a resolution of the United Nations General Assembly (UNGA).[1] It replaced the UN Commission on Human Rights (The Commission), which had existed since 1946 under the auspices of the UN Economic and Social Council.[2] Then United Nations (UN) Secretary-General Kofi

---

* Dharshan Weerasekera is a Sri Lankan lawyer. Presently, he is in private practice and also pursuing an LLM Degree at the University of Colombo. He is the former Head of Department of the Legal Unit of the Eastern Province Provincial Council of Sri Lanka. He was born and raised in Sri Lanka but educated in the United States, at the University of California at Berkeley and also the University of Iowa. He later returned to Sri Lanka and attended the Sri Lanka Law College. He has worked briefly at the Sri Lankan Defense Ministry. Also, as a consultant to the Foreign Ministry.

1 UN General Assembly (UNGA) Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

2 Vineetha Pathak, 'Promoting Human Rights: The UN Record' (2009) 70 Indian Journal of Political Science 151.

Annan, in the addendum to a document titled, 'In Larger Freedom: Towards Development, Security and Human Rights for all', which many scholars regard as one of the key statements that presaged the creation of the UNHRC,[3] discusses the context, challenges as well as the promise of the new institution as follows:

> 1. The establishment of a Human Rights Council would reflect in concrete terms the increasing importance being placed on human rights in our rhetoric. The upgrading of the Commission on Human Rights into a full-fledged Council would raise human rights to the priority accorded to it in the Charter of the United Nations. Such a structure would offer architectural and conceptual clarity, since the United Nations already has Councils that deal with two other main purposes – security and development.
>
> 2. The Commission on Human Rights in its current form has some notable strengths and a proud history, but its ability to perform its functions has been overtaken by new needs and undermined by the politicization of its sessions and the selectivity of its work. A new Human Rights Council would help serve to overcome some growing problems — of perception and in substance — associated with the Commission, allowing for thorough reassessment of the effectiveness of United Nations intergovernmental machinery in addressing human rights concerns.[4]

The UNHRC is still a relatively new institution. However, it is crucial that members of the public, especially the friends of international law, be familiar with even this short history as a means of assessing the prospects for the UN's playing a supranational role in protecting and promoting human rights worldwide. The object of this paper is to acquaint international readers with a series of actions of the UNHRC that, in the author's opinion, conclusively demonstrate that the UNHRC has failed in its mission and draw out its implications. To date, there has been no academic discussion of these events either in Sri Lankan journals or foreign ones. It is hoped that this paper will generate such a discussion.

From 2012–2019, the UNHRC adopted a series of resolutions on Sri Lanka, calling for accountability for war crimes and other crimes allegedly committed during the war against the Liberation Tigers of Tamil Eelam (LTTE), which ended in May 2009. A key resolution in this series, resolution 30/1 (October 2015), was co-sponsored by the Government of Sri Lanka (GOSL). In March 2020, the GOSL withdrew from this co-sponsorship.[5] However, in March

---

[3] Jarvis Matiya, 'Repositioning the International Human Rights Protection System: The UN Human Rights Council' (2010) 36(2) Commonwealth Law Bulletin 313. Generally speaking, scholars identify four key documents as having helped pave the way for the creation of the Council, namely: the report of the special panel commissioned by then UN Secretary-General Kofi Annan to inquire into emerging challenges in the world (Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility' (2 December 2004) UN Doc A/59.565), the Secretary-General's response to the said report including especially the addendum to that report (Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (23 May 2005) UN Doc A/59/2005/Add.1), the Secretary-General's address to the Commission on Human Rights in April 2005 (Statement of the Secretary-General Kofi Annan, 'Secretary-General's Address to the Commission on Human Rights' (*United Nations*, 7 April 2005) <https://www.un.org/sg/en/content/sg/statement/2005-04-07/secretary-generals-address-commission-human-rights> accessed 5 November 2023, and the 2005 World Summit Outcome (UNGA Res 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1.

[4] Report of the Secretary-General, 'In Larger Freedom' (n 3) paras 1-2.

[5] '43rd Session of the Human Rights Council – High Level Segment Statement by Hon Dinesh Gunawardena, Minister of Foreign Relations of Sri Lanka on 26 February 2020' (*United Nations*, 26 February 2020) <https://www.un.int/srilanka/news/43rd-session-human-rights-council-%E2%80%93-high-level-segment-statement-hon-dinesh-gunawardena> accessed 7 November 2023.

2021, the Council adopted a new resolution (resolution 46/1) calling for the full implementation of resolution 30/1, and also imposing further conditions. The GOSL rejected this resolution.[6]

Operative paragraph 6 of the said resolution authorises the Office of the UN High Commissioner for Human Rights (OHCHR) to establish a mechanism to collect and consolidate 'information and evidence' of war crimes purportedly committed during the war, and also develop 'future strategies for accountability'. Two overarching questions emerge. First, is the Council's adoption of resolution 30/1, a resolution co-sponsored by the nation adversely affected by it, consistent with Article 2(7) of the UN Charter, which prohibits the UN from interfering unduly in the internal affairs of nations?[7] Secondly, is the Council's adoption of resolution 46/1, in the light of paragraph 6, consistent with Article 2(7) of the UN Charter, along with relevant provisions of the Council's founding statutes? I answer 'no' to both questions.

In regard to the first, I argue that there is no evidence that the UNHRC has ever established a satisfactory standard of proof that the alleged war crimes ever took place. Therefore, to uphold the notion of a co-sponsored resolution would set a precedent for interested parties to level unsubstantiated allegations against a country and, based on such claims (which go unchallenged because of the co-sponsorship), get a resolution passed that allows them to intervene in the internal affairs of the targeted country. If true, it means that the sponsors of resolution 30/1 have developed a tactic by which they could lawfully circumvent Article 2(7) of the UN Charter without establishing a recognised standard of proof of the charges which presumably justify such action.

In regard to the second, I argue that resolution 46/1 is unlawful because of the following reasons. It appears that, through the impugned mechanism, the Council has acquired an enforcement capability that is beyond the scope of its mandate. The UNHRC's founding statutes, among other things, enjoin the Council always to be guided in its official actions by the principles of 'cooperation' and 'constructive international dialogue'.[8] With the impugned mechanism, the Council has seemingly delegated authority to the High Commissioner to promote human rights in a particular country (ie, Sri Lanka) by any means, including those that may not necessarily conform with these principles. This clashes with the aforesaid principles.

If the claims above are true, then both tactics set dangerous precedents. They can be used against not just Sri Lanka but against other countries, especially weak ones. In these circumstances, I argue that there is an urgent need for members of the public to call on the High Commissioner or the UN Secretary-General to seek an advisory opinion of the International Court of Justice (ICJ/the Court) on the legality of both resolutions 30/1 and 46/1, if there are further efforts to keep Sri Lanka on the agenda at the UNHRC. This matter

---

6 UNHRC, 'Comments Received from the Permanent Mission of Sri Lanka on the Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation and Accountability in Sri Lanka' (1 March 2021) UN Doc A/HRC/46/G/16.

7 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

8 UNGA Res 60/251 (n 1) para 4.

is relevant to a wider international audience rather than just Sri Lankans because of the following reasons.

The larger issue that Sri Lanka's experience at the UNHRC highlights is the tension between, on the one hand, the need of Governments to combat rebellions, insurgencies, and other such threats to domestic peace and, on the other, the need for the UN to monitor such occasions to ensure that there are no abuses. It is not in dispute that Governments have committed atrocities in the name of 'national security'. However, it has become apparent in recent years, as shown in Iraq, Afghanistan, Libya, and elsewhere, that the UN's monitoring role is also prone to exploitation, and powerful nations have got the UN to endorse various interventions, including 'regime change' operations under the pretext of protecting or advancing human rights.

In this context, a definitive interpretation of Article 2(7) of the UN Charter would be one of the best ways to help rebuild the credibility of the UN system. Firstly, it would guide UN organs when they are asked to endorse various interventions in the future. Secondly, it will make it much easier for the 'victims' to challenge interventions they consider illegitimate. On the subject of UN reform in general, the following observation of Professor Richard Falk, the renowned expert on international law as well as the UN, is highly pertinent:

> To simplify matters, reformist energies need to be understood in relation to two overriding goals: a more legitimate United Nations and a more effective United Nations. The Organization, in general, will operate more legitimately and appear to be doing so in relation to three standards of assessment: a) acting in accordance with the UN Charter, including its broad principles and objectives, 2) achieving representativeness in relation to the peoples of the world, particularly on the Security Council and operating in a manner that embodies democratic practices of participation, transparency and accountability, 3) moving toward political independence in relation to the most powerful geopolitical actors in the world, which will depend on the avoidance of 'double standards' in regard to circumstances of conflict and emergency and staffing its bureaucracy with international civil servants who possess integrity and competence.[9]

If Sri Lanka's experience at the UNHRC could trigger a definitive interpretation of Article 2(7) of the UN Charter, it would benefit the whole world. The paper consists of seven sections, some further divided into several parts. The main sections are: i) the facts of the case, ii) the intention behind Article 2(7), iii) an inquiry into the legality of resolution 30/1, iv) an inquiry into the legality of resolution 46/1, v) meeting objections, 1, vi) meeting objections, 2, and vii) the case for a referral for an advisory opinion.

Methodology

The methodology followed in this paper is to analyse relevant provisions of certain primary sources, namely, the UN Charter and the UNHRC's founding statutes, in the light of i) scholarly commentary and ii) the UNHRC's official record of proceedings and reasonable inferences that can be drawn from such record, in order to assess the legality as well as propriety of the Council's conduct towards Sri Lanka.

Section 1: the facts of the case

[9] Richard Falk, 'The United Nations System: Prospects for Institutional Renewal' (2000) World Institute for Development Economics Research, Working Papers 189 <https://ageconsearch.umn.edu/record/295531/?ln=en> accessed 6 November 2023, 30.

On 19 May 2009, the Sri Lankan armed forces decisively defeated the Liberation Tigers of Tamil Eelam (LTTE) and ended a civil war that had been raging in the country for over thirty years.[10] On the same day, a group of 17 nations led by Germany called for a special session of the UNHRC to inquire into what they claimed were possible war crimes committed during the last phase of the war.[11]

The session was held from 26 to 27 May 2009. At its close, the Council adopted a resolution that had been tabled by a group of nations in the global south to counter a resolution that the German-led group presented. This resolution congratulated the Sri Lankan government on bringing the war to a successful close, commended the post-war reconstruction, resettlement, and de-mining efforts, and in essence, encouraged the government to keep up the good work.[12]

Soon afterwards, in August 2009, then UN Secretary-General Ban Ki Moon appointed a panel of experts to advise him on whether war crimes had been committed during the war.[13] The final report of the panel – the Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (POE) – concluded that sufficient allegations existed to indicate that such crimes may have been committed and recommended that they be investigated.[14]

Meanwhile, in April 2010, the Sri Lankan Government launched its domestic mechanism – the Lessons Learnt and Reconciliation Commission (LLRC) – to look into whether war crimes had been committed. The LLRC concluded that there was no evidence of crimes attributable to the State but said that crimes by individual soldiers or offices might have occurred.[15] The LLRC identified seven such incidents and recommended that these be investigated.[16]

However, in March 2012, the POE (ie, the Secretary-General's report) was submitted indirectly to the UNHRC and became the basis for a US-sponsored resolution on Sri Lanka which called for an international investigation.[17] This initial call was repeated and expanded in subsequent resolutions in 2013 and 2014. Finally, in March 2014, the Council authorised

---

[10] 'Sri Lankan President Formally Announces End of Civil War' (*Deutche Press Agentur*, 19 May 2009) <https://reliefweb.int/report/sri-lanka/sri-lankan-president-formally-announces-end-civil-war> accessed 7 November 2023.

[11] UNHRC, 'Note Verbale dated 19 May 2009 by the Secretariat of the Human Rights Council in relation to the Eleventh Special Session' (19 May 2009) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/SpecialSession/Session11/NV11thSpecialSession.pdf> accessed 9 January 2024; See also UNHRC 'Report of the Human Rights Council on its Eleventh Special Session' (26 June 2009) UN Doc A/HRC/S-11/2.

[12] UNHRC, 'Assistance to Sri Lanka in the Promotion and Protection of Human Rights' (27 May 2009) UN Doc A/HRC/S-11/1.

[13] Report of the Secretary-General, 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (31 March 2011), 2.

[14] ibid ii.

[15] Government of Sri Lanka, 'Report of Commission of Inquiry on Lessons Learnt and Reconciliation (16 December 2011) <https://reliefweb.int/report/sri-lanka/report-commission-inquiry-lessons-learnt-and-reconciliation> accessed 7 November 2023.

[16] ibid paras 9.9 and 9.37a. I have analysed the relevant sections in my essay. See Dharshan Weerasekera, 'The UN's Sri Lanka Strategy and Its Implications for International Law' (*Foreign Policy Journal*, 4 February 2014) <https://www.foreignpolicyjournal.com/2014/02/04/the-uns-sri-lanka-strategy-and-its-implications-for-international-law/> accessed 5 November 2023.

[17] UNHRC, 'Promoting reconciliation and accountability in Sri Lanka' (3 April 2012) UN Doc A/HRC/RES/19/2.

the OHCHR to undertake the investigation in question.[18] The High Commissioner thereon appointed a 3-member panel, and they set to work in August 2014.

Their final report – the OHCHR investigation on Sri Lanka (OISL Report) – was released to the public on 16 September 2015.[19] It concluded that 'system crimes'[20] had occurred and recommended that the perpetrators be tried and punished. An advance copy of this report had already been sent to the Government about a week earlier, and on 15 September 2015 (a day before the report was released to the public), the Government thanked the Council for the report and accepted its conclusions without challenge.[21]

The UNHRC's thirtieth session was held from 14 September – 2 October 2015.[22] On or about 1 October 2015, the United States (US) tabled draft resolution 30/L.29, which was co-sponsored by Sri Lanka.[23] Subsequently, the Council adopted the resolution without a vote.[24]

Two points need to be made about resolution 30/1. First, it is sweeping in scope. Consisting of twenty operative paragraphs, it calls on the GOSL to implement a wide range of legal reforms, including constitutional reforms. Operative paragraph sixteen is key

---

[18] UNHRC Res 25/1 'Promoting reconciliation and accountability in Sri Lanka' (9 April 2014) UN Doc A/HRC/RES/25/1. Paragraph 10 of this resolution mandates the High Commissioner to conduct a comprehensive investigation into possible violations of humanitarian law and human rights law that may have happened in the period covered by the LLRC.[18]

[19] UNHRC, 'Report of the OHCHR Investigation on Sri Lanka (OISL)' (16 September 2015) (OISL Report) UN Doc A/HRC/30/CRP.2.

[20] This is how the High Commissioner describes the findings of the OISL Report in the 18-page summary of that report submitted to the Council prior to the tabling of resolution 30/1: 'the sheer number of allegations, their gravity, recurrence and the similarities in their modus operandi, as well as the consistent patterns of conduct that they indicate, all point to system crimes….Indeed, if established before a court of law, many of these allegations may, depending on the circumstances, amount to war crimes if committed as part of a widespread or systemic attack against a civilian population'. See UNHRC, 'Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (28 September 2015) UN Doc A/HRC/30/61, para 24. The High Commissioner also observes: '[t]hese patterns of conduct consisted of multiple incidents that occurred over time. They usually required resources, coordination, planning and organization, and were often executed by a number of perpetrators within a hierarchical command structure. Such systemic acts cannot be treated as ordinary crimes but, if established in a court of law, may constitute international crimes, which give rise to command as well as individual responsibility' (para 5).

[21] 'Note Verbale dated 16th September 2015 from the Permanent Mission of Sri Lanka to the United Nations Office at Geneva (28 September 2015) UN Doc A/HRC/30/G/4.

[22] UNHRC, 'Report of the Human Rights Council on its Thirtieth Session' (30 September 2019) UN Doc A/HRC/30/2, para 1.

[23] Ibid para 54. See also Ministry of Foreign Affairs Sri Lanka, 'Statement by Democratic Socialist Republic of Sri Lanka - 30th Session of the Human Rights Council' (*Ministry of Foreign Affairs Sri Lanka*, 1 October 2015) <https://mfa.gov.lk/wp-content/uploads/2020/01/30-0.pdf> accessed 5 November 2023.

[24] UNHRC, Report 30/2 (n 22) para 59.

in this regard. It calls for a 'political settlement' that would involve, among other things, the thirteenth amendment to the Sri Lankan Constitution.[25]

Secondly, the OISL Report is the sole factual basis for resolution 30/1. This is because of two reasons: a) there are only two references to reports in the entire resolution, both occur in paragraph, 1 and they are to the OISL Report and the 18-page redacted version of that report tabled at the Council by the High Commissioner when he first introduced the report to the Council,[26] and c) the recommendations in the resolution exactly mirror the recommendations in the OISL Report.

To fast forward, in 2017 and 2019, the Council reviewed the progress of resolution 30/1, and on both occasions, the delegate purporting to represent the Government re-affirmed the co-sponsorship. In November 2019, former President Gotabhaya Rajapaksa took over the reins of power in the country. As mentioned earlier, at the UNHRC's 43rd session in March 2020, the new government withdrew from the co-sponsorship.

Finally, in March 2021, a group of nations led by the UK, Germany, Canada, and others tabled resolution 46/1, which called for the full implementation of resolution 30/1. This resolution was subsequently adopted by the Council. As mentioned earlier, paragraph 6 of the resolution authorises the High Commissioner to set up a mechanism to 'collect, consolidate, analyse and preserve information and evidence of war crimes' and 'develop possible future strategies of accountability'.[27]

Section 2: the intention behind article 2(7)

The main issue in discussing Article 2(7) of the UN Charter is whether one should interpret this provision strictly or in a more flexible manner.[28] The problem can be briefly set out as follows. International law is ultimately based on the concept of the sovereign equality of the various nations and their consent to be bound by this system of law.[29] From this perspective, Article 2(7) is an ultimate safeguard for the integrity of international law. If so, one would have to interpret the provision strictly.

However, the world is constantly changing. Today, there is an explosion of human rights abuses in many parts of the world. Much of this is caused by internal conflict, for instance, ethnic conflict, and also popular uprisings against repressive governments. As a result, horrendous human rights abuses, for instance torture, extra-judicial killings, arbitrary arrests, and so on, have become common in many countries. The international community cannot be expected to turn a blind eye to these situations. To do so would be morally wrong. Therefore, the real issue is not what Article 2(7) might have meant in the past but what it should mean in the present as well as the future.

Precisely because of considerations such as the above, certain leading scholars – John Rawls, Joseph Raz, and Erasmus Mayr, to name just a few – have argued that human rights should be considered a special category of individual rights that are capable of overcoming the traditional immunity accorded to sovereignty. Joseph Raz says, for instance: '[s]overeignty does not justify State action, but it protects States from external interference. Violation of human rights disable this protection [ie disables the protection from external interference]'.[30]

Therefore, the exact meaning and scope of Article 2(7) remains very much open to debate. I argue that the most reasonable option is still the strict interpretation for following reasons. First, the original intention of the framers of a treaty must be given special weight when interpreting such a treaty. One must presume that it is the assurance that the said

[25] UNHRC Res 30/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' (14 October 2015) UN Doc A/HRC/RES/30/1, para 16. Paragraph 16 states: '[the Human Rights Council welcomes] the commitment of the Government of Sri Lanka to a political settlement by taking the necessary constitutional measures, encourages the Government's efforts to fulfill its commitments on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population; and also encourages the Government to ensure that all Provincial Councils are able to operate effectively, in accordance with the thirteenth amendment to the Constitution of Sri Lanka'. To international readers who may be relatively unfamiliar with Sri Lankan history and politics, this passage may seem innocuous. However, the 13th Amendment to the Sri Lankan Constitution (13A), and indeed devolution of power as a 'political solution' to the so-called 'ethnic problem' in Sri Lanka, remains a hugely controversial topic in the country. For the benefit of readers who may be unfamiliar with the backdrop to this issue, it is important to place the following matters on record. First, many Sri Lankans, especially the Sinhalese (the majority community) allege that the 13A was foisted on this country by a powerful neighbour. The circumstances under which the 13A became law in 1987 lend some credence to these allegations. The 13A is the result of a pact between Sri Lanka and India signed by then Sri Lankan President J.R. Jayawardena and Indian Prime Minister Rajiv Gandi in July 1987. Bryan Pfaffenberger, an American scholar who has written extensively on Sri Lanka, describes the mood at the said signing as follows: 'Riots in Colombo showed widespread public anger among Sinhalese at the government for signing the pact, a mood that infected even the official state ceremonies. As Gandhi reviewed Sri Lanka's honour corps, a Sinhalese sailor struck the Indian leader in full view of a world television audience. Absent from the ceremonies were three senior ministers in Jayawardena's own government who had opposed the accord, the popular Prime Minister Ranasinghe Premadasa, Agriculture Minister Gamini Jayasuriya and Defence Minister Lalith Athulathmudali.' (Bryan Pfaffenberger, 'Sri Lanka in 1987: Indian Intervention and Resurgence of the JVP' (1988) 28 Asian Survey 137, 142.). See also Vasantha Amerasinghe, 'Sri Lankan Presidential Election: An Analysis' (1989) 24(7) Economic and Political Weekly 346. Secondly, to turn to the LLRC, the LLRC in its recommendations does discuss devolution. However, it sets out three crucial qualifications, to wit: i) before there is any further devolution, there should first be a political consensus on the issue of devolution itself – ie the LLRC admits that, as of the time of writing, there appeared to be no consensus on the issue; ii) there were shortcomings in the provincial council system (ie the 13A) and these had to be addressed if a proper system of devolution was to be designed; and iii) the issue of a 'political solution' should not be internationalised. See LLRC Report (n 15) paras 9.229, 9.231(d), 9.234. If the LLRC's conclusion is that, as of the time of writing there appeared to be no consensus on the issue of devolution, and furthermore, that there were shortcomings in the 13A, then this obviously clashes with the Council's recommendation that a 'political settlement' must invariably be based on the 13A, or at any rate, that the 13A is indispensable to such a solution. Thirdly, to turn to the findings of the LLRC, the LLRC observes that over the years many Sinhalese people, as well as Muslims, may have been forcibly evicted from the north and east of the country. See LLRC Report (n 15) paras 6.18-6.27. If true, it means that these people and their descendants would have a right of return to their former homes. Some Sinhalese fear that, if more power is devolved to the northern and eastern provinces (where Sri Lanka's second largest minority, the Tamils, predominate) they might invoke a right to self-determination under international law and try to secede, something they would not be able to do if the evacuees were present in these areas. See Suneetha Lakshman Gunasekara, *Tigers, 'Moderates' and Pandora's Package* (Ceylon 1996). Finally, to go back to the UNHRC's 2012 resolution on Sri Lanka, which first set the stage for an international investigation into possible war crimes that may have been committed during the war, the following is what it states: '[Calls upon] the Government of Sri Lanka to implement the constructive recommendations of the Lessons Learnt and Reconciliation Commission.…[and encourages] the Office of the United Nations High Commissioner for Human Rights and relevant special procedures mandate holders to provide, in consultation with, and the concurrence of, the Government of Sri Lanka, advice and technical support on implementing the above-mentioned steps'. See UNHRC, 'Annotations to the Agenda for the Nineteenth Session of the Human Rights Council' (5 January 2012) UN Doc A/HRC/19/1, paras 1–3. There is no record of the Council ever commissioning a report on the feasibility of the 13A, or for that matter devolution of power, as a 'political solution' in Sri Lanka. The point is that a process that started with a very limited scope in 2012, namely, a request to OHCHR to provide 'advice and technical assistance' to the GOSL in implementing the recommendations of the domestic mechanism, and that also in 'consultation with, and concurrence of', the GOSL, has morphed into one where the international community is now making recommendations on highly sensitive national issues. Clearly, these are matters that are very much within the domestic jurisdiction of Sri Lanka.

intention would continue to be honoured in the future that prompts the signatories to bind future generations of the citizens of their respective countries to the treaty in question.

Secondly, if one starts from the premise that the foundation of international law is consent, then to concede that there may be occasions that may warrant a breach of sovereignty entails shaking the very foundations of international law, which is counterproductive. Finally, in practice, the potential harm of taking a flexible approach to the prohibition imposed by Article 2(7) outweighs the benefits for reasons that I shall explain later.

In this section, I shall first set out the case for a strict interpretation. For this purpose, I rely on the work of the Australian scholar David R Gilmour, along with the American scholar J S Watson. I also rely on certain observations of the ICJ. Gilmour's work is important for gaining an understanding of what may have been the original intent of the framers when formulating the various provisions of the UN Charter. Watson's work is important because, in the author's opinion, he presents some of the strongest arguments against a teleological or purposive interpretation of Article 2(7). Meanwhile, the observations of the ICJ largely support the strict interpretation.

I shall then briefly discuss the ideas of Rawls, Raz, and Mayr in regard to the contention that human rights are capable of limiting sovereignty. I show that these ideas do not conflict with the limited point that I am trying to make. Finally, I shall provide an assessment and the relevant conclusions.

The case for a strict interpretation

The ideas of D R Gilmour

I discuss Gilmour's paper, 'The Meaning of "Intervene" within Article 2(7) of the UN Charter: An Historical Perspective' (1967).[31] In it, he analyses the proceedings of the San Francisco Conference in order to derive various conclusions about the intention of the drafters. Presuming that his facts are correct, it is the closest that one can get to what may have been the original intention behind the various provisions.

---

[26] See UNHRC Res 30/1 (n 25) para 1.

[27] UNHRC Res 46/1 'Promoting reconciliation, accountability and human rights in Sri Lanka' (26 March 2021) UN Doc A/HRC/RES/46/1, para 6.

[28] Generally speaking, following the adoption of the UN Charter, two schools of thought emerged regarding the intention behind Article 2(7) of the UN Charter. One view, associated with Sir Hersch Lauterpacht, is that the provision should be interpreted narrowly, ie by 'intervention' what is meant is only 'dictatorial intervention'. See Lassa Oppenheim, *International Law: A Treatise, Vol 1, Peace* (Hersch Lauterpacht (ed), Longmans 1955). The other, associated with Hans Kelsen, is that the provision should be interpreted broadly, ie as intended to prevent all interference other than what is covered under the relevant exception. See Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens 1950); Leland M Goodrich, Edvard Hamro and Anne Patricia Simons, *Charter of the United Nations: Commentary and Documents* (World Peace 1949).

[29] Matthew J Lister, 'The Legitimating Role of Consent in International Law' (2011) 11(2) Chicago Journal of International Law 663; Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) The Yale Law Journal Company 207.

[30] Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 328.

[31] D R Gilmour, 'The Meaning of "Intervene" with Article 2(7) of the United Nations Charter: An Historical Perspective' (1967) 16(2) The International and Comparative Law Quarterly 330.

Gilmour argues that the discussions that preceded the final formulation of Article 2(7) show that the framers intended to impose a very strong prohibition on the UN from intervening in the domestic affairs of nations; that is to say, they wanted to prevent intervention 'pure and simple' rather than merely 'dictatorial interference' as suggested by some. He bases this argument on three points: a) the prohibition is a principle of the Organisation, b) the import of Article 10 of the UN Charter[32] and c) the import of the exception in Article 2(7). In the last two matters, the Australian delegation, especially its head, Dr Evatt, had played a critical role.

In regard to the first, Gilmour points out that, originally in the Dumbarton Proposals, the prohibition on interference had been placed in Chapter VIII (today's Chapter VI). The four sponsoring governments had proposed an amendment to move the provision to Chapter II, which contains the principles of the Organisation.[33] According to Gilmour, this shows that the framers considered the provision to be of overriding value.[34] It implies that the provision should be interpreted in an expansive rather than a restrictive way.

To turn to Article 10, the drafting committee had initially agreed that the UNGA would have the power to discuss all matters that fell 'within the sphere of international relations'.[35] However, the Russian delegation had insisted that a clause be included to limit these powers to matters relating to the 'maintenance of international peace and security'.[36] Gilmour explains that the gist of the Russians' objection was that there was a danger that under the original version, a country 'could raise for discussion at the UNGA any act of another which it did not like'.[37]

Therefore, the provision was re-drafted. The final version states, *inter alia*, that the UNGA has the power to discuss 'any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter'. This formulation takes full cognizance of the prohibition imposed by Article 2(7). Gilmour observes:

> The early discussions on the general question of the power to be given to the General Assembly demonstrated a desire to bestow on that body wide powers of discussion. However, while there was general agreement on this question of principle, when it came to drafting a specific proposal, difficulties arose over the exact scope of those powers. Australia was instrumental in working out the wording that was finally accepted by the Conference and her delegation made it clear that discussion of domestic affairs was not within the powers of the General Assembly under Article 10. No major objections were made to this and it must therefore be presumed that the interpretation was accepted by the Conference.[38]

Finally, to turn to the exception mentioned in Article 2(7), Gilmour explains that, as originally conceived, the exception was not limited to the United Nations Security Council's

---

[32] UN Charter (n 7) art 10: 'The General Assembly shall discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the members of the United Nations or to the Security Council or to both on any such questions or matters'.

[33] Gilmour (n 31) 335.

[34] ibid 336.

[35] ibid 339.

[36] ibid 340-341.

[37] ibid 341.

[38] ibid 343.

(UNSC) powers of enforcement but its powers to make recommendations as well. The Australian Delegation had pointed out that this latter raised a problem. Dr Evatt had said, *inter alia*:

> Should the Charter authorize the Security Council, in cases where a state is threatened or attacked by reason of some matter of domestic jurisdiction, to intervene in that matter by making recommendations to the state threatened or attacked? The Australian delegation contends that the answer should be 'no' […]. Such a provision is almost an invitation to use or threaten force, in any dispute arising out of a matter of domestic jurisdiction, in the hope of inducing the Security Council to extort concessions from the state that is threatened. Broadly, the exception cancels out the rule, whenever an aggressor threatens to use force.[39]

The Australian amendment sought to limit the application of the exception only to enforcement measures, and this was the version that was finally accepted by the Conference. Gilmour says: '[b]y introducing this amendment Australia hoped to prevent the UNSC dealing with any domestic matter whether by way of discussion, study or recommendation'.[40]

In sum, the original intention of the framers of Article 2(7) was to impose the strongest possible prohibition against interference of any kind, other than enforcement measures triggered under the relevant provisions of Chapter VII.

The ideas of J S Watson

I discuss here Watson's paper, 'Auto-interpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter'.[41] The paper is important for my purposes here because Watson sets out to rebut three of the most popular arguments of those who claim that the UN must play a supranational role in the world in order to advance such things as human rights, namely, a) a teleological or purposive interpretation is the best way to advance the UN's purposes, b) UN practice and c) the domestic affairs of a nation, if they lead to matters of 'international concern', should come within the purview of the UNGA. In the following, I shall limit myself to quoting his observations on each of these matters at length.

In regard to the first, his argument is that international law is still in its early stages of development and, therefore, adherence to its fundamental principles is more important than ever. Any deviation from these principles risks undermining the entire system. For instance, he says:

> Theory must yield to reality because the problem of credibility that would be created affects not only the public perception of international law, but also, more importantly, those intangibles upon which legal systems rely so heavily for obedience […]. They include the habits of obedience, the acceptance of the long-range benefits of order as opposed to chaos, the sense of security presented by predictable and reasonably stable norms, the realization that law is based on consensual reciprocity and so on. It is international law's inevitable reliance on these intangibles that dictate a very careful approach to the interpretation of this particular Charter provision and one would be well advised to adopt the classical positivistic doctrine of the Permanent Court of International Justice in the *Lotus* case: 'The rules of law binding upon states

---

[39] Gilmour (n 31) 347.

[40] ibid 348.

[41] J S Watson, 'Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter' (1977) 71 American Journal of International Law 60.

> […] emanate from their own free will as expressed in conventions […] restrictions upon the independence of states cannot be presumed'.[42]

In regard to the claims about UN practice, Watson argues that much of the UN's work is political and, therefore such practice cannot be incorporated as customary international law. He says:

> The 'customary interpretation' is widespread and tends to run as follows: the meaning of any given provision of the Charter or of the Charter as a whole may be found in the practice of the UN organs, and this practice becomes valid international law on the basis of customary acceptance regardless of the specific provisions of the Charter […]. What is usually lacking in this argument is an analysis of the relationship between usage and custom and the mechanism whereby usage becomes custom. This is a particularly unfortunate omission since the United Nations is primarily a political organization and consequently the motivation for much behavior there is *ad hoc* or political and thus not susceptible of systematic treatment to a degree necessary for establishment of customary international law.[43]

Finally, in regard to issues of 'international concern' coming within the purview of the General Assembly, Watson points out that there is an inherent danger that this idea can be abused for ideological purposes, depending on who decides what issue is of 'international concern'. He says:

> It would be strange indeed to give legal recognition to a rule which has as its basic premise that the Charter may be systematically ignored. If, as is so frequently claimed, the use of international concern as a basis for jurisdiction is now a valid rule, then all that is required is an amendment to the Charter.[44]

The above passages are self-explanatory and do not require additional commentary.

The rulings of the International Court of Justice

The ICJ has not had an occasion to rule definitively on the scope of Article 2(7).[45] However, from some of its observations on related matters, it is possible to extract an idea of what the ICJ's general position might be as to whether the provision should be interpreted strictly. For instance, in *Conditions of Admission of a State to Membership in the United Nations*, the Court observes:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute a limitation on its powers or criteria of its judgment. To ascertain whether an organ has freedom of choice for decisions, reference must be made to the terms of its constitution.[46]

In the *Corfu Channel case*, the Court states:

---

[42] Watson (n 41) 71.
[43] ibid 73.
[44] ibid 82.
[45] See Antonio Augusto Cançado Trindade, 'The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations' (1976) 25(4) The International and Comparative Law Quarterly 715.
[46] Watson (n 41) 83, citing *Conditions of Admission of a State to Membership in the United Nations* (Press Release 19448/30) <https://www.icj-cij.org/node/100002> accessed 13 December 2023.

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the defects in present international organization, find a place in international law. Intervention is still perhaps less permissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[47]

Meanwhile, in the *Asylum case*, the Court states:

> The decision to grant diplomatic asylum implies derogation of the sovereignty of the state in which the refugee had committed his crime: this decision permitted the criminal to escape punishment by the state and constitutes intervention into a domain which falls exclusively within the jurisdiction of the territorial state. Such a derogation of territorial sovereignty cannot be admitted unless its legal basis was established in every single case.[48]

In sum, it appears that the Court would be inclined to consider that a) limitations placed on a treaty should be honoured (even though it may at times be politically inconvenient to do so), b) intervention inherently favours the strong nations over the weak and therefore as a general rule should be looked on with suspicion and c) if any derogation from the prohibition against intervention is to be allowed, it should be done uniformly in respect of all the nations.

The ideas of John Rawls, Joseph Raz, and Erasmus Mayr on human rights

The ideas of John Rawls, Joseph Raz, and Erasmus Mayr are important to the present discussion because they comprise the vanguard of an academic project to formulate a theoretical basis for human rights law that would impose an obligation on the international community to concern itself with human rights, and possibly to even intervene in countries in order to prevent human rights abuses. If true, this would mean that Article 2(7) has to be interpreted flexibly. However, these ideas do not affect my arguments regarding the need to interpret Article 2(7) strictly, and in fact, in certain respects, support them because of the following reasons.

First, to give a brief overview of the work of these three thinkers for readers who may be relatively unfamiliar with them, all three thinkers are adherents of what is termed the 'political conception' of human rights, ie, the view that human rights are individual rights that are capable of limiting sovereignty.[49] However, they occupy different positions along a spectrum of opinion regarding the extent to which morality is a part of human rights. Rawls, one of the first proponents of the 'political conception', holds that human rights need not be moral rights.[50]

---

47 *Corfu Channel Case (UK v Albania)* (Judgment) [1949] ICJ Rep [35], [44]. Tomislav Mitrovic, 'Non-intervention in the Internal Affairs of Nations' in Milan Sahovic (ed), *Principles of International Law Concerning Friendly Relations and Cooperation* (Institute of International Politics and Economics 1972) 257. (The original title of this book, in Serbo-Croatian, is, KODIFICACIJA PRINCIPA MIROLJUBIVE I AKTIVNE KOEGZISTENCIJE – Zbirka radova Institut za medunarodnu politiku I privedu 1969)

48 *Asylum Case (Colombia v Peru)* (Judgment) [1951] ICJ Rep [266], [275]. Mitrovic (n 47) 258.

49 Erasmus Mayr, 'The Political and Moral Conception of Human Rights – a Mixed Account' in Gerhart Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights* (De Gruyter 2012) 73.

50 ibid 73.

On the other hand, Raz is considered by many scholars to have presented a more moderate version of the 'political conception'.[51] In his view, human rights are moral rights.[52] Nevertheless, he maintains that the primary characteristic of human rights is that of limiting sovereignty.[53] Mayr, the most recent of the thinkers, argues that morality is the essence of human rights and, therefore, must remain the ultimate justification for respecting such rights.[54] As mentioned earlier, these ideas do not affect the point I am trying to make regarding Article 2(7).

The ideas of these thinkers relate to concepts and principles for a future system of international law where the requisite concessions to human rights over sovereignty have been formally made. This is very clear in Rawls. For instance, he says:

> [Finally,] I note the distinction between the law of peoples and the law of nations, or international law. The latter is an existing, or positive, legal order, however incomplete it may be in some ways, lacking say an effective scheme of sanctions that normally characterizes domestic laws. The law of peoples, by contrast, is a family of political concepts along with principles of right, justice and the common good that specify the content of a liberal conception of justice worked up to extend to and apply to international law. It provides the concepts and principles by reference to which that law is to be judged.[55]

I agree that if Article 2(7) were to be amended by the UNGA in order to include limitations to sovereignty for human rights abuses, then human rights would be able to play the role that these thinkers envision. However, such an amendment has not yet been brought. If a human rights crisis were to arise in a particular country today, action under Article 10 or the relevant provisions of Chapters 6 or 7 could be triggered. Therefore, the international community is not entirely lacking in the means to address such situations under the UN Charter as it exists at present.

Meanwhile, as mentioned earlier, the ideas of the three thinkers, in certain respects, are very favourable to my argument. This is especially the case with Joseph Raz. For instance, he states categorically: '[t]he contemporary practice of human rights identifies as human rights only those that should be enforced by law'.[56]

I do not question that if a country agrees, by treaty, to subject itself to the jurisdiction of an extra-territorial agency in regard to specified human rights, then such a nation effectively limits its sovereignty. For instance, the signatories to the European Convention on Human Rights have accepted limitations on their sovereignty in respect of the rights specified in the treaty. If such rights are abused, the victims can file an action before the relevant tribunals.

However, the question is whether the signatories to the UN Charter, convening under the auspices of an organ of the UN, can claim a right to intervene in the internal affairs of a nation on the basis of human rights. That is, where the members, as yet, have not consented to limits on their sovereignty in such circumstances. Raz's observation does not apply to these types of situations. Therefore, there is no conflict, *per se*, between contemporary practice on human rights and the need to interpret Article 2(7) strictly. To pursue this matter further, Raz also observes:

---

51 Mayr (n 49) 78.
52 ibid 81.
53 ibid.
54 ibid 102.
55 John Rawls, 'The Law of Peoples' (1993) 20 Critical Inquiry 36, 43.
56 Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory 31.

> The vital importance of impartial, efficient and reliable institutions for administering and enforcing human rights has three implications for arguments about them. First, if there is a human right to something, then there is also a duty to establish and support impartial, efficient and reliable institutions to ensure its implementation and protect it from violation. Second, until such institutions exist, normally one should refrain from attempts to use coercive measures to enforce the rights […]. Third, if, given the prevailing circumstances, there is no possibility that impartial, efficient and reliable institutions may come into existence regarding a certain right, then that right is not a human right.[57]

Clearly, Raz's view that human rights should limit sovereignty is premised on there existing impartial, efficient, and reliable institutions for enforcing such rights. The question that I raise in this paper is precisely whether, at least as far as the UNHRC is concerned, the international community has managed to create such an institution.

Finally, to turn to Erasmus Mayr, he wishes to add a certain ingredient to contemporary human rights discourse that he considers is lacking from it at present, namely a sufficient emphasis on morality. He argues that, ultimately, if there is to be effective enforcement of human rights, such rights must be accepted by the international community as universal, and the only way to do this is on the basis of morality. For instance, he observes:

> The answer to the question of whether there is one system of human rights or many ultimately depends on the success of the project pursued by adherents of the moral conception of human rights of showing which rights are possessed by human beings per se. If they can show that there are fundamental interests common to all human beings per se, then these interests – or, rather, those of them that are of sufficient weight – will provide the basis for a set of individual rights that are valid interculturally.[58]

The above point does not affect my argument. I agree that human rights, if they are to be effectively enforced, must be rights, the abuse of which is capable of generating moral outrage in the international community generally. However, it does not follow that moral outrage should trump the prohibition against intervention imposed by Article 2(7). For instance, who decides the threshold of outrage necessary to overcome Article 2(7)?

Clearly, in the context of the UN, an intervention would be authorised by a vote. Therefore, the threshold for moral outrage for a human rights intervention would be determined by the consensus of the majority of members at any given time. However, is there a method to guarantee consistency in consensus? For instance, how does one ensure that the same set of nations that approve of an intervention against a particular country at one time will approve an intervention against a different country under the same circumstances?

A final note on Mayr. He makes an important distinction between external and internal limitations on sovereignty. For instance, he says:

> What the exclusive focus on the international role of human rights misses is the centrality of the function of imposing internal limits on state power, ie limits directly within the relationship between the state and citizen. This function is clearly systemically and historically primary, and must be so in any adequate account of human rights. These rights only limit state sovereignty

---

[57] Raz (n 56) 43-44.

[58] Mayr (n 49) 101.

> on the international level because they limit (any) state power internally, and the former function derives from the latter.[59]

This point is very useful to my argument. If human rights are individual rights capable of limiting sovereignty, then the first option for such limitation is the internal, namely, the right of the citizens to challenge their government. If the international community were to intervene in an overhasty fashion, it could potentially impede the capacity of the citizens to address the problem domestically.

Assessment

It is impossible to deny that the basis of international law is the concept of the legal equality of nations and the related consent of such nations to be bound by the said system of law. This, coupled with the details discussed by Gilmour and also the observations of the ICJ, indicate beyond any reasonable doubt that if there is a 'standard interpretation' of Article 2(7) based on the intention of the framers, it is that the provision is designed to impose a very broad prohibition on the UN from interfering in the internal affairs of nations.

It is difficult to see how, in the absence of an amendment to the provision, human rights can prevail over the prohibition imposed by Article 2(7) if a country were to insist on such prohibition in a situation that does not come under the relevant exception. It seems to me that the difference of opinion between the strict constructionists and thinkers such as Rawls, Raz, and Mayr stems ultimately from the fact that the two sides hold two fundamentally different conceptions as to what international law should be, ie whether it should be based on consent or consensus.

One can agree that there are profound difficulties in having consent as a basis for a system of law. However, this does not mean that a consensus-based model is without difficulties. There are two in particular. For instance, as mentioned earlier, how does one ensure consistency in consensus? Also, what happens if there is a consensus for an evil end? The international community should, no doubt, engage in a serious conversation about whether the basis of international law should be changed from one of consent to one of consensus. However, until such a change is formally accepted by all of the nations, one must presume that the validity of provisions based on the consent model of international law remains intact.

One must also consider the following two matters. First, a flexible interpretation of Article 2(7) would favour strong nations over the weak because the former can control the occasions when the UN would play its proposed supranational role in advancing human rights. This is inherently unfair. Second, the UN Charter does not have a provision to let the citizens of a country adversely affected by an intervention to claim compensation for the harm they may have suffered. The UN is a forum for governments to meet and discuss issues. There is no mechanism for a private citizen to lodge a complaint against the Organisation.

And yet, it is the private citizens of a country who are ultimately affected by an intervention. For instance, what happens if an intervention, ostensibly for the sake of human rights, were to lead to disastrous consequences such as exacerbating existing ethnic rivalries, famine, or a refugee crisis? For persons who suffer such consequences to be without a means of holding the UN accountable for its actions is unjust. In these circumstances, it is reasonable

[59] Mayr (n 49) 90.

that Article 2(7) should be interpreted as strictly as possible to protect the sovereignty of the individual nations, at least until the issues discussed above are addressed.

Section 3: an inquiry into the legality of resolution 30/1

In this section, I turn to resolution 30/1. My contention is that the UNHRC's adoption of this resolution is inconsistent with both the letter as well as spirit of Article 2(7) of the Charter, hence, illegal. I shall: i) discuss the overall importance of the Sri Lankan case in terms of the UNHRC's history, ii) discuss the obligations on Sri Lanka as well as the UNHRC assumed when adopting a co-sponsored resolution, iii) explain the key procedural violation committed by the UNHRC in adopting resolution 30/1, and iv) provide an assessment and conclusion as to the legality of the said action.

i) The importance of the Sri Lankan case

As mentioned at the very start of this paper, the UNGA decided to replace the UN Commission on Human Rights in 2006 mainly because the Commission had come to be viewed in many quarters as being partial and biased in its dealings. One of the chief criticisms in this regard, it should be noted, is that the Commission had begun the practice of taking action based on country-specific resolutions, which many considered were brought in a seemingly arbitrary manner according to the wishes of powerful nations.[60]

When creating the UNHRC, the UNGA inserted into the founding document itself that the new institution was to be guided by the principles, *inter alia*, of 'objectivity, impartiality and non-selectivity'. The UNGA also gave the UNHRC the freedom to devise the mechanisms through which it was to carry out its mandate in conformity with these principles. Accordingly, UNHRC resolution 5/1 'Institution-Building in the Human Rights Council' sets out a number of such mechanisms.

The main mechanism is the Universal Periodic Review (UPR). It is an interactive process involving the country being reviewed, the members of the Council, civil society organisations, and others. Some scholars have pointed out that the UPR is an especially innovative mechanism for carrying out the UNHRC's mandate while avoiding the pitfalls into which the Commission had fallen.[61]

There is a famous legal maxim that states: '*nihil simul inventum est et perfectum*' ('nothing is invented and perfected at the same time'). It is reasonable to suppose that, given time, the UPR could have reached its full potential. However, in the very first decade after the founding of the UNHRC, the UNHRC began resorting to country-specific resolutions. It is true that there were numerous crises that might have called for such resolutions. However, with Sri Lanka, the Council went a step further.

It should be recalled that the first country-specific resolution against Sri Lanka was in 2012. However, there was no ongoing crisis in Sri Lanka at the time. This was admitted even by the US, which tabled the resolution. Ambassador Eileen Chamberlain Donahue, then head of the US delegation, said:

---

[60] Patrizia Scannella and Peter Splinter, 'The United Nations Human Rights Council: A Promise to be Fulfilled' (2007) 7 Human Rights Law Review 41; See also Kevin Boyle, 'The United Nations Human Rights Council: Politics, Power and Human Rights' (2009) 60(2) Northern Ireland Legal Quarterly 121.

[61] Scannella and Splinter (n 60) 41.

> The case of Sri Lanka is different and difficult. It is essentially dealing with large-scale civilian casualties during a civil war that took place over many years, but ended in 2009. It's not an ongoing crisis, and for that reason it's slightly more challenging.[62]

This raises a number of questions. For instance, 'could the international community have pursued its concerns on Sri Lanka through the UPR process, and if so, has the evolution of the UPR been permanently derailed?' Also, 'if the UNHRC (or some other future institution that the UNGA creates to advance human rights) resorts to country-specific resolutions, what are the criteria or standards that it should follow in determining when to do so and when to desist?'

Finally, 'what does all this entail for the future development of international law as well as human rights law, if one presumes that the UN will be the driving force in such development in both instances?' The Sri Lankan case, to repeat, compels one to reflect on such questions.

ii) The legal obligations on Sri Lanka as well as the UNHRC in regard to a co-sponsored resolution

I consider two questions: i) 'what are the legal obligations that Sri Lanka might have assumed in co-sponsoring resolution 30/1?' and ii) 'was there an obligation on the UNHRC to discuss and assess the contents of the OISL Report (the basis for resolution 30/1) prior to adopting the said resolution regardless of the fact that the GOSL had accepted the report?' I shall take each in turn.

Legal obligations on Sri Lanka

Before one can discuss the legal obligations that Sri Lanka might have assumed in co-sponsoring resolution 30/1, one must first decide what the legal status of a resolution of the UN or its subsidiary organs on the members of the UN is. Some commentators in Sri Lanka have argued that UN resolutions other than UNSC resolutions are not legally binding but only morally binding because there are no means of enforcing such resolutions.[63] However, in my view, a duly adopted resolution of the UN or one of its subsidiary organs is legally binding on the countries that participate in the vote on the resolution because of the following reasons.

Firstly, reasonable inferences can be drawn from Articles 2(1), 2(2) and 2(5) of the UN Charter. It is to be noted that all these provisions are principles of the Organisation. Article 2(1) states: '[t]he Organization is based on the principle of the sovereign equality of all its Members'.[64] Article 2(2) states: '[a]ll members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter'.[65] Article 2(5) states: '[a]ll members shall give the United Nations every assistance in any action it takes in accordance with the present Charter'.[66]

---

[62] 'Pieris-Samarasinghe Differ in Geneva as US Talks Tough' (*The Sunday Times*, 4 March 2012) <https://www.sundaytimes.lk/120304/Columns/political.html> accessed 7 November 2023.

[63] See for instance Palitha Kohona, 'Western Remedies for Sri Lanka's ills: Lessons from History' (*In Depth News*, 20 April 2017) <https://indepthnews.net/western-remedies-for-sri-lanka-s-ills-lessons-from-history/ > accessed 7 November 2023.

[64] UN Charter (n 7) art 2(1).

[65] ibid art 2(2).

[66] ibid art 2(5).

The gravamen of Articles 2(2) and 2(5) is that cooperation is a *sine quo non* for the work of the UN. Meanwhile, Article 2(1) states that all members of the Organisation are sovereign equals. Among equals, the only way to decide what should be done is by the democratic principle, ie the will of the majority must prevail. A resolution is a formal expression of the wishes of a majority of the members of an organisation at a given time. If a country takes up the position that it will obey a resolution only when it is convenient to do so, it cannot expect others to follow its wishes on occasions where it sides with the majority.

It necessarily follows that a duly adopted resolution is legally binding on members if they intend on continuing to be a part of the organisation.[67] The fact that there may be no mechanisms to ensure compliance does not mean that a recalcitrant member is immune from the potential future consequences of non-compliance. For instance, members could in theory cooperate in devising enforcement measures to address specific situations.

Meanwhile, to turn specifically to the UNHRC, paragraph 8 of the Council's founding document states that 'the Council may suspend the membership of a country for habitual violation of human rights'.[68]

A persistent refusal to honour the wishes of the Council can arguably be considered a habitual violation of human rights since the Council's mandate is to promote and protect human rights worldwide. Therefore, it would be possible for the Council to suspend the membership of a country if it persistently refuses to honour the terms of a resolution. It is clear that, in co-sponsoring resolution 30/1, the then GOSL assumed a serious legal obligation to comply fully with the terms of that resolution.

In fact, there is perhaps a greater obligation on Sri Lanka to live up to its commitments under the resolution since a co-sponsored resolution involves a nation accepting an adverse finding made against it. It is reasonable to suppose that a nation that admits that it has done something wrong has a greater responsibility to remedy such wrong. It follows that the Council could hold successor governments accountable if they withdraw from the co-sponsorship without good reason.

Legal obligations on the UNHRC when adopting a co-sponsored resolution

The question is whether there was an obligation on the UNHRC to assess the OISL Report prior to adopting resolution 30/1, regardless of the fact that the GOSL had accepted that report? In my opinion, there was, because of the following three reasons: i) sentiments expressed in the UNHRC's founding statutes, ii) relevant provisions of the International Law Commission's Draft Articles on the Responsibility of International Organisations, and iii) reasonable inferences that can be drawn from Article 28 of the Universal Declaration of Human Rights (UDHR) about a possible connection between individual human rights and violations of Article 2(7) by the UN. I shall take each in turn.

Sentiments expressed in the UNHRC's founding statutes

---

[67] This idea is supported, in my opinion, by the ideas associated with the 'soft positivism' of Herbert L A Hart. Hart rejected the view of earlier positivists who argued that law necessarily involved commands or orders backed by threats. Instead, he argued that law is more an affair of rules and that in order for a law to be valid what is needed was agreement as to the rules that would apply to the context or situation in question. See Herbert L A Hart, *The Concept of Law* (Oxford University Press 1961).

[68] UNGA Res 60/251 (n 1) para 8.

I quote below some of the relevant sections. For instance, preambular paragraphs 9 and 10 of UNGA Resolution 60/251 state:

> Recognizing also the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,
>
> Recognizing further that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings.[69]

Meanwhile, operative paragraph 4 of the resolution states:

> Decides further that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.[70]

Finally, Chapter 5 of resolution 5/1 (Institution Building in the Human Rights Council), which explicitly lists the principles that are to guide the Council in its work, sets out the following:

> Universality, Impartiality, Objectivity, Non-selectivity, Constructive dialogue and cooperation, Predictability, Flexibility, Transparency, Accountability, Balance, Inclusive/comprehensive, Gender perspective, Implementation and follow-up decisions.[71]

In all these passages, there is a clear insistence that the UNHRC act with objectivity and impartiality. It necessarily follows that, if the UNHRC intends to take action against a particular nation based on an adverse finding, the Council must assess and evaluate the said finding prior to proceeding with such action. Otherwise, the Council would not have a rational basis for its action, which by definition entails a lack of objectivity and impartiality. This argument is strengthened when one considers the International Law Commission's Draft Articles on the Responsibility of International Organisations.

Relevant provisions of the 2011 Draft Articles of the International Law Commission on the Responsibility of International Organisations

I draw the reader's attention, in particular, to Articles 4 and 10 of the draft proposals. Article 4 states:

> [Elements of an internationally wrongful act of an international organization]
> There is an internationally wrongful act of an international organization when conduct consisting of an action or omission,
> (a) Is attributable to that organization under international law, and
> (b) Constitutes a breach of an international obligation of that organization.[72]

---

[69] UNGA Res 60/251 (n 1) preamble.

[70] ibid para 4.

[71] UNHRC Res 5/1 'Institution-Building in the Human Rights Council' UN Doc A/HRC/RES/5/1, Ch 5.

[72] ILC, 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/10, para 88 (ILC Draft Articles) art 4.

Meanwhile, Article 10 states:

> [Existence of an international obligation]
> 1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.
> 2. Paragraph 1 includes the breach of any international obligation that may arise from an international organization towards its members under the rules of that organization.[73]

Clearly, these provisions entail that the UNHRC could be held accountable if it violates obligations stemming from its founding statutes.

The argument concerning Article 28 of the UDHR

I contend that there is a connection between Article 2(7) of the UN Charter and human rights, which, if true, means that if a proposed action entails interfering in the internal affairs of a nation, the Council has an obligation to the citizens of the affected country to subject the basis of that action to extra scrutiny, regardless of whether the government of that country has accepted the said basis. This is because of the following reasons.

Article 28 of the UDHR states: '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.[74]

It is reasonable to suppose that, in order for human rights to thrive, it is imperative that the rule of law be honoured throughout the world. The UN Charter is one of the central pillars of international law. Therefore, in order for human rights to thrive, the UN Charter has to be honoured and respected. In these circumstances, the phrase 'international order' in Article 28 of the UDHR must be interpreted to mean a world where the UN Charter is honoured and respected.

The above assertion gains support from the interpretation given to Article 28 by a number of well-known scholars of the UDHR who see a connection between Article 28 and i) the existence of an organisation such as the UN that can provide overarching guarantees of human rights independently of national mechanisms and ii) the reference to 'rule of law' in the preamble of the UDHR. For instance, Josh Curtis and Shane Darcy of the National University of Ireland Galway have said:

> The rationale for the inclusion of Article 28 seems to have been to emphasize that no particular existing national order could be favored, and that the full realization of rights and freedoms was also dependent on a certain international order. Malik himself [Ambassador Charles Malik of Lebanon who drafted Article 28] later explained his understanding of the provision that 'the declaration should clearly set forth the rights of mankind to have in a United Nations a world organization, as well as a social order, in which these rights and freedoms could be realized'. The organization was already in existence while the Declaration was being drafted, and perhaps the idea was that it would have a more prominent role to play in the protection of human rights.[75]

---

[73] ILC Draft Articles (n 72) art 10.

[74] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 28.

[75] Josh Curtis and Shane Darcy, 'The Right to a Social and International Order for the Realization of Human Rights: Article 28 of the Universal Declaration and International Cooperation' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar Publishing 2012).

> Both the social and international order should be based on the rule of law, mention of which is made in the Universal Declaration's preamble.[76]

If the intention behind Article 28, as conceived by its draftsman, was *inter alia* to permit the UN to play a more prominent role in protecting human rights, and if both the social and international order as envisioned in Article 28 are to be based on the rule of law, it necessarily follows that in order to achieve the objectives of the UDHR, which include the full realisation of Article 28, one must respect the UN Charter, the legal basis of the UN. Therefore, a breach of any provision of the UN Charter by the UN or any of its subsidiary organs can be considered a breach of an individual's rights in the circumstances specified above.

The UNHRC is the UN's main organ for promoting and protecting human rights worldwide. It would be absurd to suppose that an institution dedicated to such a cause could lightly deprive the citizens of a country of the protection they would normally enjoy under Article 2(7) of the UN Charter merely because a particular government, at a particular time, chooses to accept an adverse finding against itself. In democratic countries, governments invariably change. However, the citizens must live with the consequences of the actions of successive governments.

In these circumstances, if a co-sponsored resolution involves matters that fall within the domestic jurisdiction of a particular country, the Council would have an obligation to the *citizens* of the affected country, as opposed to the *Government* of such country, to adopt the resolution only after assessing and evaluating the adverse finding that gives rise to the resolution. On this ground also, the Council had an obligation to discuss and debate the OISL Report prior to adoption of resolution 30/1 regardless of the fact that the GOSL has accepted the report without challenge. The only remaining question is whether the Council discussed and debated the OISL Report as aforesaid. To this, I turn next.

iii) The key procedural violation that the UNHRC committed in adopting resolution 30/1

It is my contention that the UNHRC failed to subject the OISL Report to an assessment prior to adoption of resolution 30/1. The proof of this is found in the official record of the proceedings of the 30th session. The relevant portion, which I shall quote shortly, states that the High Commissioner made a statement via video and presented a redacted version of the OISL Report, which was followed by a discussion on the implementation of resolution 25/1, ie, the resolution that authorised the OISL investigation. There is not a word about discussing the OISL Report let alone debating it or subjecting it to an interactive dialogue.

The best way to demonstrate the unique nature of what happened at the 30th session is to contrast it with other sessions where the High Commissioner submitted reports on Sri Lanka. Accordingly, I present below representative passages from the official account of the proceedings of the UNHRC at its 22nd (March 2013), 30th (September 2015) and 34th (March

[76] Curtis and Darcy (n 75). See also Guðmundur S Alfreðsson and Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martin Nijhoff Publishers 1999) 605; Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 Northwestern Journal of International Human Rights 1.

2017) sessions.[77] At each of these the High Commissioner tabled reports on Sri Lanka: A/HRC/22/38 in February 2013; A/HRC/30/CRP.2 (the OISL Report) and its 18-page summary A/HRC/30/61 in September 2015; and A/HRC/34/20 in March 2017.

The following is from the Report of the Human Rights Council of its 22nd session:

> 66. At the 45th meeting, on 20 March 2013, the Deputy High Commissioner for Human Rights introduced the country-specific reports submitted under agenda item 2 (A/HRC/22/17/Add.1, Add.2 and Corr.1 and Corr.2, Add.3 and Corr.1, A/HRC/22/18, A/HRC/22/38 and A/HRC/22/48).
> 67. At the same meeting, on the same day, the representatives of Bolivia (Plurinational State of), Colombia, Cyprus, Guatemala, Iran (Islamic Republic of) and Sri Lanka made statements as the States concerned.
> 68. During the ensuing general debate on the country-specific reports of the High Commissioner and the Secretary General submitted under agenda item 2 at the same meeting, on the same day, the following made statements.[78]

The following is from the 34th session:

> 48. At the 54th meeting, on 22 March 2017, the High Commissioner for Human Rights presented the report of the United Nations High Commissioner for Human Rights on the progress made in the implementation of Human Rights Council resolution 30/1, on promoting reconciliation, accountability and human rights in Sri Lanka, under item 2.
> 49. At the same meeting, the Deputy Minister of Foreign Affairs of Sri Lanka, made a statement as the State concerned.
> 50. During the ensuing interactive dialogue, at the same meeting, the following made statements and asked the High Commissioner questions.[79]

Contrast the above two with the following, from the 30th session:

> 46. At the 37th meeting, on 30 September 2015, the United Nations High Commissioner for Human Rights made a statement by video message to present the report prepared by OHCHR on promoting reconciliation, accountability and human rights in Sri Lanka (A/HRC/30/61), pursuant to Council decision at its organizational meeting, held on 16 February 2015, to defer the consideration of the report until its thirtieth session. In accordance with Council resolution 25/1, the presentation was followed by a discussion *on the implementation of that resolution*.
> 47. At the same meeting, the representative of Sri Lanka made a statement as the State concerned.

---

[77] From 2013 to 2017 there were four High Commissioner's reports on Sri Lanka, to wit: 1) UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on Advice and Technical Assistance for the Government of Sri Lanka on Promoting Reconciliation and Accountability in Sri Lanka' (11 February 2013) UN Doc A/HRC/22/38; 2) UNHRC, 'Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation and Accountability in Sri Lanka' (24 February 2014) UN Doc A/HRC/25/23; 3) UNHRC 'Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (28 September 2015) UN Doc A/HRC/30/61; 4) UNHRC 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' (10 February 2017) UN Doc A/HRC/34/20. Because of the constraints of space, I have discussed only three.

[78] UNHRC, 'Report of the Human Rights Council on its twenty-second session' (24 November 2017) UN Doc A/HRC/22/2), paras 66-68.

[79] UNHRC, 'Report of the Human Rights Council on its thirty-fourth session' (4 May 2020) UN Doc A/HRC/34/2, paras 48-50.

> 48. During the ensuing discussion, at the 37th and 38th meeting, on the same day, the following made statements and asked the Deputy High Commissioner for Human Rights questions.[80]

These entries show that overall, at the 37th Meeting held on 30 September 2015 the Council discussed only the *implementation* of the resolution; there is not a word about discussing the report. Further, the Report that the High Commissioner presented to the Council, ie, A/HRC/30/61, is the 18-page summary of the OISL Report. Therefore, almost inevitably, the Council must not have discussed and may not have been able to discuss the full-length version at the 37th and 38th meetings mentioned in paragraph 48 of the HRC report.

The High Commissioner's reports in 2013 and 2017, indeed all such reports other than the OISL Report, were routine productions where the High Commissioner had been requested by the Council to report on the progress of the GOSL in implementing the various resolutions. However, the OISL Report is the result of an investigation specifically ordered by the Council to provide a definitive answer to the question that had vexed the Council since 2012, namely, whether the allegations of war crimes and other crimes being levelled by Sri Lanka's critics were true. Hence, there was all the more reason to discuss it. And yet, when the report came out, it seems the Council never discussed it or was never given a chance to discuss it.

Assessment

It is important to note that resolution 30/1 contains recommendations for constitutional changes, matters that indisputably come within the domestic jurisdiction of a state. If, as mentioned earlier, the intention behind Article 2(7) of the UN Charter is to bar the UN from interfering in the internal affairs of nations other than where enforcement measures under UNSC authorisation are involved, then what has happened with the adoption of resolution 30/1 is that any protection that Sri Lankan citizens could have expected under that provision has been completely nullified. The conclusion is inescapable: the adoption of resolution 30/1 is inconsistent with Article 2(7).

Section 4: an inquiry into the legality of the evidence-gathering mechanism established under resolution 46/1

In this section, I turn to the evidence-gathering mechanism established under resolution 46/1 of March 2021. The GOSL rejected this resolution. In these circumstances, the question is whether the mechanism is lawful. I argue that it is not because it is fundamentally inconsistent with the Council's founding principles. Furthermore, it sets a dangerous precedent of providing the Council an enforcement capacity that, arguably, is beyond its mandate. I shall first briefly discuss the evolution of this mechanism to date and then point out the problems that it raises.

First, this is paragraph 6 of resolution 46/1:

> [The Council] [r]ecognizes the importance of preserving and analyzing evidence relating to violations and abuses of human rights and related crimes in Sri Lanka with a view to advancing accountability and decides to strengthen in this regard the capacity of the Office of the High Commissioner to collect, consolidate, analyze and preserve information and evidence and to develop possible future strategies of accountability processes for gross violations of human

[80] UNHRC, 'Report of the Human Rights Council on its thirtieth session,' (30 September 2019) UN Doc A/HRC/30/2, paras 46-48.

> rights and serious violations of international humanitarian law in Sri Lanka, to advocate for victims and survivors and to support relevant judicial and other proceedings, including in Member States with competent jurisdiction.[81]

Under this provision, the High Commissioner has established something called the 'Sri Lanka accountability Project'.[82] At the UNHRC's 51st session in September 2022, the High Commissioner reported on the progress of the mechanism. She said, *inter alia*:

> OHCHR continues to develop the information and evidence repository using an e-discovery platform […].OHCHR commenced identifying material held by other actors and engaging with information providers. To date, the databases of two organizations have been migrated into the repository, and negotiations with other information providers are ongoing.[83]

The High Commissioner also discussed the plans for 'future accountability strategies'. She said:

> To develop possible strategies for future accountability processes, the project team started mapping potential accountability process at international level, including through consultations with relevant stakeholders, in particular national authorities, victims and civil society organizations.[84]

Meanwhile, the High Commissioner's report on Sri Lanka filed at the Council's 54th session in September 2023, contains a further update on the mechanism. The High Commissioner states, *inter alia*:

> The team continues to prioritize the establishment and development of a repository of information and evidence, to maximize OHCHR's long-term contribution to supporting accountability initiatives. The repository was originally populated with data from the earlier OHCHR investigation on Sri Lanka, together with other material collected over the years by OHCHR. It has been supplemented by material from nine key non-governmental organizations and academic sources. The project team is engaging with other stakeholders to seek to bolster the repository's holdings, subject to appropriate terms of access.[85]
>
> An initial analysis of available material by the project team highlighted further investigations would be necessary to address outstanding gaps in the factual basis of some violations, as well

---

81 UNHRC Res 46/1 (n 27) para 6.

82 The mechanism is allocated a budget of $3.4 million for 2023. See UNHRC, 'Revised Estimates Resulting from Resolutions and Decisions Adopted by the Human Rights Council at its Forty-Ninth, Fiftieth and Fifty-First Regular Sessions, and at its Thirty-Fourth Special Session, in 2022' (4 November 2022) UN Doc A/77/579. It is reported that, the Council has already spent $5.46 million in pursuing various measures on Sri Lanka related to the accountability resolutions. See UNGA, 'Fifth Committee Approves $3.4 Billion Programme Budget for 2023, Permanent Shift from Biennial to Annual Cycle, Concluding Main Part of Seventy-Seventh Session' (30 December 2022) Press Release GA/AB/4414 <https://press.un.org/en/2022/gaab4414.doc.htm> accessed 14 December 2023.

83 UNHRC 'Comprehensive Report of the United Nations High Commissioner for Human Rights on Situation of Human Tights in Sri Lanka' (4 October 2022) UN Doc A/HRC/51/5, para 54.

84 ibid para 56.

85 UNHRC 'Report of the Office of the United Nations High Commissioner for Human Rights on Situation of Human Rights in Sri Lanka' (6 September 2023) UN Doc A/HRC/54/20, para 50.

> as in material linking violations and related crimes to specific individuals, whether those directly involved or bearing command responsibility.[86]

Finally, on the evolving 'accountability strategies, the High Commissioner states:

> The project has provided increased support to jurisdictions that are investigating and prosecuting international crimes committed in Sri Lanka […]. During this period, the project has also sought to increase its engagement with State prosecutorial authorities. In April 2023, the project briefed representatives from 29 States drawn from national prosecutorial authorities and/or law enforcement agencies on the mandate and work of the project, and to explore potential collaboration.[87]

The above observations of the High Commissioner raise the following concerns. First, the High Commissioner admits that the repository initially consisted of material from the OISL investigation and other material in OHCHR's possession. This has now been supplemented by material from nine NGOs and academic sources. However, these nine sources have not been identified. It raises the question whether any of these sources have received funding from, or are in any other way connected to or associated with, Sri Lanka's critics. It is a factor that could potentially affect one's assessment of the material in question.

Secondly, there is absolutely no mention about whether Sri Lanka's domestic mechanisms, the two key ones are the LLRC (2011) and the subsequent Paranagama Commission (2015),[88] along with their respective databases, have been 'migrated into' the repository. It is reasonable to suppose that if material in the domestic mechanisms suggest conclusions different from those suggested by the team's sources, prosecuting authorities would be interested in seeing such material. This is especially so since the High Commissioner admits that the team has done an initial analysis of the material in its possession and found that there are 'outstanding gaps in the factual basis' of some allegations.

Because the GOSL has rejected the impugned mechanism and hence cannot, in principle, collaborate with it, there is no way for anyone to check whether the material of the domestic mechanisms is included in the repository and, if it is, whether it is being given due weight in discussions with prosecutorial agencies. Meanwhile, if there are 'outstanding gaps' in the team's material, as mentioned above, then why the seeming rush to initiate prosecutions? It is in this context that one has to consider the legality of the mechanism. I argue that it is illegal because of the following reasons.

First, recall that the UNGA has explicitly stated, among other things, that the Council must be guided in all its actions by the principles of cooperation and constructive international dialogue. Nowhere in paragraph 6 does it say that the impugned mechanism has to submit its material to the Council for review. Indeed, it is clear that the mechanism has begun to submit its data directly to prosecuting agencies. Meanwhile, Sri Lanka, the country concerned, has expressly rejected both resolution 46/1 as well as the impugned mechanism. Therefore, by definition, the mechanism contravenes the Council's obligations under the aforesaid principles.

---

86 UNHRC 'Report A/HRC/54/20' (n 85) para 52.

87 ibid paras 56-57.

88 Office on Missing Persons, 'Report of the Second Mandate of the Presidential Commission of Inquiry Into Complaints of Abductions and Disappearances' (August 2015) (Paranagama Report).

Secondly, the UNGA has delegated the task of protecting and promoting human rights worldwide to the UNHRC, not to any other entity. One must presume that this is because the UNGA was convinced that a group of nations rather than an individual or agency was the best means through which to carry out the said task. If the Council can, by resolution, delegate the task of advancing human rights in a particular country to the High Commissioner, and the High Commissioner can in turn create an entity for such purpose that is not obliged to submit its material to the Council, then this goes against the UNGA's vision and objectives in establishing the Council.

Thirdly, it appears that the OHCHR has been given the sole discretion to decide what material it will forward to prosecuting authority and other entities and when it will do so. The accused persons, along with the GOSL, which one presumes would have an overwhelming interest in the matter since the accused persons are Sri Lankan citizens, never get to see the material in question or respond to it before the Council. This is a violation of the principles of natural justice of both the accused persons as well as the GOSL. It is also a violation of the individual rights of the accused persons to due process and a fair trial. These are all rights guaranteed under the UDHR.

Fourthly, the so-called 'new strategies for accountability' are intended only for Sri Lanka. This violates the principle of 'non-selectivity,' another one of the UNHRC's guiding principles. Finally, the UNHRC has numerous investigative options provided under its founding statutes. These include the UPR, special procedures, and others. All of these are based on cooperation among the members. Therefore, the question arises whether the UNHRC could have pursued the Sri Lankan case through these mechanisms rather than by resorting to country-specific resolutions.

However, someone might object that the Sri Lankan case involves alleged humanitarian law violations. Therefore, a process such as the UPR might not be the best means through which to pursue such issues. I reply that this objection does not apply in the instant case because of the following reasons. Paragraph 5(e) of UNGA resolution 60/251 states:

> [The Council shall] undertake a universal periodic review, based on objective and reliable information of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue with the full involvement of the country concerned and with consideration given to its capacity-building needs.[89]

Meanwhile, Section 1 of the Annex to UNHRC resolution 5/1 sets out detailed operating procedures for the UPR. It states that the basis of the review is: a) the UN Charter, b) the UDHR, c) human rights instruments to which a state is party, and d) voluntary pledges and commitments made by States. Section 2 of the Annex states: '[i]n addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable humanitarian law'.[90]

---

[89] UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para 5(e).

[90] UNHRC Res 5/1 (n 71) Annex, para 2.

It is clear that the framers intended that the UPR should look into possible violations of human rights law as well as humanitarian law. Therefore, if there were questions regarding accountability in Sri Lanka, they could conceivably have been pursued through the UPR. This does not mean that the UNHRC cannot investigate a country without its consent. For instance, it can be done through Special Rapporteurs, but here again, the nation concerned has recourse to the Council if it has a complaint.

Neither UNGA resolution 60/251 nor UNHRC resolution 5/1 explicitly prohibits resorting to country-specific resolutions. However, given the instructions for the UPR in paragraph 5 (e) and also the broad scope of the UPR as envisioned in UNHRC resolution 5/1, it follows that if the Council resorts to a country-specific resolution, it should be for a crisis of a magnitude and urgency that cannot be addressed through the UPR or special procedures. Otherwise, it makes no sense to have the UPR and special procedures.

It is reasonable to suppose that whether or not a crisis of a magnitude and urgency that cannot be addressed through the UPR exists in a particular country is a question of fact that must be decided by the Council prior to authorising mechanisms that are not expressly mentioned in the relevant statutes. There is no evidence that the sponsors of resolution 46/1 ever submitted to the Council a report to establish that the need to address the allegations of war crimes purportedly committed during the war constitutes, both for Sri Lanka as well as the world a crisis of a magnitude and urgency that cannot be handled by the UPR or special procedures.

In sum, under paragraph 6 of resolution 46/1, the UNHRC has given itself an enforcement capability through country-specific resolutions that are entirely contrary to the purposes that the UNGA envisioned for that institution. It is a power that, arguably, not even the UNGA or the UNSC has under the relevant provisions of the UN Charter. It necessarily follows that such a capacity is illegal.

Section 5: meeting objections, 1

In the next two sections, I address two further objections that critics might raise. First, it could be pointed out that if the allegations of wrongdoing against a country are strong enough, technical issues should not prevent the Council from looking into them. For instance, a critic could say that, even if it were true that the Council may have failed to discuss or debate the OISL Report prior to the adoption of resolution 30/1, nevertheless, the resolution is not unjustified since, in the final analysis, it is only asking the GOSL to ensure that the human rights/fundamental rights of its citizens are protected.

Moreover, even the domestic mechanisms appear to have found that violations of humanitarian law may have occurred during the war. Therefore, there cannot be anything wrong per se in the Council recommending that these matters be pursued further. Second, the GOSL is on record as having co-sponsored resolution 30/1. Unless there is some indication that the GOSL did not co-sponsor willingly, ie, that the co-sponsorship was obtained through pressure or other nefarious means, it would be futile to challenge the act. The Council cannot be expected to look behind the formal act of a government in order to judge whether it is correct or not. I shall take each one in turn.

In regard to the first, I reply that if the Council is to accuse a country of wrongdoing, there is an obligation on the Council to substantiate its allegations to an acceptable standard of proof – for instance, the standard set out in the terms of reference of the Council's report

that presents the allegations in question.[91] It should not be possible for the Council to merely assert that it has produced a report and that it substantiates the allegations in question and then proceed to recommend measures against the targeted country.

The only reasonable way for the Council to ensure that a report meets acceptable standards is to file it of record and give an opportunity to the country concerned, or anyone else that may be interested, to respond to it. With the OISL Report, this was not done. This harms the interests of Sri Lankan citizens because of the following reasons. The problem is, precisely, the existence of the reports of the domestic mechanisms.

It is true that the domestic mechanisms, ie, the LLRC and the Paranagama Commission, found that violations of humanitarian law by individual soldiers may have happened and recommended further investigation of these incidents.[92] However, at no time did they accept that there was evidence of so-called 'system crimes,' ie, crimes showing concert and organisation as well as patterns of conduct and similarities in *modus operandi,* which suggest or indicate a widespread and systemic attack against a civilian population.[93] More

---

[91] For instance, the standard of proof of the OISL Report is, '[r]easonable grounds to believe'. See OISL Report (n 19) 3.

[92] For instance, the Paranagama Commission states: 'The Commission is of the view, as found by the LLRC, that there are matters to be investigated in terms of specific instances of deliberate attacks on civilians. These matters need to be the subject of an independent judicial inquiry. There are credible allegations, which if proved to the required standard, may show that some members of the armed forces committed acts during the final phase of the war that amounted to war crimes giving rise to individual criminal responsibility'. Paranagama Report (n 88) para 47.

[93] See for instance, LLRC Report (n 15) para 4.360. See also, Paranagama Report (n 88) paras 619-626 ('The Commission's recommendation.')

importantly, they never recommended constitutional amendments involving the 13th Amendment.[94] The OISL does both these things.[95]

It is not my contention that the conclusions of the domestic mechanisms should invariably be preferred to those of the Council's reports. However, given the principle of international law that domestic remedies must be exhausted before resorting to international ones, it necessarily follows that if the Council's reports reach conclusions that are different from, or inconsistent with, those of the domestic mechanisms, then those who advocate for the conclusions of the Council's reports must justify why the former should prevail over the latter. Otherwise, there is no point in having domestic mechanisms.

---

[94] See for instance, LLRC Report (n 15) paras 9.236. 9.237 and 9.282. In these paragraphs, the Commission discusses the lack of consensus on devolution, and the need for all parties to first reach such a consensus if there is to be any reconciliation. Para 9.282, in particular, states: '[o]ne of the dominant factors obstructing reconciliation in Sri Lanka is the lack of political consensus and a multi-party approach on critical national issues, such as the issue of devolution'. (para 9.282)

[95] It is difficult to provide international readers who may be unfamiliar with the charges that the UNHRC has been levelling against Sri Lanka any objective third-party assessments of the contents of the OISL Report. This is because, the GOSL has not published an official rebuttal to the OISL Report. Neither does the UNHRC's official record contain a comprehensive review, analysis and assessment of the report published by any other government, international organisation, NGO or academic institution. However. the present author produced a rebuttal to the report in March 2017. See Dharshan Weerasekera, *A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations against the Armed Forces, Vols 1 & 2* (Kalyananda Thiranagama and Raja Gunaratne (eds), Global Sri Lanka Forum 2017). This report was handed over to UNHRC representatives both in Colombo and in Geneva. Therefore, the Council is aware of this report. For a critique of the report, see Michael Cooke, 'War Crimes in Sri Lanka: Stain or Slander?' (*Groundviews*, 16 September 2018) < <https://groundviews.org/2018/09/16/war-crimes-in-sri-lanka-stain-or-slander/> accessed 14 December 2023. In November 2020, a copy of the report was also filed of record in the Sri Lankan Parliament. See Parliament of the Democratic Social Republic of Sri Lanka, 'Parliamentary Debates (Hansard) Official Report' vol 280 no 3 (25 November 2020) <https://www.parliament.lk/uploads/documents/hansardvolumes/1630904311054580.pdf> accessed 14 December 2023. Finally, in November 2020, a revised and updated version of the report was published through a reputed Sri Lankan publisher. Therefore, it is in the public domain as well. The said report, is based on work that the author has been doing on the accountability resolutions since about 2012, and published in three long articles in the Foreign Policy Journal, edited by Jeremy Hammond. The articles are: Dharshan Weerasekera, 'The UNHRC Resolution Against Sri Lanka: What it Really Means' (*Foreign Policy Journal*, 18 April 2012) <https://www.foreignpolicyjournal.com/2012/04/18/unhrc-resolution-against-sri-lanka-what-it-really-means/> accessed 14 December 2023; Dharshan Weerasekera, 'The Illegality of UN Secretary-General Ban Ki Moon's Approach to Sri Lanka' (*Foreign Policy Journal*, 19 March 2013) <https://www.foreignpolicyjournal.com/2013/03/19/the-illegality-of-un-secretary-general-ban-ki-moons-approach-to-sri-lanka/> accessed 14 December 2023; Weerasekera (n 16).
The aforesaid three articles, along with the book, arguably comprise the most extensive treatment currently available of the accountability resolutions and matters connected thereto. They would be helpful to any international reader seeking information on the said resolutions, especially the nature of the charges that the UNHRC has been levelling against Sri Lanka. In this regard, the OISL levels eight charges, four on alleged violations of international humanitarian law and four on alleged violations of international human rights law. The four on humanitarian law are: indiscriminate shelling of the 'no-fire' zones, shelling of hospitals, depriving civilians in the conflict zone of food and medicine, and deliberate or unlawful killings. The four on human rights law are: deprivations of liberty (arbitrary arrests, etc), enforced disappearance, torture, and sexual violence. The author has gone into detail in examining the evidence that the OISL panel has adduced in support of each of these charges and pointed out various problems with it. See Weerasekera, *A Factual Appraisal of the OISL Report: A Rebuttal to the Allegations Against the Armed Forces* (rev ed, Sarasavi 2020).

Therefore, the failure to debate or discuss the OISL Report prior to the adoption of resolution 30/1, if true, is not a mere technical glitch or deficiency. It goes to the root of the issue as to whether Sri Lanka can ever expect justice at the UNHRC.

Section 6: meeting objections, 2

In this section, I discuss some circumstantial evidence that suggests that the GOSL may have been pressured into co-sponsoring resolution 30/1. If true, it goes to the issue of motive, which is important in understanding not just the possible reasons that might have led the GOSL to co-sponsor resolution 30/1 but also why the US and its allies continue to pay special attention to Sri Lanka at the UNHRC. I shall discuss four matters: i) the geopolitics of the Indo-Pacific region in the past decade-and-a-half and its impact on Sri Lanka, ii) some key developments in the domestic politics in Sri Lanka over this same period, iii) evidence of disagreement over resolution 30/1 within the GOSL at the time of the co-sponsorship, and iv) statements by other countries that Sri Lanka is being subjected to a politicised process at the UNHRC.

i) Geopolitics

The key geopolitical development in the Indo-Pacific region over the past decade or so is the so-called 'Pivot to Asia' by the US. This is a policy determination by the Obama Administration that the US's future prosperity and security depends on developments in the Indo-Pacific region, and to expand and consolidate American power over that region as much as possible. As President Obama put it in 2011, in a speech to the Australian Parliament, '[t]he United States will play a larger and long-term role in shaping this region and its future'.[96] The policy was continued during the Trump years.[97] It is also very much a part of the foreign policy of the Biden Administration.

The Pivot inevitably pits the US against China, Asia's traditional 'superpower'. Unfortunately, Sri Lanka has become a great prize in this contest because of its strategic location in the middle of the Indian Ocean. The following observation by one Thomas Shannon, a US Under-Secretary of State, while on a visit in 2015, conveys something of how US policymakers see the island. He says:

> Your nation sits at the crossroads of Africa, South Asia and East Asia […]. Our wonderful US Ambassador here my good friend Atul [Keshap] has recounted to me his amazement at seeing, from the ramparts of the old Dutch Fort in Galle, the countless ships that sail past Sri Lanka along the sea lanes between the Straits of Hormuz and the Straits of Malacca. Forty percent of all seaborne oil passes through the former, and half the world's merchant fleet capacity sails through the latter. To put it simply, the stability and prosperity of the entire world is dependent on the stability of these energy and trade routes. And Sri Lanka is at the center of this.[98]

---

[96] The White House, Office of the Press Secretary, 'Remarks by President Obama to the Australian Parliament' (*White House National Archives*, 17 November 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament> accessed 7 November 2023.

[97] See for instance David Rothkopf, 'Op-Ed: One Foreign Policy Move Trump is Getting Right—Maintaining Obama's Pivot to Asia' (*Los Angeles Times*, 15 July 2018) <https://www.latimes.com/opinion/op-ed/la-oe-rothkopf-trump-shift-to-pacific-20180715-story.html> accessed 7 November 2023.

[98] 'US Under-Secretary of State Thomas Shannon's Speech at the Lakshman Kadirgamar Institute of International Relations and Strategic Studies' (*US Embassy in Sri Lanka*, 6 December 2015) <https://lk.usembassy.gov/u-s-secretary-state-designate-thomas-shannons-speech-lakshman-kadirgamar-institute-international-relations-strategic-studies/> accessed 7 November 2023.

Starting around 2009 (ie, during the tenure of President Mahinda Rajapaksa), China began pouring vast sums of money into various development projects in Sri Lanka, including new freeways and harbours. These efforts led to concerns among the US and its allies that Sri Lanka was becoming unduly close to China.[99]

In these circumstances, it is reasonable to suppose that the US would seek to gain a degree of influence and indirect control over Sri Lanka in order to prevent China from gaining a foothold on the island. The accountability resolutions undoubtedly provide the UNHRC, and thereby any country or group of countries that can control or manipulate the Council, a convenient means of exerting pressure on Sri Lanka, including in regard to constitutional changes.

ii) Domestic politics

The defeat of Mahinda Rajapaksa in January 2015 and the rise to power of Maithripala Sirisena (as President) and Ranil Wickremasinghe (as Prime Minister) paved the way for an unprecedented engagement between the US Government and that of Sri Lanka.[100] To give just a few examples, starting in January itself the Government handed over the formulation of the entire 'economic growth policy' of the country to an official flown in from the US Treasury Department.[101] The former Prime Minister Ranil Wickremasinghe during his testimony at the Bond Scam hearings is heard to say 'he [the American] gave us this system'.[102]

The Government also overhauled the finance laws, including the tax law, with the help of IMF advisors introduced by the Americans.[103] Meanwhile, the Americans and their allies, the British, undertook the task of 'reforming' the Sri Lankan security forces.[104] This involved the UK giving Sri Lanka a 'grant' of 6.6 million pounds with the condition that a British military attaché was to be stationed within the security forces to oversee the disbursal of the funds.[105] The Americans also helped develop a contingent of Marines in the Sri Lanka Navy capable of being deployed with the US Marines.[106] There were many other such measures.

Therefore, starting in January 2015, the US Government had begun to steadily increase its capacity to influence the internal policy decisions of the Sri Lankan Government, including

---

[99] Jack Goodman, 'Sri Lanka's Growing Links with China' (*The Diplomat*, 6 March 2014) <https://thediplomat.com/2014/03/sri-lankas-growing-links-with-china/> accessed 14 December 2023.

[100] Frederic Grare, 'What Sri Lanka's Presidential Election Means for Foreign Policy' (*Carnagie Endowment for International Peace*, 16 January 2015) <https://carnegieendowment.org/2015/01/16/what-sri-lanka-s-presidential-election-means-for-foreign-policy-pub-57739> accessed 14 December 2023.

[101] Chaturanga Pradeep Samarawickrama, 'Had to Raise Money to Pay for Unaccounted Expenditure: PM' (*Daily Mirror*, 20 November 2017) <https://www.dailymirror.lk/article/Had-to-raise-money-to-pay-for-unaccounted-expenditure-PM-140753.html> accessed 7 November 2023.

[102] ibid.

[103] 'New Tax Law: Capitulating to the IMF' (*The Sunday Times*, 2 April 2017) <https://www.sundaytimes.lk/170402/editorial/new-tax-law-capitulating-to-the-imf-235109.html> accessed 7 November 2023.

[104] Jeff Smith, 'Sri Lanka: A Test Case for the Free and Open Indo-Pacific Strategy' (*The Heritage Foundation*, 14 March 2019) <https://www.heritage.org/asia/report/sri-lanka-test-case-the-free-and-open-indo-pacific-strategy> accessed 14 December 2023.

[105] 'Cameron Meets Sirisena, Offers £6.6 M Over 3 Years' (*Daily FT*, 28 November 2015) <https://www.ft.lk/Front-Page/cameron-meets-sirisensa-offers-6-6m-over-3-years/44-501669> accessed 7 November 2023.

[106] 'First Ever Marines of the Sri Lanka Navy Pass out in Mullikulam' (*Sri Lanka Navy Marines*, 27 February 2017) <https://marine.navy.lk/index.php?id=23> accessed 14 December 2023.

by introducing foreigners into key ministries and other institutions. This is the context in which the co-sponsorship happened.

iii) Disagreement within the GOSL over resolution 30/1

Following the adoption of resolution 30/1, President Sirisena, on a number of occasions, publicly stated that he would never permit the establishment of special courts to try Sri Lankan soldiers for war crimes, an express provision of resolution 30/1 (paragraph 6).[107] The Prime Minister also expressed similar sentiments, saying *inter alia* that special courts are not politically feasible.[108] Accordingly, as a matter of inevitable inference, it follows that the delegate who approved the Council passing resolutions bringing in such measures could not have been properly mandated to do so by the President.

If special courts are not politically feasible because of the constitutional change they would require, it is incomprehensible why the President/Government/Council delegate would co-sponsor a resolution that expressly calls for such courts unless the President and the delegate were under improper political pressure. Therefore, to repeat, it is possible that the GOSL was pressured into co-sponsoring resolution 30/1. At any rate, it is a plausible scenario.

iv) Statements by other States

From the very start of the accountability resolutions, many countries went on record pointing out that Sri Lanka was being unfairly targeted. In this section, I set out some of their observations. When the Report of the Secretary-General's Panel of Experts was released in May 2011, Russia raised objections to it at the UNSC. A reporter for a local newspaper asked the then Russian Ambassador to Sri Lanka, Vladimir P Mikaylov, on what grounds the objections had been made, and he replied:

> On the grounds that it was not a UN report. On the grounds that it was not done in accordance with the regulations and the procedures of the UN. From the very beginning it was told that the report was purely for the Secretary General. So, if it was for the Secretary General why did they have to publish it?[109]

In both 2013 and 2014, significant numbers of UNHRC members expressed strong disapproval of the push by some countries for an international investigation of Sri Lanka. For instance, at the March 2013 session, a group of fourteen nations, including China, Russia, Venezuela, and Iran issued a joint statement objecting to the report that the High Commissioner tabled calling for such an investigation. The OHCHR's official press release states:

> Russia, speaking on behalf of a group of 14 States, said that they were of the view that in the report (A/HRC/22/38) on Sri Lanka, the High Commissioner had exceeded her mandate of

---

[107] 'Sri Lanka Rejects UN Call for Foreign Judges in War Probe' (*NDTV*, 5 March 2017) <https://www.ndtv.com/world-news/sri-lanka-rejects-un-call-for-foreign-judges-in-war-probe-government-1666321> accessed 7 November 2023.

[108] Ajith Siriwardana, 'Hybrid Court Not Politically Feasible: PM' (*Daily Mirror*, 3 March 2017) <https://www.dailymirror.lk/breaking-news/Hybrid-Court-not-politically-feasible-PM/108-124837> accessed 7 November 2023.

[109] Anthony David, 'Moscow May Veto UN Resolution Against Sri Lanka: Russian Envoy' (*The Sunday Times*, 1 May 2011) <https://www.sundaytimes.lk/110501/News/nws_26.html> accessed 7 November 2023.

> reporting on the provision of assistance, by making substantive recommendations and pronouncements, and that the recommendations were of a political nature. The High Commissioner specifically in paragraph 64 of the report had hastened to prejudge the outcome of Sri Lanka's domestic reconciliation process.[110]

In March 2014, just after the vote on resolution 25/1, which authorised the international investigation in question, Ambassador Dilip Sinha, the head of the delegation for India, said:

> It has been India's firm belief that adopting an intrusive approach that undermined national sovereignty and institutions is counter-productive….Moreover, any external investigative mechanism with an open-ended mandate to monitor national processes for protection of human rights in a country is not reflective of the constructive approach of dialogue and cooperation envisaged by UN General Assembly resolution 60/251 that created the HRC in 2006, as well as UNGA resolution 65/281 that reviewed the HRC in 2011.[111]

Meanwhile, the OHCHR's official press release reports that Pakistan responded to the resolution, particularly the proposed investigation, as follows:

> Pakistan, in an explanation of the vote before the vote, said that this approach to Sri Lanka was counterproductive, and that any initiatives had to be taken with Sri Lanka's cooperation….An international investigation by the Office of the High Commissioner was a clear violation of the sovereignty and territorial integrity of Sri Lanka, and had unfortunate budget implications. If this investigation should be funded by countries supporting this resolution, this would be a serious breach of its impartiality….Pakistan called for a vote for the deletion of operative paragraph 10 of this resolution.[112]

To turn to the UNHRC's 46th session in March 2021, China made the following observation during the interactive dialogue on the High Commissioner's report on Sri Lanka:

> It is the consistent stand of China to oppose politicization of and double standards on human rights, as well as using human rights as an excuse in interfering in other countries' internal affairs. We are concerned about the clear lack of impartiality shown in the OHCHR's report to

---

[110] 'Council Discusses Country Reports under Agenda Items and Annual Report of the High Commissioner and on Technical Assistance' (*United Nations Office of the High Commissioner for Human Rights*, 20 March 2013) <https://www.ohchr.org/en/press-releases/2013/03/council-discusses-country-reports-under-agenda-items-annual-report-high> accessed 9 January 2023.

[111] 'Explanation of Vote by the Permanent Representative of India to the UN Offices in Geneva, Amb Dilip Sinha at the UNHRC on Agenda Item 2 on the Resolution on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka' (*Ministry of External Affairs Government of India*, 27 March 2014) <https://www.mea.gov.in/Speeches-Statements.htm?dtl/23150/Explanation+of+Vote+by+the+Permanent+Representative+of+India+to+the+UN+Offices+in+Geneva+Amb+Dilip+Sinha+at+the+UNHRC+on+Agenda+Item+2+on+the+resolution+on+Promoting+reconciliation+accountability+and+human+rights+in+Sri+Lanka> accessed 14 December 2023.

[112] 'Human Rights Council adopts a resolution on reconciliation, accountability and human rights in Sri Lanka,' (*United Nations Office of the High Commissioner for Human Rights*, 27 March 2014) <https://www.ohchr.org/en/press-releases/2014/03/human-rights-council-adopts-resolution-reconciliation-accountability-and> accessed 9 January 2023.

> this session on Sri Lanka and express our regret over the failure of the OHCHR to use the authoritative information provided by the Sri Lankan Government.[113]

Meanwhile, the official report of the proceedings of the UNHRC's 51st session (where yet another resolution on Sri Lanka was adopted) reports on the observations of the head of delegation for Venezuela, as follows:

> His delegation wished to reiterate its opposition to the selective approach taken by certain members of the Council in putting forward draft resolutions, such as the one under consideration, for purely politicized reasons. Such texts do not enjoy the support of the country concerned and violate the principle of respect for state sovereignty and non-interference in the internal affairs of states. His delegation was deeply concerned to note that the text granted OHCHR the power to collect criminal evidence for future judicial proceedings, in violation of the Offices mandate set out in General Assembly resolution 48/141.[114]

Finally, at the interactive dialogue following the tabling of the latest High Commissioner's report on Sri Lanka, the head of the delegation for the Islamic Republic of Iran observed:

> The Human Rights Council has a key text in promoting human rights through dialogue and international cooperation based on the principle non-selectivity, impartiality and objectivity. The Council and its mechanisms should refrain from politicization and political prejudice towards any country.[115]

There are many other similar statements. It is clear that at the time of the adoption of resolution 30/1 as well as afterward there was information in the public domain – information that one can reasonably expect at least some Council officials to have been aware of – that indicated that when Sri Lanka co-sponsored the resolution it might not have done so willingly. More importantly, there were statements in the Council's own record where other countries had explicitly stated that Sri Lanka was being subjected to a politicised process.

In these circumstances, it is reasonable to suppose that the Council had an obligation to discuss and debate the OISL Report prior to the adoption of the resolution. It would be absurd for anyone to suggest that the Council could 'impartially and objectively' decide to take action on Sri Lanka based on such a report without first considering its contents.[116] A critic might object that all of the statements of the other countries are themselves political in nature. However, it is impossible to deny that all these nations seem to agree that what is

---

[113] 'China Strongly Supports Sri Lanka During UNHRC Session in Geneva' (*The Island*, 27 February 2021) <https://island.lk/china-strongly-supports-sri-lanka-during-unhrc-session-in-geneva/> accessed 7 November 2023.

[114] UNHRC, 'Summary Record of the 40th Meeting' (1 November 2022) UN Doc A/HRC/51/SR40, para 28.

[115] UNHRC, 'Interactive Dialogue on OHCHR Report on Sri Lanka' (11 September 2023) <https://www.ohchr.org/en/statements-and-speeches/2023/09/sri-lanka-update> accessed 7 November 2023.

[116] Indeed, it raises a reasonable suspicion that, the OHCHR waited until the last moment to release the OISL Report to the public precisely because it knew that the report would not stand up to scrutiny. Further, it should be noted that, by releasing the report on 16 September 2015, barely two weeks before the resolution was tabled at the Council, the OHCHR effectively denied Sri Lankan citizens the opportunity to scrutinise the evidence for themselves, and if they found problems with it, to challenge the GOSL's decision to accept the report, and also the co-sponsorship, before the domestic courts. In this sense, the OHCHR has also arguably violated the human rights of all Sri Lankan citizens.

happening to Sri Lanka somehow offends the Council's, as well as the UN's, most basic principles. Can they all be wrong?

Section 7: the case for a referral for an advisory opinion

There is a famous legal maxim that states: '*ubi jus in vertum, ibi jus nullum*' ('where the law is uncertain, there is no law'). It is not in dispute that Sri Lanka, as a member of the UN, is obliged when conducting military operations during an internal armed conflict to comply with international humanitarian law as well as international human rights law as applicable. However, the UN must also abide by its obligations when condemning or taking action against a member. For the convenience of the reader, I summarise below what has happened:

1. Sri Lanka successfully ends a civil war, and there are allegations that the Government may have committed war crimes during the last phase of the conflict.
2. A special session of the UNHRC is held to discuss these concerns. At the end of that session, the Council passes a resolution congratulating the Government on ending the war and also the post-war efforts. There is absolutely no mention of war crimes.
3. In spite of this, the Secretary-General commissions a panel to advise him on whether war crimes may have been committed. They report that such crimes might have happened. This report is then submitted indirectly to the Council to anchor a resolution calling for an international investigation.
4. The initial resolution is expanded over time, and in 2014 the Council authorises the investigation in question.
5. The final report of this investigation states that war crimes were committed.
6. However, by this time, the government in Sri Lanka has changed. The new government [for whatever reason] is unwilling to challenge the findings in the report.
7. Instead, it co-sponsors a resolution based on the report. The resolution contains recommendations for constitutional changes and other matters well within the domestic jurisdiction of Sri Lanka.

It is clear that the initial allegations of war crimes have never been established to an acceptable standard before the Council. Therefore, Sri Lanka's critics in the Council have developed a process to target a country and thereby gain the means to intervene in the internal affairs of such a country including pushing for Constitutional changes without ever having to prove or establish the initial charges which purportedly warrants the intervention in question.

In sum, a co-sponsored resolution is the perfect means for the UN or its subsidiary organs, or interested groupings of nations capable of carrying a vote on any issue of their choice, to overcome the prohibition imposed by Article 2(7) of the UN Charter, by getting the targeted country to *acquiesce* in any type of intervention. If this continues, there is no more need for Article 2(7), or for that matter, international law: whatever the powerful nations wish to do, they will be able to do.

As mentioned earlier, resolution 30/1 recommends constitutional changes for Sri Lanka. If these changes are pushed through without adequate reflection or genuine consent of the people and ends in destabilising the country or causing some other grave harm, can the

High Commissioner, the Secretary-General, or any of the other UN officials who prepare the reports to urge action against Sri Lanka indemnify the citizens of this country against such damage? Therefore, the citizens of Sri Lanka have a right to expect fair play.

They have a right to expect that the protection accorded to a country under Article 2(7) of the UN Charter will apply to their country when they most need it. This is not to say that the allegations of war crimes and other crimes against Sri Lanka ought not to be investigated. It is only to say that if the UN is to do the investigating, it must have clean hands.

In this situation, what can the friends of international law do? If, as I have suggested, what has happened to Sri Lanka strikes at the very foundations of international law, the only reasonable course of action is to try and get the ICJ to inquire into this matter. Article 65 of the Statute of the ICJ states:

> 1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request,
> 2. Questions upon which the advisory opinion of the court is asked shall be laid before the court by means of a written request containing an exact statement of the question upon which an opinion is required and accompanied by all documents likely to throw light upon the question.[117]

Unfortunately, private citizens do not have *locus standi* at the court. However, the UN Secretary-General and the UN High Commissioner for Human Rights do. Therefore, it is in the interests of the friends of international law to demand of the High Commissioner or the Secretary General that they seek an advisory opinion of the ICJ on whether the adoption of resolution 30/1 is consistent with Article 2(7) along with the relevant provisions of the UNHRC's founding documents. Also, whether the continuing operation of the evidence-gathering mechanism established under resolution 46/1 is consistent with the said documents.

The Secretary-General or the High Commissioner, as the case may be, have two choices: either to do nothing, in which case it will be 'business as usual' in their respective institutions, or take a dramatic step to raise the status as well as the relevance of international law. By referring the matter to the ICJ, the High Commissioner or the Secretary General would be doing the whole world an enormous favour. It would, at long last, trigger a definitive interpretation of Article 2(7) of the UN Charter.

The moment a request for an advisory opinion is made, the Court is obliged to forward the related question to all UN members in order for them to provide their input. Therefore, all of these members will get a chance to share their perspectives on the present matter, which will be determined, amongst other things, by how the question affects their particular national interests. This will result in as comprehensive a treatment as possible of the different permutations of the question – ie, the different ways that Article 2(7) can or has been exploited – which in turn will ensure that the Court's judgment will cover all those angles.

Inevitably, a resulting interpretation, whether it is in favour of Sri Lanka or otherwise, will be invaluable for rebuilding the credibility of the UN. Among other things, it would provide weak nations as firm a foundation as can reasonably be expected to vindicate their rights under Article 2(7) before the Court as well as other venues in the years to come.

---

[117] Statute of the International Court of Justice (24 October 1945) 1 UNTS XVI art 65.

Conclusion

I have in this paper explained that the UNHRC's adoption of resolution 30/1 of October 2015 and the subsequent resolution 46/1 of March 2021 is inconsistent with the provisions of Article 2(7) of the UN Charter along with the UNHRC's founding statutes. I have also shown that the impugned evidence-gathering mechanism established under resolution 46/1 is an affront to the sanctity of the principles that underpin the said documents. This violation is continuing, with no end in sight.

Someone might say that, even if all of the above were true, it is no reflection on the nature or quality of much of the rest of the Council's work. Furthermore, that the Council is fully capable of addressing its mistakes and that the Council should be left alone to carry on with its work without incessant criticism. However, if one accepts that the backbone of international law is consent, then the institutions that are established to facilitate such consent must carry out their task in good faith. A co-sponsored resolution permits groupings of interested nations to subvert the principle of consent. This strikes at the very foundations of international law. The tactics developed in regard to Sri Lanka can now be used against any other nation.

The nations of the world came together in 1945 in the aftermath of World War II and established the UN in the hopes of preventing a calamity such as the one that had just ended from ever happening again. They also hoped to prevent horrendous crimes such as those committed by the Nazis, including genocide and crimes against humanity, from ever again being repeated. An organisation that violates its own principles cannot be expected to accomplish the original purposes for which it was created. Therefore, what has happened to Sri Lanka at the UNHRC poses an existential threat not just to the continuance of the UN system but ultimately to the future viability of international law. It is up to the friends of international law and all those who wish for an international order predicated on stability, predictability, and, above all, adherence to the rule of law to decide what they should do about this situation.

****

Promoting Food Security through the Multilateral Trading System: Assessing the WTO's Efforts, Identifying its Gaps, and Exploring the Way Forward

Giovanni Dall'Agnola*
DOI: 10.21827/GroJIL.10.2.141-178

Abstract:

The Covid-19 pandemic and the conflict in Ukraine have unveiled the vulnerabilities of global food systems, resulting in food shortages, price spikes, and worsening food security. The World Trade Organization can play a key role in addressing these challenges through its developed body of rules. Its regulatory framework on agriculture, however, is affected by shortcomings and asymmetries that pose challenges to the long-term achievement of secure and sustainable food systems. Despite extensive negotiations among countries in the Committee on Agriculture ahead of the 12th Ministerial Conference, few concrete proposals were made to reform trade rules on agriculture. Additionally, the 12th Ministerial Conference itself failed to produce satisfactory results with respect to food security. The ongoing stalemate in agricultural negotiations since the outbreak of the Covid-19 pandemic indicates the need for a new, holistic approach to address food security at the World Trade Organization, particularly in preparation for the upcoming 13th Ministerial Conference in 2024. This approach should be informed by equity considerations and grounded in the notion of sustainable development and the human right to food. While a comprehensive reform of the Agreement on Agriculture informed by this approach is the ultimate goal, it is unlikely to occur in the short- to medium-term due to disagreement among countries on how to reform the three pillars of the Agreement. Therefore, an incremental approach could be adopted by prioritising issues for which short- to medium-term reforms are more likely to garner consensus, such as sustainable agricultural production, and by employing soft law instruments. The latter favour a flexible approach and promote cooperation and trust among countries.

* PhD Candidate in International Law, Graduate Institute of International and Development Studies (Geneva). Email: <giovanni.dallagnola@graduateinstitute.ch>. I am grateful to Professor Katrin Kuhlmann for her feedback and guidance on an earlier version of this paper.

I. Introduction

Food insecurity is on the rise after decades of development gains.[1] The Covid-19 pandemic and the conflict in Ukraine demonstrated that action is urgently needed to create a world free of hunger by 2030.[2] The trade-restrictive measures adopted to limit the spread of Covid-19 have had a significant impact on food supply chains and access to food.[3] Lockdowns and supply chain disruptions have resulted in food shortages and price spikes.[4] This has highlighted the vulnerability of global food systems and the need to improve resilience and sustainability to ensure adequate food supplies during crises. The conflict in Ukraine has disrupted local agricultural production, with farmers facing difficulties accessing their land and markets. Infrastructure networks have also been damaged, hindering transportation and food storage. This has contributed to food shortages and price increases, especially for staple foods. Additionally, the conflict has contributed to global food price volatility, particularly for wheat and other grains, of which Ukraine is a major exporter. This has undermined food security globally, especially in developing countries, least-developed countries (LDCs), and net food-importing developing countries (NFIDCs).[5]

According to the Food and Agriculture Organization (FAO) and the World Food Program (WFP) data, 11.7 per cent of the world's population faced severe food insecurity in 2021, with LDCs and NFIDCs suffering the most. In 2022, these countries were confronted

---

1 FAO, IMF, WB, WFP and WTO, 'Joint Statement by the Heads of the Food and Agriculture Organization, International Monetary Fund, World Bank Group, World Food Programme, and World Trade Organization on the Global Food Security Crisis' (*The World Bank*, 8 February 2023) <https://www.worldbank.org/en/news/statement/2023/02/08/joint-statement-on-the-global-food-and-nutrition-security-crisis> accessed 22 December 2023; Food security is defined when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food that meets their dietary needs and food preferences for an active and healthy life. Accordingly, there are four main dimensions of food security: physical availability of food, economic and physical access to food, food utilisation, and stability of the three previous dimensions over time. See FAO, 'An Introduction to the Basic Concepts of Food Security' (*Food and Agriculture Organization,* 2008) <https://www.fao.org/3/al936e/al936e00.pdf> accessed 22 December 2023.

2 See SDGs targets 2.1 ('By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round') and 2.2 ('By 2030, end all forms of malnutrition, including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 years of age, and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons'). See UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.

3 Ilaria Espa, 'Export Restrictions on Food Commodities during the COVID-19 Crisis: Implications for Food Security and the Role of the WTO' in Amrita Bahri, Weihuan Zhou, and Daria Boklan (eds), *Rethinking, Repackaging, and Rescuing World Trade Law in the Post-Pandemic Era* (Bloomsbury Publishing 2021) 43.

4 UN, 'Policy Brief: The Impact of COVID-19 on Food Security and Nutrition' (*United Nations*, 2020) 2-4 <https://unsdg.un.org/sites/default/files/2020-06/SG-Policy-Brief-on-COVID-Impact-on-Food-Security.pdf> accessed 22 December 2023; Anita Regmi, Nina Hart, and Randy Schnepf, 'Reforming the WTO Agreement on Agriculture' (*Congressional Research Service*, 2020) 13 <https://crsreports.congress.gov/product/pdf/R/R46456> accessed 22 December 2023; UNGA, 'State of Global Food Insecurity: Draft Resolution by Brazil, Egypt, Fiji, Kenya, Lebanon, Pakistan, Qatar, Senegal, South Africa and Tunisia' (9 May 2022) UN Doc A/76/L.55.

5 Caitlin Welsh, 'Russia, Ukraine, and Global Food Security: A One-Year Assessment' (*Center for Strategic and International Studies*, 2023) <https://www.csis.org/analysis/russia-ukraine-and-global-food-security-one-year-assessment> accessed 22 December 2023; WFP, 'War in Ukraine Drives Global Food Crisis: Hungry World at Critical Crossroads' (*World Food Programme*, 2022) <https://docs.wfp.org/api/documents/WFP-0000140700/download/?_ga=2.120252239.630776563.1695902477-1182851192.1695902477> accessed 22 December 2023; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (12 April 2022) UN Doc G/AG/R/10 paras 1.6, 3.8, 3.10.

with a worsening situation, with record food import bills.[6] In both 2022 and 2023, the WFP warned that the world is facing 'the largest hunger and nutrition crisis in modern history'.[7] To address this crisis, FAO recommended that countries pay particular attention to long-term food security, sustainability objectives, and the damaging effects of trade-restrictive measures.[8]

In this context, the multilateral trading system is key in promoting food security, thanks to its developed, technical, and enforceable rules. Due to its limited scope, this paper addresses exclusively how the World Trade Organization (WTO) Agreement on Agriculture (AoA)[9] and other agricultural-related instruments at the WTO impact the advancement of food security.[10]

The paper proceeds as such. Part II analyses the WTO framework on agriculture ahead of Ministerial Conference (MC) 12 with a focus on the AoA and other WTO decisions relevant to the pursuit of food security. The framework covers numerous issues that are crucial for the achievement of food security, including import barriers, domestic support measures, export subsidies, safeguard mechanisms, public stockholding programs, investment subsidies, export restrictions, international food aid programs, and measures to protect LDCs and NFIDCs. The analysis shows that the WTO framework on agriculture is hampered by deficiencies that hinder the attainment of food security. These inadequacies arise from a variety of factors, such as Members circumventing rules and manipulating trade-distorting measures, certain rules lacking appropriate differentiation based on Members' different levels of development, some rules being temporary or yet to be put into practice, and others lacking comprehensiveness or a well-defined scope of application.

Part III delves into the proposals advanced by Members ahead of 12th Ministerial Conference (MC12)—between 2020 and 2022—to amend the described WTO framework on agriculture with the aim of better protecting food security interests. The analysis reveals that Members had divergent views on most issues and lacked the ability to make concrete reform proposals, except for public stockholding and international food aid. Market access, safeguard mechanisms, export subsidies, and export restrictions were widely debated, although no concrete proposals for reform were made. Domestic support, due to its sensitive nature, received little attention. Notably, Members discussed other key issues for food security, including transparency, special and differential treatment (S&DT), and sustainability.

Part IV examines the outcomes achieved at MC12 and highlights the shortcomings of the Members in attaining any significant progress beyond the regulation of international food

---

6 WTO, 'Members Maintain Focus on Food Security, Discuss Farm Policies, Transparency' (*World Trade Organisation*, 28 March 2023) <https://www.wto.org/english/news_e/news23_e/agri_28mar23_e.htm> accessed 22 December 2023.

7 ibid*;* WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 21-22 November 2022' (17 January 2023) UN Doc G/AG/R/104 para 3.25. Women are disproportionately affected by hunger and food insecurity, in part as a result of gender inequality and discrimination. While women contribute more than 50% of the food produced worldwide, they also account for 70% of the world's hungry; See UNGA, *State of Global Food Insecurity* (n 4).

8 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 27-28 June 2022' (8 August 2022) UN Doc G/AR/R/102 para 4.13.

9 Agreement on Agriculture (concluded 15 April 1994) 1867 UNTS 470 (AoA).

10 Other agreements that are relevant for the achievement of food security but that fall outside the scope of the present paper include the General Agreement on Tariffs and Trade (concluded 15 April 1994) 1867 UNTS 187; the Agreement on Technical Barriers to Trade (concluded 15 April 1994) 1868 UNTS 120; the Agreement on the Application of Sanitary and Phytosanitary Measures (concluded 15 April 1994) 1867 UNTS 493 (SPS Agreement); the Agreement on Trade Facilitation (concluded 27 April 2014) 2317 UNTS 69.

assistance. Members only agreed to exempt foodstuffs purchased for humanitarian purposes by the WFP from the imposition of export prohibitions or restrictions. No meaningful advancements were made on most of the key issues mentioned above. This is the reason why MC12 had a modest impact on food security.

In light of Members' failures to make relevant progress over the past years, part V advocates for the need to craft a comprehensive legal framework grounded in sustainable development and the right to food that goes beyond market access, subsidy regulations, and export measures in addressing the multifaceted nature of food security. This framework would be grounded on the premise that treating food security as an exception to the WTO rules is undesirable. Accordingly, part V explores the theoretical foundation and the legal basis for implementing a holistic approach to food security in the WTO framework on agriculture and proposes recommendations for adopting this innovative approach in the AoA. It also sheds light on the possibility of moving toward this approach at the 13th Ministerial Conference (MC13).

Part VI concludes by showing that a shift toward the aforementioned approach would be possible at MC13. Progress will not happen all at once but will rather be incremental due to the consensus-based decision-making at the WTO. To streamline this process, Members could prioritise the issues that need to be discussed. This can be done by giving precedence to those issues that are more likely to gain consensus in the short to medium term, such as sustainable agriculture, which has witnessed a renewed push following MC12. Additionally, Members could explore the use of soft law instruments, such as guidelines on good practices and voluntary commitments, to expand the legal tools employed. These instruments would favour a flexible approach that promotes cooperation, trust, and confidence among Members.

II. The WTO framework on agriculture ahead of the 12th Ministerial Conference

During the Uruguay Round, Members negotiated the AoA to both liberalise agricultural trade and address food security concerns.[11] The AoA is based on three pillars—market access, domestic support, and export subsidies. Each of them provides S&DT to developing countries and LDCs.[12] The following sections critically analyse the key provisions of each pillar, as well as other matters relevant to food security covered by the AoA. Table 1 summarises the key findings.

Table 1

Issue	The WTO framework on agriculture ahead of MC12	Limits
Market access	● Import barriers are converted into tariffs and then reduced. ● Commitments (reductions and time frame) are differentiated for developed	● Non-product specific tariff reduction has resulted in 'tariff peaks'. ● Many Members have maintained higher tariffs on processed

[11] WTO, 'Agriculture: Fairer Markets for Farmers' (*World Trade Organization*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm> accessed 22 December 2023.

[12] AoA (n 9) art 15.

	countries, developing countries, and LDCs.	products than on raw materials ('tariff escalation'). ● Members artificially inflated their tariffs during the base period or overestimated the tariff equivalent of their non-tariff barriers ('dirty tariffication').
Domestic support	● Amber Box: programs that directly impact production and trade (to be reduced). ● Green Box: programs that have minimal or no effects on trade (exempt from limitations). ● Blue Box: Amber Box programs that have conditions to mitigate trade distortions (exempt from limitations).	● Trade-distorting measures have been manipulated to meet Green Box requirements. ● Blue Box programs have been used almost exclusively by developed countries.
Export subsidies	● Capping of existing subsidy programs and commitment to decrease expenditure and product coverage. ● At the 10th Ministerial Conference (MC10), Members committed to eliminating their remaining scheduled export subsidy entitlements, with different time frames for developed countries, developing countries, LDCs, and NFIDCs.	● Export subsidies can be substituted with domestic ones by eliminating the export contingency (this issue has not been addressed). ● All countries, irrespective of their level of development and specific needs, are required to eliminate their export subsidies (no S&DT).
Safeguards	● A safeguard against sudden import surges or decreases in import prices is provided through additional tariffs on the products impacted (AoA, Article 5).	● Use is restricted to products subject to the safeguard according to the country's tariff schedule. ● Use is restricted to products that have been 'tariffed'. ● Safeguards do not mitigate price increases.

Public stockholding programs	● May be classified as Green Box programs if they do not rely on supported or administered price systems. ● At the 9th Ministerial Conference (MC9), Members temporarily committed not to challenge public stockholding programs in developing countries.	● No permanent solution has been found. ● Members hold divergent opinions regarding the role of public stockholding programs.
Investment subsidies	● Excluded from domestic support reduction commitments to promote agricultural and rural development subject to certain conditions (AoA, Article 6(2)).	● Limited and unclear scope of application. ● The investment subsidies exception does not constitute a comprehensive 'food security box'.
Export restrictions or prohibitions	● Allowed but subject to due consideration of the effects on importing Members' food security (AoA, Article 12).	● Lack of transparency in the notification of export restrictions.
International food aid	● Must be needs-driven, provided in full grant form, not connected to the commercial export of other products, not linked to market development, and not re-exported (with exceptions).	● Aid providers independently assess the needs of recipient countries. ● An exception intended to grant Members 'maximum flexibility' in the provision of aid might ease practices that distort local markets. ● Export restrictions on foodstuffs purchased for humanitarian purposes are not addressed.
Measures to protect LDCs and NFIDCs	● The Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries (NFIDC Decision) implemented measures to facilitate access to food for LDCs and NFIDCs.	● The NFIDC Decision has not been operationalised yet.

A. Market access

The AoA sets up a mechanism where import barriers are converted into tariffs and then reduced.[13] Developing countries were required to make smaller reductions and were given more time than developed countries (ten years versus six years), while LDCs were not obliged to reduce tariffs but had to establish tariff bindings for agricultural goods.[14] Furthermore, for products with imports accounting for less than 5 per cent of domestic production, Members agreed to allow a minimum amount of imports under low or minimal tariffs through the implementation of tariff-rate quotas.[15] Annex 5 to the AoA describes the special treatment provisions regarding market access. In essence, its Section A allows Members to keep barriers in place and abstain from tariff reduction commitments with regard to primary agricultural products and their worked products.[16] The permission to apply special treatment for these products reflects their significance for food security.[17] Additionally, Section B provides an exemption from the obligations in Article 4.2 of the AoA for agricultural products that are the main staple in the traditional diet of a developing Member.[18]

Loopholes in the AoA have enabled market access practices that do not serve the objective of furthering food security. First, tariff reduction is not product-specific, as it is based on the general tariff level. Accordingly, Members can maintain higher tariffs on certain products, such as sensitive crops, while making greater tariff cuts on less significant products.[19] This has given rise to 'tariff peaks', whereby specific products face exceptionally high tariffs amongst a trend of otherwise low tariffs.[20] Tariff peaks curtail the ability of products from developing countries to compete with similar products in the importing country.[21] Second, many Members have maintained higher tariffs on processed products than on raw materials ('tariff escalation').[22] This hinders the ability of developing countries to transition from the production of primary agricultural products to higher value-added products.[23] Third, Members have engaged in 'dirty tariffication', ie, they have artificially inflated their tariffs during the

---

13 AoA (n 9) art 4; see also Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (Kluwer Law International 2002) 67-70.

14 AoA (n 9) arts 1(f), 15(2); see also WTO, 'Agriculture: Fairer Markets for Farmers' (n 11).

15 In a tariff-rate quota system, a specific amount of a good is subject to a low tariff. Once the predetermined amount has been imported, any further imports of that good will be subject to a higher tariff rate. Tariff-rate quotas are sometimes considered a deceptive market access instrument because they can create uncertainty and limit transparency in international trade. For example, tariff-rate quotas can be used to manipulate trade flows by creating uncertainty for foreign exporters, who may not know how much they will be able to export to a particular market at the lower tariff rate, or whether they will be subject to the higher tariff rate. Tariff-rate quotas can also be used to favour certain exporters over others by allocating the low-tariff quota among different countries.

16 AoA (n 9) annex 5.1.

17 ibid annex 5.1(d).

18 ibid annex 5.7.

19 Rhonda Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?* (Brill 2017)166.

20 WTO, 'Glossary' (*World Trade Organization*) <https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> accessed 22 December 2023; see also Geboye Desta (n 13) 62.

21 Ferguson (n 19) 166.

22 WTO, 'Glossary' (n 20).

23 Olivier De Schutter, 'International Trade in Agriculture and the Right to Food' (2009) 46 Dialogue on Globalization 17.

base period or overestimated the tariff equivalent of their non-tariff barriers. As a result, Members made reduction commitments based on an inflated rate.[24] Developed countries have often been the protagonists of dirty tariffication.[25] Lastly, tropical products tend to face higher and more complex tariffs compared to products from temperate zones.[26] This creates challenges for countries that produce a small number of crops.

B. Domestic support

The AoA allows domestic support programs (subsidies) that do not directly impact production and limits those that do.[27] Members agreed to reduce domestic support programs that directly impact production and trade, referred to as Amber Box programs, on the basis of a calculation called the 'aggregate measurement of support'.[28] As with the provisions on market access, developing countries were allowed to make smaller reductions and were given a longer implementation period, while LDCs were not required to introduce any cuts.[29] Additionally, the AoA allows Members to maintain *de minimis* levels of subsidies, which are set at 5 per cent of the value of agricultural production for developed countries and 10 per cent for developing countries.[30]

Programs that have minimal or no effects on trade, referred to as Green Box programs, are exempt from limitations and challenges under the AoA.[31] However, they may still be challenged under other agreements due to the expiration of the 'peace clause' in Article 13 of the AoA.[32] The peace clause regulated the application of other WTO agreements to subsidies in respect of agricultural products, preventing countervailing duty action or other subsidy action under the WTO Agreement on Subsidies and Countervailing Measures,[33] as well as actions based on non-violation nullification or impairment of tariff concessions under the General Agreement on Tariffs and Trade (GATT).[34] Members' opinions on the Green Box's future vary widely. Some appreciate the policy space offered to support vulnerable industries and regions.[35] Others contend that some Members have exploited the Green Box by

---

24 Geboye Desta (n 13) 75.

25 Kevin Gray, 'Right to Food Principles vis-à-vis Rules Governing International Trade' (*British Institute of International and Comparative* Law, 2003), 17 <https://www.scribd.com/document/58576402/RIGHT-TO-FOOD-PRINCIPLES-VIS-A-VIS-RULES-GOVERNING-INTERNATIONAL-TRADE> accessed 22 December 2023.

26 De Schutter, 'International Trade in Agriculture and the Right to Food' (n 23) 13.

27 AoA (n 9) art 6, annex 2.

28 Ferguson (n 19) 211. For a detailed analysis of the contradictions and complications affecting the 'aggregate measurement of support', see 211-217.

29 AoA (n 9) arts 1(f), 15(2).

30 ibid art 6(4).

31 ibid art 6(1), annex 2.1. As per AoA annex 2, any support falling under the Green Box category must be financed through a government program and must not result in providing price support to producers.

32 Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014) 331; See also WTO, 'Subsidies and Countervailing Measures: Overview, Agreement on Subsidies and Countervailing Measures' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/scm_e/subs_e.htm> accessed 22 December 2023.

33 Agreement on Subsidies and Countervailing Measures (concluded 15 April 1994) 1869 UNTS 14.

34 General Agreement on Tariffs and Trade (concluded 15 April 1994) 1867 UNTS 187 (GATT). See WTO, 'Other Issues' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/ag_intro05_other_e.htm#:~:text=The%20Agreement%20in%20Agriculture%20contains,agricultural%20products%20(Article%2013)> accessed 22 December 2023.

35 Coppens (n 32) 317.

manipulating their trade-distorting measures to meet the requirements.[36] Some also argue that Green Box programs resemble the programs of developed countries and do not encompass the type of support required by developing countries.[37]

Lastly, Blue Box programs, which are essentially Amber Box programs that have conditions to mitigate trade distortions, are not subject to limitations.[38] Historically, developed countries have been the main users of Blue Box programs, and currently, they are exclusively utilised by the European Union (EU), Iceland, Norway, Japan, the Slovak Republic, and Slovenia.[39] Countries are divided on the future of the Blue Box as well. Some would transfer these measures to the Amber Box, as they are technically linked to production, which is generally not allowed under the AoA.[40] Others advocate for keeping the Blue Box in place.[41] Blue Box measures can also be subject to challenge due to the expiration of the peace clause in Article 13 of the AoA.

MC9 made clear that some general service programs that offer specific services or advantages to agricultural or rural communities might be eligible for exemptions from domestic support restrictions.[42] These exemptions could apply to programs that pertain to land reform and rural livelihood security, such as measures for soil conservation and drought management, intended to encourage rural development and alleviate poverty.[43]

C. Export subsidies

The AoA capped the existing subsidy programs and committed Members to decrease their expenditure and product coverage.[44] This includes direct subsidies linked to export performance, export sales of non-commercial agricultural stocks below domestic market prices, payments for exported agricultural products, programs aimed at reducing the cost of producing export goods, preferential internal transportation and freight charges for exported

---

36 Coppens (n 32) 321-22. For example, between 1995 and 2010, the EU's expenditure on Green Box subsidies surged from €9.2 billion to €68 billion. See Ferguson (n 19) 208.

37 Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System' [2011] WTO Activity Report, Briefing Note 4, 6 <https://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 22 December 2023; See also Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 185.

38 AoA (n 9) art 6(5); See also WTO, 'Agriculture Negotiations: Background Factsheet, Domestic Support in Agriculture' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm> accessed 22 December 2023; Coppens (n 32) 316-317.

39 WTO, 'Domestic Support: Amber, Blue and Green Boxes' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm> accessed 22 December 2023.

40 WTO, 'Agricultural Negotiations: Backgrounder, The Issues and Where We Are Now', (*World Trade Organization*) <https://www.wto.org/english/Tratop_e/agric_e/negs_bkgrnd00_contents_e.htm> accessed 22 December 2022. If the Blue Box were to be eliminated, developing countries would lose the chance to support their agricultural sectors in the same ways as the developed countries did.

41 ibid.

42 AoA (n 9) annex 2.2.

43 WTO, 'Ministerial Decision of 7 December 2013: General Services' (11 December 2013) UN Doc WT/MIN(13)/37.

44 AoA (n 9) arts 8 and 9. The measures subject to reduction requirements are listed in AoA art 9(1); See also Terence Stewart and Stephanie Manaker Bell, 'Global Hunger and the World Trade Organization: How the International Trade Rules Address Food Security' (2015) 3(2) Penn State Journal of Law & International Affairs 113, 132.

goods, and subsidies on products that are components of exported goods.[45] Developing countries committed to making smaller reductions over a longer period of time, while LDCs are not required to make reductions.[46]

At MC10, further restrictions were imposed on agricultural export subsidies. Developed countries were required to eliminate their remaining scheduled export subsidy entitlements, while developing countries were instructed to eliminate their export subsidy entitlements by the end of 2018.[47] LDCs and NFIDCs can use export subsidies until the end of 2030.[48] This decision contributed to progress on Sustainable Development Goal (SDG) 2.b, which calls for governments to address trade restrictions and distortions in agricultural markets as part of their efforts to ensure food security and promote sustainable agriculture. Although the achievement is noteworthy, distinguishing between export and domestic subsidies is not as straightforward as it may seem.[49] Subsidies can be designed and presented in multiple formats, which means that an export subsidy can be substituted with a domestic one by eliminating the export contingency.[50] Regrettably, domestic agricultural subsidies have not been curtailed. These subsidies persist and are increasing.

One of the primary reasons why it took so long to abolish export subsidies is the differing priorities of policymakers in developed and developing countries. In developed countries, policymakers often prioritise the interests of farmers, whereas their counterparts in developing countries tend to focus more on the well-being of consumers. In developing nations, food prices are politically sensitive matters that can have significant implications for the livelihoods of their citizens and potentially lead to political instability. Conversely, in developed countries, food prices are a political concern for farmers.[51] This explains why farm subsidies have historically been more substantial in developed countries in comparison to developing countries.

D. Other matters relevant for food security

In addition to the three pillars above, the AoA tackled several other matters, including food security to a limited extent, specifically with respect to LDCs and NFIDCs. The AoA's preamble emphasises the importance of addressing non-trade concerns, such as food security, recognising that S&DT is crucial and taking into account the potential adverse consequences of the AoA on LDCs and NFIDCs.[52] Accordingly, the AoA incorporates some provisions that try to safeguard countries' ability to address food security concerns. The sections below provide an overview of such provisions.

---

45 AoA (n 9) art 9(1).

46 WTO, 'Agriculture: Explanation, Export Competition/Subsidies' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/ag_intro04_export_e.htm> accessed 22 December 2023.

47 WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (21 December 2015) UN Doc WT/MIN(15)/45 paras 6, 7.

48 ibid.

49 Simon Lester, 'Is the Doha Round Over? The WTO's Negotiating Agenda for 2016 and Beyond' (2016) 64 Herbert A Stiefel Center for Trade Policy Studies 1.

50 ibid.

51 Heinz Strubenhoff, 'The WTO's Decision to end Agricultural Export Subsidies is Good News for Farmers and Consumers' (*Brookings*, 8 February 2016) <https://www.brookings.edu/articles/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers/> accessed 22 December 2023.

52 AoA (n 9) preamble.

1. Safeguards

The AoA provides a safeguard provision against sudden import surges or decreases in import prices.[53] This provision allows Members to impose an additional tariff on the products impacted, provided that certain criteria are met. The safeguard is triggered without any need to test for injury or negotiate compensation.[54] However, it has some limits that may hamper the ability of developing countries to protect domestic producers.[55] The safeguard can only be used for products identified as being subject to the safeguard in the country's tariff schedule.[56] Additionally, it is restricted to products that have been 'tariffed' (eg, quantitative restrictions converted to equivalent tariffs). Many developing countries that had unbound products, however, chose to offer ceiling bindings on those products, and they were not required to reduce their base rate.[57] As a result, these countries relinquished their right to use the safeguard.[58] Moreover, the implementation of safeguards does not mitigate price increases.[59]

In 2015, Members agreed in the Ministerial Decision on Special Safeguard Mechanism for Developing Country Members to negotiate the implementation of a Special Safeguard Mechanism (SSM) for developing countries.[60]

2. Public stockholding programs

Public stockholding programs may be classified as Green Box programs under Annex 2 to the AoA if they meet the general requirements—ie, they are administered via a government program that is publicly funded and does not offer price support to producers—together with program-specific requirements.[61] However, food security programs that rely on supported or administered prices (ie, purchasing foodstuffs for stockholding at fixed prices) are not covered by the Green Box.[62] This means that developing countries need to limit their spending to specific *de minimis* levels for each product.[63]

A temporary solution was adopted at MC9, where ministers agreed that, on an interim basis, public stockholding programs in developing countries aimed at procuring primary

---

53 AoA (n 9) art 5.

54 WTO, 'Agriculture Agreement: Explanation, Market Access' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm> accessed 22 December 2023.

55 Carmen Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 Columbia Journal of Environmental Law 433, 479.

56 WTO, 'Agriculture Agreement: Explanation, Market Access' (n 54).

57 Stephen Healy, Richard Pearce, and Michael Stockbridge, *The Implications of the Uruguay Round Agreement on Agriculture for Developing Countries: A Training Manual* (Food and Agriculture Organization 1998) para 3.2.1.

58 See WTO, 'Agriculture: Negotiations, An Unofficial Guide to Agriculture Safeguards' (*World Trade Organization*) <http://www.wto.org/english/tratop_e/agric_e/guide_agric_safeg_e.htm> accessed 22 December 2023..

59 De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 37) 12. Food prices have been rising over the past fifteen years and there is no effective response under AoA art 5.

60 WTO, 'Ministerial Decision of 19 December 2015: Special Safeguard Mechanism for Developing Country Members' (19 December 2015) UN Doc WT/MIN(15)/43. The introduction of a special safeguard mechanism for developing countries has been debated also in the meetings of the WTO Committee on Agriculture ahead of MC12. See below, section III.B

61 AoA (n 9) annex 2; see also WTO, 'Domestic Support' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm> accessed 22 December 2023.

62 Panos Konandreas and George Mermigkas, 'WTO Domestic Support Disciplines: Options for Alleviating Constraints to Stockholding in Developing Countries in the Follow-Up to Bali' (2014) 45 FAO Commodity and Trade Policy Research Working Paper 6.

63 Ferguson (n 19) 213.

agricultural products that are predominant staples in the traditional diet would not be challenged, even if a country's agreed limits for trade-distorting domestic support were breached.[64] This commitment was reaffirmed at MC10, where Members were encouraged to agree on a permanent solution.[65] The interim agreement has sparked controversy. For example, India relied on it to provide support to rice cultivators in excess of its domestic support limits, and the United States (US) contested that India did not adequately report the costs of its stockholding program to the WTO, which is a pre-condition to be exempt from challenges.[66] Disagreement about compliance with the interim agreement has impeded WTO Members from reaching a permanent agreement.[67]

3. Investment subsidies

Similarly to Annex 2 to the AoA, Article 6(2) of the AoA acknowledges that investment subsidies that are generally accessible to agriculture in developing Members, as well as agricultural input subsidies that are generally accessible to low-income or resource-poor producers in developing Members, shall be excluded from domestic support reduction commitments for the purpose of promoting agricultural and rural development.[68] However, the AoA fails to specify who should be considered a resource-poor producer.[69]

4. Export restrictions or prohibitions

Although Article XI of the GATT allows for certain export restrictions or prohibitions, Article 12 of the AoA requires Members to consider the impact of an export restriction or ban on foodstuff on the food security of importing Members. Prior to enacting such a measure, a Member should submit written notice to the Committee on Agriculture (CoA) and, upon request, engage in consultations with importing Members.[70] The provision does not apply to developing Members, except where the Member is a net-food exporter of the specific foodstuff.[71] Countries are increasingly seeking greater transparency on the imposition of export restrictions.[72]

5. International food aid

Article 10 of the AoA provides that Member donors shall ensure that the provision of international food aid is not tied to commercial exports of agricultural products to recipient

---

64 WTO, 'Ministerial Decision of 7 December 2013: Public Stockholding for Food Security Purposes' (11 December 2013) UN Doc WT/MIN(13)/38 para 2; see also WTO, 'Food Security' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm> accessed 22 December 2023; WTO, 'The Bali Decision on Stockholding for Food Security in Developing Countries' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm> accessed 22 December 2023.

65 WTO, 'Ministerial Decision of 19 December 2015: Public Stockholding for Food Security Purposes' (21 December 2015) UN Doc WT/MIN(15)/44; see also WTO, 'Food Security' (n 64).

66 Regmi, Hart, and Schnepf (n 4) 12.

67 WTO, 'Ministerial Decision of 19 December 2015: Public Stockholding for Food Security Purposes' (n 65) para 2.

68 AoA (n 9) art 6(2), known as Development Box.

69 FAO, *WTO Agreement on Agriculture: The Implementation Experience—Developing Country Case Studies* (Food and Agriculture Organization 2003).

70 AoA (n 9) art 12(1).

71 ibid art 12(2).

72 See below, section III.F.

countries and, to the extent possible, is provided in full grant form.[73] Food aid that meets these criteria is not considered an export subsidy and hence is not limited.

At MC10, Members reaffirmed their food aid responsibilities in an attempt to ensure that aid is available in humanitarian crises but does not serve as a covert export subsidy. Accordingly, Members agreed to maintain adequate levels of aid, take into account the interests of food aid recipients, and not unintentionally impede the delivery of food aid in emergencies.[74] They also agreed that food aid must be needs-driven, provided in full grant form, not connected to the commercial export of other products or services, not linked to market development, and not re-exported (with some exceptions).[75] Moreover, governments must refrain from providing in-kind international food aid when it could negatively impact local production.[76] In addition, food aid can be monetised—ie, sold to fund development initiatives—only where there is a demonstrable need for the purpose of transportation and distribution of food assistance, or to tackle the causes of hunger and malnutrition in LDCs and NFIDCs.[77]

This framework has some notable weaknesses. First, food aid providers can independently assess the need of recipient countries for aid—no international or regional organisation is involved in such assessment. Second, an exception intended to grant members 'maximum flexibility' in the provision of aid might serve to continue undesirable practices that distort local markets.[78] Third, re-exportation is allowed in many circumstances whose rationale is not always clear.[79] Lastly, the imposition of export restrictions on foodstuffs purchased for humanitarian purposes was addressed only at MC12, where WFP purchases were exempted from these measures.[80] Some authors have lamented that the WTO keeps influencing international aid policies, even though it is not its 'business', and have further pointed out that, despite the renewed commitment to provide food aid and consider the needs of importing countries, this remains a 'best endeavour' under the AoA.[81]

6. Measures to protect least-developed countries and net food-importing developing countries

Under Article 16 of the AoA, developed Members are required to adhere to the NFIDC Decision,[82] which deals with measures related to the potential adverse impacts of the AoA on LDCs and NFIDCs. The NFIDC Decision acknowledges that such countries may face

---

73 AoA (n 9) art 10(4).

74 WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (n 47) para 22.

75 ibid para 23.

76 ibid para 24.

77 ibid para 27.

78 ibid para 30.

79 ibid para 23(e). Re-exportation is allowed in the following circumstances: the agricultural products were not permitted entry into the recipient country; the agricultural products were determined inappropriate or no longer needed for the purpose for which they were received in the recipient country; re-exportation is necessary for logistical reasons to expedite the provision of food aid for another country in an emergency situation.

80 See below, section IV.A.

81 Christian Häberli, 'Food Security and the WTO Rules' in Baris Karapinar and Christian Häberli (eds), *Food Crises and the WTO: World Trade Forum* (Cambridge University Press 2010) 316.

82 WTO, 'Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries' (15 April 1994) UN Doc LT/UR/D-1/2 (hereinafter NFIDC Decision).

challenges in terms of acquiring sufficient supplies of essential foodstuffs from external sources under fair conditions.[83] The NFIDC Decision implemented various measures to facilitate access to food, including periodic reviews of the adequacy of food aid provided to developing countries, guidelines to ensure that LDCs and NFIDCs are provided with basic foodstuffs on appropriate concessional terms, the evaluation of requests made by LDCs and NFIDCs for financial and technical support, and S&DT with respect to rules governing agricultural export credits.[84] Developing countries have claimed that the NFIDC Decision has not been operationalised and has brought little benefit.[85] At MC12, Members committed to operationalising the NFIDC Decision.[86]

III. Members' proposals on food security ahead of the 12th Ministerial Conference (2020-22)

The following sections analyse Members' proposals on food security ahead of MC12. Since the Covid-19 pandemic and the conflict in Ukraine sparked renewed attention to the topic, the analysis is focused on submissions made between January 2020 and June 2022, when MC12 took place.[87] Countries' submissions are grouped thematically.

Members mainly addressed the issues reported in section II. Market access, safeguards, export subsidies, and export restrictions have been widely debated, although no concrete proposals for reform have been made. Some countries have, however, advanced reform proposals with respect to public stockholding programs and international food aid. Domestic support, due to its sensitive nature, has received little attention. This is one of the major drawbacks of the debate ahead of MC12, since several Members resort extensively to domestic support measures, which can be very trade-distortive.[88] However, Members also discussed other key issues for food security, including transparency, S&DT, and sustainability, although no detailed proposals have been made on these issues. The key findings of the analysis are summarised in table 2 below.

Table 2

Issue	Views expressed	Limits

[83] NFIDC Decision (n 82) para 2; see also WTO Secretariat, *The WTO Agreements Series: Agriculture* (World Trade Organization 2003) 22.

[84] NFIDC Decision (n 82) paras 3(i)-(iii), 4.

[85] James Hodge and Andrew Charman, 'An Analysis of the Potential Impact of the Current WTO Agricultural Negotiations on Government Strategies in the SADC region' in Basudeb Guha-Khasnobis, Shabd Acharya, and Benjamin Davis (eds), *Food Security: Indicators, Measurement, and the Impact of Trade Openness* (Oxford University Press 2007) 239, 258.

[86] See below, section IV.B.

[87] The analysis is based on the minutes of the meetings of the WTO CoA, as well as other relevant communications submitted by the Members.

[88] One of the most striking examples is provided by the EU and its Common Agricultural Policy, which has seen a considerable increase in funding over the years. See European Parliament, 'Fact Sheets on the European Union: Financing of the CAP' (*European Parliament*) <https://www.europarl.europa.eu/factsheets/en/sheet/106/financing-of-the-cap> accessed 22 December 2023.

Market access and supply chains	● Many Members favoured keeping markets and supply chains open. They called for emergency measures to be no more trade-restrictive than necessary. ● Some Members, on the other hand, emphasised that open trade is a complement to domestic production, which plays a critical role in ensuring food security. Accordingly, they advocated for greater policy space to protect local production.	● No proposals were made to either keep markets open in times of crises and/or introduce greater flexibilities to protect domestic markets.
Special safeguard mechanism	● Some Members conceive the SSM as a means of safeguarding highly vulnerable farmers against price volatility. Accordingly, the SSM should be user-friendly, offer effective remedies to counteract sudden surges in imports and price drops, and more generally remedy the existing distortions. ● Other Members see the SSM as a time-bound tool, meant to increase market access. Accordingly, its use should be constrained, and it should not be triggered by normal price fluctuations or regular trade expansion.	● No proposals were made to advance negotiations on a SSM.
Export subsidies	● Members stressed the need to implement the Ministerial Decision on Export Competition of 19 December 2015. ● Members also reaffirmed their concern on transparency in the notification of export subsidies.	● No proposals were made to address transparency issues.
Public stockholding programs	● The African Group, the G33 Group, and the African-Caribbean-Pacific Group suggested to amend the AoA to change the formula for calculating the amount of domestic support generated by public stockholding programs to increase their accessibility. ● Brazil, on the other hand, suggested to restrict the use of domestic support in public stockholding programs to LDCs, NFIDCs, and countries requiring external assistance for food.	● Despite the detailed proposals, convergence toward a common solution is unlikely due to divergent views.

Export restrictions or prohibitions	● Many Members warned against the adoption of export restrictions as they are harmful to developing and low-income countries that rely on imports for their food needs. ● Some developing Members, however, upheld the importance of export restrictions in protecting domestic markets from food shortages during worldwide crises.	● No proposals were made, including on transparency and notification issues, due to the different views on the impact of export restrictions on food security.
Transparency	● Most Members acknowledged the need for greater transparency in the notification of trade-restrictive measures to the WTO. ● Views differed as to how transparency and notification mechanisms could be improved, especially with respect to the WTO Secretariat's role.	● No proposals were made.
International food aid	● Many Members supported Singapore's proposal, ultimately adopted at MC12, to exempt foodstuffs purchased by the WFP for humanitarian purposes from export prohibitions and restrictions.	● Only the WFP was exempted. ● Trade barriers other than export restrictions were not addressed.
S&DT	● S&DT received little attention.	● No proposals were made.
Sustainability	● A statement supporting a reform of the AoA to promote an 'inclusive' vision of sustainable agricultural production was submitted.	● Only 16 Members joined the statement. ● No proposals on how to reform the AoA were made.

A. Market access and supply chains

In the aftermath of the Covid-19 pandemic, many Members, including Canada, [89] expressed views in favour of keeping markets and supply chains open. These proposals emphasised the importance of ensuring that production levels are maintained and safeguarding the ability of

[89] Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Paraguay, Peru, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay.

Members to import agricultural products to fulfil their domestic needs.[90] The Cairns Group called on all Members to refrain from implementing unjustified trade barriers on imports of agricultural products.[91] Russia also argued that, in tackling the pandemic, Members should keep food supply chains open and minimise the adoption of measures that impact global trade.[92] The EU also took a stance in favour of maintaining open and predictable trade in agricultural products.[93] Many countries, both developed and developing, called for making sure that emergency measures related to agricultural products designed to address Covid-19 be targeted, balanced, proportionate, transparent, temporary, WTO-consistent, science-based, not more trade-restrictive than necessary, and not harmful for the food security of other countries.[94]

Other countries, while expressing views in favour of preserving market openness, also emphasised that local production plays a critical role in ensuring food security. The Philippines and Indonesia view open trade as a complement to domestic production.[95] Indonesia argued that countries should not rely excessively on international trade for attaining food security, particularly to address small farmers' vulnerability.[96] With respect to Covid-19 measures, Pakistan supported their temporary nature but also affirmed Members' right to invoke their policy space under WTO law to ensure the food security of their populations.[97]

---

90 WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (29 May 2020) UN Doc WT/GC/208/Rev.2 paras 1.2, 1.3, 1.6; see also WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (17 August 2020) UN Doc G/AG/R/94, para 1.2; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (n 5) para 3.9. This group of countries emphasised that open and interconnected supply chains play a pivotal role in ensuring the movement of agricultural goods, which avoids food shortages and ensures global food security.

91 WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (17 June 2020) UN Doc WT/GC/218 G/AG/31, annex para 5. The Cairns Group is composed of Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay, Vietnam.

92 WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.10.

93 ibid para 1.15.

94 ibid paras 1.2, 1.4, 1.10, 1.11, 1.22, 1.25, 1.28, 1.29, 1.34. Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, the EU, Georgia, Hong Kong, India, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Norway, Paraguay, Peru, Qatar, Russia, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, US, Uruguay, the ACP Group, and the Cairns Group; see also WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 90) para 1.6; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (22 December 2020) UN Doc G/AG/R/96 para 2.22; WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 91) para 1.6, annex para 1.

95 WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.30.

96 ibid para 1.35.

97 ibid para 1.27.

B. Special safeguard mechanism

While the 2015 Nairobi Decision on a Special Safeguard Mechanism for Developing Country Members pushed for the implementation of an SSM,[98] disagreement among Members has prevented any meaningful progress.[99]

G33 members have advocated for flexibilities in opening markets through a simple and accessible SSM as a means of addressing price instability risks and counterbalancing distortions in global agricultural trade.[100] Other Members believe that discussion on SSM should be part of the broader debate on liberalising agricultural markets and contend that an agreement is unlikely to be reached if there are no outcomes on market access more generally.[101]

The disagreement reflects two different views on the rationale for an SSM. Some Members see the SSM as a means of safeguarding vulnerable farmers against price volatility. They believe that the SSM should be user-friendly, offer effective remedies to counteract sudden surges in imports and price drops, and remedy the existing distortions, including the subsidies provided by wealthy countries.[102] Other Members see the SSM as a time-bound tool, meant to increase market access. They believe that the use of the SSM should be constrained and that tariffs should not be raised beyond the levels agreed upon before the Doha Round. Additionally, the SSM should not be triggered by normal price fluctuations or regular trade expansion. This perspective is rooted in the idea that enhanced market access is crucial for farmers striving to overcome poverty.[103]

Due to these different perspectives, no progress has been made since 2020 on the SSM negotiations, and few countries have addressed the issue. South Africa urged for advancements in the negotiations, stating that developing countries should be permitted to implement tailored approaches within their WTO commitments.[104] Similarly, Jamaica noted that Covid-19 highlighted the urgency to address SSM to achieve a balanced outcome in the agriculture negotiation with S&DT at its core.[105] Egypt also flagged the need to deliver on SSM.[106]

---

98 WTO, 'Ministerial Decision of 19 December 2015: Special Safeguard Mechanism for Developing Country Members' (n 60).

99 WTO Committee on Agriculture, 'Committee on Agriculture in Special Session: Report by the Chairperson, H.E. Ms Gloria Abraham Peralta, to the Trade Negotiations Committee' (23 November 2021) UN Doc TN/AG/50 para 7.1.

100 WTO, 'An Unofficial Guide to Agricultural Safeguards' (*World Trade Organization*) <https://www.wto.org/english/tratop_e/agric_e/guide_agric_safeg_e.htm> accessed 22 December 2023. The G33 Group, also called 'Friends of Special Products' in agriculture, is a coalition of developing countries (forty-seven WTO Members) pressing for flexibility to undertake limited market opening in agriculture.

101 ibid.

102 ibid.

103 ibid.

104 WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.7.

105 ibid para 1.11.

106 ibid para 1.36.

C. Export subsidies

Since MC10, where stricter rules on export subsidies were established, no progress has been made. Since 2020, Members have focused on the implementation of the Nairobi Decision on Export Competition,[107] as well as on transparency in the notification of export subsidies.

The EU has emphasised that the modification of export subsidy schedules in accordance with the Nairobi Decision should result in the complete eradication of such subsidies, 'not only de jure, but also de facto', advising developing countries against using these tools.[108]

The EU, together with Switzerland, the US, and Ukraine, has also called for increased transparency and more stringent requirements toward the implementation of the Nairobi Decision and the use of Article 9.4 of the AoA. These Members are concerned about the lack of notifications related to export subsidies under Article 9.4 of the AoA, which received a more extended phase-out period in the Nairobi Decision.[109] Article 9.4 of the AoA grants S&DT to developing Members with respect to export subsidies.[110] The provision allows them to provide marketing cost subsidies and internal transport subsidies, as long as these subsidies are not utilised to circumvent the commitment to reduce export subsidies.[111] Export subsidies must be notified each year to the CoA and, as part of this obligation, Members also have to provide a list of those measures that may be used under Article 9.4 of the AoA.[112] Many countries, however, have not complied with these obligations.

D. Public stockholding programs

Public stockholding is one of the most controversial subjects in agricultural negotiations. Stockholding per se is not a problem. Issues arise when governments set prices for purchases into the stocks (so-called 'administered prices'), thereby involving domestic support, rather than relying on market prices.[113] Since 2020, Members have expressed different views on how to permanently regulate public stockholding programs for developing countries.

Many Members have urged developing countries to exercise restraint when introducing domestic food stocks of agricultural products that are typically exported in order to prevent disruptions or distortions in global trade.[114] The Cairns Group also called for transparency and consistency with the WTO agreements and the Nairobi Decision on Export

---

[107] WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (n 47).

[108] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 94) para. 2.5.

[109] ibid paras 2.5, 2.7, 2.8; see also WTO, 'Ministerial Decision of 19 December 2015: Export Competition' (n 48) para 8.

[110] WTO, 'Agriculture: Explanation, Export Competition/Subsidies' (n 47).

[111] ibid.

[112] ibid.

[113] WTO, 'Food Security' (n 64).

[114] Argentina, Australia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Guatemala, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Pakistan, Paraguay, Peru, Philippines, Qatar, Saudi Arabia, Singapore, South Africa, Switzerland, Taiwan, Thailand, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Vietnam. See WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 90) para 1.6; WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 91) annex para 3.

Competition in the disposal of food stocks built up in public storage facilities, or as a result of the public subsidisation of private storage facilities.[115] Egypt, India, and South Africa called for more engagement on public stockholding but did not clarify how they would address the issue.[116] Despite these general remarks, only two concrete (and divergent) proposals have been advanced.

The African Group,[117] the G33 Group, and the African-Caribbean-Pacific Group (ACP Group),[118] suggested amending the AoA to make the calculation of domestic support less stringent.[119] However, they also emphasised that public stockholding 'shall not substantially distort trade or adversely affect the food security of other [Members]'.[120] The proposal suggests changing the formula for calculating the amount of domestic support generated by (i) redefining the base price reference used to calculate how much price support is given and (ii) redefining 'eligible production' to encompass only the amount actually purchased, instead of the amount that could potentially be purchased.[121] The current base reference price, fixed at prices in 1986-88,[122] would be replaced with either more recent prices or adjustments that consider inflation.[123] This would reduce the disparity between the reference prices and the current government-fixed prices, leading to a decrease in the level of trade-distorting domestic support.

Brazil submitted the first-ever counter-proposal due to its concerns that the proposal from the African Group and its allies could enable major producers to distort markets and negatively impact food security.[124] Rather than proposing amendments to the AoA, Brazil suggested restricting the use of domestic support in public stockholding programs to those countries that rely on food imports or are not major traders, while also introducing stricter rules, including additional transparency obligations. On the one hand, Brazil's proposal is more radical than the one advanced by the African Group and its allies, as it suggests that the difference between the acquisition price of food stocks and the external reference price should not be included in the calculation of domestic support.[125] However, this would only apply to a select group of eligible countries, namely, (i) LDCs, (ii) NFIDCs,[126] and (iii) countries

---

[115] See WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 91) annex para 4.

[116] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) paras 1.7, 1.36; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 94) para 2.31.

[117] The African Group comprises the African Members and Observers of the WTO (forty-four).

[118] ACP comprises African, Caribbean and Pacific countries with preferences in the EU (sixty-two WTO Members).

[119] MC12, General Council, 'Public Stockholding for Food Security Purposes: Proposal by the African Group, the ACP, and G33' (6 June 2022) UN Doc WT/MIN(22)/W/4 para 11.1.

[120] ibid para 5.1.

[121] ibid para 3.

[122] WTO, 'Agriculture: Fairer Markets for Farmers' (n 11).

[123] MC12, General Council, 'Public Stockholding for Food Security Purposes: Proposal by the African Group, the ACP, and G33' (n 119) para 3(a)-(b).

[124] It is interesting to note that, two years before submitting this proposal, Brazil was claiming that, despite needing updates, the AoA already provided Members with ample policy space and the tools to manage food crises in the least distorting way possible. See WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) paras 1.18, 1.31.

[125] MC12, General Council, 'Communication from Brazil' (6 June 2022) UN Doc WT/MIN(22)/W/5 para 2.

[126] See WTO, 'Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries' (n 82).

requiring external assistance for food (as defined by FAO) at least once in the past two years.[127] In order to meet the criteria for the last two categories, the country must not be a major player in the relevant product, based on its share of exports (not exceeding 2 per cent of global exports in any case) and the size of its stockpiles compared to the product's total production.[128] Under this system, for example, India would meet the eligibility requirements for wheat based on the 2020 figures, as its share of exports was roughly 0.5 per cent, but not based on the 2021 figures, as its share of exports exceeded 3 per cent. In the case of rice, India would not be eligible at all, as its export share exceeds 30 per cent.[129]

Overall, the proposal presented by the African Group appears preferable, as it ensures that public stockholding programs are accessible to a larger number of countries. However, Brazil's proposal is worthy of consideration, not only because it is more impactful with respect to the calculation of domestic support, but also because it highlights certain aspects of food security that have frequently been overlooked. Brazil stressed that food security issues are 'multifaceted', and, for this reason, they require the adoption of a 'comprehensive approach' to be effectively tackled. Public stockholding is merely one component of such a 'comprehensive package'.[130] Brazil's statements draw attention to the lack of a holistic approach in the way food security has been addressed at the WTO. This shortcoming will be further addressed in section V below.

E. Export restrictions or prohibitions

In the aftermath of the Covid-19 pandemic, many countries resorted to food export restrictions to ensure food supplies for their own populations, prevent shortages, and stabilise prices within their markets.[131] Countries reacted differently to the introduction of such measures.

Many Members warned against the adoption of export restrictions due to their negative impact on global food security. Canada, together with other countries,[132] argued that export restrictions on agricultural products create an unpredictable trading environment that might result in a widespread food security crisis due to supply chains disruptions, price spikes, price volatility, and shortages.[133] Vulnerable populations would bear the brunt of increased export restrictions.[134] Brazil, similarly, noted that export restrictions rarely achieve the desired

---

[127] MC12, General Council, 'Communication from Brazil' (n 125) para 5.

[128] ibid para 6.

[129] Peter Ungphakorn, 'Two Last-Minute Agriculture Proposals Land as WTO Conference Approaches' (*Tradebetablog*, 2022) <https://tradebetablog.wordpress.com/2022/06/01/two-proposals-ag-wto-conference/> accessed 22 December 2023.

[130] MC12, General Council, 'Communication from Brazil' (n 125) preamble.

[131] Jonathan Hepburn and others, 'COVID-19 and Food Export Restrictions: Comparing Today's Situation to the 2007/08 Price Spikes' (*International Institute for Sustainable Development*, 2020) <https://www.iisd.org/system/files/2020-08/covid-19-food-export-restrictions.pdf> accessed 22 December 2023.

[132] Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Paraguay, Peru, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay.

[133] WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 90) para 1.3; WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.1.

[134] WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 90) para 1.4.

objectives and rather distort international trade.[135] Along the same lines, the ACP Group held that export restrictions could have aggravated the Covid-19 crisis.[136] The EU highlighted that export restrictions are particularly harmful to developing and low-income countries that rely on imports for their food needs and urged Members to promptly notify those measures to the WTO.[137] Japan urged Members to withdraw their export restrictions due to their potential to cause artificial food shortages.[138] Switzerland emphasised, both after the outbreak of the Covid-19 pandemic and the conflict in Ukraine, that export restrictions amplify food insecurity concerns, especially for vulnerable populations.[139] The FAO, the International Monetary Fund (IMF), the World Bank (WB), the WFP and the WTO also stressed that export restrictions can impede access to food for poor consumers in low-income food-importing countries.[140] Lastly, the WFP noted that export restrictions result in increased costs and longer delivery times for its procurement operations.[141]

Not every Member, however, especially developing economies, upheld the view that export restrictions are always a threat to food security. Pakistan highlighted the significance of these measures in protecting domestic markets from food shortages during worldwide crises. By citing the research of Amartya Sen on the famines in Ireland and Bengal, Pakistan emphasised that market failures and food shortages during global crises jeopardise the ability of poor people to access food, as purchasing power becomes the primary factor in acquiring food from the market.[142] Similarly, India warned against the narrative of prohibiting export restrictions to facilitate the access of developing countries to agricultural products. India contended that this narrative overlooks the practical reality that, in times of scarcity, producers would prioritise selling their products to the highest bidders, who may not originate in developing countries.[143]

The different views on the impact of export restrictions on food (in)security prevented any meaningful reform, including on transparency and notification, which are crucial during crises.

---

[135] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.5.

[136] ibid para 1.11.

[137] ibid para 1.24; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 17-18 June 2021' (13 July 2021) UN Doc G/AG/R/99 para 5.7. The EU referred to the Export Restrictions Tracker released by the International Food Policy Research Institute and expressed its concern over the fact that several measures documented on the tracker had not been reported to the WTO since the beginning of the Covid-19 pandemic.

[138] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.22; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 94) para 2.45; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (n 5) para 3.11.

[139] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.23; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 15-16 March 2022' (n 5) para 3.12.

[140] FAO, IMF, WB, WFP and WTO, 'Joint Statement' (n).

[141] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (4 February 2021) UN Doc G/AG/R/972.9.

[142] WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90), para. 1.27.

[143] ibid para 1.34.

F. Transparency in the notification of trade-restrictive measures

The Covid-19 pandemic has unveiled the inadequacy of the existing provisions on transparency and notification of trade-restrictive measures to the WTO. Without sufficient transparency, it is not possible to assess Members' compliance with WTO rules.[144] Since 2020, many countries have adopted restrictive measures to deal with the pandemic without giving proper notification to the WTO, especially with respect to export restrictions.[145] Members have generally acknowledged the need for greater transparency. However, views differ as to how transparency and notification mechanisms could be improved, especially with respect to the WTO Secretariat's role in facilitating information collection and management.

Canada, together with other countries,[146] encouraged Members to share with the WTO information on their trade-restrictive measures affecting agricultural products, as well as information on their levels of food production, consumption, stocks, and food prices.[147] Canada held that information-sharing should be Member-driven.[148] Similarly, the EU held that greater involvement of the WTO Secretariat is unrealistic in the absence of Members' inputs,[149] and the US contended that the Secretariat's monitoring should not prejudge how Members should notify their measures.[150] Along the same lines, India held that the information-sharing process should remain Member-driven, to avoid an 'overarching role' for the Secretariat,[151] and Indonesia cautioned against turning information-sharing into a 'policing mechanism.'[152]

Setting forth a different view, Australia encouraged the WTO Secretariat to assist Members by compiling information on their agricultural trade-restrictive measures. The country noted that, due to the capacity constraints of developing countries and LDCs, formal notifications to the Secretariat can take too long. For this reason, greater assistance would be

---

144 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (19 October 2020) UN Doc G/AG/R/95 para 3.3.

145 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 94), para 2.35; WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.22.

146 Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Ecuador, European Union, Georgia, Hong Kong, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Paraguay, Peru, Qatar, Saudi Arabia, Singapore, Switzerland, Taiwan, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay.

147 WTO Committee on Agriculture, 'Responding to the Covid-19 Pandemic with Open and Predictable Trade in Agricultural and Food Products' (n 90) para 1.6; see also WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.2.

148 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 144) para 3.5.

149 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 92) para 2.35.

150 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (n 141) para 2.14.

151 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 144) para 3.15; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 94) para 2.31.

152 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 144) para 3.13.

valuable.[153] New Zealand and Chile also called on the Secretariat and Members to work together.[154]

Allowing the WTO Secretariat to play a greater role in the collection and management of information on trade-restrictive measures and their effects on food security has potential benefits and drawbacks. While it could enhance transparency and facilitate informed trade policy decisions, as well as monitoring and impact assessments, there are also considerations around resource limitations and sovereignty concerns among some Members.

G. International food aid

In 2020, Singapore proposed to not impose export prohibitions and restrictions on foodstuffs purchased by the WFP for non-commercial, humanitarian purposes.[155] Singapore emphasised the importance of exempting WFP's food purchases to contribute to the SDG 2 on 'zero hunger', especially in light of the increased humanitarian food needs as a result of the Covid-19 pandemic.[156] The Cairns Group supported this proposal and encouraged other Members to do so.[157] Singapore's proposal was ultimately adopted at MC12.[158]

H. Special and differential treatment

S&DT for developing countries did not receive great attention in the aftermath of the Covid-19 pandemic. South Africa called for progress on S&DT, noting that developing countries need 'tailored approaches' within their WTO commitments.[159] The ACP Group stressed the vulnerabilities of developing countries and their need for S&DT.[160] However, no concrete reform proposals have been advanced.

I. Sustainability

Argentina, Australia, Brazil, Canada, Chile, Colombia, Ecuador, Guatemala, New Zealand, Paraguay, Peru, the Philippines, South Africa, Ukraine, Uruguay, and Vietnam are the only Members that devoted significant attention to sustainability through a joint statement.[161]

---

153 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 28 July 2020' (n 144) para 3.4.

154 ibid paras 3.7, 3.19; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 22-23 September 2020' (n 94) para 2.34; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (n 141) para 2.13.

155 WTO Committee on Agriculture, 'Proposal on Agriculture Export Prohibitions or Restrictions Relating to the World Food Programme: Draft General Council Decision' (4 December 2020) UN Doc WT/GC/W/810.

156 WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 17-18 June 2021' (n 137), para. 5.5.

157 WTO Committee on Agriculture, 'Communication on Behalf of Members of the Cairns Group—Covid-19 Initiative: Protecting Global Food Security Through Open Trade' (n 90) annex para 8; see also WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) paras 1.25, 1.29.

158 See below, section IV.A.

159 WTO Secretariat, 'Summary Report of the Special Meeting of the Committee on Agriculture Held on 18 June 2020' (n 90) para 1.7.

160 ibid para 1.11.

161 WTO Committee on Agriculture, 'Submission by Brazil: Joint Statement—The Contribution of International Agricultural Trade to Sustainable Food Systems' (26 March 2021) UN Doc G/AG/GEN/186; Brazil also introduced a concept paper on 'Food Security, Agriculture Trade and Stability of Agricultural Markets in the Long term' (21 September 2020) UN Doc RD/AG/79. The document, however, is not publicly available.

Relying on FAO's recommendations, they supported the need to reform the AoA to ensure agricultural production that is economically, socially, and environmentally sustainable to contribute to poverty reduction and the responsible use of natural resources,[162] in line with SDG 1 on 'no poverty' and SDG 12 on 'sustainable consumption and production'. However, they warned against the adoption of 'one development model that can be applied to all nations', arguing instead that it is fundamental to have an 'inclusive vision of the sustainability of food systems', with solutions 'adapted' to local needs.[163] On this basis, the transition toward sustainable production systems should be 'gradual' and follow the format and timeframes decided by each Member.[164]

In line with SDGs 2.b and 2.c,[165] these countries also supported the elimination or reduction of unjustified import barriers, export restrictions, and trade-distorting subsidies to achieve sustainable food systems.[166] In light of the challenges posed by climate change, they also acknowledge the need to focus on adaptation, in order to ensure the resilience of food systems.[167] This group of countries also acknowledged the role of rural women in food security, particularly in family, rural and indigenous production, and urged Members to agree on effective mechanisms to close gender gaps, which are key to reducing poverty and achieving sustainable food systems.[168]

IV. Outcomes achieved at the 12th Ministerial Conference on food security

At MC12, two main outcomes were achieved on food security.[169] The two documents, analysed below, were intended to complement the Draft Ministerial Decision on

---

[162] ibid paras 1.2, 7; see also WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 29-30 March 2021' (12 May 2021) UN Doc G/AG/R/98 para 4.10.

[163] WTO Committee on Agriculture, 'Communication from Argentina, Brazil, Chile, Paraguay and Uruguay: Principles and Values of the Region Regarding the Production of Food Within the Framework of Sustainable Development' (1 June 2021) UN Doc G/AG/GEN/187 para 1.4.

[164] ibid para 1.4.

[165] To end hunger, achieve food security and improved nutrition, and promote sustainable agriculture, SDG 2.b requires to '[c]orrect and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect', while SDG 2.c promotes the adoption of 'measures to ensure the proper functioning of food commodity markets and their derivatives and facilitate timely access to market information, including on food reserves, in order to help limit extreme food price volatility'.

[166] WTO Committee on Agriculture, 'Submission by Brazil: Joint Statement—The Contribution of International Agricultural Trade to Sustainable Food Systems' (n 162) para 5.

[167] WTO Committee on Agriculture, 'Communication from Argentina, Brazil, Chile, Paraguay and Uruguay: Principles and Values of the Region Regarding the Production of Food Within the Framework of Sustainable Development' (n 163) para 1.1.

[168] ibid para 1.6.

[169] Other important results have been achieved on issues that indirectly impact food security and the achievement of sustainable food systems. In particular, Members agreed on a multilateral Agreement on Fisheries Subsidies, which responds to the SDG 14.6, and on a Declaration on Responses to Modern SPS Challenges. See, respectively, MC12, 'Ministerial Decision of 17 June 2022: Agreement on Fisheries Subsidies' (22 June 2022) UN Doc WT/MIN(22)/33; MC12, 'Ministerial Declaration adopted on 17 June 2022: Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges' (22 June 2022) UN Doc WT/MIN(22)/27.

Agriculture.[170] However, due to Members' disagreement, the agriculture package of MC12 is incomplete and misses its primary component on agricultural negotiations. This is the reason why no meaningful advancements were made on most of the issues addressed under section III, including market access, safeguards, export subsidies, public stockholding programs, export restrictions, transparency, S&DT, and sustainability. Progress was made only with respect to the regulation of international food aid. Overall, MC12 had a modest impact on food security.

A. The Ministerial Decision on World Food Program food purchases exemption from export prohibitions or restrictions

Due to its role in offering a lifeline to the most disadvantaged communities, Members agreed to endorse Singapore's proposal[171] and decided to not impose export prohibitions or restrictions on foodstuffs purchased for non-commercial humanitarian purposes by the WFP.[172] Specifically, the WFP was selected as it provides critical humanitarian support and always makes procurement decisions guided by the principles of avoiding harm to the supplying Member and promoting local food procurement.[173]

The Decision strikes a delicate balance by, on the one hand, granting the aforementioned exemption, and, on the other hand, reaffirming that Members retain the right to implement measures aimed at securing their food security, provided that these measures comply with WTO law.[174] The hope is that the WFP exemption will be interpreted in good faith and that Members will ensure that the domestic measures enacted to promote food security do not hinder the exemption. However, it remains to be seen whether this will always be the case.

The WFP exemption represents a symbolically important achievement that demonstrates the determination of Members to address the ongoing food crisis. According to the WFP, the exemption could help save time and guarantee that crucial aid reaches those most in need.[175] By agreeing on this exemption, Members showed that the WTO can serve as a platform for advancing non-trade concerns. This outcome is also in line with SDG 2 on the achievement of food security and improved nutrition. Despite its symbolic importance, however, the Decision could have been more ambitious. First, it could have exempted not only the WFP but also other humanitarian organisations.[176] Second, it could have also addressed other trade barriers aside from export prohibitions or restrictions that may hinder the procurement efforts of the WFP.

---

[170] MC12, 'Draft Ministerial Decision on Agriculture' (10 June 2022) UN Doc WT/MIN(22)/W/19.

[171] See above section III.G

[172] MC12, 'Ministerial Decision on World Food Program Food Purchases Exemption from Export Prohibitions or Restrictions' (22 June 2022) UN Doc WT/MIN(22)/29.

[173] ibid.

[174] ibid.

[175] Export restrictions have negatively impacted the WFP's ability to procure food efficiently, resulting in longer processing times, increased transportation expenses, and, in cases of export bans, meal losses and higher procurement costs. See WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 30 November-1 December 2020' (n 141) para 2.9.

[176] WFP food purchases represent less than 1 per cent of global food purchases. This is probably one of the reasons why Members managed to reach an agreement to ban export prohibitions or restrictions on WFP's purchases. See Facundo Calvo, 'Global Food Crisis May Take Centre Stage at MC12 Agriculture Negotiations' (*International Institute for Sustainable Development*, 7 June 2022) <https://www.iisd.org/articles/policy-analysis/global-food-crisis-mc12-agriculture-negotiations> accessed 22 December 2023.

B. The Ministerial Declaration on the Emergency Response to Food Insecurity

The Ministerial Declaration on the Emergency Response to Food Insecurity (WTO Food Security Declaration) emphasises the importance of open agricultural trade flows and urges avoiding export restrictions that are inconsistent with WTO law.[177] Notably, it commits Members to establish a dedicated work program in the CoA to operationalise the NFIDC Decision.[178] Among other things, the work program shall consider 'the best possible use of flexibilities' to enhance the agricultural production and domestic food security of LDCs and NFIDCs.[179]

Despite the above positive statements on minimising trade-restrictive measures, the WTO Food Security Declaration does not contain any binding and enforceable provision on the use of export restrictions.[180] Although it is commendable that Members expressed a commitment to ensuring that emergency measures introduced to address food security 'minimise trade distortions as far as possible' and are 'temporary', 'targeted', and 'transparent',[181] this is a non-binding commitment that is part of a broader best-endeavour declaration. Members could have at least committed to prohibiting the imposition of export restrictions by Members who are major exporters of certain food products when such products are purchased by LDCs and NFIDCs for their domestic use.

The International Food Policy Research Institute noted that developing countries are the main users of export restrictions, which have severe consequences for other developing countries. Such restrictions commonly target commodities and staple food and, therefore, place LDCs that rely on these products to fulfil their dietary needs at the greatest

---

[177] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (22 June 2022) UN Doc WT/MIN(22)/28 para 4.

[178] See above, section II.D.6.

[179] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (n 177) para 8; see also above section II.D.6; A work program containing the thematic outline and working methods has been approved, and can be found in WTO, 'Work Programme Pursuant to Paragraph 8 of the Ministerial Declaration on the Emergency Response to Food Insecurity' (23 November 2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/35.pdf&Open=True> accessed 22 December 2023. The work program outlines four primary themes to guide future discussions: access to international food markets, financing food imports, agricultural and production resilience of LDCs and NFIDCs, and a set of horisontal issues to foster collaboration. It also aims to facilitate the identification of the challenges faced by LDCs and NFIDCs, as well as the responses of Members to food insecurity in these countries, through questionnaires. The finalised questionnaire is available in WTO, 'Questionnaire on LDC and NFIDC Members' Utilization of WTO Flexibilities (Work Programme-Paragraph 8 of MC-12 Declaration on Food Insecurity)' (88 December 2022) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/GEN214.pdf&Open=True> accessed 22 December 2023.

[180] Facundo Calvo, 'How Can the WTO Contribute to Global Food Security?' (*International Institute for Sustainable Development*, 22 June 2022) <https://sdg.iisd.org/commentary/policy-briefs/how-can-the-wto-continue-delivering-good-outcomes-on-food-security/> accessed 22 December 2023.

[181] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (n 177) para 5.

disadvantage.[182] To ensure that positive food security outcomes are achieved at MC13, Members could consider clarifying existing regulations on export restrictions, including by amending Article XI of the GATT and Article 12 of the AoA.

The WTO Food Security Declaration symbolically shows that Members could collectively respond to acute challenges in today's agricultural markets. However, its weak and non-binding commitments prevent it from bringing about any significant improvement.

V. The way forward at the WTO

The lack of progress since 2020 in promoting food security concerns at the WTO suggests that a new approach is needed in the way these concerns are addressed. The following sections elaborate on the necessity for a new, holistic approach and its potential implementation in the WTO framework on agriculture.

A. The need for a new approach

Section IV reveals that the food security outcome at MC12 has been rather disappointing. Essentially, Members only agreed to (i) avoid implementing export prohibitions or restrictions on foodstuffs purchased by the WFP for humanitarian purposes and (ii) establish a specific work program in the CoA to implement the NFIDC Decision.

This outcome is especially unsatisfactory considering the extensive negotiations that have occurred in the CoA since the outbreak of the Covid-19 pandemic. During these negotiations, Members discussed all the significant issues related to the food security part of the WTO framework on agriculture, such as market access, safeguards, domestic support, export subsidies, public stockholding, investment subsidies, export restrictions, international food aid, measures to protect LDCs and NFIDCs, transparency, and S&DT. They also addressed issues that have been traditionally overlooked, particularly sustainability. The lack of any relevant progress in reshaping the fundamental pillars of the AoA demonstrates that the negotiation strategy typically employed for agricultural and food security concerns, based on conceiving the various issues as being 'autonomous' and not interrelated, is not the most effective.

The WTO regulatory framework on agriculture and food security, the debate ahead of MC12, and the outcomes achieved there, reveal that food security is still treated as an exception, while commercial transactions are the rule.[183] The multilateral trading system lacks a comprehensive legal framework that addresses food security beyond market access, subsidy disciplines, and export measures. After the Covid-19 pandemic, the conflict in Ukraine has further highlighted the necessity of placing food security at the forefront of trade discussions. As Brazil outlined in its submissions to the CoA ahead of MC12, food security issues are 'multifaceted', and they need to be addressed through a 'comprehensive approach'.[184] Brazil's remarks highlight the lack of a holistic approach in the way food security has been addressed at the WTO.

---

[182] Joseph Glauber, David Laborde, Abdullah Mamun, Elsa Olivetti, and Valeria Piñeiro, 'MC12: How to Make the WTO Relevant in the Middle of a Food Price Crisis' (*International Food Policy Research Institute*, 11 June 2022) <https://www.ifpri.org/blog/mc12-how-make-wto-relevant-middle-food-price-crisis> accessed 22 December 2023.

[183] De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 37) 16.

[184] MC12, General Council, 'Communication from Brazil' (n 125) preamble; see also above, section III.D.

B. The development of a holistic approach to food security for implementation in the WTO framework on agriculture

The sections below explore the theoretical foundation and the legal basis for implementing a holistic approach to food security in the WTO framework on agriculture. Following this analysis, the paper proposes recommendations for implementing this innovative approach in the AoA, with a particular focus on its three pillars.

1. The theoretical foundation for a holistic approach to food security

To address food security holistically, the notion of sustainable development, which encompasses an economic, social, and environmental pillar,[185] is a useful tool to go beyond the 'pure' market-based trade law perspective and embrace a cross-cutting approach that draws on human rights law and the right to food.[186] The traditional trade tools aimed at improving access, distribution, and market stability are insufficient to frame a holistic approach to food security. The implementation of this approach would result in a greater focus on all the dimensions of sustainability, not only the environmental one, and on the intra- and inter-generational equity implications of agricultural and food security policies.[187] Intra-generational equity refers to the fair distribution of resources, opportunities, and benefits among individuals and groups within the same generation or time period. Inter-generational equity, on the other hand, focuses on the fair distribution of resources and the responsibility for sustainable development between different generations. Greater attention to equity considerations would shift the focus from market dynamics to farmers and resource-poor countries.[188]

A rights-based approach would also conceive food as an entitlement rather than a commodity, and it would require examining food systems in their entirety, together with the ways in which people interact with those systems.[189] In this respect, the notion of food sovereignty provides a stimulus for thinking outside the boundaries of trade law by placing greater emphasis on bottom-up approaches, the local level, and sustainability in food production, access, and distribution. Food sovereignty focuses on local food production as

---

[185] Sustainable development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. See World Commission on Environment and Development, Our Common Future (1987) (Bruntland Report) <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed 22 December 2023.

[186] See Katrin Kuhlmann, 'Trade, Sustainable Development, and Food Security' (Presentation at Georgetown's International Economic Law Colloquium, Georgetown University, 2022); According to Rayfuse, realising the right to food presumes sustainable agricultural development, which ensures that the small-scale farming sector is not left out. Similarly, also biodiversity protection requires 'diverse' farming systems. See Rosemary Rayfuse and Nicole Weisfelt, *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Elgar 2012) 87; For an overview of the different conceptions of the right to food, especially as an individual right versus a community right, see Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (Cambridge University Press 2019) 123-24.

[187] Kuhlmann, 'Trade, Sustainable Development, and Food Security' (n 186).

[188] Katrin Kuhlmann, 'Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development' (2021) 2 African Journal of International Economic Law 48, 81.

[189] Priscilla Claeys and Nadia Lambek, 'Introduction: In Search of Better Options: Food Sovereignty, the Right to Food and Legal Tools for Transforming Food Systems' in Nadia Lambek and others (eds), *Rethinking Food Systems: Structural Challenges, New Strategies and the Law* (Springer 2014) 1-25.

opposed to mass production by large corporations, the practice of small-scale sustainable agriculture that is environmentally and culturally appropriate, agroecology principles as opposed to advanced and expensive technologies to increase food production, the protection of biodiversity, and the recognition of the role of small farmers for achieving food security.[190] Giving more consideration to these aspects would lead to increased focus on matters such as biodiversity, genetic resources, agricultural inputs, the role of farmers, and the significance of local markets as a complement to non-distorted international markets.[191]

This approach links with several SDGs, including SDG 1 on ending poverty, SDG 2 on achieving food security and promoting sustainable agriculture, SDG 3 on ensuring healthy lives, SDG 12 on ensuring sustainable consumption and production patterns, and SDG 15 on promoting the sustainable use of ecosystems and protecting biodiversity.

2. The legal basis for a holistic approach to food security

The foundational agreements of the WTO provide the legal hooks for advocating in favour of a holistic approach to food security. The preamble to the Agreement Establishing the WTO adopts a comprehensive approach to sustainable development and tries to balance trade needs with non-trade values.[192] The preamble acknowledges that trade relations should be aimed at promoting higher standards of living, full employment, and higher incomes, while also ensuring the optimal use of natural resources according to sustainable development.[193] The preamble also specifies that international trade should benefit the economic development of developing countries and LDCs.[194] This is the basis for the many S&DT provisions in several WTO agreements, focused on intra-generational equity.

The preamble to the AoA reaffirms some of these concepts.[195] It acknowledges that the aim of the AoA is to establish a 'fair' and 'equitable' agricultural trading system, having regard to 'non-trade concerns', such as 'food security'.[196] In implementing market access commitments, developed Members should consider the 'needs' of developing Members through S&DT provisions and mechanisms to tackle the adverse effects of liberalisation on LDCs and NFIDCs.[197]

---

[190] See World Food Summit Nyéléni, 'Declaration of the Forum for Food Sovereignty' (27 February 2007) <https://nyeleni.org/IMG/pdf/DeclNyeleni-en.pdf> accessed 22 December 2023; Saab (n 186) 41-42; Peter Halewood, 'Trade Liberalization and Obstacles to Food Security: Toward a Sustainable Food Sovereignty' (2011) 43(1) University of Miami Inter-American Law Review 115, 134-36.

[191] Katrin Kuhlmann and others, 'Re-conceptualizing Free Trade Agreements Through a Sustainable Development Lens' (*New Markets Lab*, 27 July 2020) 13, 22-23 <https://www.unescap.org/sites/default/files/145%20Final-Team%20Katrin%20Kuhlmann-USA.pdf> accessed 22 December 2023; IFAD, 'Rural Poverty Report 2011—New Realities, New Challenges: New Opportunities for Tomorrow's Generation' (*International Fund for Agricultural Developm*ent, 1 December 2010) 94, 115 <https://reliefweb.int/report/world/rural-poverty-report-2011-new-realities-new-challenges-new-opportunities-tomorrows> accessed 22 December 2023.

[192] Marrakesh Agreement Establishing the World Trade Organization (concluded 15 April 1994, entered into force 11 January 1995) 1867 UNTS 154 (WTO Agreement); see also Emily Barrett Lydgate, 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing' (2012) 11(4) World Trade Review 621, 623-25.

[193] WTO Agreement (n 192) preamble.

[194] WTO Agreement (n 192).

[195] Ahmad Mukhtar, Policy Space for Sustainable Agriculture in the World Trade Organization Agreement on Agriculture (Food and Agriculture Organization, 15 July 2020) 9 <https://www.fao.org/3/ca9544en/CA9544EN.pdf> accessed 22 December 2023.

[196] AoA (n 9) preamble.

[197] ibid.

Both preambles provide Members with the legal hooks to move away from the current conception of food security as an exception, as they both acknowledge the importance of pursuing social and environmental interests, in addition to the economic ones, including by providing flexibilities to developing countries, LDCs, and NFIDCs. What is missing, however, is an approach to address concerns for future generations.[198] The principle of intergenerational equity, established in international law, envisages the right of future generations to enjoy a fair level of common patrimony.[199] When it comes to agriculture, inter-generational equity means ensuring that future generations have access to comparable opportunities as the current generation, while also avoiding the deterioration of natural, social, or economic capital as a whole.[200]

3. The implementation of a holistic approach to food security in the WTO Agreement on Agriculture

The following sections set forth some proposals to reform the three pillars of the AoA according to a holistic and comprehensive approach to food security grounded in the notion of sustainable development.

i. Market access

Despite commitments to reduce tariffs on agricultural products, tariff levels remain high, and it is therefore difficult for developing countries to benefit from the current tariffication system. Further tariff cuts could be aimed at increasing the access of producers from developing countries to markets in developed countries, while also ensuring that these reductions do not hinder the ability of developing countries to use tariffs for the promotion of food security.

Greater access to markets in developed countries should be a priority. This can be achieved through further reductions in the tariff levels of developed countries in order to address dirty tariffication.[201] Farmers' improved ability to access developed country markets would result in higher incomes for them.[202] Higher incomes would incentivise them to grow more products, thereby increasing agricultural productivity. In turn, increased production would facilitate the achievement of the right to food, as more individuals would find participation in agriculture lucrative.[203] Market access could also be enhanced by implementing product-specific tariff reductions to prevent selective tariff cuts,[204] by eliminating tariff escalation on products that are of export interest to developing countries, and by

---

198 Rayfuse and Weisfelt (n 186) 84.

199 ILA, *Report of the Seventieth Conference held in New Delhi 2-6 April 2002* (Cambrian Printers 2002) 22-29.

200 Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989); Keith Aoki, 'Food Forethought: Intergenerational Equity and Global Food Supply – Past, Present, and Future' (2011) 2 Wisconsin Law Review 399.

201 See above, section II.A; see also Guled Yusuf, 'The Marginalization of African Agricultural Trade and Development: A Case Study of the WTO's Efforts to Cater to African Agricultural Trading Interests Particularly Cotton and Sugar' (2009) 17(2) African Journal of International and Comparative Law 213 239.

202 It has also been argued, however, that some protections should be granted to small farmers in developing countries to be protected from international competition. See Rayfuse and Weisfelt (n 186) 87.

203 Shelton Mota Makore, Patrick Osode, and Nombulelo Lubisi, 'Re-Theorising International Agricultural Trade Regulation to Realise the Human Right to Food in Developing Countries' (2022) 47(2) Journal for Juridical Science 88, 106.

204 See above, section II.A.

increasing tariff transparency to prevent abuses and promote fair trade.[205] Developed Members could also be required to establish a generalised system of preferences for developing countries that would allow a specific percentage of their goods to enter the market.[206] To support LDCs, the percentage could be set higher. This would ensure a minimum level of free and fair agricultural trade.

The AoA could provide developing Members with flexibility in implementing tariff reductions, as they rely on tariff revenues to fund measures to boost domestic production and promote food security. Any additional tariff reduction in those countries should also be subject to careful evaluation of the risk of displacing domestic production with cheap imports from developed countries that heavily rely on domestic subsidies. This displacement could have detrimental effects on domestic farmers, rural livelihoods, and national food security goals. Developing countries could also be exempt from tariff reduction obligations for sensitive agricultural commodities, including food staples such as rice, wheat, maize, and other essential food items that are critical for ensuring a stable food supply and affordable prices for the population.[207]

To promote sustainable development, market access could be made contingent upon adherence to transparent sustainability standards, such as internationally recognised good agricultural practices tailored to the needs and capacities of developing countries.[208] This ensures that the requirements are realistic and achievable, taking into account factors like resource availability, technological capacity, and the socio-economic conditions of small-scale farmers. This approach would 'qualify' market access and ensure small farmers' participation.

ii. Domestic support

The need for reform in domestic support to agriculture becomes apparent when considering the annual worldwide expenditure, exceeding USD 500 billion, with only 35 per cent of these funds reaching farmers.[209] Much of this support incentivises inefficient use of resources, distorts global markets, or undermines environmental sustainability, public health, and agricultural productivity.[210] This funding could be repurposed towards temporary, better-targeted programs for global food security and sustainable food systems, considering the key aspects of efficiency, cost and fiscal sustainability, flexibility, administrative complexity, equity, and strengthened resilience and sustainability.[211] The strategy of inducing every

---

[205] Gonzalez (n 56) 485.

[206] Emmanuel Asmah and Brandon Routman, 'Removing Barriers to Improve the Competitiveness of Africa's Agriculture' (*Brookings*, 2016) <https://www.brookings.edu/wp-content/uploads/2016/06/0601_improving_agoa_asmah_routman.pdf> accessed 22 December 2023.

[207] Gonzalez (n 55) 485-86.

[208] FAO attempted to develop some balanced and worldwide applicable good agricultural practices. See FAO, 'Development of a Framework for Good Agricultural Practices' (13 March-4 April 2003) UN Doc COAG/2003/6.

[209] OECD, 'Governments Should Renew Efforts to Reform Support to Agriculture' (*Organisation for Economic Co-operatioon and Development*, 2019) <https://www.oecd.org/agriculture/oecd-ag-policy-monitoring-2019/> accessed 22 December 2023; Madhur Gautam and others, *Repurposing Agricultural Policies and Support: Options to Transform Agriculture and Food Systems to Better Serve the Health of People, Economies, and the Planet* (World Bank, 2022) vii.

[210] FAO, IMF, WB, WFP and WTO 'Joint Statement' (n 1).

[211] For example, domestic support could target the adoption of good agricultural practices, research and innovation (including on fertilisers), extension and advisory services, improved infrastructure and logistics, and digital technologies that improve productivity sustainably.

Member to reduce domestic support measures, irrespective of its level of development, should however be avoided, as it risks hampering development since it does not sufficiently account for the food security needs of developing Members.[212]

With specific regard to developed countries, the Green Box and Blue Box rules could be redesigned. These countries are the major users of domestic subsidies,[213] which have been employed to indirectly support agricultural production by boosting farmers' income (Green Box) and directly subsidise agricultural production (Blue Box). For this reason, they could be re-categorised as trade-distorting Amber Box subsidies, and they could be reduced. In the alternative, a more precise definition of Green Box measures could be adopted and an expenditure limit set, since countries have easily transformed Blue Box subsidies into Green Box subsidies. The latter could also be more closely tied to sustainability goals by requiring countries to demonstrate how their Green Box programs contribute to environmentally friendly and sustainable agricultural practices, such as organic farming, conservation farming, or agroforestry.[214]

With regard to developing countries, a revised AoA could acknowledge the role of domestic subsidies in promoting food security and could expand the investment subsidies exception in Article 6(2) of the AoA to turn it into a 'food security box'.[215] This box could allow for subsidies that increase domestic food production, particularly those directed toward low-income or resource-poor farmers, as well as food price subsidies, direct food provision, and income safety nets.[216] With regard to domestic subsidies falling outside the 'food security box', developing Members could be afforded the flexibility to adjust their aggregate measurement of support in response to inflation.

A revised AoA could also allow for a smoother shift from product-specific to non-product-specific measures of support, considering the non-trade concerns of agriculture, including sustainability and the right to food.[217] Product-specific subsidies incentivise farmers to adopt mechanised production techniques that rely on fertilisers and pesticides to maximise their income from the subsidies. This results in environmental degradation, biodiversity loss, and ultimately undermines the realisation of the right to food.[218] Product-specific measures could be turned into an exception to the general rules. Accordingly, WTO members would be allowed to use this type of support only in situations where such measures would be beneficial for developing Members.

---

[212] See above, section II.D.2.

[213] See above, section II.B.

[214] Timothy Josling, 'Rethinking the Rules for Agricultural Subsidies' (*International Trade Center*, 2015) 4-5 <https://ageconsearch.umn.edu/record/320153/> accessed 22 December 2023.

[215] See above, section II.D.3.

[216] Gonzalez (n 55) 489.

[217] James Simpson and Thomas Schoenbaum, 'Non-Trade Concerns in WTO Trade Negotiations: Legal and Legitimate Reasons for Revising the "Box" System' (2003) 2(3/4) International Journal of Agricultural Resources, Governance and Ecology 399.

[218] Christophe Bellmann, 'Subsidies and Sustainable Agriculture: Mapping the Policy Landscape' (*Chatham House*, 2019) 6 <https://www.chathamhouse.org/sites/default/files/Subsidies%20and%20Sustainable%20Ag%20-%20Mapping%20the%20Policy%20Landscape%20FINAL-compressed.pdf> accessed 22 December 2023.

iii. Export subsidies

Despite Members' obligation to refrain from incentivising the export of agricultural products through export subsidies,[219] countries still heavily subsidise their exports. Export subsidies, in the form of direct payments, export loans, and tax benefits, have distorted market prices leading to higher-than-market prices and surplus production in exporting countries and lower prices and less production in importing countries.[220] In the long-term, this system undermines competitiveness of food production in both exporting and importing countries. The outcome achieved at MC10—a commitment to eliminate export subsidies, with different time frames for developed countries, developing countries, LDCs, and NFIDCs—has room for improvement.

On the one hand, Articles 8 and 9 of the AoA could be revised to implement a comprehensive ban on export subsidies for developed countries, which hinder the realisation of the right to food in developing countries due to cheap imports that undermine the development prospects of local producers.[221] The AoA could also include a prohibition on measures that aim to evade this ban, like direct subsidies to producers that are not linked to export performance. As contemplated by Article 10(2) of the AoA, a revised AoA could also have binding obligations on minimum interest rates and maximum credit terms to avoid developed countries from promoting exports through government credit on concessional terms.[222] If developed countries decreased export subsidies and measures alike, the products of developing countries would gain competitiveness in both domestic and global markets, ultimately leading to increased production of both cash crops and subsistence crops.[223] Nevertheless, it should not be ignored that a decrease in export support by developed countries may lead to higher food prices, resulting in higher import costs and greater food insecurity for food-importing countries. For this reason, a revised AoA could include a commitment to provide financial aid to LDCs and NFIDCs to offset the effects of higher prices.[224]

On the other hand, pursuant to S&DT, developing countries should have leeway to utilise export subsidies to promote their agro-export industry and generate employment and export revenues.[225] Export subsidies could encourage developing countries to diversify their exports beyond primary agricultural products. By subsidising the export of value-added or processed agricultural products, these countries could move up the global value chain and increase the value of their exports, which could lead to higher export revenues and economic resilience. However, this proposal faces the problem that only a minority of the developing countries have the necessary resources to subsidise their exports, and it would thus favour only

---

[219] AoA (n 9) art 8. See also the exceptions in AoA, Articles 9 and 10.

[220] Heinz Strubenhoff, 'The WTO's Decision to end Agricultural Export Subsidies is Good News for Farmers and Consumers' (*Brookings*, 2016) <https://www.brookings.edu/articles/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers/> accessed 22 December 2023.

[221] James Scott, 'The Future of Agricultural Trade Governance in the World Trade Organization' (2017) 93(5) International Affairs 1167, 1175.

[222] Gonzalez (n 55) 487.

[223] ibid 475.

[224] UNCTAD Secretariat, 'Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Developing Countries and Ways to Address their Concerns in Multilateral Trade Negotiations' (23 June 2000) UN Doc TD/B/COM.1/EM.11/2 1.

[225] The use of export subsidies should, however, be moderate, as an excessive focus on exports risks making small-scale farmers even more vulnerable. See Rayfuse and Weisfelt (n 186) 87.

the wealthier ones, exacerbating inequalities within the group of developing countries.[226] One solution may be to allow subsidies only when justified by food security concerns, including the necessity to diversify agricultural production and reduce reliance on a few export commodities. A diverse agricultural sector is better equipped to withstand external shocks and market fluctuations, helping to protect the livelihoods of farmers and maintain economic stability.

C. The road ahead to the 13th Ministerial Conference

It might be ambitious to expect that, at MC13, Members will agree to move toward a holistic approach to food security, grounded in sustainable development, the right to food, and enhanced flexibilities to address the needs of all. However, there are optimistic signs that Members are increasingly aware of these needs.

Already ahead of MC12, Argentina, Australia, Brazil, Canada, Chile, Colombia, Ecuador, Guatemala, New Zealand, Paraguay, Peru, the Philippines, South Africa, Ukraine, Uruguay, and Vietnam, delivered a joint statement urging to reform the AoA to boost sustainable agricultural production on the basis of an 'inclusive vision' of sustainability that provides flexible solutions tailored to the specific needs of different local contexts.[227] In the aftermath of MC12, Members further demonstrated interest in moving toward a holistic and inclusive approach to food security.

Paraguay urged Members to move toward 'sustainable production', gradually and in line with their 'developmental needs'. The country stressed that the transition toward sustainability should respect "local realities", including their 'social, economic, and environmental' peculiarities. Paraguay also advocated for the introduction at the WTO of the environmental law concept of 'common but differentiated responsibility' for the implementation of environmental measures, in line with internationally established norms.[228]

New Zealand shared the need to enable small agricultural producers to participate 'fairly' in global trade and grant them adequate policy tools to improve agricultural productivity and resilience.[229] Essentially, it called for the adoption of flexibilities and exceptions that meet the needs of small-scale farmers.

China urged Members to make progress toward environmental sustainability. The country warned against the 'detrimental impacts' of fertilisers and pesticides. Accordingly, it called for 'a framework and a formula' to reduce those detrimental effects.[230]

Nigeria suggested that Members should make efforts to address existing asymmetries in the AoA and provide additional flexibilities and policy space to developing countries, LDCs, and NFIDCs, to enable them to upscale their agricultural production capacities.[231]

---

[226] This problem also draws attention to the broader issue of the inappropriateness of the current three-fold country classification at the WTO. See Fan Cui, 'Who Are the Developing Countries in the WTO?' (2008) 1(1) The Law and Development Review 124.

[227] WTO Committee on Agriculture, 'Submission by Brazil: Joint Statement—The Contribution of International Agricultural Trade to Sustainable Food Systems' (n 161) paras 1.2, 1.4, 7; see also above, section III.I.

[228] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 21-22 November 2022' (n 7) para 3.59.

[229] ibid para 3.30.

[230] ibid para 3.38.

[231] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 14-15 September 2022' (31 October 2022) UN Doc G/AG/R/103 para 3.23. See also para 3.45.

Egypt also addressed the need for greater flexibilities and the proper implementation of those already existing.[232]

Lastly, Japan, New Zealand, and China recognised the importance of reaching an agreement on well-targeted and appropriately safeguarded public stockholding programs.[233]

Although some of the major players at the WTO, such as the US and the EU, have not spoken up yet in favour of a new approach to food security centred around sustainability and inclusivity, the statements above signal an initial shift in the approach to food security. This will, in any case, require time, as decisions are ordinarily made by consensus at the WTO.

VI. Conclusion

Despite some progress being made at MC12, the current WTO framework on agriculture is still affected by shortcomings and asymmetries that pose challenges to the achievement of food security. This paper's proposals suggest a redesign of this framework, particularly the AoA, to ensure that the multilateral trading system facilitates all Members' access to adequate, safe, and nutritious food at all times. To attain this objective, there needs to be a shift toward a holistic approach to food security to ensure that 'all our peoples' benefit from the welfare gains that the multilateral trading system generates.[234]

Although a comprehensive reform of the AoA is the ultimate goal, it is unlikely to occur in the short to medium term. This is due to the consensus-based mechanism for amending treaties at the WTO, where it is challenging to gain agreement among Members due to the political considerations that come into play when decisions are taken.

The challenges associated with decision-making at the WTO have become increasingly apparent in recent years. Between 2020 and 2022, no proposals were presented by Members to reform the disciplines on market access, safeguards, domestic support, export subsidies, export restrictions, transparency in the notification of trade-restrictive measures, and S&DT.[235] While detailed submissions were made on public stockholding, a lack of agreement among Members prevented any progress. This suggests that it is unlikely that any headway will be made on these issues during MC13. Accordingly, an incremental approach could be adopted to achieve short to medium-term reforms on other topics while long-term agreement on these issues is more feasible.

In the short term, particularly in preparation for MC13, Members could consider discussing other issues that are more likely to garner consensus, such as sustainability. Prior to MC12, several countries supported an 'inclusive' vision of sustainable agriculture that includes solutions tailored to local contexts.[236] The MC12 Ministerial Declaration on the Emergency Response to Food Insecurity urges Members to 'promote[] sustainable agriculture and food systems" and "implement resilient agricultural practices'.[237] The MC12 Ministerial Declaration on Sanitary and Phytosanitary (SPS) Measures is more detailed and provides that

---

[232] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 27-28 June 2022' (n 8) para 4.29.

[233] WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 14-15 September 2022' (n 233) paras 3.40, 3.41; WTO Secretariat, 'Summary Report of the Meeting of the Committee on Agriculture Held on 21-22 November 2022' (n 7) para 3.38.

[234] MC4, 'Ministerial Declaration Adopted on 14 November 2001' (20 November 2001) UN Doc WT/MIN(01)/DEC/1 para 2.

[235] See above, section III.

[236] See above, section III.I.

[237] MC12, 'Ministerial Declaration on the Emergency Response to Food Insecurity' (n 177) preamble.

the SPS Committee should explore how the implementation of the SPS Agreement can 'facilitate global food security and more sustainable food systems, including through sustainable growth and innovation in agricultural production and international trade, and through the use of international standards, guidelines, and recommendations […]'.[238] Following MC12, there has been a renewed push toward sustainable agriculture. Paraguay, for example, advocated for a transition toward sustainability that respects 'local realities' and proposed the adoption of the environmental law concept of 'common but differentiated responsibility' at the WTO. Similarly, China urged progress toward environmental sustainability.[239]

In preparation for MC13, Members could discuss what role the CoA could play in facilitating a transition toward sustainable agricultural production and how this goal could be implemented in its work program on food security.[240] They could also reflect on the role of the Trade and Environmental Sustainability Structured Discussions as a new avenue that facilitates debate.[241] One way to establish a solid foundation for promoting sustainability in agricultural systems is by strengthening cooperation efforts, ideally under the supervision of a dedicated committee.[242] In such a forum, Members could discuss various issues, including the role of voluntary sustainability standards, regulations, and conformity-assessment procedures. For instance, they could explore how recognised voluntary standards could be utilised to demonstrate compliance with mandatory regulations, providing producers with more flexibility, lower compliance costs, and improved mutual recognition and equivalences.[243] Other potential topics for discussion include granting additional market access for sustainably produced goods, developing guidelines for sustainable agricultural practices, and promoting their adoption through capacity-building and technical assistance programs. In general, addressing these issues would favour a shift in the way the WTO approaches sustainability—from being an exception to becoming a rule.

Other issues raised by countries after MC12 are less likely to result in any tangible outcomes at MC13. New Zealand, for instance, raised the issue of the participation of small

---

[238] MC12, 'Ministerial Declaration adopted on 17 June 2022: Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges' (n 169) para 8.

[239] See above, section V.C.

[240] See above (n 179).

[241] The Trade and Environmental Sustainability Structured Discussions are a series of informal and open-ended discussions that take place within the WTO to facilitate dialogue and exchange of information between Members on the intersection of trade and environmental sustainability. See WTO, 'New Initiatives Launched to Intensify WTO Work on Trade and the Environment' (*World Trade Organization*) <https://www.wto.org/english/news_e/news20_e/envir_17nov20_e.htm> accessed 22 December 2023.

[242] This approach has been adopted by the EU since 2021 when the European Commission published a proposal for a 'Sustainable Food Systems' chapter to be included in its new preferential trade agreements. See Robert Francis, 'EU FTAs: Commission Unveils New Chapter on Sustainable Food Systems' (*Borderlex*, 14 June 2021) <https://borderlex.net/2021/06/14/eu-ftas-commission-unveils-new-chapter-on-sustainable-food-systems/> accessed 22 December 2023. To date, the only finalised (but not yet in force) agreement containing a 'Sustainable Food Systems' chapter is the EU-New Zealand Free Trade Agreement (signed 9 July 2023) ch 7 <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en> accessed 22 December 2023.

[243] Christophe Bellmann, 'Fostering Cooperation on Sustainable Agriculture and Trade at the WTO' (*International Institute for Sustainable Development*, 14 April 2023) <https://www.iisd.org/articles/policy-analysis/fostering-cooperation-sustainable-agriculture-trade-wto> accessed 22 December 2023.

farmers in global trade and the implementation of policy tools that meet their needs.[244] Although an important issue to discuss in the long run, finding short-term solutions to enable small farmers to participate fairly in global trade poses significant practical difficulties. One of these is how to consult small farmers and what questions to ask them. Another challenge is the likely lack of resources and capacity of small farmers to engage in complex policy discussions. Furthermore, the diversity of farming systems and practices across different regions can make it difficult to develop policies that are specifically tailored to their individual needs and contexts. This fits into the larger debate on the purpose of WTO rules and the interests they should serve—the interests of the people on the ground, who are the ultimate recipient of the rules, in addition to state-level interests.

Similarly, Nigeria's and Egypt's call for additional flexibilities and policy space for developing countries fits into a broader issue that Members should start discussing, that of reconsidering exceptions that enable countries to justify trade restrictions individually, as the simultaneous use of exceptional measures by several countries can harm food security.[245]

The current WTO rules on agriculture were created during times of overproduction and decreasing prices, while current challenges include disruptions in supply chains, high prices, volatile markets, and limited resources.[246] The current rules need to be reshaped to ensure that during crises, importing countries can rely on international markets while also developing more resilient agricultural systems that can withstand external shocks like climate change.

Relevant issues to address include regulations on market access, domestic subsidies, export restrictions, public stockholding programs, food aid, and sustainable agricultural production. Progress will not happen all at once but will rather be incremental due to the consensus-based decision-making at the WTO. To facilitate this process, Members should prioritise the issues that need to be discussed. This could be done by giving priority to those issues that are more likely to gain consensus in the short to medium term. Additionally, Members could explore the use of soft law instruments, such as guidelines on good practices and voluntary commitments, to expand the legal tools employed. These instruments would favour a flexible approach that promotes cooperation, trust, and confidence among Members.

****

[244] See above, section V.C.

[245] Katrin Kuhlmann, 'Critical Questions: Trade and Food Security—What is the Debate on Trade and Food Security About?' (Center for Strategic and International Studies, upcoming).

[246] Christophe Bellmann, 'Fostering Cooperation on Sustainable Agriculture and Trade at the WTO' (n 243).